The Application of Article 85 of the Treaty Establishing the European Economic Community to Exclusive Dealing Agreements

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One of the major purposes of the formation of the Common Market was the elimination of tariffs and the attendant increase in competition among the member states. These provisions should not be thwarted by private agreements between citizens of these member states. Thus, article 85 of the treaty forming the Common Market is designed to prohibit such agreements. After setting forth the basic provisions of article 85, Professor Cohen analyzes its provisions, particularly those of 85(1), in the light of recent decisions of the Court of Justice. While concluding that these decisions represent sound thinking, the author does point out some possible problems: for example, the incorporation of a "rule of reason" into article 85.

A major portion of the Treaty Establishing the European Economic Community (or Common Market) is devoted to provisions designed to eliminate tariffs and quantitative restrictions. The drafters of the treaty anticipated that the elimination of these barriers to trade between the member states would have the beneficial effect of subjecting the industries located within each state to increased competitive pressure to innovate and become more efficient and would possibly place these industries in a position, by affording them a larger market, to avail themselves of the economies of scale. The drafters also realized that the removal of these barriers would be fruitless if the treaty provisions could be nullified by the operation of private agreements.

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1 CCH COMMON MKT. REP. ¶ 151-5455 (1965) [hereinafter cited as CMR]. The Treaty Establishing the European Economic Community will be also referred to as either the treaty or the Treaty of Rome.
Consequently, articles 85 and 86 of the treaty seek to prevent the creation of private agreements which threaten to re-establish the trade barriers that had been erected by state action.

The Commission has devoted the major portion of its efforts to implement article 85 to the consideration of exclusive agreements and has recently issued a proposed group exemption which serves as a guide to the Commission's interpretation of the third paragraph of article 85. Moreover, three recent decisions of the Court of Justice are specifically concerned with the interpretation and application of article 85 to this type of agreement. It would appear appropriate, therefore, to examine in detail these actions of the Commission and these decisions of the Court of Justice.

This study is divided into three major sections. The first section sets forth the relevant provisions of the treaty; the second section is concerned with the interpretation and application of the first paragraph of article 85; and the third section presents some tentative conclusions.

I. THE TREATY PROVISIONS

The first paragraph of article 85 prohibits, as incompatible with the Common Market, all agreements between enterprises, all decisions by associations of enterprises, and all concerted practices.

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2 1 CMR §§ 2005, 2031, 2051 (1965).
3 1 CMR § 2101 (1965).
4 The Commission is one of the institutions created by the treaty to see that its functions are carried out. The treaty provisions for and procedures of the Commission are outlined in 1 CMR §§ 4472-544 (1965).
6 The Court of Justice is the judicial branch of the European Economic Community [hereinafter cited as EEC]. The treaty provisions concerning it are found in 1 CMR §§ 4600-872 (1965).
8 This study does not purport to consider all of the problems involved in the interpretation of article 85. Rather, the first paragraph of that article is dealt with in depth, with other paragraphs mentioned only for purposes of clarity. It might be pointed out that a complete study of article 85, in particular, of the third paragraph, would add greatly to the length of this study. Thus, a detailed analysis of 85(3) has been omitted at this time.
which are liable to affect trade between Member States and which are designed to prevent, restrict or distort competition within the Common Market or which have this effect. This shall, in particular, include:
(a) the direct or indirect fixing of purchase or selling prices or of other trading conditions;
(b) the limitation or control of production, markets, technical development or investment;
(c) market-sharing or the sharing of sources of supply;
(d) the application of unequal conditions to parties undertaking equivalent engagements in commercial transactions, thereby placing them at a competitive disadvantage;
(e) making the conclusion of a contract subject to the acceptance by the other party to the contract of additional obligations, which, by their nature or according to commercial usage, have no connection with the subject of such contract.9

Article 85, paragraph three provides that the first paragraph of article 85 may be declared inapplicable to agreements, decisions, or concerted practices which help to improve the production or distribution of goods or to promote technical or economic progress, while allowing consumers a fair share of the resulting profit and which . . . [do] not:
(a) subject the concerns in question to any restrictions which are not indispensable to the achievement of the above objectives;
(b) enable such concerns to eliminate competition in respect of a substantial part of the goods concerned.10

The second paragraph of article 85 declares that all agreements, decisions, and concerted practices which are prohibited by the first paragraph and which cannot be exempted from the prohibition by the third paragraph are “automatically” null and void.11

The other section of the treaty pertinent to this study, article 86, prohibits, to the extent that trade between member states is affected, “any improper exploitation by one or more . . . [enterprises] of a dominant position within the Common Market or within a substantial part of it.”12

9 1 CMR ¶ 2005 (1965).
10 1 CMR ¶ 2051 (1965).
12 1 CMR ¶ 2101 (1965).
II. THE INTERPRETATION AND APPLICATION OF ARTICLE 85 WITH PARTICULAR REFERENCE TO EXCLUSIVE DEALING AGREEMENTS

A. Agreements Between "Enterprises"

The term "enterprise," as it appears in the context of article 85 of the Treaty of Rome, has never been expressly defined by the Commission or the Court of Justice. Some doubt exists, therefore, as to whether agreements between parties in certain relationships, such as a parent corporation and its wholly owned subsidiary, are within the scope of article 85(1)."18

The Advocate General14 in Government of the Republic of Italy v. Council & Comm'n of the EEC15 offered this interpretation of the term "enterprise": "Enterprises, regardless of their legal form or of their gainful purpose, are natural or legal persons that take an active and independent part in the economy and thus do not pursue purely private activities."16 As this definition includes the requirement that an "enterprise" be a "natural or legal person," the definition would appear to be in general accord with the view that the term "enterprise" requires a juridical entity capable of entering into contracts,17 i.e., "a unit with legal capacity."18 If this interpretation were adopted, article 85(1) would not apply to agreements, for example, between a corporation and its unincorporated branch organization.19

The interpretation of the Advocate General did not consider the question of whether a wholly owned subsidiary can ever be said to take an independent role in the economy. However, a subsidiary is a legal entity. Moreover, if a parent corporation desires to maximize profits, the proper method of managing a subsidiary involves permitting the subsidiary to operate as if it were an independent

18 The doubt is primarily due to the existence under German law of the concept of "Konzern," i.e., "economically affiliated but legally independent enterprises under common management." OBERDORFER, GLEISS & HIRSCH, COMMON MARKET CARTEL LAW 2-3 (1963).
14 The Advocates General are assistants to the judges of the Court of Justice in carrying out their judicial duties. EEC Treaty Art. 166, 1 CMR ¶ 4607 (1965).
16 Id. at 7727 (conclusions of the Advocate General).
17 Schwartz, supra note 11, at 627.
18 OBERDORFER, GLEISS & HIRSCH, op. cit. supra note 13, at 2.
19 Article 86 may, however, be applicable to an "abuse of a dominant position" resulting from the action of a parent and its branch organization. 2 CMR ¶ 8048, at 7719; Etablissements Consten & Grundig-Verkaufs-GmbH v. Commission of the EEC, 2 CMR ¶ 8046, at 7651 (EEC Ct. Justice July 13, 1966).
corporation. It would seem only logical, then, that article 85(1) should apply to agreements between a parent corporation and its subsidiary if the latter is independently managed.

