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ANTITRUST IN THE EUROPEAN ECONOMIC COMMUNITY: AN ANALYSIS OF RECENT DEVELOPMENTS IN THE COURT OF JUSTICE

Jonathan S. Wolfe* and Richard Montauk**

INTRODUCTION

In this third decade of the European Economic Community (EEC),¹ it is more important than ever that its significance be taken to heart by Americans. The EEC is the single largest trading entity in the world, in addition to being the official commercial representative of nations to which many Americans have special ancestral and cultural ties. As a bold experiment in federalism, it stands as the most interesting of current attempts to combine states of widely differing backgrounds into one economic, and possibly governmental unit. Thus, the EEC is a project of scope at least comparable to that of the founding of the United States.²

The United States has an intellectual interest in comparing this experiment in federalism with its own, a humanitarian interest in seeing that the experiment succeeds for the benefit of nations long friendly to the United States, and an economic interest in understanding the laws of the Common Market which can impact on United States-European trade. It is to the last of these interests that this article is directed. In particular, the article focuses on recent developments in the field of antitrust law as set forth in European Court of Justice³ decisions, because it is this field that most directly affects American trade. While antitrust law is of interest to economists who are concerned with the distributive justice or economic efficiency

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2. Its formation, however, was based not upon the need to protect itself from the outside world, but upon the notion that it behooves Western Europeans to act in concert in such a way as to avert any possibility of future internecine struggle, and to reap economic and cultural benefits from free exchange between nations. To this extent it may be said to be an outgrowth of post-World War II sentiments. Id.
3. The European Court of Justice is one of the three institutions which govern the EEC Treaty of Rome, done March 25, 1957, art. 4, 298 U.N.T.S. 16. The legislative body is the Council of Ministers, id. arts. 145-154, 298 U.N.T.S. at 69-71, and the executive organization is the Commission of the European Communities. Id. art. 155, 298 U.N.T.S. at 71.
resulting from the operation of a given set of rules, the emphasis here will be upon the interpretation and development of the legal rules themselves by the Court of Justice.

The rules discussed are those contained in Articles 85 through 90 of the Treaty of Rome, as construed by the European Court of Justice. Articles 85, 86, and 90 contain much of the substantive law in the antitrust field, but they provide only broad guidelines. Judicial interpretation is necessary to insure that these sweeping rules and the somewhat detailed supplementary regulations, fulfill their intended purpose in the context of a specific case. Court of Justice rulings thus provide practical standards for implementing the policies that are set forth in the Treaty of Rome. This article is concerned with the development of some of the more important of these standards in recent Court of Justice decisions, and with recent interpretations by the Court of the procedural rules through which they are given effect.

THE COMPETITION PROVISIONS OF THE TREATY OF ROME: A BASIC OVERVIEW

To begin, an overview of the operation of the basic treaty provisions is necessary. Article 3(f) of the Treaty of Rome provides that the activities of the EEC shall include "the establishment of a system ensuring that competition shall not be distorted in the Common Market." Articles 85 through 94 of the Treaty set out the framework of this competition policy. Article 85 on restrictive trade practices and Article 86 on abuse of dominant position are the cornerstones of the system. All restrictive trade agreements between "undertakings" (business enterprises) which affect trade between member states are prohibited by Article 85(1). Such an agreement is automatically void pursuant to Article 85(2). Article 85(3) provides for exemptions from 85(1) under certain circumstances. Additionally, Council Regulation 17 contains rules for prohibiting and exempting agreements. This Regulation also contains a procedure known as negative clearance pursuant to which the

6. Id. art. 85, 298 U.N.T.S. at 47.
7. Id. art. 86, 298 U.N.T.S. at 48-49.
8. Council Regulation 17, art. 9, 1 COMM. MKT. REP. (CCH) ¶2401 (1962).
Commission of the European Communities (Commission) can declare that agreements or classes of agreements do not fall under Article 85(1) at all.

Article 86 prohibits any abuse of a dominant position held in a particular market if it affects trade between member states.

Both Articles 85 and 86 are implemented by the provisions contained in Articles 87 through 89. These sections also define the responsibility of Community and national authorities. Finally, special rules for public undertakings and undertakings "to which [member states] grant special or exclusive rights" are contained in Article 90. Transitional rules on dumping are provided in Article 91, and provisions regarding state aid to the national economy are in Articles 92 through 94.

**ARTICLE 85: RESTRICTIVE TRADE AGREEMENTS**

Article 85(1) prohibits "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 . . . ."

Thus, four requirements must be met for the prohibition to be applicable:

1. There must be either an agreement, a decision of an association, or a concerted practice.

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10. Id. art. 90, 298 U.N.T.S. at 50.
11. Id. art. 91.
12. Id. arts. 92-94, 298 U.N.T.S. at 51-52.
13. Id. art. 85(1), 298 U.N.T.S. at 47 (translation from 1 COMM. MKT. REP. (CCH) ¶ 2005 (1973)).
15. Many of the Commission's decisions have dealt with the decisions, the articles of membership, or the statutes of trade associations. See, e.g., German Ceramic Tiles, Commission Decision of Dec. 29, 1970, [Jan., 1971] J.O. COMM. EUR. (No. L
2. There must be more than one undertaking involved.\textsuperscript{17}

3. The practice, agreement or decision must be one which may have an effect on trade between member states.\textsuperscript{18}

4. The object or effect of the agreement, decision or practice must be to prevent, distort, or restrict competition within the Common Market.\textsuperscript{19}

Pursuant to Article 85(2), agreements falling under the prohibition of Article 85(1) are automatically void.

Article 85(3) provides for exemption from the prohibition of Article 85(1) in certain cases. Only the Commission\textsuperscript{20} can grant such an exemption, although its decision can be appealed.


16. Concerted practices are the co-ordinated actions of undertakings resulting from informal cooperation rather than formal agreement. See, e.g., Imperial Chemical Industries, Ltd. v. EEC Comm’n, [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8161 (Ct. J. 1972) [hereinafter cited as ICI].

17. The term “undertaking” which is not defined in the Treaty should be interpreted broadly to encompass all entities which conduct business including sole proprietorships, partnerships, corporations, etc. Public and state enterprises are also undertakings as indicated by Article 90. See text accompanying notes 52-54 infra, in regard to the enterprise-entity doctrine.

18. In Consten & Grundig-Verkaufs-GmbH v. EEC Comm’n, [1961-1966 Court Decisions] COMM. MKT. REP. (CCH) ¶ 8046, at 7652 (Ct. J. 1966) [hereinafter cited as Consten & Grundig], the Court said:

In this connection, it is especially important to know whether the agreement directly or indirectly, actually or potentially, is capable of jeopardizing the freedom of the trade between Member States in such a manner as to prejudice the realization of the objectives of a single market between States. Thus, the fact that an agreement helps to bring about a considerable increase in volume of trade between Member States is not sufficient to preclude the possibility that such agreement can “affect” trade within the meaning stated above.

In determining whether an agreement falls within the above definition, its legal and economic context must be taken into consideration. \textit{Id.}; Technique Minière, \textit{supra} note 14.

19. An agreement must have either the object or the effect of preventing, restricting or distorting competition. In determining whether this condition has been satisfied, account should be taken of the economic context of the agreement. Volk v. Vervaecke, [1967-1970 Court Decisions] COMM. MKT. REP. (CCH) ¶ 8074 (Ct. J. 1969) [hereinafter cited as Volk]; Technique Minière, \textit{supra} note 14.

20. The Commission, the chief executive body of the Community, is charged with administering the competition rules of the Treaty. Treaty of Rome, \textit{done} March 25, 1957, art. 155, 298 U.N.T.S. 71; see note 3 \textit{supra}.
to the European Court of Justice. In order to obtain an Article 85(3) exemption, the following four conditions must be satisfied:

1. The agreement, decision, or practice must contribute:
   a. to the improvement of the production of goods,
   b. to the improvement of the distribution of goods,
   c. to the promotion of technical progress, or
d. to the promotion of economic progress.

2. Consumers must be allowed a fair share of the resulting benefit.

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21. Council Regulation 17, art. 9, 1 COMM. MKT. REP. (CCH) ¶ 2481 (1962).
3. The restriction imposed on the parties must be absolutely necessary for the attainment of the objectives in 1 and 2.  
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4. The parties must not have the possibility of eliminating competition in respect of a substantial part of the products in question.  
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Exercise of Intellectual Property Rights

Article 222 of the Treaty of Rome provides that "[t]his treaty shall in no way prejudice the system existing in Member States in respect of property."  
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However, in several cases, national schemes for intellectual property have been utilized to prevent the free movement of goods between member states.  
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The Court of Justice has responded by holding that although the existence of national intellectual property rights, as such, is not affected by the Treaty, the exercise of these rights in a way that prevents free trade between member states is prohibited by several Treaty provisions,  
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including Articles 30 through 36,  
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dealing with the free movement of goods, as well as Articles 85 and 86.  
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Consten & Grundig v. EEC Commission  
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is perhaps the leading case demonstrating the Court's application of Article 85 to intellectual property rights. In that case, Consten, Grundig's exclusive distributor in France was empowered to register the GINT trademark in France, such registration to be cancelled or transferred if Consten and Grundig ceased association. The Commission issued a decision requiring Consten not

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27. See, e.g., CEMATEX, supra note 23; Omega, supra note 14; CECIMO, supra note 23.
31. See, e.g., id.
32. See Deutsche Grammophon, supra note 30.
33. See Sirena, supra note 30; Parke, Davis, supra note 30; Consten & Grundig, supra note 18.
34. Consten & Grundig, supra note 18.
to exercise the trademark in a manner that would prevent parallel imports. The Court found that the Commission had acted within its authority since this requirement affected only the exercise, but not the existence, of the right, and that the agreement could violate Article 85(1) since it had the object of restricting competition. Therefore, 85(1) is applicable if intellectual property rights are exercised to prevent parallel imports and if that exercise is "the object, the means or the consequence of an agreement."

Additionally, Article 86 may apply to intellectual property rights if the relevant undertaking has a dominant position within the Common Market or a substantial part of it, the exercise of the right is an abuse of that position, and this abuse is likely to affect trade between member states. A dominant position appears to require more than the monopolistic position which an intellectual property right confers.

From 1974 through 1977, the Court of Justice handed down three noteworthy decisions dealing with intellectual property rights: Van Zuylen Freres v. Hag A.G., the Centrafarm cases, and the EMI cases. Although these three cases were concerned with the rules relating to the free circulation of goods, the Court in each case made certain findings in regard to Article 85.

Van Zuylen Freres v. Hag A.G. In 1907 and 1908, the German firm, Hag A.G., first holder of a patent for the decaffein-
ating of coffee, registered trademarks for its coffee containing the word "Hag" in Germany, Belgium, and Luxembourg. In 1927, Hag A.G. created a Belgian subsidiary, Cafe Hag S.A., to which, in 1935, it transferred its Belgian and Luxembourg trademarks. After World War II, the shares of Cafe Hag S.A. were put under sequestration as enemy property. Eventually, Belgium sold these shares to the Van Oevelen family.

In June, 1971, Cafe Hag S.A. transferred its trademark, but not the rest of its business, to Van Zuylen Freres which purchased decaffeinated coffee from Cafe Hag S.A. In 1972, Hag A.G. began to supply its coffee to retailers in Luxembourg under its German trademark, "Hag." Van Zuylen reacted by bringing an action for trademark infringement before the Tribunal of Luxembourg in November, 1972. In April, 1973, Van Zuylen brought a second action to cancel the trademark of Hag A.G. in Belgium and Luxembourg.

The Tribunal of Luxembourg, by a judgment of October 31, 1973, requested the Court of Justice to give a preliminary ruling on, inter alia, whether Article 85 prohibited Van Zuylen's attempt to use a national trademark right to prevent importation of German Hag coffee. The Court observed that "there is no legal, financial, technical or economic link"" between the Belgian and German holders of the Hag trademark, and found that Article 85 did not apply when there is no such connection.

The portion of the Hag judgment concerning Article 85(1) confirms the holding of earlier cases that 85(1) does not apply to the exercise of an intellectual property right in the absence of any agreement. As the Court held in Sirena v. Eda, the exercise of a trademark right may come within the prohibition of Article 85(1) "if it is the object, the means or the consequence of an agreement." The Hag judgment, however, suggests that the Court concluded that the Hag trademark was outside Article 85(1), since it was vested in different parties not by a consensual arrangement but as a result of a wartime confiscation.

In fact, however, Van Zuylen Freres acquired the Hag trademark through an assignment agreement with Cafe Hag S.A. Cannot Article 85 apply because of this agreement? In Sirena, the Court said:

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41. Hag, supra note 38, at 9124.
42. See Sirena, supra note 30; Parke, Davis, supra note 30.
43. Sirena, supra note 30, at 7112.
Article 85 of the Treaty is applicable where the trademark right is invoked to prohibit imports of products coming from other Member States and carrying the same trademark, if the owners of this trademark acquired the mark or the right to use it under agreements between them or agreements with third parties.\textsuperscript{44}

\textit{Hag} and \textit{Sirena} suggest that, for Article 85 to apply, the agreements through which the concerned trademark holders have acquired their trademarks must be parts of a complex of agreements leading back to the same original trademark owner. Analysis of the relationship between parties may be likened to questions of proximate cause in the common law, insofar as proximate cause analysis also considers whether intervening events should interrupt the attribution back of later occurrences to given parties.

Thus, 85(1) did apply in \textit{Sirena} because both the Italian and German owners of the “Prep” trademark acquired their rights from the same American firm; whereas, in \textit{Hag}, the Cafe Hag/Van Zuylen agreement was not, because of wartime confiscation, part of a complex of agreements leading back to the source of the Hag A.G. trademark. In \textit{Re Advocaat Zwarte Kip}, the Commission applied a similar rule:

So long as undertakings act in accordance with principles which do not conform to the EEC Treaty in the field of trademark rights, Article 85 of the Treaty will be applicable, provided the circumstances are such as to constitute an infringement of the article and that, in particular, there exist links of a legal, financial, technical or economic nature between two current owners.\textsuperscript{45}

The Commission’s test thus has been formulated on the basis of a phrase from the \textit{Hag} judgment: “legal, financial, technical or economic link.”\textsuperscript{46}

\textit{The Centrafarm cases.}\textsuperscript{47} These cases concerned patents held by Sterling Drug, an American pharmaceutical company, in various countries including the Netherlands and Great Britain for a particular drug used in the treatment of urinary tract infections. This substance was sold under the trademark Ne-

\textsuperscript{44} Id. at 7113.
\textsuperscript{46} \textit{Hag}, \textit{supra} note 38, at 9124.
\textsuperscript{47} \textit{Centrafarm cases, supra} note 39.
gram. Centrafarm, without the consent of Sterling, imported Negram into the Netherlands from Germany and Great Britain.

Sterling, relying on its Dutch patent, and Sterling’s Dutch subsidiary, Winthrop, relying on the trademark Negram, petitioned a Dutch court for interim relief including an injunction. The Dutch court granted Winthrop the requested relief, but refused Sterling’s petition. Both cases eventually reached the Dutch Supreme Court, the Hoge Raad, on appeal.

The Hoge Raad referred certain questions to the Court of Justice pursuant to Article 177 including the following which dealt with Article 85:

[Re: Sterling]

(a) Does the fact that a patentee owns parallel patents in different countries belonging to the EEC and that he has in those countries granted to different undertakings associated with the patentee licenses to manufacture and sell (assuming that all of the agreements entered into with such licensees are exclusively or in part designed to regulate differently for the different countries the conditions on the market in respect of the goods protected by the patent) mean that this is a case of agreement or concerted practices of the type prohibited by Article 85 of the EEC Treaty and must an action for infringement as referred to under I(a) above—to the extent that this must be regarded as the result of such agreements or concerted practices—for that reason be treated as unlawful?

(b) Is Article 85 also applicable if, in connection with agreements of concerted practices as they are referred to, it is only undertakings belonging to the same concern that are involved?

[Re: Winthrop]

[Does the situation in which]

(1) different undertakings in different countries belonging to the EEC forming part of the same concern are entitled to the use of the same trademark for a certain product;

(2) products bearing that trademark, after being lawfully marketed in one country by the trademark owner, are exported by third parties and are marketed and further traded in one of the other countries;

48. Treaty of Rome, done March 25, 1957, art. 177, 298 U.N.T.S. 76. For the text of Article 177, see note 120 infra.

(3) the trademark laws in the last-mentioned country give the trademark owner the right to take legal action to prevent the trademarked goods from being marketed there by other persons, even if such goods had previously been marketed lawfully in another country by an undertaking there entitled to that trademark and belonging to the same concern . . . involve practices of the kind prohibited by Article 85 of the EEC Treaty, and must an action for infringement as mentioned therein, insofar as it is to be regarded as a consequence of such practices, be held impermissible for this reason? 50

The judgments in the Centrafarm cases were virtually identical. In both, the Court confirmed the enterprise-entity doctrine discussed below. In response to the second question posed by the Hoge Raad with respect to Sterling it held:

Article 85 of the Treaty does not apply to agreements or concerted practices between undertakings belonging to the same group in the form of parent company and subsidiary, if the undertakings form an economic unit within which the subsidiary does not have real autonomy in determining its line of conduct on the market and if the agreements or practices have the aim of establishing an internal distribution of tasks between the undertakings. 51

The Court left open the question of whether Article 85(1) applies to agreements between the holder of parallel patents and his licensees if, taken together, the goal of the agreements and concerted practices is to sell the patented product under varying conditions in various member states.

The enterprise-entity doctrine provides that if a parent company controls and determines the policy of its subsidiary so that the subsidiary cannot act autonomously, both are treated as constituting one undertaking. 52 Article 85(1) does not apply to such undertakings since agreements between parents and subsidiaries are treated as methods of internal organization, and since there is deemed to be no competition between parts of the same entity. 53 The doctrine has also been used to

50. Winthrop, supra note 39, at 9151-60, -61 (translation from COMM. MKT. L.R.).
53. See Christiani & Nielson, supra note 52, at 8659.
attribute actions of a subsidiary to a parent.\textsuperscript{44} The \textit{Centrafarm} judgments basically affirm this doctrine.

In his submission, the Advocate-General urged that the Sterling corporate structure presented an exception to the enterprise-entity doctrine and thus, Article 85 was applicable. He noted that even though the Court had held in previous cases that Article 85 did not apply to agreements between parents and subsidiary companies, it had tended to emphasize the lack of autonomy of the subsidiaries and the unitary character of the group or economic entity. He therefore suggested that previous decisions of the Court were not intended to foreclose the applicability of Article 85 to agreements between members of the same group, especially when the agreements "have the object or effect of restricting the freedom of competition of third parties." The Court, however, did not adopt the Advocate-General's interpretation of the enterprise-entity doctrine relating to third parties.\textsuperscript{55}

\textbf{The EMI cases.}\textsuperscript{56} Here, the Court of Justice was forced to consider whether a trademark right might qualify as an agreement or concerted practice and whether the holding of such a right might constitute a dominant position.

The pattern of events leading up to the cases was somewhat complex. Basically, in 1931, through a series of assignments and transfers, Electric and Musical Industries, Ltd. (EMI), an English concern, acquired the "Columbia" trademark in England and several European countries. Through a similar series of transactions, culminating in the 1950's, CBS, Inc. (then named Columbia Broadcasting System, Inc.) acquired the American "Columbia" trademarks, and also gained the "Columbia" trademarks in a variety of other countries.\textsuperscript{57}

\begin{itemize}
\item \textsuperscript{44} See Europemballage Corp. v. EEC Comm'n, [1971-1973 Transfer Binder] \textit{COMM. MKT. REP.} (CCH) \textsuperscript{\dagger} 8171 (Ct. J. 1972) [hereinafter cited as Continental Can].
\item \textsuperscript{55} Winthrop, \textit{supra} note 39, at 9152.
\item \textsuperscript{56} EMI, \textit{supra} note 40.
\item \textsuperscript{57} This situation was summarized by the Court of Justice, London, as follows:
\begin{itemize}
\item (6) For some years well prior to the Second World War the trademark X currently owned by A and B in their respective territories was held by the same inter-related undertakings. (A having acquired its rights to the trademark X by virtue of arrangements made between the predecessors in title and the predecessors in title of B at a time when such predecessors in title were wholly-owned subsidiary and parent companies respectively), but ownership of the trademark X now owned by B has changed hands on a number of occasions.
\end{itemize}
\end{itemize}

EMI Records, Ltd. v. CBS United Kingdom, Ltd., [1976 Transfer Binder] \textit{COMM. MKT. REP.} (CCH) \textsuperscript{\dagger} 8350, at 7340 (Ct. J. 1976) [hereinafter cited as EMI-United Kingdom].
Based on its acquisition of the Columbia trademarks, CBS sold records in several member states under the Columbia label.

EMI brought actions in the national courts of the United Kingdom, Denmark, and the Federal Republic of Germany against the CBS subsidiaries in those countries. EMI claimed that CBS's sale of records bearing the "Columbia" mark in those countries constituted an infringement of its trademark rights. CBS defended on the basis of the Community principles of free movement of goods and freedom of competition, alleging they prevented EMI from enforcing its claimed trademark rights.

The three national courts, in accordance with Article 177 of the EEC Treaty, requested rulings on the same fundamental questions. The High Court of Justice in London, for example, asked:

Should the provisions of the Treaty establishing the European Economic Community and in particular the provisions laying down the principles of community law and the rules relating to the free movement of goods and to competition be interpreted as disentitling A from exercising its rights in the trademark under the appropriate national law in every member state to prevent:

(i) The sale by B in each member state of goods bearing mark X manufactured and marked with the mark X by B outside the community in a territory where he is entitled to apply the mark X, or

(ii) the manufacture by B in any member state of goods bearing the mark X?8

The three cases were later joined by the Court of Justice. In the consolidated cases the Court of Justice ruled that:

1. The principles of Community law and the provisions on the free movement of goods and on competition do not prohibit the proprietor of the same mark in all the Member States of the Community from exercising his trademark rights, recognized by the national laws of each Member State, in order to prevent the sale or manufacture in the Community by a third party of products bearing the same mark, which is owned in a third country, provided that the exercise of the said rights does not manifest itself as the result of an agreement or of concerted practices which have as their object or effect the isolation or partitioning of the common market.

58. Id.
2. Insofar as that condition is fulfilled the requirement that such third party must, for the purposes of his exports to the community, obliterate the mark on the products concerned and perhaps apply a different mark forms part of the permissible consequences of the protection which the national laws of each member state afford to the proprietor of the mark against the importation of products from third countries bearing a similar or identical mark.\footnote{59}

In regard to Article 85, the Court stated that a trademark right did not qualify per se as an agreement or concerted practice.\footnote{60} It noted, however, that the exercise of such a right might come within Article 85 as part of a restrictive practice.\footnote{61} When the results of trademark agreements do not exceed those which are permitted by the simple exercise of trademark rights under national law, however, Article 85 will not apply.

Thus, when manufacturer X is still able to obtain access to all of a market in which corporation Y is exercising trademark rights, albeit without being able to use the same trademarks as Y, the courts are likely to find that the exercise of trademark rights by Y does not exceed the results generally permitted under national law. In this situation, the courts generally will not find that EEC rules have been violated.

The most important issue raised by the EMI cases is whether Article 85 can apply to situations in which there are no longer subsisting agreements. CBS argued that, where a terminated agreement still produced effects in the Community, it provided a possible basis for an Article 85 proceeding. Advocate-General Warner challenged this position. Warner argued that the Treaty of Rome was not intended to be retroactive in its application.\footnote{62} Thus, he contended that it should not apply to consequences generated by agreements terminated before the Treaty was in force.

The Court appeared to come down somewhere between these opposing views. It accepted the idea that Article 85 could apply to terminated agreements; however, for it to be applied, the Court required that the aftereffects of such an agreement be greater than those legally possible by mere exercise of na-

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\footnote{59. EMI Records, Ltd. v. CBS Schallplatten GmbH, [1976 Transfer Binder] COMM. MKT. REP. (CCH) \textsuperscript{\dag} 8352, at 7430 (Ct. J. 1976) [hereinafter cited as EMI-CBS].}
\footnote{60. Id. at 7429.}
\footnote{61. Id.}
\footnote{62. EMI-United Kingdom, supra note 57, at 7374.}
tional trademark rights. It also required that it be possible to infer the existence of elements of concerted practice from the behavior of the involved parties.

The Court could have refused to invoke Article 85 on the grounds that no “legal, financial, technical, or economic link” was present between the parties. The Court ignored this proffered standard, however, and looked instead to the present restrictive impact of the past agreement. Upon completing this examination the Court of Justice determined that Article 85 was not applicable, since CBS could still gain access to the market without the contested “Columbia” mark.

Another aspect of the applicability of Article 85 which the Court was forced to consider was whether the market allocation agreements in the instant case were the proper subject of Community concern insofar as their effect on trade was not largely intra-Common Market. Under Article 85, agreements, decisions, and concerted practices “which may affect trade between Member States,” or prevent, restrict or distort “competition within the common market,” come within its purview. The allocation agreements of EMI and CBS, however, were with third countries primarily. Thus, the major impact on trade was with third countries instead of within the Common Market. The Court, though, reaffirmed its earlier judgment that an agreement which produces effects in the Common Market would potentially come within Article 85 even though the agreement was with an undertaking in a third, nonmember country. The Court expanded this principle in EMI/CBS:

A restrictive agreement between traders within the Common Market and competitors in third countries that would bring about an isolation of the Common Market as a whole which, in the territory of the Community, would reduce the supply of products originating in third countries which are similar to those protected by a mark within the Community might be of such a nature as to affect adversely the conditions of competition within the Common Market.

63. EMI-CBS, supra note 59, at 7429.
64. Id.
65. See text accompanying note 41 infra. There is considerable doubt, however, that this was in fact the case, as contractual links did exist. Hay & Oldekop, EMI/CBS and the Rest of the World: Trademark Rights and the European Communities, 25 Am. J. Comp. L. 120, 142 (1977) (citing the oral arguments of the British and German governments).
66. See EMI-CBS, supra note 59, at 7429.
68. EMI-CBS, supra note 59, at 7429.
While the connection between the trademark agreement running to a concern in the third country and the effect upon Common Market competition still seems extraordinarily tenuous in this formulation, nonetheless the Court has firmly proclaimed that such effects may well exist, at least as far as its purposes are concerned. Thus the Court has adopted an approach which the Commission has used for several years.  

Finally, it is worth noting that the Court did not concern itself with distinguishing between the licensing and assigning of trademarks. This affirms the Hag70 and Centrafarm71 cases which largely eliminate the significance of such differences.

Exclusive Distributorships

Exclusive distributorship agreements provide that one party will supply products in a certain territory only to another party. Such agreements are prohibited if they fall within Article 85(1);72 however, contracts which merely grant exclusive distributorship rights do not necessarily come under this provision.73 Contracts which provide absolute territorial protection are almost always prohibited.74 Thus, a provision requiring that the supplier prohibit other distributors from exporting into the contract area would be void, as would a provision prohibiting the distributor from exporting into other contract areas.75

To aid in the administration of Article 85, the Commission was given the authority by Council Regulation 19/6576 to grant a “bloc”77 exemption under Article 85(3) of the Treaty to certain categories of distribution agreements which would otherwise be prohibited by Article 85(1). This power was exercised by the Commission in Regulation 67/67.78

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70. Hag, supra note 38.
71. Centrafarm cases, supra note 39.
72. See, e.g., Consten & Grundig, supra note 18.
73. See Technique Minière, supra note 14.
75. See Consten & Grundig, supra note 18.
77. A “bloc” exemption is an exemption from Article 85(1) granted to certain categories of agreements, decisions or practices.
Regulation 67/67 exempts (until December 31, 1982)\textsuperscript{79} agreements and concerted practices pursuant to which the supplier agrees to sell only to the distributor for resale within a defined area of the Common Market, or the distributor agrees to buy only from the supplier, or both.\textsuperscript{80} Apart from this exclusive purchase obligation, the only other restrictions upon competition which can be imposed upon the distributor are:

(a) **Covenants not to compete:** in an agreement exempted under Regulation 67/67 an obligation not to manufacture or distribute competing goods during the duration of the contract and for one year thereafter,\textsuperscript{81} and an obligation not to seek customers or to establish a branch or warehouse outside of the contract territory. Thus, although the inclusion of a term prohibiting the distributor from seeking customers outside his area is permitted, the benefit of the bloc exemption will be lost if the distributor is prohibited from selling outside his area.\textsuperscript{82}

(b) **Provisions to insure minimum distributor service** which obligate the distributor to: purchase a complete line of goods; buy a minimum quantity; sell in the packages specified by the supplier or under his tradenames; or promote sales by advertising, by maintaining a sales network or stock of goods, by providing after-sales service, or by employing a staff with specialized skills.\textsuperscript{83}

The Regulation 67/67 exemption does not apply to:

(a) **Intrastate matters:** agreements or practices if all the parties belong to one member state and the goods are sold in that state.\textsuperscript{84} Such agreements are not likely to affect inter-member trade and, therefore, will rarely fall within the scope of Article 85(1).\textsuperscript{85}

(b) **Horizontal restraints:** agreements whereby competitors grant exclusive selling rights to each other.\textsuperscript{86} Market shar-
ing may result from such arrangements.87

(c) Certain Article 36 rights: cases where the parties exercise intellectual property rights or take other measures to prevent parallel imports.88

Of course, the apparent rigidity of these categories may be misleading, particularly because individual, as opposed to "bloc," exemptions may be granted to exclusive distributorship agreements pursuant to Article 85(3).89 Such exemptions fall outside the ambit of Regulation 67/67. From 1974 to 1977, the Court of Justice decided four pivotal cases90 involving exclusive dealing agreements, a discussion of which follows.

_Public Prosecutor v. Dassonville._ Dassonville involved several dozen bottles of "Johnnie Walker" and "Vat 69" scotch whiskey which were imported from France by the Dassonvilles.


88. Commission Regulation 67/67, art. 3(b), 1 COMM. MKT. REP. (CCH) ¶ 2727C (1967).

89. See, e.g., Sopelem-Langen, _supra_ note 28; Omega, _supra_ note 14; FN-CF, _supra_ note 24.


One further case, Ufficio Henry Van Ameyde v. Ufficio Centrale Italiano di Assicurazione Assicurativa Automobilisti, 2 COMM. MKT. REP. (CCH) ¶ 8425 (Ct. J. 1977), was decided recently on the basis of Articles 85, 86 and 90, among others. The complex set of facts basically involved a complaint that Italy was restricting competition in the "loss adjustment" insurance field by granting a legal monopoly to the defendant, pursuant to a Community agreement authorizing restricted competition, to settle accident claims made by and against foreign drivers, when in Italy. The plaintiff, an Italian subsidiary of a Dutch company operating as a loss adjuster—investigating accidents and advising the insurer as to the nature and extent of damages and liability—maintained that it was unable to carry on its business after Italy granted the defendant the monopoly to settle claims. While other issues were also involved, for our purposes it is sufficient to state that the Court of Justice determined that no Community agreement could be regarded as authorizing the restriction of competition in the insurance field, nor did Italy's grant of monopoly power for the settling of accident claims preclude the practice of loss adjustment; but, if it were considered to have precluded this activity it may be prohibited by Article 90 taken in conjunction with Article 85 or 86.

This decision is not very significant insofar as it does not do much more than apply a simple understanding of the competition, and other articles.
into Belgium for sale in that country. The whiskey had been imported legally and cleared for customs purposes as "community goods." The Dassonvilles had affixed on the original bottles before offering them for sale a printed label which read in part as follows: "British Customs Certificate of Origin."

An inspector of foodstuffs found that the Dassonvilles did not have in their possession certificates of origin for the whiskey issued by the British government. The authenticity of the goods was not questioned; however, the public prosecutor instituted criminal proceedings against the importers, alleging that they had fraudulently attempted to induce a belief that they were in possession of an official document certifying the origin of the whiskey by attaching the labels to the bottles. He further alleged that the Dassonvilles had contravened sections one and four of Royal Decree 57 of 1934 by importing whiskey bearing the designation of origin adopted by the Belgian government without an accompanying document certifying its right to the "scotch whiskey" designation.

In addition to the criminal prosecution, the exclusive distributors of the two brands of whiskey for Belgium, S.A. Ets Fourcroy and S.A. Breuval et Cie, joined a civil claim in the criminal proceedings against the Dassonvilles praying for compensation for their damages resulting from the Dassonvilles' illegal importation.

The Dassonvilles argued that the exclusive distributors had brought a civil claim merely to protect themselves from parallel imports and that the exclusive distributorship agreements were void since they were being used in conjunction with a national intellectual property law (the Royal Decree 57) to prevent parallel imports. Therefore, the Belgian court referred the following question to the European Court of Justice:

2. Is an agreement to be considered void if its effect is to restrict competition and adversely to affect trade between member-states only when taken in conjunction with national rules with regard to certificates of origin when that agreement merely authorizes or does not prohibit the exclusive importer from exploiting that rule for the purpose of preventing parallel imports?

91. Dassonville, supra note 90, at 7119.
92. Id.
93. Id. at 7119-20.
94. Id. at 7120.
95. Id.
This question was phrased in such a way that there could be little doubt as to the answer. As the Court of Justice noted: “the fact that an agreement merely authorizes the concessionaire to exploit such a national rule or does not prohibit him from doing so, does not suffice, in itself, to render the agreement null and void.”

Lord MacKenzie Stuart began discussion of the competition problem posed by the Belgian court by restating the established doctrine that exclusive dealing agreements prohibiting parallel importers violate Article 85. Lord MacKenzie Stuart however, went beyond this principle. He reasoned that an exclusive distributorship agreement could violate Article 85 if the distributor was able to prevent other member states from sending parallel imports into the territory covered by the concession by means of the agreement and a national law requiring the exclusive use of certain means of proof of authenticity.