B. Types of Agreements Within the Scope of Article 85(1)

(1) Horizontal Versus Vertical Agreements.—Article 85(1) prohibits agreements which are liable to affect trade between the member states and which are "designed to prevent, restrict or distort competition . . . or which have this effect." The phrase "prevent, restrict, or distort competition" is clarified by five examples of the type of change in market conditions which is to be considered a prevention, restriction, or distortion of competition. The type of change indicated by each example can be viewed as that which results from the conclusion of a horizontal agreement but not from the conclusion of a vertical agreement. Therefore, the position of the Commission that article 85(1) applies to both vertical and horizontal agreements has been the subject of dispute. The Court of Justice has decided, in accord with the views of the Commission and the Advocate General, that article 85(1) applies to both vertical and horizontal agreements. This conclusion is premised upon the fact that article 85(1) makes no express distinction between vertical and horizontal agreements and "one cannot, in principle, make distinctions where the Treaty makes

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22 See text accompanying note 9 supra.
23 Regulation 17 provides for the notification of all agreements including both horizontal and vertical. Thus, it was apparent for some time that the Commission did not doubt that article 85(1) prohibited both vertical and horizontal agreements. EEC Council Reg. 17, art. 5, 1 CMR § 2441 (1965).
24 Id. at 7624 (argument of the plaintiffs).
25 See cases cited note 7 supra.
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Moreover, if article 85(1) did not apply to vertical agreements,

the parties could, through such an agreement, by preventing or
limiting the competition of third parties with respect to the pro-
ducts, attempt to establish or to ensure for themselves an unjustified
advantage to the detriment of the consumer or the user, which
would be contrary to the general objectives of Article 85.28

Therefore, article 85(1) applies to both vertical agreements between
parties that do not compete with each other and horizontal agree-
ments between parties in competition with one another.

An analysis of the objectives of the Treaty of Rome indicates
that the court reached the most desirable result. The prime objec-
tive of the treaty is to integrate the six national markets of the
member states into one common market by eliminating barriers,
represented by tariffs and quantitative restrictions, to trade between
the member states. This will have the beneficial effect of subject-
ing industries located in one member state, heretofore protected
from international competition by these barriers, to the stimulus of
the competition of industries located in other member states. The
increased competition of industries located in other member states
will stimulate the industries located in each member state to inno-
vate and reduce costs.

It is clear from the examples contained in article 85(1) that
the article is directed, at least in part, toward the prevention of pri-
ivate agreements which are intended to eliminate (or which have
the effect of eliminating) the increase in competition made possible
by the removal of tariffs and quantitative restrictions or which are
intended to eliminate (or which have the effect of eliminating) the
benefits of this increased competition. For example, one of the
benefits of the increase in competition will be, presumably, an in-
crease in price competition. The examples contained in article
85(1) clearly indicate that a price-fixing agreement between parties
located in different member states and in competition with each
other (horizontal agreement) is prohibited by that article if the
agreement can be viewed as liable to affect trade between member
states. If parties located in different member states and in compe-
tition with each other were permitted to fix prices by agreement,
each party would be as effectively insulated from the price competi-

tion of the other as he would be if tariffs and quantitative restrictions had not been removed.

The same insulation from price competition can be accomplished by means of a series of vertical resale price maintenance agreements between a manufacturer and two or more dealers, each of which is located in a different member state. If, therefore, article 85(1) were to be interpreted as applying solely to horizontal agreements, the treaty provisions could not effectively prevent private agreements from nullifying the benefits of the increased competition made possible by the removal of tariffs and quantitative restrictions. Thus, the Court of Justice exercised sound judgment in deciding that article 85(1) applies to both horizontal and vertical agreements.

(2) Exclusive Dealing Agreements.—A manufacturer may choose from among a number of different methods of distribution, including the utilization of an exclusive distributor and/or a branch organization. The competitive effects of both means of distribution are similar. Thus, if it is admitted that article 85(1) does not apply to distribution by means of a branch organization or a “non-independent” subsidiary, it may then be argued that article 86 and not article 85(1) applies to exclusive distributor agreements.29

However, the two methods of distribution are legally distinguishable,30 and their competitive effects are not necessarily identical.31 For example, if the exclusive distributorship agreement prohibits the distributor from distributing goods competitive with those of the manufacturer, then the ability of other manufacturers to locate distributors for their goods is to some extent limited. If distribution is effected by means of a wholly owned subsidiary or branch organization (created by internal expansion rather than merger), the ability of other manufacturers to locate distributors for their products is either enhanced32 or, at least, relatively unaffected.33

Upon the basis of arguments similar to the foregoing, the Court

29 See the arguments of the Republic of Italy in id. at 7710. See also Etablissements Consten & Grundig-Verkaufs-GmbH v. Commission of the EEC, 2 CMR ¶ 8046, at 7625-26 (EEC Ct. Justice July 13, 1966).
31 Ibid.
32 This would be the case if the parent operates to maximize profits by permitting the subsidiary or branch to act as if it were an independent organization, i.e., if profitable, to distribute the goods of other manufacturers.
33 This would be the case if the parent requires the subsidiary or branch to distribute only the goods of the parent. It should be noted that the same considerations apply to interbrand competition as well.
of Justice has decided that, if the other requirements are fulfilled, article 85(1) applies to exclusive distributorship agreements while article 86 is applicable to an enterprise which distributes its goods by means of a branch or, presumably, a wholly owned “non-independent” subsidiary.\(^{34}\)

The decision that article 85(1) and not article 86 is applicable to exclusive distributorship agreements may stimulate a number of vertical integrations. Article 85(1) is presumably applicable to a variety of exclusive distributorship agreements. Unless an exclusive distributorship agreement comes within the terms of the rather narrow proposed group exemption,\(^{35}\) the parties to this type of agreement will find it necessary to bear the burden of obtaining an exemption pursuant to article 85(3) or of obtaining a “negative clearance.”\(^{36}\) In contrast, article 86 applies only to an enterprise which possesses a dominant position in the market.\(^{37}\) A manufacturer might find it desirable, therefore, to integrate forward and thereby greatly reduce or even eliminate (unless the firm possesses a dominant position, article 86 does not apply at all) the possibility of a violation of the treaty’s antitrust laws.

C. “Designed To Prevent, Restrict or Distort Competition Within the Common Market or Which Have This Effect” — A “Rule of Reason”?

Section 1 of the Sherman Act\(^{38}\) prohibits “every” contract in restraint of trade. The Supreme Court of the United States has decided that section 1 is not to be interpreted literally, that is, not every contract in restraint of trade is prohibited by this section\(^{39}\) — only those agreements which “unreasonably” restrain trade.\(^{40}\) An individual familiar with the judicial interpretation of section 1 of

\(^{34}\) See authorities cited note 30 supra.


\(^{36}\) Pursuant to EEC Council Reg. 17, art. 2, 1 CMR § 2411 (1965), the Commission may, “at the request of the enterprises . . . concerned . . . find that, according to information it has obtained, there are, under Article 85(1) or Article 86 of the Treaty, no grounds for it to intervene with respect to an agreement, decision or practice.” See note 41 infra for a further discussion of article 85(3). See generally Schwartz, supra note 11, at 636-37.

\(^{37}\) Article 86 applies only to the “abuse” of a dominant position. CMR § 2101 (1965). It should be noted that the Court of Justice may interpret article 85(1) to apply to mergers (as agreements which prevent, distort, or restrict competition).


\(^{39}\) United States v. Standard Oil Co., 221 U.S. 1 (1911).