Lord MacKenzie Stuart also indicated that, for the purpose of determining whether there has been such a violation, one must look not only to the rights and obligations flowing from the agreement but also to the relevant legal and economic context. In particular, account should be taken of similar agreements between the producer and exclusive distributors in other member states.

Finally, Lord MacKenzie Stuart noted that in the Court’s judgment the existence of price differentials between member states may instigate an inquiry “as to whether the exclusive dealing agreement is being used to prevent importers from obtaining the necessary certificate of authenticity.” On this point, the Advocate-General suggested, in his submissions, that the behavior of the Belgian exclusive distributors in requesting the criminal action and in instituting the civil actions and of the French distributors in refusing to help the Dassonvilles obtain the certificate of origin could be evidence of a concerted practice designed to ensure absolute territorial protection for each national market. The Advocate-General like-

96. Id. at 7130.
97. Id. at 7129.
98. Id. at 7129-30.
99. The Court of Justice is assisted by four Advocates-General. Their function is to aid the Court in finding the law and rendering its decision. Advocates-General do not represent any one party to the proceedings, but act impartially in assisting the Court. The Court need not follow the Advocates-General’s recommendations in rendering decisions. 1 COMM. MKT. REP. (CCH) ¶ 4607 (1976).
wise indicated that the use of such a concerted practice in close conjunction with the exclusive dealing agreement could cause the agreement to violate Article 85.100

In Dassonville, the Court of Justice reaffirmed its position that the invocation of national law by an exclusive distributor to ensure absolute territorial protection violates Article 85(1).101 Similarly, Dassonville aligns with previous precedent in its determination that for the purpose of testing whether an agreement enables a distributor to prevent parallel imports, and therefore adversely affects trade between member states and hinders competition, the agreement's legal and economic context should be examined.102 In this regard, the Court stated that particular attention should be paid to "the possible existence of similar [exclusive distributorship] agreements concluded between the same producer and concessionaires established in other member-states."103

Finally, the Dassonville Court required the exclusive distributorship agreement to "adversely" affect trade between member states to run afoul of 85(1). The German, Italian, and Dutch texts of the treaty suggest that an agreement must affect trade adversely to fall under Article 85(1);104 whereas, in the French105 and English versions, "affect" has no pejorative connotation. In this instance, the principles set forth in Article 3(f) of the Treaty of Rome suggest that any restriction on competition, within 85(1), which is capable of endangering freedom of trade between member states in a way which

100. Id. at 7137-38 (opinion of Advocate-General Alberto Trabucchi).
101. The Court of Justice articulated this position in Beguelin Import Co. v. G.L. Import-Export S.A., [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8149 (Ct. J. 1971) [hereinafter cited as Beguelin]. Dassonville differs from Beguelin in one important respect. In the latter case, the national law was invoked by the exclusive distributor; whereas, in the former, it was invoked by the public prosecutor. Thus, as the Advocate-General observed with respect to the Dassonville facts, "the obstacle to interstate trade and therefore to freedom of competition derives essentially and directly from the national law itself." Dassonville, supra note 90, at 7137 (opinion of Advocate General Alberto Trabucchi).
102. See Volk, supra note 19. In Technique Minière, supra note 14, the Court decided that when examining a possible violation of Article 85(1) by an exclusive distributorship agreement, a number of factors should be considered. One of these was "the isolated nature of the agreement in question or its place among a network of agreements." Id. at 7696.
103. Dassonville, supra note 90, at 7129.
105. The French text reads "qui sont susceptibles d’affecter le commerce entre etats membres . . . ." 1 COMM. MKT. REP. (CCH) ¶ 2005.
could hinder the development of a single market between such states, "affects" trade for purposes of Articles 85 and 86.106 Thus, the adverse effect which is prohibited is not that on trade only, but that on the Community objectives of a single market. Similarly, it has been suggested that a restriction on competition that may potentially prove unfavorable to trade between member states is prohibited.107

Van Vliet Kwasten-en Ladderfabriek N.V. v. Fratelli Dalle Crode.108 In a contract dated February 25, 1968 Fratelli Dalle Crode, an Italian manufacturer of plastic brushes, appointed Van Vliet Kwasten-en Ladderfabriek N.V., a Dutch company, as its exclusive distributor for the Benelux countries. The contract provided that Dalle Crode would ensure that its products delivered to wholesalers, manufacturers, and other customers in Italy would not be exported to the Benelux territory. In order to fulfill this provision, Dalle Crode was required to notify its customers of the restriction on export in brochures, offers, price lists, and invoices "before or during the preparation of the contracts of sale."109 Dalle Crode also had to expressly prohibit the export or the causing of export to the Benelux territory by buyers in Italy when it delivered branded articles.


Dalle Crode argued that the contract was null and void because the export restrictions conflicted with Article 85(1) and because Regulation 67/67110 was inapplicable.

After judgment for Dalle Crode, Van Vliet appealed arguing, inter alia, that the contract with Dalle Crode was ex-

107. In Consten & Grundig, supra note 18, the Court discussed the phrase, "which may affect trade between member states": "It is necessary in particular to know whether the agreement is capable of endangering, either directly or indirectly, in fact or potentially, freedom of trade between member states in a direction which could harm the attainment of the objects of a single market between states." Id. at 7652. Thus, the adverse effect which is prohibited is not that on trade only, but that on the Community objectives of a single market.
108. Van Vliet, supra note 90.
109. Id. at 7660.
empted by Regulation 67/67 because parallel imports of Dalle Crode products into the Benelux countries were still available from West Germany and France. The court of appeals found that the applicability of Regulation 67/67 depended upon the interpretation of Article 3\textsuperscript{111} of that Regulation.

It, therefore, referred the following questions to the Court of Justice:

1. Do the agreements which by Article 3 are excluded from exemption also include exclusive dealing agreements between a manufacturer in one of the member states and an exclusive dealer elsewhere within the common market which contain provisions upon compliance with which only manufacturers and dealers in the member state of the contracting party/manufacturer are prevented from disposing of the goods to the territory covered by the contract while dealers and consumers in the territory covered by the contract are prevented only from acquiring the goods from the member state of the contracting party/manufacturer?

2. In answering the first question, would it make any difference: (a) if dealers and consumers in the territory covered by the contract do—or do not—in practice continue to be able to obtain the goods from elsewhere in the common market outside the territory covered by the contract and from outside the member state of the contracting party/manufacturer; and (b) if, to the extent to which such a possibility continues to exist in practice, dealers and consumers in the territory covered by the contract do—or do not—in complying with the provisions in the contract referred to under 1 refrain to a noticeable degree from making use of that possibility?\textsuperscript{112}

In response, the Court of Justice noted that Regulation

\begin{footnotesize}
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\item Article 3 reads as follows: Article (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:
(ii) 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;
(ii) exercise other rights or take other measures to prevent dealers or consumers from obtaining elsewhere goods to which the contract relates or from selling them in the territory covered by the contract.
\end{enumerate}
\end{footnotesize}
67/67 exempts certain exclusive dealing agreements from Article 85(1) because of "the advantages which . . . such agreements afford for the improvement and the continuity of supplies as well as the continuance of the competition system to the benefit of particular small and medium size undertakings." It indicated that Article 3(b) of Regulation 67/67 provides that there is no exemption if:

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 . . . 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.

Thus, according to the Court, for the Regulation 67/67 exemption from Article 85(1) to be available to the contracting parties, their agreement must not cause difficulty in the procuring of goods within the Common Market, result in the partitioning of markets, or prevent parallel imports. The Dalle Crode/Van Vliet agreement ran afoul of these criteria and fell within the provision quoted above, Article 3(b)(2) of Regulation 67/67. The requirement of the contract that Dalle Crode prevent exports by third parties, which the Court calls "an encroachment on the freedom of action of . . . [these] parties," is not a restriction which is permitted in exclusive dealing agreements exempted by Regulation 67/67. This prevention of parallel imports from Italy hindered dealers and consumers in the Benelux countries in obtaining supplies.

The Court further found that a real possibility, whether exercised or not, of parallel imports from member states other than Italy would not save the contract from being excluded from the Regulation 67/67 exemption because, such possibility notwithstanding, the parallel import of a substantial quantity of the articles in question would still be prevented by the agreement.

Thus, the Court of Justice concluded that an exclusive distributing agreement between a manufacturer in one member state and a dealer in another does not come within the Regulation 67/67 exemption if the agreement requires the man-

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113. Id. at 7664.
114. Id. (quoting Council Regulation 67/67, art. 3(b)(3), 1 COMM. MKT. REP. (CCH) ¶ 2727C (1967)).
manufacturer to prohibit the export by buyers in their state to the territory covered by the contract "where it has the effect of making it impossible for dealers and consumers in that territory to acquire a substantial quantity of the goods directly from the manufacturer's state."\textsuperscript{115}

Van Vliet reaffirmed the principle that Regulation 67/67 does not apply if the contracting parties prevent parallel imports into the exclusive distributor's territory.\textsuperscript{116} The Court, furthermore, expanded and clarified this principle by holding Regulation 67/67 inapplicable if the parties prohibited parallel imports from the supplier's state, even if they allowed such imports from other member states.

The Court did not consider the situation where parallel imports from the supplier's state are permitted, but where such imports from another member state are prohibited. It seems reasonable to assume that the Court, following the policy of free parallel imports, would hold that Regulation 67/67 would not be applicable to such a contract.

\textit{S.A. Fonderies Roubaix-Wattrelos v. Société Nouvelle des Fonderies A. Roux.}\textsuperscript{117} Roubaix involved a contract dated June 29, 1963, by which Gontermann-Pelpers (Gopag), a German company, granted Les Fonderies de Roubaix-Wattrelos (Roubaix), a French concern, the exclusive right to sell Gopag iron in the northern part of France. This exclusive right was later expanded to include all of France. Roubaix agreed not to compete with Gopag in the manufacture of iron products or to perform any work for Gopag's competitors. The Commission was given notification of these arrangements on September 8, 1966.

On October 6, 1964, an agreement parallel to the above was entered into by Roubaix and Fondries A. Roux (Roux), which granted Roux the exclusive right to resell Gopag products in southern France. Roux also agreed not to compete with Gopag and acknowledged that this agreement was subordinate to, and dependent for its validity on the Gopag-Roubaix agreement. The Commission was not notified of this agreement. In March, 1972, Roux purchased Swiss iron castings, precipitating the institution of an action against it by Roubaix. Roubaix charged that Roux had breached its agreement not to compete

\textsuperscript{115} Id. at 7665.
\textsuperscript{116} This principle was established in Begeulin, supra note 101, at 7704-05.
\textsuperscript{117} Roubaix-Wattrelos, supra note 90.
with Roubaix's own supplier, Gopag, upon which Roubaix was contractually dependent for supplies of iron. Roubaix feared that those supplies might be cut off if it, or an enterprise connected to it, breached the non-competition agreement. Roux defended on the ground that the Roubaix-Gopag agreement was void because it conflicted with Article 85, and that as a result, the Roux-Roubaix agreement was also void.

In reversing the lower court and holding for Roubaix, the court of appeals in Paris reasoned that the original notification to the Commission provided "provisional validity" for the later Roubaix-Gopag agreement until such time as the Commission rendered a decision on its propriety. Provisional validity, it should be noted, is a term signifying that a given action, here notification, is sufficient to provide immunity to liability which otherwise might arise. The validity is effective only until a court ruling provides differently. At that time, liability may arise for similar acts committed after the ruling.

In regard to the Roux-Roubaix agreement, the court of appeals decided that because it was between enterprises within one state covering sales within that state, the exemption covering certain interstate agreements provided in Regulation 67/67 did not apply. For that reason the French court looked instead to Article 4(2)(1) of Regulation 1711 to determine whether the agreement was valid under Article 85.

Article 4(2)(1) of Regulation 17 provides that notification of agreements to the Commission is necessary unless: (1) the only parties to the agreement are from one member state and (2) the agreements do not relate to exports or imports between member states.

Upon examining Regulation 17, the court of appeals concluded that, if its notification requirement was applicable, it must be met as a prerequisite to obtaining an individual exemption under Article 85(3). Therefore, the French court, pursuant to Article 177120 requested that the Court of Justice give

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118. Id. at 7208.
119. Council Regulation 17, art. 4(2), 1 COMM. MKT. REP. (CCH) ¶ 2431 (1971).
120. Article 177 reads as follows:

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

(a) the interpretation of this treaty;
(b) the validity and interpretation of acts of the institutions of the Community;
(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.
a preliminary ruling on whether the Roux-Rouxbaix agreement related "either to imports or to exports between Member States" under Article 85.

The Court of Justice framed the question before it in the following fashion:

[W]hether, assuming that this subconcession agreement is covered by the prohibition in Article 85(1) and does not benefit from the exemption applying to certain categories of agreements contained in Article 1 of Commission Regulation No. 67/67 . . . , it requires preliminary notification in order to benefit under Article 85(3) from an individual exemption from prohibition.\textsuperscript{121}

In defining the parameters of the exemption from Regulation 17's notification requirement for agreements which do not relate to exports or imports between member states, the Court considered the Regulation's goal of simplifying administrative procedure.\textsuperscript{122} When read in conjunction with Article 85(1) and (3), the Court reasoned that Article 4 of Regulation 17 was designed to take out from under the general sweep of Article 85(1) the less harmful agreements which would probably qualify under Article 85(3) as exempt in any case. The Court further stated that the fact that the products to be marketed were previously imported from another member state was not determinative of whether the second condition was met. Therefore, the Roux-Rouxbaix agreement, which applied to marketing solely within a member state, was exempt from the notification requirements.\textsuperscript{123}

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.


121. Roubaix-Wattrelos, supra note 90, at 7211.
122. Id.
123. The Court answered the first question as follows:

(1) To the extent to which it exempts from notification agreements which do not relate either to imports or to exports, Article 4(2)(1) of Council Regulation No. 17 must be interpreted as extending to agreements granting exclusive sales concessions in relation to the marketing of goods, where the marketing envisaged by the agreement takes place solely within the territory of the Member State to whose laws the under-
While the instant case required only a decision as to the need for notification, the issue of what type of agreement was to be granted an exemption under Regulation 67/67 would eventually require interpretation.

Therefore, the Court of Justice went on to discuss the proper interpretation of Regulation 67/67 in relation to this type of restrictive agreement. Article 1(2) of Regulation 67/67 provides that exclusive distributorship agreements between parties in the same member state are not covered by Regulation 67/67. According to the Court, Article 1(2) only applies to intrastate exclusive distributorship agreements which do not affect trade between member states; intrastate exclusive distributorship agreements which do affect trade between member states do not fall under Article 1(2) of Regulation 67/67 and, therefore, can benefit from the bloc exemption provided by that Regulation.

Even though intrastate exclusive distributorship agreements which do not affect trade between member states cannot benefit from the Regulation 67/67 exemption, such agreements do not violate Article 85(1) since they do not affect trade between member states.

Prior to the Rouxbaix decision, intrastate exclusive distributorship agreements which did affect trade between member states were treated as not being able to benefit from Regulation 67/67, which resulted in the anomalous situation that takings are subject, even if the goods in question have at a former stage been imported from another Member State.

Id. at 7212-13.

124. Article 1 of Regulation 67/67 reads as follows:

1. 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.

2. Paragraph 1 shall not apply to agreements to which undertakings from one Member State only are party and which concern the resale of goods within that Member State.

Commission Regulation 67/67, art. 1, 1 COMM. MKT. REP. (CCH) ¶ 2727A (1972).

125. Rouxbaix-Wattrelos, supra note 90, at 7212.

126. Id.

127. See Goodyear Italiana-Euram, Commission Decision of Dec. 19, 1974,
certain exclusive distributorship agreements which affected trade between member states could take advantage of a group exemption; whereas, other similar, and perhaps less harmful agreements could not. The Roubaix decision resolves that anomaly by limiting Article 1(2) of Regulation 67/67 to intra-state exclusive distributorship agreements which do not affect trade between member states.

De Norre v. N.V. Brouwerij Concordia. In De Norre, a married couple took over a Belgian cafe and an existing obligation not to sell or stock beverages of any kind other than those supplied by Concordia, a small brewer. Concordia sued the new owners after it learned that they were selling other beverages. The initial action, in the Oudenaarde court of first instance, resulted in judgment for Concordia. The couple appealed to the Hof van Bereup, Ghent, claiming that their contract was not binding because it was void under Article 85 of the EEC Treaty.

The Hof van Bereup, Ghent, stayed the proceedings to refer seven questions to the Court of Justice. Only the second question was actually answered by the Court, but the others will be adverted to where called for below. The second question referred was:

May it be deduced by analogy with the judgment in Fonderies de Roubaix that the exemption by category laid down by Regulation No. 67/67 of the Commission is applicable to all exclusive dealing agreements of the type at issue, concluded between undertakings in a single Member-State?

In replying to the above quoted second question, the Court initially weaved its way through Regulation 67/67 which sets out the types of agreements which are exempted from Article 85's coverage. The Court noted that Regulation 67/67 exempts agreements to which only two organizations are party, but it withholds this group exemption from exclusive dealing agreements when the two parties are from the same state. After scanning Regulation 67/67 the Court of Justice refused to grant

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128. De Norre, supra note 90.
129. Id. at 7921.
130. Id.
131. Id. at 7922 (footnote omitted).
a group exemption in the instant case. In so doing the court did not condemn domestic agreements to Article 85’s application; it merely reasoned that because these domestic agreements generally are thought to have so minimal an impact on trade between member states, there is little need for an exemption to protect them from an article which can seldom be used against them. The Court then concluded its analysis of Regulation 67/67 by declaring that it does apply to exempt those domestic exclusive dealing agreements “when by way of exception, they are caught by the prohibition contained in Article 85(1) of the Treaty” because they affect trade between member states.132

In De Norre the Court fashioned a wide scope for the Article 85 group exemption. Its reading of Article 1 of Regulation 67/67 relied heavily on the policies underlying this whole area, instead of being overly concerned with a narrow and literal interpretation. A so-called literal interpretation restricting group exemptions would have resulted in the curious anomaly of multistate agreements being permitted, but domestic ones not. The former are more likely to significantly and deleteriously affect the goal of an integrated and competitive Common Market than are the latter, so a “literal” reading of the regulation without regard to its broader context would have been counter productive.

The widening of the scope of the group exemption was also based upon an expressed desire for legal certainty which was said to be part of the reason for the existence of Regulation 67/67. The normal practice in applying the competition law is to examine each small agreement to see whether it may be part of a general pattern of similar agreements which, when taken together, might be restrictive of competition.133 Since the small business owner frequently is unaware of these agreements, he cannot readily be certain that an agreement into which he entered is valid. Extension of the group exemption helps allay these problems of uncertainty in planning at the small business level.134 Where an unacceptable web of agreements at this level is thought to be too stifling to competition, the Commission is

132. Id. at 7940-43.
134. With the knowledge that a group exemption is more readily available, a small business owner can be more confident of the legal validity of any local exclusive dealing arrangement he enters into.
still free to withdraw the group exemption.\textsuperscript{135}

The extension of the group exemption is particularly reasonable in light of the small amount involved in these small business situations and the large amount of expenditure that would be required to adequately furnish a local court with market information.

\textit{Resale Price Maintenance}

One aspect of restrictive competitive practices covered by Article 85 involves vertical agreements. Vertical agreements are those between suppliers of goods and the firms which later resell those goods.\textsuperscript{136} The issue of primary concern is how restrictive the supplier may be in imposing limitations regarding resale upon the purchaser. The principal restriction is dictation of the price, or of a minimum price, at which goods may be resold. Such a restriction is termed "resale price maintenance."\textsuperscript{137}

The EEC's problems resulting from such price dictation have not been significant, because it has been unusual for such pricing schemes to have a truly interstate impact. National laws of the member states generally regulate the practice, and in any case, such a practice is difficult to continue where imports of interchangeable products are available.\textsuperscript{138} Yet, to whatever extent a given firm or industry has market power within a country, restriction of competition among middlemen may help exploit that power.\textsuperscript{139}

The general approach of the Commission has been to allow purely intrastate price maintenance schemes to operate unmolested on the ground that such schemes are primarily a national concern rather than a Common Market problem.\textsuperscript{140} The Commission has chosen instead to prevent exploitation of monopoly power in individual states where such power presents a Com-

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\textsuperscript{135} It may do so under Article 7 of Regulation 19/65, quoted by the Court. De Norre, \textit{supra} note 90, at 7942.
\textsuperscript{136} \textit{See}, e.g., C. Bellamy \& G. Child, \textit{Common Market Law of Competition} 33 (1973) [hereinafter cited as C. Bellamy].
\textsuperscript{137} \textit{Id.} at 63-73.
\textsuperscript{138} D. Barounos, D. Hall \& J. James, \textit{EEC Anti-trust Law; Principles and Practice} 50 (1975) [hereinafter cited as D. Barounos].
\textsuperscript{140} \textit{See} A. Deringer, \textit{The Competition Law of the European Economic Community} 24-28 (1968).
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community concern by removing restrictions upon the free movement of goods so as to open individual markets to competition from imports.

Resale price maintenance schemes are open to attack under Article 85(1), however, where there is an impact upon trade between member states. The Commission, thus, has found in two cases that resale price maintenance across the boundaries of member states is an illegal restriction of competition.

In Groupement des Fabricants de Papiers Peints de Belgique v. EEC Commission, the Court of Justice further defined the type of pricing agreement that may violate Article 85(1). This case involved five Belgian companies who founded the Groupement des Fabricants de Papiers Peints de Belgique (The Group) in 1922 to help market wallpaper. In 1962, The Group notified the Commission of its agreement that served to fix quality standards, prices, resale prices, rebates, and also to issue joint publicity. One member left The Group in 1963, and sued the remaining four members in the Cour d'Appel de Bruxelles. The court rendered a judgment favorable to the plaintiff on the ground that The Group's joint efforts had infringed Belgian competition law.

In 1968, the Commission requested further information from The Group because of the Belgian civil judgment. In answer to the Commission's questions, The Group stated that its customers were under an obligation to adhere to its resale prices in Belgium, but that no such restriction applied to export items. In 1971, The Group learned that Mr. Pex, one of its customers, was reselling wallpaper below the official list price. For this reason, in March, 1972, The Group refused to supply Mr. Pex. Subsequently, he complained to the Commission charging collective refusal of The Group to supply him with wallpaper.

141. Id.
145. Notification is required by Council Regulation 17, art. 5(1), 1 COMM. Mkt. Rep. (CCH) ¶ 2441 (1962); see text accompanying notes 277-283 infra.
146. Groupement, supra note 144, at 7104.
The Commission initiated a proceeding and eventually found that the boycott of Pex was an infringement of Article 85(1). The Group sought annulment of this decision before the Court of Justice, claiming that the refusal to supply Pex did not come under Article 85(1), or in the alternative, that the fines imposed by the Commission were excessive.\footnote{147} The Court of Justice observed that both systems of fixing selling prices and of price listing that forbid announcement of rebates are violative of Article 85(1). The Court noted, moreover, that the initial selling prices dictated to Group members were controlled so as to eliminate all intragroup competition. This practice clearly fell within the proscription of Article 85(1).

The Court of Justice affirmed the Commission’s finding that The Group had decided jointly to suspend delivery to Mr. Pex. The structure of the agreement signed by all of The Group’s customers, which emphasized the penalties The Group could enact for failure to follow the regimented pricing policy, was considered to have restricted competition in Belgium and, as a result, within the Common Market.\footnote{148}

The Court also concluded that a price-fixing agreement, designed to operate only upon the marketing of products in one member state, may nonetheless affect the Common Market insofar as it tends to compartmentalize markets, causing national markets to be resistant to integration. The significance of this effect is judged, the Court stated, by examining “the means available to the parties to a restrictive agreement to insure that customers remain loyal, the relative importance of the agreement on the market concerned and the economic context in which it exists.”\footnote{149}

The above statements notwithstanding, the Court found that the Commission’s decision lacked adequate explanation and therefore overruled it.\footnote{150} The Court’s rationale for overturning the Commission’s decision was that it went beyond previous decisions in declaring that an intrastate agreement affected community trade, and that it failed to adequately substantiate this result. In other words, where a Commission decision breaks new ground, complete explanations are neces-

\footnote{147} Id. at 7110 (art. 85(1)), 7114 (excessive fine).
\footnote{148} Id. at 7118.
\footnote{149} Id.
\footnote{150} Id. at 7119.
sary. In the instant case, the Commission did not set forth facts to show that the small amount of Belgian market activity affected by the subject agreement could have had an impact upon trade between member states.

The Court did not reach the question of whether impact upon local trade or impact upon Community trade is the relevant standard to be applied. Indeed, all of the Court's comments in this regard are dicta, albeit significant dicta. The importance of a restriction upon Community trade is the criterion which should, of course, be used.

While the Commission did not properly document its case here, in the past it has struck down price-fixing agreements whose operation was limited to one country where they affected imports to or exports from member states. The Court of Justice has willingly supported these decisions. The instant case may be distinguished on the ground that its impact upon interstate trade was not readily ascertainable, unlike some of the earlier cases.

It is also worth noting that the Commission previously indicated that when resale price maintenance agreements are limited to a single member state, the situation is generally within the sole competence of that state. Apparently, the reason the Commission adopted this position was that such agreements were considered unlikely to affect Community trade patterns.

Relevant Product Market

The determination of the relevant product market is always important in cases involving Article 86 and can be of importance in those dealing with Article 85. One cannot determine in the abstract whether a dominant position exists; rather, it is necessary to examine a firm's position in a particular product market in the "common market or a substantial part of it" over a specified period.

Likewise, in applying Article 85, it is sometimes necessary

151. Id. at 7118.
152. Id.
153. See D. Barquinos, supra note 138, at 50.
154. Id.
155. See Du Pont, supra note 143. See generally C. Bellamy, supra note 136, at 74-75.
156. See C. Bellamy, supra note 136, at 74-75 (no challenge to these Commission decisions has been allowed by the Court of Justice).
to determine the relevant product market, particularly in examining the applicability of Article 85(3). The fourth requirement for exemption from 85(1) pursuant to 85(3) is that the agreement, decision, or practice must not give the parties the opportunity to eliminate competition in regard to a substantial portion of the products in question. In order to ascertain whether such a possibility exists, one first must decide which goods are "the products in question," in other words, what is the relevant product market? In 1974-1977, the Court of Justice decided one case, Kali & Salz A.G. v. EEC Commission, under Article 85 and several cases under Article 86, in which the determination of the relevant product market was an issue.\textsuperscript{157}

In Kali, Kali & Salz A.G. (K&S) and Kali-Chemie A.G. (KC) were the only two producers of potash in Germany. K&S was responsible for 88.9% of the German production in 1973, while KC was responsible for 11.1%. On July 6, 1970, these two companies entered into an agreement under which "KC supplies K&S with that part of KC's production which KC does not market itself or which is not required for the manufacture of its compound fertilizer RHE-KAPHOS, while K&S for its part undertakes to purchase the surplus, the parties agreeing moreover to draw up, each time for a period of two years, a provisional plan for allocation of this production."\textsuperscript{158} The Commission, in a decision of December 21, 1973,\textsuperscript{159} held that this agreement infringed Article 85(1), refused an exemption for the agreement, and ordered K&S to cease the infringement. On March 11, 1974, the two companies brought an action for annulment of the Commission's decision.

The Commission had found that the relevant product market was "that of straight potash fertilizers";\textsuperscript{160} whereas, the companies argued that the relevant product market was that of straight potash fertilizers and compound potash fertilizers combined since these two projects were competitive and interchangeable. The Court of Justice, opting for the companies' definition of product market, concluded that there was competition between the products, which was "determined by their price and their intrinsic advantages to the consumer." Therefore, it reasoned there was no basis for the conclusion in

\textsuperscript{158} Id. at 7248.
\textsuperscript{159} Id. at 7236.
\textsuperscript{160} Id. at 7249.
the Commission's decision that "the declaration of inapplica-

bility of Article 85(3) must in any case be refused because the
agreement affords the undertakings the possibility of eliminat-
ing competition in respect of a substantial part of the products
in question." 161

Similarly, the Commission had ruled that the agreement
violated 85(1) because the spirit of the contract and the prac-
tice of the parties resulted in KC delivering its whole produc-
tion to K&S. On the other hand, the companies argued that
KC could itself decide how much potash to deliver to K&S. The
Court found that the companies' contention was substantiated
by the fact that the part of KC's production sold to K&S was
decreasing; whereas, the production used in the preparation of
its compound fertilizers was increasing; that the contract was
designed to enable KC to concentrate on the production and
sale of its compound fertilizers; and that KC decided how
much potash to use for the compound product and then sold
any surplus to K&S. Thus, on the facts, the Court agreed with
the companies.162

The Kali decision suggests that the operative concept in
the determination of a market is interchangeability of prod-

ucts. In United States v. E.I. du Pont de Nemours & Co., the
United States Supreme Court said:

The "market" which one must study to determine
when a producer has monopoly power will vary with the
part of the commerce under consideration. The tests are
constant. That market is composed of products that have
reasonable interchangeability for the purposes for which
they are produced—price, use and qualities considered.163

The European Court of Justice seems to have applied a
similar test in Kali. The Court found that the Commission
neglected to demonstrate that the two fertilizer products made
up two different markets although it failed to state firmly that

161. Id.
162. The Court also found that the Commission did not comply with Article 190,
since it did not give sufficient reasons for its decisions; the Court quashed the Commis-
sion's decision. Article 190 reads as follows: "The regulations, directives and decisions
of the Council and of the Commission shall be supported by reasons and shall refer to
any proposals or opinions which are to be obtained pursuant to this Treaty." Treaty
163. 351 U.S. 377, 404 (1955). See also Packard Motor Car Co. v. Webster Motor
Car Co., 243 F.2d 418 (D.C. Cir.), cert. denied, 355 U.S. 822 (1957); Kansas City Star
Co. v. United States, 240 F.2d 643 (8th Cir.), cert. denied, 354 U.S. 923 (1957); United
the test to be used to determine product markets was that of interchangeability. It did, however, note that in some years the farmers buy one product, in other years the other, which goes some distance towards establishing an interchangeability test.

This notion of interchangeability is discussed frequently by economists in terms of "cross elasticity of demand."¹⁶⁴ This is shorthand for a statistically-based approach which attempts to measure the interrelationship between a seller's sales or output and a rival's change in product prices.¹⁶⁵ Where products are "reasonably interchangeable," changes in the price of one should cause changes in purchasing behavior toward the other. The more closely related the product, the greater the change should be. Thus, calculations which demonstrate that slight price changes in one product result in a large shift of buyers to or from the other, indicate significant interchangeability and should be taken as evidence that both products are part of the same market. The Kali approach to product markets is thus similar to that favored by economists, but it fails to adopt explicitly enough the interchangeability approach which seems desirable.

Agriculture—The Sugar Cartel

In most areas of endeavor, the EEC's Rules of Competition provide for the opening of markets to firms in different states. The goal of Article 85 in particular is to eliminate barriers in order to promote competition and free trade.¹⁶⁶ The agricultural sphere represents an exception to this approach, however, insofar as the Treaty enables the Community to establish a centrally-controlled market structure for agricultural projects.¹⁶⁷ Pursuant to this exception, the Council of Ministers of the European Communities has set forth in Regulation 26/62 special rules for agricultural associations and agreements.¹⁶⁸ This regulation exempts such associations and agreements from the restrictions of Articles 85(1) and 86 where they "form an integral part of a national market organization or are necessary for attainment of the objectives set out in Article 39 of the Treaty."¹⁶⁹ The Article 39 objectives referred to are: (1) in-

¹⁶⁵. Id.
¹⁶⁶. See D. Barounos, supra note 138, at 1; C. Bellamy, supra note 136, 46-49.
¹⁶⁷. See generally D. Barounos, supra note 138, at 242-45.
¹⁶⁹. Id. art. 2(1), 1 COMM. MKT. REP. (CCH) ¶ 935B (1975).
creased productivity; (2) a fair standard of living for the agricultural community; and (3) stable markets with ready supplies at reasonable prices. The Commission has the exclusive power to decide which agreements or practices are covered by the Regulation 26/62 exception to Articles 85 and 86.

These overlapping policies of trying to establish, on the one hand, a competitive market system, and, on the other hand, a stable agricultural market are not necessarily compatible. Theoretically, competition provides an unstable market, at least to the degree that firms will drop out or expand as their relative efficiencies dictate. The notion that stability was needed in the agricultural products market is based on the underlying idea that competition could grow “excessive” and thereby destructive of a smoothly functioning market. The result is that a balance is struck between the desire to have competition and thus lower, though fluctuating, prices, and the desire to have stability, and thus uniform and constant, though generally higher, prices.

On a practical level, the Commission manages the agricultural field pursuant to directions provided by the Council. These directions dictate how particular products are to be treated. However, the proper balancing of interests is still a complex task. One strict requirement that aids the Commission in formulating its decisions is that an agreement or practice will not be exempt from Article 85(1), even if it produces the overall goals discussed above, if other, less restrictive means are available.

The European Sugar Cartel cases demonstrate the interrelation of the Community’s agricultural policies and its competition rules. Since the facts of the multiple Sugar Cartel cases are too complicated to state in detail, a broad outline will

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170. Consumers’ interests, it is to be noted, are protected by the stated goals of steady supplies at reasonable prices. The producer’s interests are protected by the establishment of a goal of a “fair standard of living for the agricultural community.”


172. See F. Scherer, supra note 139, at 41-130.


174. Id.

175. See generally id. at 242-44.

176. See generally id. at 243-45.

177. See, e.g., FRUBO, infra note 183.

be sketched briefly.