\(^{40}\) Ibid.
the Sherman Act is apt, therefore, to inquire whether article 85(1) is to be interpreted as prohibiting only agreements which "unreasonably" prevent, restrict, or distort competition or whether that article is to be interpreted as prohibiting "any" agreement which has the proscribed effect upon competition.

(1) The Application of Article 85.—Article 85(1) prohibits, as incompatible with the Common Market, "any" agreement, "any" decision, and "any" concerted practice which results in the proscribed effects or which possesses the proscribed "object." Article 85(3) provides that the provisions of article 85(1) may be declared inapplicable to the agreements, decisions, and practices prohibited by article 85(1) if the agreements, decisions, or practices fulfill two positive and two negative requirements.41 If article 85(1) is to be

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41 The two positive requirements are: the agreement must contribute to the improvement of the production or distribution of the goods; and consumers must be allowed a fair share of the resulting profits. The two negative conditions are: the restrictions must be indispensable to the attainment of the positive objectives; and the parties must not be enabled by the agreement to eliminate competition "in respect of a substantial portion of the goods concerned." EEC Treaty art. 85(3), 1 CMR § 2051 (1965).

Under the authority of EEC Treaty art. 87, 1 CMR § 2201 (1965), the Council has issued EEC Council Reg. 19, 1 CMR § 2717 (1965), which empowers the Commission to exempt certain agreements as a group when the experience of the Commission indicates that the type of agreement involved is prohibited by article 85(1) but fulfills the requirements of article 85(3).

The Commission has apparently decided to exercise the power granted by the Council to exempt certain exclusive dealership agreements which do not: involve resale price maintenance (Proposed Group Exemption art. 1, 2 CMR § 9125, at 8274 (Aug. 26, 1966)); impose a reexport prohibition upon the dealer (Id. art. 2(6), at 8275); and which do not prohibit parallel imports (Id. art. 2(5), at 8275).

The Commission has apparently decided to exempt, as a group, those exclusive agreements which do not contain the restrictions noted in the preceding paragraph upon the basis of the following considerations. An exclusive agreement concluded between a manufacturer located in one member state and a dealer located in another member state which prevents the dealer from carrying goods competitive with the contract goods improves distribution by aiding the manufacturer in an attempt to "rationalize" production, by helping the manufacturer to overcome linguistic, cultural, and legal differences between member states, and by stimulating the dealer to intensively develop the market. Id. consideration (4), at 8273. Consumers are permitted to share in these improvements in that: the operation of the agreement provides the consumer with a wider choice and faster delivery; the existence of potential intrabrands competition (made possible by the absence of a prohibition of parallel imports) and the existence of interbrand competition ensures that the cost-savings resulting from the improvements in distribution will be passed on to the consumer in the form of lower prices; the intensive development of the market by the dealer may enable the manufacturer to expand production and thereby possibly enable the manufacturer to take advantage of economies of scale (again, the existence of potential intrabrands competition and the assumed existence of interbrand competition will ensure that the cost-savings made possible by economies of scale will be passed on to the consumer in the form of lower prices). Id. consideration (5), at 8273-74. The restrictions of competition contained in this type of agreement are indispensable to the achievement of these improvements if due to the state of the market and the position of the parties on that
applied in conjunction with and in light of article 85(3), then article 85(1) prohibits only “unreasonable” agreements, “unreasonable” being defined in article 85(3). If article 85(1) is to be applied separately and apart from article 85(3), then article 85(1) prohibits “any” agreement, decision, or concerted practice which is intended to restrain, prevent, or distort competition or which has that effect and which is liable to affect trade between the member states. An agreement, decision, or concerted practice would be exempted from this prohibition only if, upon a separate investigation, the agreement, decision, or concerted practice fulfills the requirements of article 85(3).

In Etablissements Consten & Grundig-Verkaufs-GmbH v. Commission of the EEC, the plaintiff Consten and the Government of the Federal Republic of Germany contended that “article 85 market, the distribution system could not be further improved. Id. consideration (6), at 8274 (semble). Finally, the existence of potential intrabrand competition (made possible by the absence of a prohibition of parallel imports) and the existence of interbrand competition will ensure that the parties will not be in a position to eliminate competition for a substantial portion of the products concerned. Id. consideration (7), at 8274.

The considerations utilized by the Commission as the basis for the Proposed Group Exemption indicate that the Commission has had difficulty in reconciling the widespread use of exclusive agreements with the requirements specifically set forth in article 85(3). See generally Ladas, Exclusive Distribution Agreements and the Common Market Antitrust Laws, 9 ANTRUST BULL. 761, 767 (1964). The benefits which the Commission views as resulting from an exclusive agreement would appear to be of minor importance. Moreover, the Commission’s interpretation of “indispensability,” as used in 85(3), as simply requiring a demonstration that the distribution system could not be “further improved” would appear to be erroneous. With respect to the past decisions of the Commission, see Schwartz, supra note 11, at 632-34. Finally, the proposed group exemption, if ultimately adopted, would appear to offer little security to parties which rely upon its provisions and therefore fail to notify the Commission of their agreement. The applicability of the exemption is expressly dependent upon a determination of the existence of adequate interbrand competition and upon a determination that there will be no impairment of the ability of other manufacturers to locate distributors for their products. These determinations must be made by the parties to the agreement before they may rely upon the group exemption. Only the passage of time will indicate the number of individuals who are willing to rely upon their own judgment in these matters in light of the scant information given by the Commission in its past decisions.

In defense of the Commission on this final point, it should be noted that although the proposed group exemption does not prevent the parties from notifying if they wish to do so, Proposed Group Exemption consideration (3), CMR ¶ 9125, at 8273 (Aug. 26, 1966), the exemption specifically repeals the portion of a previous regulation which permitted exclusive dealing agreements to be notified upon a simplified form. Id. consideration (10), at 8274. It would therefore seem clear that the Commission does not expect that a large number of exclusive agreements will be notified after the adoption of the proposed group exemption. Therefore, it would appear that in the very vast majority of cases, the Commission is willing to assume that vigorous interbrand competition exists and that the ability of other manufacturers to locate distributors and dealers will not be significantly impaired.

should be applied as a whole and with one stroke." The parties based this contention upon the fact that, in their view, the exception contained in article 85(3) is too narrow and that it is too difficult for a private party to assume the burden of proof under the requirements of article 85(3). Accordingly, article 85(1) should be applied in a "reasonable" manner, i.e., as a whole.

The Commission took the position that the "rule of reason" approach developed by the American judiciary was not appropriate to the interpretation of Community law. The "rule of reason" was a necessary consequence of the fact that the American antitrust statute did not contain any specific exceptions. In contrast, the Community provisions which prohibit restraints of trade contain, in article 85(3), specific provisions concerning exceptions. Therefore, the Commission contended that the "rule of reason" approach was not apposite to Community law, and articles 85(1) and 85(3) must be applied separately.

The Court of Justice apparently agrees with the Commission's interpretation of article 85, for, when discussing regulation 19, it stated:

The first paragraph of Article 85 sets forth a prohibition, its second paragraph describes its effects, and its third paragraph tempers these provisions by authorizing the granting of exemptions from the prohibition. The conditions under which an agreement does not automatically fall under the prohibition of Article 85, paragraph 1, and those under which it can be granted an exemption under Article 85, paragraph 3, are different.