Essentially, the main sugar producers in France, Belgium, the Netherlands, Germany, and Italy attempted to separate their national markets from each other, so as to allow each group of national producers sole access to its own market. According to the Commission's findings, sales were allowed between markets only as accepted by producers in these markets. On these facts, the Commission found various prohibited concerted practices. The Court of Justice annulled large parts of the Commission's decision. Again, the specific details regarding which of sixteen producers was liable on what count is beyond the scope of this article. The relevant aspects of the law discussed in the opinion, however, are set forth below.

The overlap between the Community's agricultural policy and its rules of competition was clearly demonstrated in that portion of the opinion dealing with the organization of the Community itself. The Court found that in agricultural matters, even where the market organization involved national production quotas, EEC antitrust rules were applicable so long as there was room for private competition within the organization. Yet, where private competition was largely restricted by organization in the member state, anticompetitive practice by private firms consequently could not significantly affect competition due to the very nature of the market concerned. In such a case, Article 85(1) would not apply. In the present case though, the Court reasoned with respect to sugar, that a significant residual field of competition existed, and that conduct worsening conditions in it was not acceptable.

The Sugar Cartel cases extended and refined the analysis of an earlier case, FRUBO v. EEC Commission, regarding

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180. Id. at 9282.
181. Sugar Cartel, supra note 178, at 8262.
182. Id. at 8150-52.
183. [1973-1975 Transfer Binder, New Developments] COMM. MKT. REP. (CCH) ¶ 9673 (Ct. J. 1975) [hereinafter cited as FRUBO]. FRUBO concerned the organization of a system for the sale of fresh fruit, which the Commission found in breach of Article 85(1) of the EEC Treaty. Advocate-General Mayera correctly noted in the Sugar Cartel cases that FRUBO represented the only other time the Court had faced the difficulties of applying a rule of competition to an agricultural section covered by a Common Market organization. Sugar Cartel, supra note 178, at 8302.

The FRUBO Court cited Council Regulation 26/62, 1 COMM. MKT. REP. (CCH) ¶
situations where the competition and agricultural policies of the EEC overlap. Rather than assuming the market to be simply bifurcated, the Sugar Cartel Court showed an awareness of the necessity for a significant private market before Article 85(1) would apply, for otherwise, there could be by definition no significant effect upon trade between member states. The Sugar Cartel Court also implied that a balancing mechanism was called for where the private market was of less significance. Where a market’s significance is diminished, the rigorousness of the standards applied to potentially noncompetitive behavior should be reduced. While not constituting a per se rule in any sense, this approach nonetheless provides some clarification in an area clouded by doctrinal overlap.

The Court of Justice, also discussing concerted practices, concluded that parties must act independently in adapting themselves to the practices of their competitors. Thus, direct or indirect contact between competitors in order to influence a firm’s actions or to reveal one’s own planned conduct is absolutely precluded. This conclusion reaffirms the position taken in earlier case law. There is still a need under this “adaptation and influences” approach to examine all the facts and circumstances surrounding the situation. The Sugar Cartel cases stand for the proposition that while market conditions may cause essentially parallel pricing and behavior, that result must be arrived at independently by the individual firm to avoid application of Article 85. The Court’s view that a concerted practice only involves action based on contact between

935 (1962), which implements Article 42 of the EEC Treaty, Treaty of Rome, done March 25, 1957, art. 42, 298 U.N.T.S. 32, as controlling. FRUBO, supra, at 9497-4. Article 1 of Regulation 26 states that Articles 85 through 90 of the EEC Treaty are applicable to production of or trade in agricultural products. Article 2(1) of Regulation 26/62, however, qualifies Article 1, providing that “Article 85(1) of the Treaty shall not apply to such of the agreements, decisions and practices referred to in the preceding Article as form an integral part of a national market organization or are necessary for attainment of the objectives set out in Article 39 of the Treaty.” Council Regulation 26/62, supra, at ¶ 935B. The FRUBO Court held that the subject agreement, while stabilizing the market, did not meet the requirements for exemption to Article 85(1) under Article 2(1) of Regulation 26/62. In the Court’s view, the agreements failed either to increase agricultural productivity, or to insure a fair standard of living for the agricultural community. FRUBO, supra, at 9497-5.

184. See notes 14-19 and accompanying text supra.
185. Id.
186. Sugar Cartel, supra note 178, at 8179.
188. Sugar Cartel, supra note 178, at 8179.
the parties rather than the carrying out of a deliberate plan is sound; the latter view, urged by the companies in the instant case, is close to a definition of an agreement rather than a practice. The standard established here for applying Article 85 is more realistic in light of business practices than would be the less easily applied test advocated by the companies.

**Conclusion**

As noted at the outset, Article 85 represents one of the cornerstones of a system designed to foster free competition. However, its sweeping prohibition against restrictive trade practices is clearly tempered by judicial interpretation when the facts of a specific case so demand. This seems a desirable goal, for in an area that fluctuates as rapidly as economic markets, any hard and fast rules would quickly prove unworkable. If the provisions of Article 85 were the sole guarantors of competition in the Common Market, there would still be many avenues through which undertakings could distort the free flow of goods. The provisions of Article 86 are designed to fill this void.

**ARTICLE 86: ABUSE OF DOMINANT POSITION**

According to Article 86: "[a]ny abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States."\(^{189}\) Thus, the following four conditions must be satisfied for this Article to apply:

1. One or more undertakings must have a dominant position.\(^{190}\)
2. The dominant position must be held within the Common Market or a substantial part of it.
3. There must be an abuse of that dominant position.
4. The abuse must be capable of affecting trade between member states.

**Dominant Position**

Neither Article 86 nor Regulation 17 gives a definition of

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\(^{190}\) Article 86 applies to one or more undertakings which abuse a dominant position; thus, it probably also applies to oligopolies.
the term, "dominant position," but the Commission, in the Continental Can case has emphasized "overall independence of behavior".

Undertakings are in a dominant position when they have the power to behave independently, which puts them in a position to act without taking into account their competitors, purchasers or suppliers. That is the position when, because of their share of the market, or of their share of the market combined with the availability of technical knowledge, raw materials or capital, they have the power to determine prices or to control production or distribution for a significant part of the products in question. This power does not necessarily have to derive from an absolute domination permitting the undertakings which hold it to eliminate the decisionmaking power of their partners. It is sufficient that they be strong enough as a whole to ensure to those undertakings an overall independence of behavior, even if there are differences in intensity in their influences on the different partial markets.

Thus, to have a dominant position, an undertaking must: 1. be able to have a significant influence on the market; 2. have the power to behave independently; and 3. understand its position and its ability to influence the market.

It should be noted that the mere existence of a dominant position does not infringe Article 86; only abuses of a dominant position are prohibited.

Additionally, the phrase "within the common market or a substantial part of it," is not defined in either the Treaty or Regulation 17. However, the Commission has concluded that Germany constitutes a "substantial part" of the Common Market. Similarly, the Commission has indicated that Benelux and north and central Germany fulfill this requirement. Thus, France, Germany, Benelux, Italy, the United Kingdom, and possibly Denmark and Ireland, are substantial parts of the Common Market.


192. *Id.* at 9029 (translation from COMM. MKT. L.R.).

Abuse

Article 86(a)-(d) provides the following examples of the types of "abuse" which are prohibited:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.¹⁹⁴

Major Pre-1974 Article 86 Decisions

The two major pre-1974 cases under Article 86 are the Commission Decision, *Gema*¹⁹⁵ and the Court of Justice decision, *Continental Can.*¹⁹⁶ In the Gema decision, the Commission found that the following activities by Gema, the organization which manages the rights of authors and composers of musical works in Germany, were abusive:

1. discriminating against nationals of other member states,
2. binding members by unnecessary obligations,
3. preventing, through its system, the establishment of a single market in the supply of services of music publishers,
4. extending copyright, through contractual means, to non-copyright works,
5. discriminating against independent importers of phonograph records as compared with manufacturers of records,
6. discriminating against importers of tape recorders and optical sound recorders as compared with the German manufacturers of such equipment.¹⁹⁷

This decision is significant in that the Commission employed a broad definition of abuse. It is clear that the Commission considered the list of possible abuses in Article 86, not

exhaustive, but merely exemplary.

In the Continental Can case, the Court of Justice further expanded the definition of abuse: "Thus, abusive conduct could be present where an enterprise in a dominant position strengthens that position to the point where the degree of domination achieved substantially hampers competition, so that only enterprises which in their market conduct are dependent on the dominant enterprise would remain on the market."198

In essence, the Court concluded that a merger could be a method of so strengthening a dominant position and, therefore, an abuse. This decision was based on the purposes and policy embodied in Article 3(f)199 and the substantive provisions of Articles 85 and 86. The Court held that the principle of Article 3(f) indicates that Article 86 is intended to be broad enough to prevent enterprises from accomplishing through merger what they could not achieve by way of agreement because of Article 85.

Thus, abuse must be defined by reference, on the one hand, to the list of examples in Article 86 and by reference, on the other hand, to the general principles of harmonious economic development and undistorted competition contained in Articles 2200 and 3(f).201

Major Post-1974 Article 86 Decisions

From 1974 through 1976, the Court of Justice decided two cases under Article 86,202 two cases in which both Articles 86

198. Continental Can, supra note 54, at 8300.
199. Article 3(f) reads as follows: "For the purpose set out in Art. 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein: . . . (f) the institution of a system ensuring that competition in the Common Market is not distorted." Treaty of Rome, done March 25, 1957, art. 3(f), 298 U.N.T.S. 16.
200. Article 2 reads as follows:

It shall be the aim of the Community, by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States.

Id. art. 2, at 15.
201. In group regulation cases, the Court generally concludes that the introduction of a system of undistorted competition is essential to the establishment of a common market.
and 90 were in issue; \textsuperscript{203} one case under Articles 85 and 86; \textsuperscript{204} and one case which dealt with Articles 85, 86, 90, and others. \textsuperscript{205}

Commercial Solvents case. \textsuperscript{204} This case involved a refusal to sell by the sole manufacturer of a precursor of certain pharmaceutical substances. Commercial Solvents Corporation (CSC), a Maryland corporation, manufactured and sold products based on nitroparaffines, including 1-nitropropane and its derivative 2-amino-1-butanol. Both these chemicals are used in the manufacture of ethambutol and ethambutol-based substances which are used in the treatment of tuberculosis. In 1962, CSC acquired a controlling interest in the Istituto Chemioterapico Italiano S.A. (Istituto), an Italian company, which resold the aminobutanol manufactured in the United States by CSC.

Beginning in 1966, Laboratorio Chemico Farmaceutico Giorgio Zoja, SpA (Zoja) purchased aminobutanol from Istituto. However, after Istituto had begun the development of its own ethambutol-based products in 1968, CSC decided that it would stop selling the basic precursors of ethambutol, nitropropane and aminobutanol, to purchasers in the Common Market. Instead, it decided to supply dextroaminobutanol, an upgraded intermediary between these precursors and ethambutol-based products, to Istituto which would convert this chemical to ethambutol for sale in the Common Market and for its own use.

After extended negotiations with Istituto and after searching the world market, Zoja found that aminobutanol was available only from CSC. CSC, however, refused to sell aminobutanol to Zoja. Therefore, on April 8, 1971, Zoja requested that the Commission institute proceedings.

After the normal procedural prerequisites, the Commission, on December 14, 1972, issued a decision requiring Istituto and CSC:

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[1974 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8209 (Ct. J. 1975) [hereinafter cited as Commercial Solvents].


204. Sugar Cartel, \textit{supra} note 178; EMI, \textit{supra} note 40.

205. Industria Gomma Articoli Vari v. Ente Nazionale per la Cellulosa e per la Carta, [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8311 (Ct. J. 1975) [hereinafter cited as IGAV]. One other case, discussed at text accompanying notes 74-84 \textit{supra}, also dealt with Article 86 in conjunction with Article 85. It is not discussed here because of its very limited significance.

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(a) Under penalty of a fine of 1000 units of account per day of delay, beginning 31 days after receipt of the decision, to supply 60,000 kilograms of nitropropane or 30,000 kilograms of aminobutanol to Zoja, at its most urgent needs, at a price not exceeding the maximum price charged for those two products;

(b) under penalty of a second fine of 1000 units of account per day, to submit to the Commission within two months after receipt of the decision, proposals for the subsequent supply of Zoja;

(c) to pay a fine of 200,000 units of account. 207

On February 16, 1973, Istituto and CSC applied to the Court for the annulment of this decision.

At the outset, the Court of Justice was forced to consider whether CSC held a dominant position. The Court found that it was not disputed that the world's leading manufacturers of ethambutol used raw material produced by CSC. Similarly, the Court found that the production and sale of ethambutol by other manufacturers was of minor importance in comparison to that of these major producers. Based on this evidence, the Court concluded that CSC had a dominant position in the world market for the precursors of ethambutol.

On the relevant product market question, the Court found, contrary to CSC's and Istituto's arguments, that the market for the manufacture of a product could be distinguished from the market on which the product is sold.

An abuse of a dominant position on the market in raw materials may thus have effects restricting competition in the market on which the derivatives of the raw materials are sold, and these effects must be taken into account in considering the effects of an infringement, even if the market for the derivatives does not constitute a self-contained market. 208

The Court also found that CSC's and Istituto's refusal to supply Zoja, with the object of reserving the raw materials for themselves, risked eliminating competition from Zoja. Such conduct was contrary to the principles expressed in Article 3(f) and in Articles 85 and 86 of the Treaty. Therefore, such refusal was an abuse of a dominant position.

In discussing the effect of CSC's abuse on trade between

207. Id. at 8803.
208. Id. at 8819.
member states, the Court of Justice observed that Article 3(f) and Article 2 must be taken into consideration in the interpretation and application of Articles 85 and 86. Article 3(f) provides that the activities of the Community shall include the institution of a system ensuring that competition in the Common Market is not distorted, while Article 2 charges the Community with the task of promoting "throughout the Community harmonious development of economic activities." Article 86, therefore, applies to abuses which directly affect consumers, as well as to abuses which indirectly affect them by impairing an effective competitive structure.

The result is that the Community authorities must take into consideration all the consequences of illegal abuses for the Common Market's competitive system without distinguishing between production intended for intra-market sale and that intended for export.

When an undertaking in a dominant position within the Common Market abusively exploits its position in such a way that a competitor in the Common Market is likely to be eliminated, it does not matter whether the conduct relates to the latter's exports or its trade within the Common Market, once it has been established that this elimination will have repercussions on the competitive structure within the Common Market.

The Court of Justice held that CSC and Istituto should be treated as a single economic unit and that they should be held jointly and severally liable. It based this decision on the fact that CSC not only had, but also exercised, the ability to control Istituto's policy, and on the fact that the firms acted for their common benefit.

Finally, in reference to liability, they affirmed the Commission's decision, which ordered CSC and Istituto to begin supplying Zoja with specified quantities of the raw material. The defendants argued that both the order to supply and the specification of an amount exceeded the Commission's remedial powers. The Court made short work of these contentions noting that a Commission decision requiring termination of an infringement "may include an order to do certain acts or pro-

209. See note 199 and accompanying text supra.
210. See note 200 and accompanying text supra.
211. Commercial Solvents, supra note 202, at 8821.
212. Id. at 8821-22.
vide certain advantages which have been wrongfully withheld."

The *Commercial Solvents* case establishes that a dominant firm’s refusal to deal which is likely to eliminate competition is an abuse under Article 86. It also reaffirms the position that the list of abuses set out in Article 86 is not exhaustive. More importantly, however, the Court of Justice seems to have promulgated a per se rule and to have reiterated that Article 3(f) must be taken into consideration in the interpretation of Article 86. The formulation of a per se rule provides a measure of guidance in a legal area where businessmen have often complained of the difficulty of dealing with market uncertainty.

The Court did not come to grips, however, with the policy questions involved in a refusal to deal situation. After all, what is the actual problem that results from a corporation refusing to supply another enterprise-entity with necessary goods? Presumably, it is that the bankruptcy of the second corporation will somehow lessen competition in the given market. Yet, that is nowhere examined in the opinion of the Court, which makes the unwarranted assumption regarding an oligopoly that another firm in the market will necessarily enhance competition and lower prices. Neither the acquisition of a supplier or customer by a dominant firm (vertical integration), nor the driving out of business of a supplier or customer, will necessarily have a deleterious impact on prices. The per se rule adopted by the Court unfortunately seems to preclude an investigation into individual market conditions, which might reveal whether the loss of a supplier or customer would affect prices, without any apparent reason.

The Court extended the enterprise-entity doctrine since the relationship between CSC and Istituto was not as close as that between parents and subsidiaries to which the enterprise-entity doctrine had been applied in previous cases. The judgment also affirmed that the Community’s antitrust law has an extraterritorial effect. Thus, a non-EEC company which con-

213. *Id.* supra note 202, at 8822.
214. *See* notes 199 & 200 and accompanying text *supra*.
215. *See* text accompanying notes 52-54 *supra*.
EEC ANTITRUST LAW

The scope of Article 86 recently has likewise been expanded by the reasoning of Commercial Solvents. According to the Court, Article 86 prohibits an abuse by a dominant undertaking if that abuse is likely to affect the competitive structure of the Common Market. Apparently, this is true even if the abuse does not relate to exports and imports between member states, but only to exports outside the Community. This interpretation of the phrase in Article 86, "affect trade between member states," is similar to that given to the same phrase in Article 85.\textsuperscript{218} In addition, this holding follows from the judgment in Continental Can that Articles 2 and 3(f) should be taken into consideration in the interpretation of Article 86.

Finally, the Court of Justice strengthened the power of the Commission by approving its order that CSC and Istituto supply Zoja with the immediately needed raw materials and submit proposals regarding its subsequent supply. As a result of this judicial approval, the Commission can require positive action, as well as the termination of infringements, by undertakings.

\textit{General Motors Continental N. V. v. EEC Commission.}\textsuperscript{219} The parameters of Article 86 were further defined by the Court in this case. The Belgian government required that all motor vehicles used in Belgium meet certain technical requirements. Manufacturers or authorized Belgian agents of foreign manufacturers were required to inspect all vehicles assembled in Belgium and all vehicles imported into Belgium which are less than six months old and to issue certificates which confirm that such vehicles conform to such technical requirements.

General Motors Continental N.V. (GMC), a subsidiary of General Motors for the Benelux countries, was the sole authorized inspecting agent for General Motors and its subsidiaries.

The certificates of conformity were issued by GMC for vehicles sold through its approved dealers. As sole authorized agent, it also issued certificates for General Motors vehicles which were new or had been registered outside of Belgium for less than six months, and which were imported by individuals or non-approved dealers (parallel imports) rather than through

\textsuperscript{218} See text accompanying notes 61-64, 131-132 \textit{supra}.

\textsuperscript{219} General Motors, \textit{supra} note 202.
the standard General Motors system. No charge was made for the inspection of vehicles assembled in Belgium or imported by approved dealers.

Between March 15 and July 31, 1973, in five cases, GMC charged the same rate for the inspection of and issuance of documents for parallel imports of European manufacture as it charged for such inspection of General Motors vehicles manufactured in and imported from the United States; however, the actual cost of inspection of the European vehicles was less than that of the American vehicles.

Beginning August 1, 1973, a new scale of charges was implemented which distinguished between vehicles of European and American manufacture. At approximately the same time, GMC refunded part of the payment in the five cases where owners of the European vehicles had been required to pay the rate charged for vehicles manufactured in the United States.

Despite this refund, the Commission instituted an inquiry after it became aware of the facts. After fulfilling the procedural requirements of Regulation 17, the Commission adopted a decision on December 19, 1974, which found that:

between March 15 and July 31, 1973, General Motors Continental N.V. intentionally infringed Article 86 by charging a price that was abusive for the issue of certificates [of conformity] . . . which it was required to issue under Belgian law after inspecting Opel vehicles to check their conformity with the general approved type and after determining identification of the vehicles. 220

The Commission, therefore, imposed a fine on GMC of 100,000 units of account. GMC brought proceedings before the Court of Justice on March 7, 1975, praying that the Court annul the decision or discharge GMC from payment of the fine.

On the issue of dominant position, GMC argued that issuance of certificates of conformity was merely ancillary to its sale of motor vehicles and that the relevant product market was the motor vehicle industry in which it did not have a dominant position. The Court, however, found that the Belgian government had granted GMC a legal monopoly to issue certificates of conformity and that GMC had power to fix any price for this service. Thus, GMC had a dominant position within the meaning of Article 86 since, for any given make, the ap-

220. Id. at 7728.
proval procedure could be carried out in Belgium only by the manufacturer or officially appointed authorized agent under conditions fixed unilaterally by that party.

In the course of deciding whether GMC had abused its dominant position, the Court theorized that GMC could possibly do so by setting a price for its conformity service "which is to the detriment of any person acquiring a motor vehicle imported from another Member State and subject to the approval procedure." The Court, however, observed that it must take into account all of the factors that contributed to the Commission's decision in order to determine whether GMC had abused its dominant position.

The Court indicated that GMC was only occasionally required to carry out an inspection of the type in question, that such inspections were of minute importance in comparison to the other inspections conducted by GMC, and that GMC simply charged for this relatively unusual activity the price "which was until then normal for the vehicles it imported."

The Court also observed that after complaints by the parties concerned, and before action by the Commission, GMC reduced the charge for inspection of vehicles of European manufacture to a level that was related to the inspection cost and refunded the excess over the new inspection price to the parties concerned.

Based on the foregoing evidence, the Court concluded that GMC's conduct did not amount to an abuse of a dominant position under Article 86.

General Motors Continental indicates that Belgium is a "substantial part" of the Common Market. Thus, it is probable that any member state is a substantial part of the Common Market under Article 86. The case also affirms that a dominant position can result from the grant of an exclusive right by the government of a member state.

The Court's conclusion that GMC's conduct was not an abuse presents grounds for some speculation. Although the Court discussed the facts and observed that they indicate an absence of abuse, it did not explain the basis of such a conclusion.

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221. Id. at 7735.
222. Id.
224. General Motors, supra note 202, at 7735.
In its submissions, GMC argued that the purpose of both Articles 85 and 86 was to maintain effective competition within the Community and that there can be no abuse of a dominant position if neither the object nor the effect of the conduct in question is to affect competition adversely. GMC further contended that "where . . . conduct corresponds to one of the examples given in the second paragraph [of Article 86], it only gives rise at the most to a rebuttable presumption of an abuse," and that, Article 86 therefore could not be automatically applied because of such correspondence.

The Commission responded and the Advocate-General agreed that Article 86 imposed no additional requirement that conduct have the object or effect of adversely affecting competition; rather, an abuse, by definition, has an adverse effect on competition. Therefore, it was only necessary to determine whether the actions of an undertaking were abusive. Since GMC's activities fell within Article 86(2)(b), the Commission and Advocate-General concluded there was an abuse.

It is possible that the Court accepted the Commission's and the Advocate-General's legal reasoning that an abuse by its very nature has an adverse effect on competition, but rejected their factual determination that GMC imposed unfair prices. This interpretation is supported by the Court's holding that GMC's conduct was not an abuse, instead of holding that such conduct did not adversely affect competition.

It is also possible that the Court partially followed GMC's arguments by finding that Articles 85 and 86 were designed to prevent the distortion of or adverse effects on competition, and that, therefore, conduct cannot be abusive within Article 86 unless it distorts or adversely affects competition. In paragraph nine of the judgment the Court stated: "Such an abuse might consist . . . 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 . . . ." One might possibly interpret this passage to mean that a price is an abuse if it is unfair ("excessive") and if it has an adverse effect on competition ("effect of curbing"). Such an interpretation

225. Id. at 7731.
226. Id.
227. Id. at 7732.
228. Id. at 7740.
229. Id. at 7735 (emphasis added).
would suggest the Court’s partial agreement with GMC’s contention.

Finally, it is possible that the Court was relying on an alternative approach in interpreting GMC’s conduct. Article 86 requires that the prohibited conduct affect trade between member states. One commentator has suggested that this translates into a requirement that the abuse, to be prohibited, must adversely affect trade between member states:

[I]t is not just the fact that a particular type of abuse of a monopolistic or oligopolistic position has an impact on a substantial part of the trade between the member States of the Community that would seem to matter so much (as indeed the provisions of Article 86 of the EEC Treaty on their face would seem to suggest). It is rather more important that some effect on trade, however infinitesimal or minimal, has occurred or is likely to occur, which in principle might be deemed on the balance of probabilities to militate against competition in business or in trade.230

If the Court of Justice was following this line of reasoning, it may have determined that GMC’s conduct was an abuse, but that it did not adversely affect trade between member states.

The Sugar Cartel cases. Abuse of dominant position under Article 86 was also an issue in the Sugar Cartel cases231 discussed previously in connection with Article 85. In these cases, the Court of Justice employed a definition of “substantial part of the common market” even more liberal than the single member state view adopted in General Motors Continental. In examining the relevant geographical market, the Court looked to various economic factors on both the production and consumption sides, and found that the southern part of Germany met the meaning of Article 86’s required “substantial part of the common market.”232

This marked a significant departure from the Court’s early decisions which required several countries combined, or at least one member state to satisfy the substantial part test.233 Here, the test was satisfied by a portion of one member state.234 This suggests that market conditions, such as the proportion

231. Sugar Cartel, supra note 178.
232. See text accompanying notes 193 & 194 supra.
233. See text accompanying notes 191-194 supra.
234. Sugar Cartel, supra note 178.
of use in the given area of a product relative to the whole Community's use, will be given precedence in determining the applicability of Article 86 over strict concerns for the number of national areas involved.

In examining the possibility of an abuse of a dominant position, the question of agency also figured prominently in the Sugar Cartel decisions. Agents operating solely for one principal are to be regarded as quasi-employees of the principal and therefore not subject to Article 86. Yet, if the agent is contractually allowed to work for others in a similar capacity, and if the principal later contracts to prohibit the agent's dealing in competing goods, this may be an abuse of a dominant position if it is likely to help further such dominance. If a dominant firm also largely controls distribution of the product and foreign competitors can find no uncontrolled outlets for distribution and must seek those of the dominant firm, an abuse of dominant position may be found.235

The EMI cases.236 Article 86 was also touched on briefly in the EMI cases, where the Court of Justice also found that the ownership of a trademark right did not per se constitute a dominant position under Article 86. This position accords with prior case law.237 Generally, a dominant position will only be found if, in addition to an industrial property right, another basis for exclusion of competition exists.

Previous cases also established that the exploitation of a
The instant case affirms these decisions. However, it leaves open the question of whether an exceptional power to abuse, conferred by an industrial property right, is sufficient to trigger Article 86's application.

Conclusion

Along with Article 85, the provisions of Article 86 form the cornerstones designed to guarantee free competition within the Common Market. Particularly, Article 86 attacks those undertakings which seek to restrict or distort competition by exercising undue control over the free flow of goods. Again, as with Article 85, the strength of the Article 86 sanctions depends largely on the interpretation given its provisions by both the Commission and the Court of Justice. Certain Treaty provisions limit the undertakings directly subject to the language of Articles 85 and 86. An examination of Article 90 provides a look at the circumstances under which the competitive rules will apply to these undertakings.

ARTICLE 90: SPECIAL UNDERTAKINGS

Article 90 contains rules for the application of the Treaty, particularly the competitive provisions, to public undertakings and undertakings to which member states grant special or exclusive rights. Article 90(1) prohibits member states from enacting measures in favor of public or special un-

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238. See Deutsche Grammophon, supra note 30; Sirena, supra note 30.
239. Article 90 reads as follows:
1. Member States shall in respect of public enterprises and enterprises to which they grant special or exclusive rights, neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular, to those rules provided for in Article 7 and in Articles 85 to 94 inclusive.
2. Any enterprise charged with the management of services of general economic interest or having the character of a fiscal monopoly shall be subject to the rules contained in this Treaty, in particular to those governing competition, to the extent that the application of such rules does not obstruct the de jure or de facto fulfilment of the specific tasks entrusted to such enterprise. The development of trade may not be affected to such a degree as would be contrary to the interests of the Community.
3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, issue appropriate directives or decisions to Member States.

The SABAM case. This decision concerned the application of Articles 86 and 90 to the Belgian Association of Authors, Composers and Publishers (SABAM), a co-operative organization, governed by Belgian law, which is charged with the exploitation, administration, and management of all copyrights and related rights, on its behalf, for its members and associates, and for its clients and affiliated undertakings.

In 1963 and 1967 respectively, SABAM entered into its standard form contracts with Davis, a composer, and Rosenstraten, a songwriter. Pursuant to these contracts, Davis and Rosenstraten assigned to SABAM their copyrights in all present and future compositions of which they were or would be owners, and all present of future rights on performances and productions of phonograph records. The contracts gave SABAM the authority to retain and to exercise the assigned rights for five years after a member's withdrawal from the association.

On March 11, 1969, the Belgische Radio en Televisie (BRT) entered into an agreement with Davis and Rosenstraten pursuant to which BRT was assigned certain copyrights for the words and music of a song, “Sperciebonen.” This contract included provisions which required that the assignment to BRT be exclusive for two years and, if the agreement was incompatible with other contracts concluded by the authors, that the authors procure from the other party to the incompatible contract a declaration permitting the agreement with BRT. “Sperciebonen” was repeatedly broadcast on radio and televi-
sion. SABAM entrusted the Bureau International d’Edition Mecanique (BIEM) with the responsibility of managing the SABAM repertoire and of granting permission for the production of recordings.

The Belgian company NV Fonior which had a contractual, nonexclusive right to record works in the BIEM repertoire produced and sold a recording of “Sperciebonen.” In March and April, 1969, both BRT and SABAM tried to prevent Fonior from producing this record, however, Fonior continued its manufacture and distribution. BRT and SABAM, therefore, brought an action before the Tribunal de Premiere Instance of Brussels praying that Fonior be condemned for the alleged illegal reproduction.241 The dispute centered around the ownership of the copyrights. Both SABAM and BRT claimed title to the rights and thus the right to prohibit Fonior’s reproduction.

On June 3, 1970, the Commission, on its own initiative, began proceedings pursuant to Article 3 of Regulation 17 in regard to SABAM and similar organizations in France and Germany. SABAM was notified by a letter of June 8, 1970 of the Commission’s objections. It particularly objected to clauses in the form copyright assignment contracts dealing with the global assignment of copyrights and the length of time the assignment continued after the resignation of a member. These proceedings were still in progress at the time of the SABAM judgment.

On April 4, 1973, the Brussels court referred the following questions to the European Court of Justice:242

1. Can the facts that an undertaking which enjoys a de facto monopoly in a Member-State in the management of copyrights requires the global assignment of all such rights without making any distinction between specific categories be regarded as an abuse of a dominant position within the meaning of Article 86 of the EEC Treaty?
2. Can the abuse of a dominant position also consist in the fact that such an undertaking stipulates that an author shall assign his present and future rights, and in particular in the fact that, without having to give an account of its

241. Id. at 9185-16.
242. On December 12, 1973, the Court first heard the Advocate-General “on the preliminary issue of whether it would accept remission of the questions or whether the Belgian court, rather, should not have stayed its own proceedings until the Commission had issued a decision in its proceedings. . . .” The Court accepted the remission on January 30, 1974. The Court heard submissions of the Advocate-General again on February 12, 1974, and gave its final judgment on March 27, 1974. Id.
actions, that undertaking can continue to exercise the rights assigned for five more years following the withdrawal of the member?

3. How should the expression "undertaking entrusted with the operation of services of general economic interest" be understood? Is it necessary that such an undertaking should have specific privileges which are denied to other undertakings?

4. Can the provisions of Article 90(2) of the Treaty create rights for private parties which national courts must safeguard?

In response to questions one and two, the Court of Justice observed that the Brussels court had found that SABAM enjoyed a quasi-monopoly in Belgium and that it therefore, had a dominant position in a substantial part of the Common Market. After noting that Article 86 requires that an abuse, inter alia, directly or indirectly impose unfair trading conditions, the Court found that it must examine whether SABAM, in its statutes or contracts, directly or indirectly imposed "unfair conditions on members or third parties in the exploitation of copyrights."

In the course of this examination, all the relevant interests had to be considered to ensure a balance between the freedom of authors, composers, and publishers to dispose of their works and the effective management of their copyrights by an organization which in practice they must join.

It was also necessary to consider the fact that SABAM's purpose was to protect the rights and interests of its members vis-à-vis major exploiters of musical material. For the organization to achieve its objectives, the copyrights had to be assigned to such an extent that SABAM could operate on an effective scale. Thus, it had to be determined whether the assignments required by the SABAM form contracts were greater than those absolutely necessary for the attainment of the organization's goals.

Although the Court observed that the clauses in question may be abuses under Article 86, it held that the relevant national court must decide whether, in fact, they were abuses, taking into account both their effect when combined and their effect when separate. Furthermore, if it were found that the clauses were abusive, that court must determine the effect of the clauses on the relevant members or third parties in order to decide "the consequences for the validity and effect of the
contracts in dispute or certain of their provisions.\textsuperscript{243} The Court, thus concluded in answer to the first two questions that:

the fact that an undertaking entrusted with the exploitation of copyrights and occupying a dominant position within the meaning of Article 86 imposes on its members obligations which are not necessary for the attainment of its purpose and which impair unreasonably a member's freedom to exercise his copyright could constitute an abuse.\textsuperscript{244}

In answering question three, the Court concluded that Article 90(2) must be strictly interpreted since it permits action in derogation of the Treaty. The Court also found that private entities could come within the provision if they were entrusted with the “operation of services of general economic interest” by government action.\textsuperscript{245}

The Court, therefore, ruled that Article 90(2) did not encompass SABAM since this association, which merely managed private intellectual property rights, had been given no task or duty by Belgium.\textsuperscript{246}

Finally, the Court held that since Article 90(2) was not applicable to SABAM, it was not necessary to answer the fourth question, and therefore unnecessary to decide whether Article 90(2) was directly applicable.\textsuperscript{247}

In its Gema decision,\textsuperscript{248} the Commission determined that an undertaking in a dominant position cannot impose unreasonable obligations and restrictions and that the measures employed to achieve its goal must be the least restrictive possible. In SABAM, the Court basically affirmed this decision.