Thus, a "rule of reason" was not incorporated into article 85(1); article 85 was to be applied as a whole. However, as will subsequently be noted, the Court of Justice appears to have adopted a "rule of reason" in its interpretation of the phrase "prevent, restrict or distort competition," as contained in article 85(1).

43 Id. at 7640.
44 Id. at 7641. The parties contended that a "reasonable" approach would require the Commission, in applying article 85(1), to consider whether interbrand competition was of such strength that the restriction could not be considered to have an "unreasonable" effect on competition. Id. at 7659, 7652.
45 Id. at 7641.
46 Ibid.
47 Ibid.
48 Ibid. The Commission was therefore of the opinion that interbrand competition would only be relevant in considering whether an exemption should be granted pursuant to article 85(3). Ibid.
(2) The Interpretation of Article 85(1): Exclusive Dealing Agreements.—

(a) The Commission.—In the Consten decision, the Commission considered an agreement to be prohibited by article 85(1) whenever it was determined that "the agreement not only theoretically but also perceptibly affects the freedom of action of the parties or the position of third parties on the market." This standard is perhaps best understood by considering several of the decisions of the Commission concerning exclusive distributorship agreements.

In Decision of the Comm'n on D.R.U.-Blondel Agreement, Decision of the Comm'n on Hummel-Isbecque Agreement, and Decision of the Comm'n on Jallatte Agreements, the Commission indicated that the fact that an exclusive distributorship agreement between two firms, each of which is located in a different member state, prevented the manufacturer from delivering the contract goods directly to anyone but the exclusive dealer located within the contract territory was sufficient, in and of itself, to cause the agreement to result in at least a theoretical restriction, distortion, or prevention of competition.

The products for which the exclusive distributorship is granted generally possess some identifying characteristics which are usually emphasized by the use of a trademark. If effective intrabrand competition exists, customers will be in a position to compare the prices for the same brand charged by different distributors or retailers. Customers will therefore patronize the most efficient distributor or retailer, his price necessarily being the lowest. The opportunity given customers to compare prices and thus to patronize the most efficient distributor or retailer will force all such merchants to lower their costs and, consequently, lower their prices. If effective intrabrand competition is not present, the stimulus to lower costs, and thus prices, is removed.

An exclusive distributorship agreement which prevents the manufacturer from delivering the product directly to third parties located within the contract territory greatly impairs intrabrand competition. Third parties (parallel importers) located within the contract territory must purchase the goods indirectly from parties located

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61 2 CMR J 8046, at 7640.
63 2 CMR J 9063, at 8137 (EEC Comm'n 1965).
64 2 CMR J 9083, at 8175 (EEC Comm'n 1965).
65 2 CMR J 9049, at 8098-99; 2 CMR J 9063, at 8137-38; 2 CMR J 9083, at 8176.
outside of the contract territory. Since the parallel importer must purchase the goods indirectly, the price he pays for the goods will ordinarily include the middleman's cost and profit. Consequently, the parallel importer will always incur costs greater than those incurred by the exclusive dealer who is in a position to purchase directly from the manufacturer. Therefore, an exclusive distributorship of this type impairs intrabrand competition. 66

The interpretation of the requirement that the restriction, distortion, or prevention of competition be "perceptible" is more difficult. The Commission has expressly stated that the determination of "perceptibility" does not involve quantitative factors. 67 Therefore, the requirement of perceptibility is not satisfied, for example, by a determination that the parties do a substantial volume of business. The only other indication of the meaning attributed to this term by the Commission is the statement made by that authority in its argument before the Court of Justice in the Consten 68 case:

In this case the suit brought by the UNEF firm [complaint to the Commission], the intervention of the Leissner firm [in the suit brought by Grundig and Consten to annul the decision of the Commission that the agreement between the two firms violated article 85(1)], and the earlier conduct of Grundig and Consten [the institution of legal proceedings against UNEF 69 and Leissner 60 upon the basis that the latter had committed unfair acts of competition by parallel importing] . . . shows that the restriction of competition resulting from the prohibited agreements was perceptible. 61

Apparently, therefore, the restriction of competition resulting from an agreement between enterprises is "perceptible" if the agreement is being implemented by the parties.

(b) The Advocates General.—Mr. Karl Roemer, one of

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66 Where, as in Decision of the Commission on the Grundig-Consten Agreements, 1 CMR § 2743 (EEC Comm'n 1962), the manufacturer imposes reexport prohibitions on all of the exclusive dealers, the agreements are even more inimical to intrabrand competition as parallel imports are made impossible.


71 Id. at 7640. See also Société Technique Minière v. Machinenbau Ulm GmbH, 2 CMR § 8047, at 7701 (EEC Ct. Justice June 30, 1966).
the Advocates General, contended that an agreement does not restrict competition within the meaning of article 85(1) unless the agreement actually results in or is likely to result in a "significant" impairment of competition. Here again, a determination of "significance" should not be based solely upon the volume of business done by the parties. Rather, under this view, the Commission must compare the market situation as it exists after the conclusion of the agreement with the market situation as it would have developed in the absence of the agreement. For example, in considering whether an exclusive distributorship agreement results in a significant impairment of competition, the Commission should, under this view, consider such questions as whether the manufacturer would have been in a position to penetrate the contract territory without an exclusive distributorship agreement and whether interbrand competition is so vigorous that no intrabrand competition would have occurred even in the absence of the agreement.

(c) The Court of Justice.—The Court of Justice has interpreted article 85(1) to require, in the first instance, an inquiry into the purpose of an agreement. This inquiry is to be based upon an analysis of the agreement itself in light of the economic context within which the agreement is to be implemented and not upon the subjective intent or motive of the parties. If the analysis of the agreement does not reveal a sufficient degree of injury to competition, then the effects of the agreement must be examined. For the agreement to be prohibited, the conditions establishing that competition has actually been either prevented or perceptibly restricted or distorted must be present. The competition in question must be

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62 Id. at 7702.
64 Ibid. In Kleding-Verkoopbedrijf de Geus en Uitdenbogerd v. Robert Bosch GmbH, 2 CMR § 8003 (EEC Ct. Justice 1962), M. Lagrange, the other Advocate General, agreed with the interpretation of the German government that article 85(1) is violated where "a restraint of competition . . . causes the movement of goods to deviate from its normal and natural course. . . . For this reason, any influence or economic movement, even though not substantial, constitutes . . . [a violation] of Article 85, paragraph 1." (Emphasis added.) Id. at 7153 (conclusions of the Advocate General).
66 Ibid. If the purpose of the agreement is to restrain, prevent, or distort competition, it is not necessary to examine the effects. Etablissements Consten & Grundig-Verkaufs-GmbH v. Commission of the EEC, 2 CMR § 8046, at 7652-53 (EEC Ct. Justice July 13, 1966).
understood as that which would actually exist without the agree-
ment in issue.\textsuperscript{67}

Perhaps the opinion of the court can be clarified somewhat by
considering its approach to a specific type of agreement, \textit{viz.}, an
exclusive distributorship agreement:

An alteration of competition may be suspected where an agree-
ment appears to be necessary for an enterprise to penetrate a ter-
ritory in which it was not doing business. That is why, to decide
whether a contract containing a clause "granting an exclusive sell-
ing right" must be considered as prohibited because of its object
or because of its effect, it is necessary to take into account the fol-
lowing in particular: the nature of the products and whether or
not their quantity was limited, the position and importance of the
licensor and licensee on the market of the products concerned,
whether the contract is isolated or is one of a group of contracts,
and whether the clauses protecting the exclusiveness are rigid or
possibilities are left open for other channels of trade in the same
product through re-exports and parallel imports.\textsuperscript{68}

Prior to the abolition of tariffs and quantitative restrictions by
the member states, many manufacturers confined their distribution
and sales efforts to national markets. As the barriers to trade be-
tween the member states were abolished, these manufacturers found
that it became increasingly feasible to distribute their products in
other markets. To take advantage of this situation, a manufacturer
could choose to establish his own distribution system in the new
market or to utilize a distributor previously established in that
market. It is clear from the portions of the opinion of the Court
quoted above that if the manufacturer chooses to distribute his
product in a new market by means of a distributor, an agreement
between the manufacturer and the distributor which grants the lat-
er the exclusive right to distribute the product within a certain
territory is suspect and may come within the scope of article 85(1).\textsuperscript{69}
However, it would appear that an exclusive agreement is not pro-
hibited per se by article 85(1).