The operative concept in the Court’s interpretation of Article 90(2)’s term “undertaking entrusted with the operation of services of general economic interest” seems to be that the undertaking must be assigned tasks by the state or public authorities. This interpretation expands upon the judgment in Public Prosecutor of Luxembourg v. Muller-Hein\textsuperscript{249} in which the Court found that Article 90(2) “could apply to an undertak-

\begin{flushright}
\textsuperscript{243} \textit{Id.} at 9185-37. \\
\textsuperscript{244} \textit{Id.} \\
\textsuperscript{245} \textit{Id.} \\
\textsuperscript{246} \textit{Id.} \\
\textsuperscript{247} \textit{Id.} Directly applicable Treaty provisions confer rights on individuals which national courts must respect. \\
\textsuperscript{248} \textit{Gema, supra} note 193. \\
\textsuperscript{249} \textit{[1971-1973 Transfer Binder]} \textit{COMM. MKT. REP.} (CCH) § 8140 (Ct. J. 1971). 
\end{flushright}
ing that enjoys certain privileges so that it can carry out the
task given to it by law, 'maintaining for this purpose close con-
tact with the public authorities. . . ."\(^{250}\)

In Muller-Hein, an undertaking entrusted with a task by
a statute was considered to possibly be within the ambit of
Article 90(2). In SABAM, the Court concluded that an under-
taking could not be within 90(2) unless entrusted with a task
by a government.

Ex parte Sacchi.\(^ {251}\) This Court of Justice decision further
defined the type of undertaking to which Article 90 applies and
served to clarify the relation of that Article to Article 86. Sac-
chi, the defendant in the original criminal proceedings, owned
and managed Telebiella, a firm which transmitted advertise-
ments and programs of its own production by cable television,
and which maintained receivers for these transmissions in sev-
eral public bars. He was prosecuted under an Italian law for
failure to pay a license fee for the privilege of using these televi-
sion receivers.

In the proceedings before the Tribunals of Biella, Sacchi
argued that, since the fee was intended for the financing of the
state broadcasting company, RAI, which possessed only the
exclusive right to transmit television broadcasts over the air,
it could not be collected for receivers used only to pick up a
private company's cable transmissions. Sacchi further argued
that if the exclusive right of RAI extended to the field of cable
television, it would infringe various articles of the Treaty of
Rome dealing with the free movement of goods and freedom of
competition. In response to these arguments, the Tribunal, on
July 6, 1973, stayed the proceedings and referred, among oth-
ers, the following questions to the Court of Justice:

3. Whether Article 86, taken together with Articles 2 and
3(f) and Article 90(1) of the Treaty, is to be interpreted to
mean that, regardless of the means employed, to establish
a dominant position in a substantial part of the Common
Market is illegal and prohibited when the undertaking
which does so eliminates all forms of competition in the
field in which it operates and over the whole territorial area
of the Member-State, even though it is entitled by law to
do so.

4. If the answer to question 3 is in the affirmative,
whether a limited company on which a Member-State has

\(^{250}\) Id. at 7606.

\(^{251}\) Ex parte Sacchi, supra note 203.
conferred by law the exclusive right, over the entire territory of the State, to carry out television broadcasting of all kinds including broadcasts transmitted by cable, and those for commercial advertising purposes, hold [sic] within that territory a dominant position which is incompatible with Article 86 and is prohibited because, to the detriment of Community consumers who, in a wider sense, can be also regarded as users in general, the exclusive right before-mentioned entails:

(a) the elimination of all competition as far as it involves: broadcasting of advertisements (whether treated as a product in its own right or as an instrument for promoting trade); the release for transmission of films, documentaries and other television programs produced in the Community;
(b) the imposition of monopoly prices on television commercials (in the absence of any other competitor in the market), leading to the abuse of a dominant position;
(c) the ability to restrict at will broadcasts advertising products not approved of by the authorized company, whether on political or commercial grounds;
(d) the possibility of preferential treatment for the advertising broadcasts of industrial or trade groups, again for reasons which are not strictly economic;
(e) the broadest discretionary power in the choice and distribution for broadcasting of productions, such as films, documentaries and other programs whose use may wholly depend on the authorized company’s decision.

5. If the answer to question 4 is in the affirmative, whether individuals have a subjective right, enforceable in the national courts, to have the exclusive right whose effects were described in 4, abolished.\(^\text{252}\)

In response to question three, which regarded the permissibility of state-granted monopolies, the Court noted that Article 90(1) allows member states to grant special or exclusive rights to undertakings.\(^\text{253}\) It also found that nothing in the Treaty prohibited a member state from granting to a particular entity, for reasons of public interest of a noneconomic nature, exclusive rights in the fields of radio and television broadcasting, including cable television. The Court further stated that, in fulfilling their duties, these entities “remain subject to the prohibitions against discrimination and, to the extent that this

\(^{252}\) Id. at 9175-76.
\(^{253}\) Id. at 9185-3.
performance comprises activities of an economic nature, they are covered by Article 90. Thus, where member states organize their television industries as "undertakings performing a service of general economic interest," Article 86's "prohibitions apply, as regards their behavior on the market, by reason of Article 90(2), so long as it is not shown that these prohibitions are incompatible with the performance of their tasks."  

As a result of interpreting Article 86 in conjunction with Article 90, the Court of Justice concluded that a monopoly held by an institution to which a member state grants exclusive rights is not, as such, incompatible with Article 86, and that an extension of this monopoly by the state is, therefore, also acceptable under 86.

Although the Court found that the conduct described in question four was capable of amounting to an abuse within the meaning of Article 86, it held that the existence of such an abuse must be ascertained by the national court. Finally, in answer to question five, the Court observed that even in the framework of Article 90, the prohibitions of Article 86 create rights enforceable by individual citizens in national courts.

Although the term "undertakings" is not defined in the Treaty it has been interpreted broadly to include all recognized types of economic entities, including individual proprietorships, partnerships, corporations, unincorporated associations, statutory bodies, co-operative societies, public enterprises, and state-owned corporations. In Sacchi, the Italian and German governments argued that their television institutions were not undertakings because they pursued informational and cultural tasks in the public interest. In rejecting this contention, the Court affirmed the broad definition of undertaking discussed above. Sacchi also provides an important example of the type of entity to which Article 90 applies. Although there has been a fair amount of commentary regarding the characteristics of undertakings falling under Article 90, Sacchi is one of the first judgments of the Court of Justice to consider this question.

254. Id.
255. Id. at 9185-4.
256. Id.
257. Id.
258. Id.; see note 247 supra.
259. Ex parte Sacchi, supra note 203, at 9185-3.
Also, the judgment confirmed that Articles 86 and 90 in conjunction permit a monopoly resulting from exclusive rights granted by a state. In the Continental Can case,\textsuperscript{261} the Court had held that an abuse of a dominant position could consist of a dominant firm's strengthening of its position to a point at which potential competitors were no longer existent, since all firms in the relevant market had become dependent on the dominant firm. In \textit{Sacchi}, however, the Court determined that the strengthening of a monopoly, because of an extension of its coverage by the state, was not incompatible with Article 86 even though this extension could bring cable television, the business most able to compete with broadcast television, under the control of the broadcast television monopoly.\textsuperscript{262} Such an extension, somewhat similar to that condemned in \textit{Continental Can}, apparently was permitted in \textit{Sacchi} because the relevant undertaking was covered by Article 90. The case also emphasizes that a monopoly, permitted by a joint interpretation of Articles 86 and 90, is prohibited from abusing its dominant position.

Certain provisions of the Treaty are "directly applicable."\textsuperscript{263} Such provisions confer rights upon individuals which the national courts must respect. In \textit{de Geus v. Bosch},\textsuperscript{264} it was held that Article 86 is directly applicable. The \textit{Sacchi} judgment extends this doctrine by holding that Article 86 is directly applicable even in the context of Article 90.

\textit{Industria Gomma Articoli Vari v. E.N.C.C.}\textsuperscript{265} This case provides additional insight into the Court's attitude on public undertakings. In 1970 and 1971, Industria Gomma Articoli Vari (IGAV) imported, principally from member states, paper products for processing. On May 17, 1974, the Ente Nazionale per la Cellulose e per la Carta (ENCC) made a claim against IGAV for payment of 23,334,538 lire which was a levy on these paper products prescribed by Italian law. IGAV was willing to pay ENCC a duty of 2,042,031 lire for paper products imported from non-member countries; however, it disputed the remaining 21,287,507 lire claimed as a levy on imports from member

\textsuperscript{261} Continental Can, \textit{supra} note 54.

\textsuperscript{262} \textit{Ex parte Sacchi}, \textit{supra} note 203, at 9185-4.


\textsuperscript{264} IGAV, \textit{supra} note 205.
states, and secured a temporary injunction, in an Italian court, to prevent the ENCC’s collection of the disputed sum. After IGAV requested that the injunction be given permanent effect, the Italian court referred various questions to the Court of Justice, including the following question regarding Article 85 and Article 86:

With regard [to the use of the funds collected by ENCC described above], and bearing in mind that the E.N.C.C. duty ultimately subsidizes the national production of newsprint, does not the said duty conflict with the Community rules in that, since only the papermills in the country in question are entitled to benefit from the duty, they are placed in the position of being able, to the exclusion of Community competitors, to share among themselves almost the whole of the Italian newsprint market, thus creating an agreement which is contrary to Articles 85 and 86 of the Treaty?

The Court of Justice observed that the Treaty of Rome contains, in addition to Articles 85 and 86, several provisions dealing with impairments of normal competition resulting from state action. Thus, it found that “the activities of an institution of a public nature even if autonomous, fall under [these] provisions . . . and not under Articles 85 and 86, even if its interventions take place in the public interest and are devoid of commercial character.” The Court, therefore, ruled that the activities described in the question put by the Italian court did not fall under Articles 85 and 86.

The duty attacked by IGAV was essentially used to finance national aids. Although the Court found that the activities in question fell under Articles 90, 92, 93, 94, 101, 102, and/or 37 and formally held that such activities did not come under Articles 85 and 86, it can be persuasively argued that the judgment stands for the proposition that Articles 85 and 86 cannot be applied to a levy used to finance national aids.

The discussion of Article 90 completes the examination of recent decisions of the European Court of Justice relating to the key substantive antitrust provisions embodied in the

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265. Id. at 7620.
266. Id. at 7628.
Treaty of Rome. To fully comprehend how the rules prohibiting unfair competition are implemented, it is necessary to take a brief look at the procedural provisions of the Treaty.

TREATY OF ROME: PROCEDURAL FRAMEWORK

Article 87(1)\(^{288}\) confers on the Council of Ministers of the European Communities authority to institute regulations or directives implementing Articles 85 and 86. Similarly, the Commission is granted authority by Article 89\(^{289}\) to ensure application of the Community cartel and monopoly rules. The Commission may investigate cases of suspected infringement and make recommendations. If the recommendations are not followed, it must prepare a decision indicating the existence of the violation and may authorize enforcement measures.

Regulation 17,\(^{270}\) issued pursuant to Article 87, implements Articles 85 and 86 and sets out the procedure to be followed by the Commission when enforcing them. The Regulation provides the Commission with three procedures: negative clearance,\(^{271}\) notification,\(^{272}\) and termination of infringement.\(^{273}\)

Negative Clearance

Pursuant to the negative clearance procedure, parties can obtain from the Commission a declaration that an agreement, decision, or practice does not fall within Article 85 or Article 86. Under Article 2 of Regulation 17,\(^{274}\) upon application of firms, the Commission can certify that, on the basis of the facts known to it, it has no ground for invoking Article 85(1) or Article 86.\(^{275}\)

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269. Id. art. 89, at 49-50.
270. Council Regulation 17, 1 COMM. MKT. REP. (CCH) ¶ 2401-2634 (1962).
271. Id. art. 2, ¶ 2411.
272. Id. art. 4, ¶ 2431.
273. Id. art. 3, ¶ 2421.
274. Council Regulation 17, art. 2 reads as follows:
   Upon application by the undertakings or associations of undertakings concerned, the Commission may certify that, on the basis of the facts in its possession, there are no grounds under Article 85(1) or Article 86 of the Treaty for action on its part in respect of an agreement, decision or practice.
   Id. art. 2, ¶ 2411.
275. If the application is successful, the Commission will issue a declaration stating that there are no grounds for it to intervene with respect to an agreement, decision or practice. Id. ¶ 2412, at 1715.
An application for negative clearance is not followed by an investigation. Instead, the Commission makes a decision on the basis of the facts presented by the parties. Technically, domestic courts are not bound by a negative clearance decision. Furthermore, such a decision may be revised if the Commission hears of new facts or information, or even if there is a change in the judicial interpretation of the law.276

Notification

Notification is the procedure which an undertaking must follow to obtain an exemption under Article 85(3) of the Treaty. Article 4(1) of Regulation 17 states:

Agreements, decisions, and concerted practices of the kind described in Article 85(1) of the Treaty which come into existence after the entry into force of this Regulation and in respect of which the parties seek application of Article 85(3) must be notified to the Commission. Until they have been notified, no decision in application of Article 85(3) may be taken.277

Notified agreements are exempt from fines until the Commission issues a decision.278

Certain agreements do not have to be notified in order to obtain an 85(3) exemption.279 Furthermore, certain classes of agreements under Article 85(3) benefit from bloc exemptions under Article 85(3).280 Such agreements do not have to be notified.281

Article 85(3) exemptions may only be granted for a specific period, and may be subject to conditions and obligations.282 The Commission may amend or revoke the exemption decision if: (a) the fundamental factual situation has changed; (b) the parties have breached any obligation attached to the decision; (c) the decision is based on incorrect information or was induced by deceit; or (d) there has been an abuse of the exemption.283

277. Council Regulation 17, art. 4(1), 1 COMM. MKT. REP. (CCH) ¶ 2431 (1971).
278. Id. art. 4(2), ¶ 2431.
279. Id. art. 15(5), ¶ 2541.
280. See Commission Regulation 67/67, 1 COMM. MKT. REP. (CCH) ¶ 2727 (1972).
282. Council Regulation 17, art. 8, 1 COMM. MKT. REP. (CCH) ¶ 2471 (1982).
283. Id.
Termination of Infringement

Upon its own initiative or upon the request of member states or natural or legal persons who claim a legitimate interest, the Commission may investigate possible infringements of Articles 85 and 86. If an infringement is found, the Commission may make a binding legal decision pursuant to Article 3(1). Such a decision will also be issued as a result of a refusal of a negative clearance or a refusal of an exemption under Article 85(3), if the agreement is not voluntarily abandoned. The Commission may, before making a decision that there is an infringement, make recommendations to the relevant parties with a view toward bringing about a voluntary modification of the practices in question so that they no longer infringe the Community rules. If the parties make satisfactory changes, the Commission may grant a negative clearance or an exemption; otherwise, termination of the infringement will be required.

From 1974 through 1977, the Court of Justice decided three cases touching on procedural issues. In Commercial Solvents, discussed above, the Court decided that the Commission may order an undertaking to take positive remedial action. Procedural issues were also discussed in SABAM and Sadolin & Holmblad A/S (Members of the Transocean Marine Paint Association) v. EEC Commission.

Transocean Marine. In this case, the Court examined the exemption procedures and the imposition of conditions on exemptions. The Transocean Marine Paint Association is a group of medium-sized companies which manufacturers marine paint. Its purpose is to provide a worldwide sales network for this type of paint. The organization allows its members to compete with the major international manufacturers which each have their own international sales network.

The members manufacture marine paint of an identical composition, use a common trademark, and maintain similar

284. Id. art. 2, ¶ 2411.
285. Id. art. 3(1), ¶ 2921.
286. Id. art. 2, ¶ 2411.
288. SABAM, supra note 203.
290. Id.
quality control. Each member determines its own prices and has its own sales territory. If a member makes a sale in another member's territory, it must pay a commission to the latter. Commissions are also payable "when a member sells, under its own individual trademark, other paints in the territory of a member and when a member passes on to another an order which it is itself unable or unwilling to execute.”

This agreement was exempted by a June 27, 1967 decision of the Commission until December 31, 1972, pursuant to Article 85(3). The association was required by the decision to notify the Commission of "any change in the composition of membership.”

On October 22, 1972, the association requested a ten year renewal of the exemption. The Commission determined that an exemption should be granted, subject to stricter conditions than those of the 1967 exemption. Stricter conditions were necessary because of the following factors:

(a) the total turnover of the Association and its percentage of the market in marine paints had considerably increased;
(b) the turnover of one group of members, Nippon Paint, had increased substantially and this group accounted for 60 percent of the turnover in marine paints of the Association;
(c) five members had withdrawn, eight new members had joined;
(d) two members, Astral (France) and Urruzola (Spain), had formed links with two large paint manufacturing groups, AKZO and BASF, which are not members;
(e) a movement towards concentration had occurred both in the marine paints sector and in the general paints sector.