An exclusive agreement is prohibited by article 85(1) if, upon
an analysis of the agreement itself in light of the economic context
within which it is to be applied, the agreement can be said to prevent,
restrict, or distort competition.\textsuperscript{70} As noted previously,\textsuperscript{71} an exclu-

\textsuperscript{67} Société Technique Minière v. Machinenbau Ulm GmbH, 2 CMR \$ 8047, at
\textsuperscript{68} Ibid.
\textsuperscript{69} Ibid.
\textsuperscript{70} See EEC Treaty art. 85(1), 1 CMR \$ 2005 (1965).
\textsuperscript{71} Text accompanying notes 52-56 supra.
exclusive distributorship agreement may theoretically impair intrabrand competition. However, the terms of the agreement, particularly the "exclusive dealing" clause, must be interpreted in light of the economic context within which it is to be implemented. If, for example, the manufacturer possesses a relatively small portion of the market or if the product is relatively new, there may be no significant demand for the product within the contract territory at the time the agreement is concluded. If there is no significant demand for the product, it is likely that very few or no parallel imports would occur in the absence of the agreement. Under these circumstances, therefore, it may be that an analysis of the terms of the agreement in view of the economic context may not indicate a "sufficient" (whatever that may mean) degree of injury to competition. It would then become necessary to examine the actual effect of the agreement in order to determine whether the agreement prevents, restricts, or distorts competition.

The opinion of the Court of Justice appears to hold that an agreement is not prohibited by article 85(1) by reason of its effect unless the agreement actually prevents or "perceptibly" distorts competition. If parallel imports would not occur in the absence of the agreement, the agreement obviously does not prevent intrabrand competition. Moreover, if there is no significant demand for the product at the time the agreement is concluded, it would appear that dealers (other than the proposed exclusive dealer) located within the proposed contract territory would not desire to purchase the goods directly from the manufacturer. If other dealers do not desire to purchase the goods directly from the manufacturer, it is likely that these dealers would not complain to the Commission about the agreement. The parties would also not find it necessary to institute legal proceedings against a parallel importer to prevent parallel imports since no such imports would occur. In this case, therefore, the exclusive agreement would not perceptibly distort competition. It would thus appear that if, because of the manufacturer's position in the market or because of the nature of consumer acceptance of the product there is no significant demand for the product at the time the agreement is concluded, the agreement.

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73 For a discussion of "perceptible," see text accompanying notes 57-61 supra.
is not, according to this interpretation of the opinion of the Court of Justice, prohibited by article 85(1).\textsuperscript{74}

If the *Consten* opinion can, in fact, be interpreted as holding that an exclusive agreement is not prohibited if parallel imports would not have occurred in the absence of the agreement, the decision is desirable in terms of competitive theory. If there is no significant demand for the manufacturer's product at the time of the conclusion of the agreement and if the manufacturer lacks the financial resources for internal expansion or forward vertical integration, it is likely that the manufacturer's product would not have appeared on the market represented by the proposed contract territory in the absence of some agreement between the manufacturer and a dealer established in the new market. The exclusive agreement thus enables a new product to appear on the market which would not have appeared in any other manner. The appearance of this new product may have the beneficial effect of stimulating inter-brand competition between the new product and products previously established on the market.

However, the incorporation of a "rule of reason" into article 85(1) so as to permit an exclusive agreement in the circumstances noted does not appear to be in accord with the apparent adoption by the court of the view that article 85(1) is to be applied as if that article were separate and distinct from article 85(3).\textsuperscript{75} The types of factors that the court indicates should be taken into account in determining whether an agreement is prohibited by article 85(1) appear to be the very factors which the drafters of the treaty intended to be considered, if at all, only in determining whether an exemption should be granted pursuant to article 85(3).

A possible explanation for the apparent departure from the express provisions of article 85 can be found in article 9 of regulation 17.\textsuperscript{76} Article 9(1) of that regulation vests exclusive authority in the Commission to grant an exemption pursuant to article 85(3). Article 9(3) of regulation 17 permits the national authorities to apply article 85(1) as long as the Commission has not begun a proceeding\textsuperscript{77} to determine whether or not the activities in question


\textsuperscript{75} See text accompanying notes 38-50 supra.

\textsuperscript{76} EEC Council Reg. 17, art. 9, 1 CMR § 2481 (1965).

\textsuperscript{77} For a discussion of the difficulties involved in a determination of whether or not the Commission has "commenced a proceeding," see OBERDORFER, GLEISS & HIRSCH, COMMON MARKET CARTEL LAW 136-39 (1963).
are entitled to a negative clearance\textsuperscript{78} or constitute a violation of article 85 or article 86 or are entitled to an exemption pursuant to article 85(3) of the treaty.\textsuperscript{79}

While article 9(1) is binding upon the national courts, article 9(3) is, in all probability, not.\textsuperscript{80} Thus, there are three alternatives available to a national court before which a proceeding is pending involving an agreement to which article 85(1) might be applicable. The first is to voluntarily suspend the proceedings until the Commission has determined whether the agreement was prohibited by article 85(1) and, if so, whether the agreement was entitled to an exemption pursuant to article 85(3); and then after that determination to adhere to the decision of the Commission on these matters. Second, if a new question involving the interpretation of the treaty has arisen, refer the question to the Court of Justice\textsuperscript{81} (which, however, could answer the question only in the

\textsuperscript{78} See note 36 and accompanying text supra.

\textsuperscript{79} It will be noted that under this procedure, the power of the national authorities is virtually illusory. If a proceeding is brought before a national authority, the parties to the agreement involved in the proceeding, realizing that the Commission is the only authority competent to grant an exemption pursuant to article 85(3), may decide to apply to the Commission for a negative clearance. Once the Commission initiates a proceeding concerning this application, the national authority will be deprived of jurisdiction.

Prior to the incorporation of a "rule of reason" into article 85(1), it was likely that the parties to an agreement would always notify the Commission once the agreement became the subject of a proceeding before a national authority. However, the incorporation of a "rule of reason" into article 85(1) may change this situation to some extent. The national authority now possesses the ability to apply article 85(1) in a "reasonable" manner. The parties to the agreement might now reason that the national authority, in its application of article 85(1), will be more "reasonable" than the Commission and may thus decide to permit the national authority to proceed to consider the matter rather than to deprive the national authority of jurisdiction by setting the Community machinery in motion.