Thus, on December 21, 1973, the Commission granted an exemption to the association subject to several new conditions including the following:

Article 3
1. . . . the Commission shall be informed without delay of the following matters:

291. Id. at 9147-78.
292. Id.
293. Id.
(d) any links by way of common directors or managers between a member of the Association and any other company or firm in the paints sector or any financial participation by a member of the Association in such outside companies or vice versa including all changes in such links or participation already in existence.294

On March 4, 1974, the association initiated proceedings before the Court of Justice to annul Article 3(1)(d) of the Commission's decision. It argued that because Article 3(1)(d) was not mentioned in the July 27, 1973 "notice of objections," the September 27, 1973 hearing, or in any communication from the Commission prior to the decision, it had not had an opportunity to give its views on the obligation.

The association alleged that this denial of opportunity violated Regulation 99/63 which sets out the procedural rules for hearings held pursuant to Regulation 17.295 In particular, the association argued that the Commission failed to comply with Article 2 of Regulation 99/63 which requires that "[t]he Commission . . . inform undertakings . . . in writing of the objections raised against them"296 and with Article 4 of that Regulation which permits the Commission to deal only with "those objections . . . against undertakings . . . of which they have been afforded the opportunity of making known their views."297 Finally, it contended that the Commission had infringed Article 85 and Article 8(1) of Regulation 17,298 by imposing an obligation wider in scope than permitted by those provisions.

The Commission, in response to the association's charge that it had violated Regulation 99/63, asserted that such regulation was not applicable to conditions attached to a decision granting an exemption.

The Court began its analysis of these competing procedural claims by examining Article 19 of Regulation 17.299 It

294. Id. at 9147-78, -79.
296. Id. art. 2, ¶ 2637 (1977).
297. Id. art. 4, ¶ 2639.
298. Council Regulation 17, art. 8(1) reads as follows:
   (1) A decision to issue a declaration under Article 85, paragraph 3, of the Treaty shall be valid for a specified period and may have certain conditions and stipulations attached.
1 COMM. MKT. REP. (CCH) ¶ 2471 (1971).
299. Council Regulation 17, art. 19 reads as follows:
   1. Before taking decisions as provided for in Articles 2, 3, 6, 7, 8, 15 and 16, the Commission shall give the undertakings or associations of
found that this provision requires the Commission, before issuing a decision pursuant to Articles 2, 3, 6, 7, 8, 15, and 16 of Regulation 17 to give the undertakings or associations concerned an opportunity to be heard on the matters to which it has taken objection. The reference to Article 6 indicates that this procedure must be followed before the issuance of decisions granting or denying Article 85(3) exemptions.

Additionally, the Court noted that the Commission is empowered by Article 24 to adopt rules of procedure implementing Article 19. The Commission exercised this power by the issuance of Regulation 99/63.

The Court found that Regulation 99/63 was intended to apply to all Article 19 hearings including those dealing with Article 85(3). The Court reasoned that Regulation 99/63 flows from the general principle that grants the right to be heard to a person whose interests will be materially affected by the pro-

undertakings concerned the opportunity of being heard on the matters to which the Commission has taken objection.

2. If the Commission or the competent authorities of the Member States consider it necessary, they may also hear other natural or legal persons. Applications to be heard on the part of such persons shall, where they show a sufficient interest, be granted.

3. Where the Commission intends to give negative clearance pursuant to Article 2 or take a decision in application of Article 85(3) of the Treaty, it shall publish a summary of the relevant application or notification and invite all interested third parties to submit their observations within a time limit which it shall fix, being not less than one month. Publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Id. ¶ 2581 (1975).

300. Transocean Marine, supra note 289, at 9147-87.

Article 2 of Regulation 17 deals with “Negative clearance.” Article 4 deals with “Notification of new agreements, decisions and practices.” Article 6 deals with “Decisions pursuant to Article 85(3).” Article 7 deals with “Special provisions for existing agreements, decisions and practices.” Article 8 deals with “Duration and revocation of decisions under Article 85(3).” Article 15 deals with “Fines.” Article 16 deals with ‘Periodic penalty payments.’ 1 COMM. MKT. REP. (CCH) ¶¶ 2401-2451 (1973).

301. Council Regulation 17, art. 6 reads as follows:

1. Whenever the Commission takes a decision pursuant to Article 85(3) of the Treaty, it shall specify therein the date from which the decision shall take effect. Such date shall not be earlier than the date of notification.

2. The second sentence of paragraph 1 shall not apply to agreements, decisions or concerted practices falling within Article 4(2) and Article 5(2), nor to those falling within Article 5(1) which have been notified within the time limit specified in Article 5(1).

1 COMM. MKT. REP. (CCH) ¶ 2451 (1972).

302. Id. art. 24, ¶ 2691 (1973).

303. Transocean Marine, supra note 289, at 9147-87.
posed decision of a public authority. According to the Court, this conclusion followed “both from the nature and objectives of the procedure for hearings, and from Articles 5, 6, and 7 of Regulation 99/63.”

However, the Commission cannot be expected to anticipate the exact conditions to which it will be necessary to subject an exemption. The result is that an undertaking must be notified, in good time, of the gist of the conditions to which the Commission plans to subject an exemption and must be given an opportunity to present its views regarding these conditions to the Commission.

With regard to the association’s allegation that the obligation imposed by the Commission was broader than permitted by Article 85 and Article 8(1) of Regulation 17, the Court held that the Commission enjoys a “large measure of discretion” in setting conditions to which an exemption may be subject. In exercising this discretionary power, however, the Commission must give the undertakings concerned an opportunity to voice objections to the proposed conditions.

The Court concluded that these procedural requirements were not met in the adoption of Article 3(1)(d) of the Transocean Marine decision and, therefore, determined that the Commission must reconsider the condition contained in Article 3(1)(d) after hearing the views and suggestions of the association.

Thus, Article 8(1) of Regulation 17 gives the Commission authority to attach conditions and obligations to an exemption. The Transocean Marine judgment confirms that the Commission has a wide “measure of discretion” in setting detailed conditions and obligations to which an exemption may be subject.

Regulation 99/63 requires that undertakings be informed in writing of the objections raised against them and that only those objections about which the undertakings have been afforded the opportunity to make known their views be the subject of the Commission’s decision. These rules, however, apply primarily to decisions ordering the termination of an infringe-

304. Id. at 9147-88.
305. Council Regulation 17, art. 5, 1 COMM. MKT. REP. (CCH) ¶ 2441 (1973); id. art. 6, ¶ 2451; id. art. 7, ¶ 2461.
307. Id. at 9147-88, -89.
308. For the text of art. 8(1), see note 298 supra.
ment, imposing a fine or denying negative clearance to an exemption. The Court extended the rights of notice and having an opportunity to be heard to cases where an exemption is granted subject to conditions and obligations. The undertaking concerned must be informed in good time of the essence of the proposed conditions and must have an opportunity to make comments.\footnote{309. The requirement adopted by the Court is analogous to the British rule of natural justice, audi alteram partem. See S. deSMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION ch. 4 (2d ed. 1968); H. WADE, ADMINISTRATIVE LAW ch. V (3d ed. 1971).}

\textit{SABAM}. Prior to the adoption of Regulation 17, the authorities of the member states were charged with ruling on the admissibility of restrictive trade practices and abuses of dominant position in accordance with national law, Article 85, and Article 86. In 1962, Regulation 17 was adopted pursuant to Article 87,\footnote{310. Treaty of Rome, done March 25, 1957, art. 87, 298 U.N.T.S. 49.} which requires, \textit{inter alia}, the delineation of the respective functions of the Commission and the national authorities. The areas of competence of these bodies are defined in Article 9 of Regulation 17.\footnote{311. Article 9 of Regulation 17 reads as follows:}

1. Subject to review of its decision by the Court of Justice, the Commission shall have sole power to declare Article 85(1) inapplicable pursuant to Article 85(3) of the Treaty.

2. The Commission shall have power to apply Article 85(1) and Article 86 of the Treaty; this power may be exercised notwithstanding that the time limits specified in Article 5(1) and in Article 7(2) relating to notification have not expired.

3. As long as the Commission has not initiated any proceeding under Articles 2 (negative clearance), 3 (termination of infringement) or 6 (exemption) of Regulation 17.\footnote{312. See notes 268 & 301 and accompanying text supra.}

The language of Article 9 raises two fundamental questions: first, when has the Commission initiated proceedings? and second, what is a national authority? The second question was touched briefly by the European Court of Justice in \textit{Bilger}
In interpreting Article 82(2)'s rule of "automatic" nullity, the Court noted, "the term 'authorities of the Member States' also includes the national courts." This conclusion, however, was not necessary to answer the questions put to the Court.

Both questions were considered, without being fully answered, in the famous de Haecht (No. 2) judgment. There, the Court indicated that proceedings were not initiated when the Commission acknowledged receipt of a request for negative clearance. However, it did not clearly define when proceedings should be considered to have commenced. In regard to the definition of "national authority," the Court stated that it was not necessary "to reexamine the question of whether the words 'authorities of the Member States' as used in Article 9 also refer to the national courts acting on the basis of Article 85, paragraph 2, of the Treaty. . . ." In SABAM, Advocate-General Mayras interpreted this statement as a reaffirmation of the indication in Bilger that national courts were national authorities.

As noted earlier, litigation between SABAM, BRT, and NV Fonior began before a Brussels court in 1969, and an investigation of the activities of SABAM and several other copyright associations was instituted by the Commission in June, 1970. The Commission's inquiry and the Belgian investigation dealt with almost the same facts. In April, 1973, the Brussels court had requested a preliminary ruling from the Court of Justice on Articles 86 and 90.

The Commission argued that the Belgian court had been deprived of jurisdiction because of the institution of Commission proceedings involving SABAM and that therefore, the Court of Justice did not have jurisdiction to decide the case. The Advocate-General in his submissions concurred with the Commission.

Thus, the Court of Justice had to decide the procedural issue of jurisdiction before considering the merits. First, it ob-

314. Id. at 8109.
    REP. (CCH) ¶ 8170 (Ct. J. 1973).
316. Id. at 8272.
317. Id. at 8271.
318. SABAM, supra note 203, at 9185-32.
319. See text accompanying notes 240-242 supra.
320. SABAM, supra note 203, at 9185-29.
served that the competence of national courts to apply Community law in private actions derived from the direct effect of the provisions of Community law itself.321 Articles 85(1) and 86 are part of national law and create direct rights for individuals which national courts must safeguard. To prohibit the application of Treaty provisions by national courts would be to deprive individuals of rights guaranteed by the Treaty.

The Court observed that the term, "authorities of member states," in Article 9(3)322 of Regulation 17 refers exclusively to those national agencies whose competence to apply Articles 85 and 86 derives from Article 88.323 Under Article 88:

the authorities of the Member-States—including the certain Member-States courts especially entrusted with the task of applying domestic legislation on competition or that of ensuring the legality of that application by the administrative authorities—are also rendered competent to apply the provisions of Articles 85 and 86 of the Treaty.324

Even though courts which deal with governmental enforcement of competition rules are covered by the term, "authorities of the member states," courts "before which the direct effect of Article 86 is pleaded"325 are not prohibited from giving judgment. Thus, the Court of Justice makes a distinction between national courts with a special competence to deal with the enforcement of competition rules by public authorities and those which handle civil cases involving the interpretation or application of Article 85 or 86. Courts of the former type are national authorities; whereas, those of the latter type are not.

The Court of Justice discussed the circumstances under which a court hearing a civil case might stay proceedings. If the Commission has instituted a proceeding for the enforcement of Article 85 or 86, a court hearing a civil case, if it considers it necessary for consistency, may stay the proceedings until the Commission has made a determination. If, however, the conduct in issue clearly cannot appreciably affect competition or trade between member states, or if there is no doubt that such conduct infringes the Treaty, the national court should gener-

321. Id. at 9185-22.
322. See note 311 supra.
324. SABAM, supra note 203, at 9185-23.
325. Id.
ally hear a case. Finally, the Court found that Article 9(3) of Regulation 17/62 cannot impede the power of a national court to refer a request for a preliminary ruling to the Court of Justice.

As a result of the SABAM judgment, national courts can maintain jurisdiction over cases in which the direct effect of Article 85 or 86 is pled, even if the Commission begins proceedings. Furthermore, the suggestion in Bilger that courts are national authorities, which cannot continue a trial after the initiation of proceedings by the Commission, is overruled.

SABAM also prevents a situation in which a plaintiff is unable to file a civil suit involving the application of Articles 85 or 86 for years because of time-consuming proceedings conducted by the Commission. On the other hand, after SABAM, problems could arise if a national court declares a notified agreement invalid pursuant to Article 85(2) and if the Commission then attempts to exempt the agreement pursuant to Article 85(3).

CONCLUSION

The cases discussed in the preceding pages demonstrate that the Court of Justice plays a major role in the development of antitrust law for the European Economic Community. The exact function which the Court performs in a particular situation varies with the fact pattern. Often, the Court acts in a traditional role by applying precedents and previously developed doctrines to the situations presented. Thus, in the Centrafarm cases, the Court applied the well-developed enterprise-entity doctrine to the facts in issue. Even when the Court functions by applying previously accepted precedents, the significance of its judgments varies depending upon whether the precedent has been previously used by the Court or only by the Commission.

In a slightly different vein, the Court will often apply a principle from a previous judgment to a similar but not identical fact situation. The Court may also expand or clarify previously decided antitrust principles. Thus, in Van Vliet, the Court reaffirmed the principle that Regulation 67/67 does not apply if the contracting parties prevent parallel imports into

326. Id. at 9185-23.
327. Id.
328. Compare Dassonville, supra note 90, with Beguelin, supra note 101.
the exclusive distributor’s territory. It also expanded and clarified this doctrine by concluding that Regulation 67/67 is inapplicable if the parties prohibit parallel imports from the supplier’s state, even if they allow such imports from other member states.

In a young legal system, like the Community, the judicial authority is often faced with novel fact situations for which there are no precise precedents. For example, in the Commercial Solvents case the Court was faced for the first time with a dominant firm’s refusal to deal. In such a case, the Court acts in several ways: it interprets the Treaty to see if the conduct in question is prohibited; it applies relevant general principles enunciated in pertinent previous cases; and, insofar as the fact pattern it faces is new and different, it makes law. Thus, in Commercial Solvents, the Court promulgated a new legal rule prohibiting refusals to deal by dominant firms. This holding is explicitly based on interpretation of the Treaty and implicitly follows from the Court’s decision in Continental Can.

Of course, one of the Court’s prime duties is to serve as an arbiter in disputes between the legal system’s enforcement authority, the Commission, and the entities subject to that authority’s jurisdiction. When fulfilling this function, the Court may sometimes apply precedent and sometimes develop new law depending upon the facts in question. In Commercial Solvents, General Motors Continental, and Transocean Marine, the Court acted as an arbiter. When performing this function, the Court ensures that the Commission does not go beyond its authority, misapply legal principles, or act without the appropriate procedural prerequisites. Thus, in General Motors Continental the Court overruled an incorrect application of Article 86; in Transocean Marine it prevented the Commission from acting without following the correct procedure; and in Commercial Solvents it declared the Commission’s order to be within its authority.

An additional function of the Court involves its capacity to issue preliminary rulings. In issuing preliminary rulings, this function is primarily an interpretive one. Thus, in Sacchi, the Court interpreted the phrase, “undertakings to which the member states grant special or exclusive rights,” in the light of a certain fact pattern.

Finally, it is worth noting that several major themes emerge from the cases examined in this article. Since these cases are part of a historical progression, some of these themes...
are continuing, while others demonstrate a new emphasis. Thus, the Court continues to strongly disapprove of agreements or actions which result in market insulation and prevent parallel imports. For example, in *Van Vliet* an agreement which prohibited parallel imports from the manufacturer's state was condemned, and in *Dassonville* the Court suggested that the invocation of national law by an exclusive distributor to ensure absolute territorial protection would violate Article 85(1). Similarly, in *Commercial Solvents* the Court reemphasized that Article 86 should be interpreted in light of the basic objectives contained in Articles 2 and 3(f).

From the Court's pronouncement on relevant product market in *Kali, Commercial Solvents*, and *General Motors Continental*, it is evident that the operative concept in defining of a product market is interchangeability. Additionally, *SABAM* and *General Motors Continental* indicate that the Court is receptive to the idea that any member state qualifies as a "substantial part of the common market" for purposes of Article 86.

With respect to abuse of dominant position, the Court continues to maintain that an undertaking in a dominant position cannot impose unreasonable obligations and restrictions and that the measures employed to achieve its goals must be the least restrictive possible.  

Finally, in examining the procedural framework of the Treaty, the Court established in *Transocean Marine* that undertakings affected by a Commission decision should receive notice and an opportunity to be heard before the adoption of such a decision. In addition, *Commercial Solvents* now provides that the Commission can require an infringing firm to take affirmative remedial action.

These recurrent and emerging themes indicate that the European Court of Justice is striving to safeguard the principles of free competition outlined in the Treaty of Rome. In so doing, it has also maintained a flexible attitude towards all types of competitive practices to further the European Economic Community's goals of stability and security.

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329. SABAM, supra note 203, at 9185-37.