This situation presents less of a danger to the Community than the situation concerning the national courts noted subsequently in the text. See text accompanying note 80 infra. The parties to an agreement do not possess complete discretion with respect to the initiation of a proceeding by the Commission. The Commission may institute a proceeding ex officio, or a third party may transmit a complaint to the Commission concerning the agreement. The initiation of a Commission proceeding ex officio or upon the complaint of a third party will deprive the national authorities of jurisdiction. See 1 CMR § 2582 (1965).

\textsuperscript{80} See EEC Council Reg. 17, art. 9, 1 CMR § 2482.10 (1965).

\textsuperscript{81} Article 177 of the EEC Treaty provides, in part: "Where any . . . question involving the interpretation of the treaty is raised before any court of law of one of the Member States, the said court may, if it considers that a decision in the question is essential to enable it to render judgment, request the Court of Justice to give a ruling thereon." EEC Treaty art. 177, 1 CMR § 4655 (1965).

Article 177 further provides that if a question involving the interpretation of the treaty arises before a court from which there is, as a matter of domestic law, no appeal, that court must refer the question to the Court of Justice. Ibid.

If the relevant article has already been interpreted by the Court of Justice, it may simply refer to the previous interpretation.
abstract and which could not apply the interpretation to the specific case). The third alternative would be to apply article 85(1) to the agreement.

Prior to the incorporation of a “rule of reason” into article 85(1), a national court which chose the third alternative had no choice but to declare that the agreement was prohibited by article 85(1) even though, had the Commission considered the agreement, it would have granted an exemption pursuant to article 85(3). After the incorporation of a “rule of reason” into article 85(1), a national court which chooses the third alternative possesses more flexibility. Although the national court may not grant an exemption pursuant to article 85(3) and although the national court must apply article 85(1) as if that article were distinct from article 85(3), the national courts may apply article 85(1) in a “reasonable” manner (“reasonable” being defined by the Court of Justice). Thus, the court may have been moved to incorporate a “rule of reason” into article 85(1) in order to give the national courts some discretion and thus avoid the charge that the Treaty of Rome reduced the national courts to mere mechanical functionaries.

If the above reasoning did in fact serve as the basis for the incorporation of a “rule of reason” into article 85(1), several criticisms may be noted. It is true that the procedures of article 177, requiring a national court of last resort to refer a question of interpretation of the treaty to the Court of Justice, will prevent to a certain extent a wide divergence between the decisions of the various national courts. However, the Court of Justice may answer questions submitted to it by the national courts pursuant to this article only in the abstract, and it may not apply the interpretation to the specific case pending before the national court. Therefore, the incorporation of a “rule of reason” into article 85(1) may result

Questions submitted under this article must involve a question of interpretation. If the questions submitted do not clearly indicate an interpretive problem, the court will “sift out” the relevant question of interpretation from the questions as formulated by the national court. See Kleding-Verkoopbedrijf de Geus en Uitdenbogerd v. Robert Bosch GmbH, 2 CMR 5 8003 (EEC Ct. Justice 1962).

Whether an interpretation is actually necessary to decide the case before the national court will not be decided by the Court of Justice. As far as the court is concerned, the only relevant fact is that the question has been submitted to it. See N. V. Algemeene Transporten Expeditie Onderreming van Gend & Loos v. Netherlands Fiscal Administration, 2 CMR 5 8008 (EEC Ct. Justice 1963).

8a EEC Treaty art. 177, 1 CMR 5 4655 (1965). See note 81 supra.
in providing considerable room for divergent "interpretations of the interpretations" of the Court of Justice as the latter are applied by the various national courts to specific factual circumstances. The uniform application of Community law is thereby impaired. The divergent applications of article 85(1) by different national courts can be as much a detriment to the integration of the six national markets into one common market as divergent corporate or tax laws.

Moreover, "notification," the procedure whereby the parties to an agreement request the Commission to grant an exemption pursuant to article 85(3), requires the disclosure in most cases of a great deal of information. If the national courts may apply a "rule of reason" in interpreting article 85(1), parties desiring to keep their agreement secret may be encouraged not to notify the Commission of the agreement. If the agreement is ever the subject of a proceeding in a national court, then there may be an opportunity to convince the court that, under the "rule of reason," the agreement is not prohibited by article 85(1). This would be especially true if the national court before which the agreement would most likely come possessed a reputation for being more "reasonable" than other national courts. Thus, the parties would operate in secret if and until the agreement comes before a national court and still not lose the opportunity to escape the prohibition of article 85(1).

(3) The Significance of Interbrand Competition: Exclusive Dealing Agreements.—The Commission has indicated that, in its opinion, the restriction, distortion, or prevention of intrabrand competition is sufficient, for the reasons noted previously, to cause an agreement to come within the scope of article 85(1). The Court

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84 EEC Council Reg. 27, 1 CMR §§ 2651-57 (1965), stipulated that EEC Council Form B, 1 CMR § 2691 (1965) was to be used for the notification of all agreements. Regulation 17 has been criticized because "the regulation requires extensive presentation of economic data and justification without providing substantive criteria." Schwartz, The Common Market Antitrust Laws and American Business, 1965 U. Ill. L.F. 617, 637.

85 EEC Council Reg. 153, 1 CMR § 2694 (1965), amended regulation 27 to provide that EEC Council Form B1, 1 CMR § 2692 (1965) may be used for the notification of certain types of exclusive distributorship agreements. This form was much less detailed than Form B. Since the Proposed Group Exemption applies to exactly the same type of agreements as those which may be notified on Form B1 and since notification will no longer be necessary for those agreements exempted by the Proposed Group Exemption, that portion of regulation 27 which was amended by regulation 153 will be repealed. Proposed Group Exemption Art. 7, 2 CMR § 9125, at 8275 (Aug. 26, 1966).

86 See text accompanying notes 52-56 supra. Interbrand competition may be significant in considering whether an exemption pursuant to article 85(3) should be granted. See Decision of the Comm'n on D.R.U.-Blondel Agreement, 2 CMR § 9049, at 8099 (EEC Comm'n 1965); Decision of the Comm'n on Hummel-Isebeque
of Justice has agreed with this position.\footnote{86}

The Commission has, however, utilized the existence of vigorous interbrand competition to support the issuance of a negative clearance. For example, in *Grosfillex Co.*,\footnote{87} the Commission granted a negative clearance to an exclusive distributorship agreement concluded between Grosfillex, a manufacturer located within the Common Market, and Fillistorf, a Swiss firm, notwithstanding the fact that, pursuant to the contract, Fillistorf was prevented from reexporting the contract goods (or from exporting goods competitive with the contract goods) to the Common Market. According to the Commission, the agreement did not restrict or distort competition due, *inter alia*, to the existence of vigorous interbrand competition.\footnote{88}

The *Grosfillex* case was primarily concerned with the effect upon firms located within the Common Market of an agreement imposing a reexport prohibition upon an exclusive representative located without the Common Market. Consider the position of a French firm, X, which desires to compete in the sale of the goods manufactured by Grosfillex with another French firm, Y. X would not find it profitable to purchase the goods indirectly from Fillistorf. This results from the fact that, before Fillistorf could deliver the goods, the price would be increased by at least an amount equivalent to Fillistorf's profit, if any, plus an amount equivalent to the common external tariff. The Commission considered the existence of the common external tariff alone as sufficiently limiting the effectiveness of intrabrand (or interbrand) competition created by the possibility of reexportation (or exportation of similar goods) by Fillistorf to the Common Market to prevent the agreement itself from restricting or distorting competition within the meaning of article 85(1). The existence of the common external tariff would prevent

\footnote{87} 1 CMR § 2412.37 (EEC Comm'n 1964).
\footnote{88} Ibid. See also S. A. Nicholas Freres, 1 CMR § 2412.46 (EEC Comm'n 1964). In this case Nicholas, a French firm, had acquired the assets of Vitrain Laboratories and transferred part of them to Vitapro, a British firm. Under the terms of the transfer, Vitapro was prohibited from selling goods in the Common Market competitive with those manufactured by Nicholas (with some exceptions) for a specified period of years. The Commission granted a negative clearance due, in part, to the fact that Nicholas was subject to vigorous interbrand competition within the Common Market.
effective intrabrand competition even in the absence of the agreement.  

Under one set of circumstances, however, X would find it profitable to purchase the goods from Fillistorf. If interbrand competition within the Common Market were relatively ineffective or, what may amount to the same thing, if Grosfillex possessed some degree of monopoly power in that area and was therefore offering the goods at a price within that area which at least exceeded the amount of the common external tariff plus Fillistorf’s profit margin plus possibly increased transportation costs, and if Grosfillex were selling the goods at a much lower price to Fillistorf, X might find it profitable to purchase the goods indirectly from Fillistorf rather than directly from Grosfillex. X would then be in a position to offer the goods within the Common Market at a lower price than that which Y charged, even though the latter purchased directly from Grosfillex. The only situation in which intrabrand competition is significantly harmed, therefore, is one in which Grosfillex possesses some degree of monopoly power (or where interbrand competition is relatively weak) and is exercising the resulting freedom with respect to prices in the manner indicated.

In the Grosfillex case, the existence of vigorous interbrand competition within the Common Market precluded the exercise by Grosfillex of a great deal of pricing freedom. It would thus appear that the two reasons noted by the Commission in Grosfillex, i.e., the existence of the common external tariff and the existence of vigorous interbrand competition, were, at least in part, cumulative and not severable.

Now consider the position of a firm such as X in the situation described in Decision of the Comm’n on D.R.U.-Blondel Agreement, Decision of the Comm’n on Hummel-Ishbecque Agreement, and Decision of the Comm’n on Jallatte Agreements. X desires to purchase goods for which Y is the exclusive dealer in order to compete with the latter. X cannot purchase the goods directly from the manufacturer since the latter has agreed not to

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89 1 CMR 5 2412.37, at 1686-87.
90 Ibid.
91 Ibid. See Fulda, The First Antitrust Decisions of the Commission of the European Economic Community, 65 COLUM. L. REV. 625 (1965), which considers the reasons given by the Commission as separable.
92 2 CMR 5 9049, at 8098 (EEC Comm’n 1965).
93 2 CMR 5 9063, at 8137 (EEC Comm’n 1965).
94 2 CMR 5 9083, at 8175 (EEC Comm’n 1965).
deliver the goods directly to anyone but Y within the contract territory. X must then purchase the goods indirectly from a party located without the contract territory. (Note that the situation was aggravated in the *Decision of the Comm'n on the Grundig-Consten Agreements* due to the fact that parties outside the contract territory were prohibited from selling to such firms as X by virtue of the reexport prohibition imposed by Grundig.) This outside party will add to the costs of the goods an amount at least sufficient to cover handling costs plus an amount representing a profit. Even if X’s transportation costs are not significantly higher than Y’s, the other two factors will always cause the costs incurred by X to be higher than those of Y, who purchases directly from the manufacturer. Unless X is significantly more efficient than Y, X will never be in a position to lower his price to that charged by Y and still make a profit. Therefore, intrabrand competition will never be as effective as it is in the situation where the manufacturer will deliver directly to anyone.

There is another situation, however, where some effective intrabrand competition is theoretically possible even if X is no more efficient than Y. If interbrand competition is relatively ineffective within the contract territory, as where the manufacturer possesses some degree of monopoly power within that area and charges Y a higher price which exceeds the cost of handling charges, the third party’s profit margin, and the amount equivalent to potential transportation charges increases, and is also charging parties outside the contract territory a much lower price, then X may find it profitable to purchase the goods from a party located outside the contract territory. The same result would occur if the price at which the goods are sold to Y is identical to the price at which the goods are sold to parties outside the contract territory and Y sells the goods at a price which at least exceeds the cost of the goods, *i.e.*, if the interbrand competition faced by Y within the contract territory is relatively ineffective or if Y possesses some degree of monopoly power within that area and is exercising the resulting price freedom in the manner indicated. In either of these two situations, therefore, in contrast to the *Grosfillex* case, less harm is done to intrabrand competition when the manufacturer or the exclusive dealer possesses

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95 1 CMR § 2743 (EEC Comm'n 1962).
monopoly power (or when interbrand competition is rather ineffectual).  

D. "Liable To Affect Trade Between the Member States"

Another requirement of article 85(1) is contained in the phrase "liable to affect trade between the Member States." Since the treaty was concluded in four official languages, the meaning of the term "affect" has been the subject of some dispute. The French version uses the term "affecter" which implies that the agreement need only have some effect upon trade between the member states. The German, Italian, and Dutch versions use terms which appear to require some harmful effect. The dispute therefore centered about the question of whether the phrase was merely a jurisdictional requirement similar to that of "interstate commerce" in the law of the United States or whether the phrase required an interpretation of article 85(1) which would result in the prohibition of only those agreements which actually reduced trade between the member states.

(1) The Advocates General.—Mr. Roemer, one of the Advo-

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97 It is true that by definition either Y or the manufacturer possesses some degree of price freedom. Therefore, should X begin to engage in intrabrand competition, Y or the manufacturer may theoretically lower the price of the goods to the point where it is no longer profitable for X to purchase the goods from parties located outside the contract territory. Suppose, however, that the price is not lowered to this point and that X does provide some intrabrand competition. Suppose further, that neither Y nor the manufacturer is obtaining an "exorbitant" profit. Y and the manufacturer would then be in a position to contend (as some of the parties in Etablissements Consten & Grundig-Verkaufs-GmbH v. Commission of the EEC, 2 CMR 8046 (EEC Ct. Justice July 13, 1966), did contend, although perhaps for different reasons, see text accompanying note 29 supra) that if their agreement (prohibiting the manufacturer from delivering directly to anyone but Y located within the contract territory) is within the scope of the treaty articles governing competition, it is article 85 which applies and not article 86. Since article 86 prohibits only the "abuse" of a dominant position, since the parties have not lowered the price to the point where intrabrand competition is impossible, and since the parties are not enjoying exorbitant profits, no violation of article 86 occurred.

Of course, this argument has become moot. As noted, the Court of Justice has decided that article 85 and not article 86 applies to exclusive distributorship agreements. See text accompanying note 34 supra.


99 The four official languages are French, German, Dutch, and Italian. EEC Treaty art. 248, 2 CMR § 3455 (1965).


101 The Italian version uses "pregudicare." The German version uses "beeinträchtigen." The Dutch version uses "ongunstig beinvloeden." See ibid. (conclusions of the Advocate General).

102 See Schwartz, supra note 84, at 628.
cates General, contended that the phrase was not simply a requirement that the agreements have some effects outside of national boundaries. Rather, the agreement must have some actual or conceivable adverse effect upon trade between member states. For example, in considering whether an exclusive distributorship agreement is liable to affect trade between those member states, it is necessary to determine whether or not the manufacturer could have effectively entered the market in any other manner. If it was not possible for the manufacturer to have done so, then the exclusive distributorship agreement, in that it increases trade across national boundaries, has a favorable effect upon trade between the member states and consequently is not within the scope of article 85(1).

Mr. Roemer's interpretation of "liable to affect trade between the Member States" as requiring an "unfavorable" effect and the Commission's interpretation of restriction, distortion, or prevention of competition may lead to the same result by different routes.

Under Mr. Roemer's approach, an agreement is not within the scope of this phrase unless it has an unfavorable effect on trade between the member states. Therefore, if a manufacturer could not effectively enter a market without an exclusive distributorship agreement, as determined by an investigation into, for example, the financial resources of the manufacturer and perhaps the consumer acceptance of the product, that agreement possesses a favorable influence upon trade between the member states and is not within the scope of article 85(1).

In order to determine whether a restriction of competition is prohibited by article 85(1), the Commission has indicated that the restriction must be "perceptible," i.e., effective. A determination of "perceptibility" seemingly would not require an investigation into such facts as, for example, the financial resources of the manufac-

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104 Ibid. Mr. Roemer used the term "conceivable" to mean "if not purely hypothetically at least as a reasonably predictable result." Ibid. See also Etablissements Consten & Grundig-Verkaufs-GmbH v. Commission of the EEC, 2 CMR § 8046, at 7666 (EEC Ct. Justice July 13, 1966).
107 Id. at 7640.
An exclusive distributorship agreement does not result in a "perceptible" restriction if no parallel imports would have occurred in the absence of the agreement or if no prospective parallel importer has complained to the Commission about the agreement. If parallel imports would not have occurred or if no parallel importer has complained, there would seem to be no present demand in the contract territory for the product of the manufacturer. It would therefore be unlikely that the manufacturer could have entered the market without the exclusive distributorship agreement, unless, of course, the manufacturer possessed the financial resources required for vertical integration or internal expansion.

Thus, both Mr. Roemer's approach to "liable to affect trade between the Member States" and the Commission's view on "perceptible" restriction of competition may prevent an agreement from coming within the scope of article 85(1) when that agreement represents the only manner in which a manufacturer may enter a market. There is one significant difference between the two approaches, however. Under Mr. Roemer's thesis, this type of agreement under these circumstances would not be subject to Community jurisdiction. Under the approach of the Commission, however, this type of agreement may very well be subject to Community jurisdiction but would not be prohibited by article 85(1) because it did not perceptibly restrict, distort, or prevent competition.

(2) The Commission.—The Commission took the position that "liable to affect trade between the Member States" will be important primarily as a jurisdictional criterion separating Community jurisdiction from the jurisdiction of the individual member states. Thus, the Commission has interpreted article 85(1) to apply to any restriction of competition which caused "trade between Member States to develop under conditions other than it would have without such a restriction... [with the proviso that the agreement's] influence on market conditions be of some significance." The Commission indicated that "trade between Member States... [develops] under conditions other than it would have with-

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108 Id. at 7643-44.
an agreement if that agreement causes trade to be "deflected from its normal and natural course . . . [and if the deflection is] of some importance." As the term "normal" is not clarified further, it is necessary to resort to a specific application of the interpretation of the Commission in order to clarify this term in a manner which does not obliterate the distinction between "liable to affect trade between Member States" and "restrict, distort, or prevent competition."

In Decision of the Comm'n on Grundig-Consten Agreement, the Commission indicated that due to the fact that the agreement prohibited the German manufacturer (Grundig) from delivering directly to anyone but the exclusive distributor (Consten) located within the contract territory (France, the Saar, and Corsica), French enterprises other than Consten were prevented from importing Grundig products into France. Similarly, the reexport prohibition imposed by Grundig upon its exclusive dealers including Consten, impeded, if not prevented, the integration of the national markets into one common market. "This effect . . . [was] demonstrated clearly by the difference in prices [for Grundig products] in various Member States . . . ." Consequently, the Commission decided that the agreements affected trade between the member states.

It would thus appear that the term "normal" should be understood as a reference to the logical consequences of the integration of the six national markets into one common market. For example, as trade barriers erected by the individual member states are removed, theoretically manufacturers will distribute their goods in many different member states as distributors in those states find it profitable to purchase goods from manufacturers located in other states. Theoretically, manufacturers will sell their goods to any distributor desiring them, whether a particular distributor is located in France, Germany, or any other member state. Thus, the significance of national boundaries will decrease. If a manufacturer grants an exclusive distributorship, he will refuse to deliver directly to anyone located in the contract territory other than the exclusive

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110 Decision of the Comm’n on Grundig-Consten Agreement, supra note 109, at 1864.
112 1 CMR § 2743 (EEC Comm’n 1962).
113 Id. at 1864.
114 Ibid.
115 Ibid.
exclusive dealing agreements

116 The Commission is thus of the opinion that an exclusive distributorship agreement is within the jurisdiction of the Community even if trade between the member states is increased due to the existence of the agreement. The sole purpose of the treaty, according to the Commission, is not to increase trade between the member states. If this were the sole purpose of the treaty, that instrument would contain no provisions for prohibiting state aids to business or for mitigating the effects of dumping. Etablissements Consten & Grundig-Verkaufs-GmbH v. Commission of the EEC, 2 CMR § 8046, at 7643 (EEC Ct, Justice July 13, 1966). See also Société-Technique Minihre v. Maschinenbau Ulm GmbH, 2 CMR § 8047, at 7689 (EEC Ct, Justice June 30, 1966).

117 Decision of the Comm'n on Grundig-Consten Agreement, 1 CMR § 2743, at 1864 (EEC Comm'n 1965).

118 See text accompanying note 111 supra.


120 Decision of the Comm'n on Grundig-Consten Agreement, 1 CMR § 2743, at 1862 (EEC Comm'n 1962).
restriction, or distortion of competition." For example, the Commission does not consider an exclusive distributorship agreement between a French manufacturer and a French distributor to be subject to the treaty rules concerning competition, that is, it is not liable to affect trade between the member states. However, this agreement will have the effect of restricting intrabrand competition within the contract territory. Therefore, if the agreement had been liable to affect trade between the member states, the agreement would have been prohibited by article 85(1) under the Commission's interpretation of "restriction, distortion, or prevention of competition" providing, of course, that the restriction was "perceptible."

(3) The Court of Justice.—The Court of Justice agreed with the Commission that the phrase "liable to affect trade between the Member States" was important as a jurisdictional criterion separating the jurisdictional authority of the Community from that of the individual member states. Thus, in order for the validity of an agreement to be governed by the treaty, the agreement "must, on the basis of all the objective elements of law or of fact taken together, indicate that there is a sufficient degree of probability that it may have some influence, direct or indirect, actual or potential, on the flow of trade between Member States." If this statement were viewed alone, the effect of the decision would be to expand the Community's jurisdiction to cover a number of agreements that would not be covered under the interpretation of the Commission. This results from the fact that under the above interpretation, any agreement between parties, each of whom is located in a different member state, would be "liable to affect trade between the Member States."

However, the statement of the court noted above should not be considered apart from the context within which it appears. The

121 This is indicated, for example, by the Proposed Group Exemption art. 1(a), 2 CMR § 9125, at 8274 (Aug. 26, 1966). An agreement may not be exempted pursuant to article 85(3) unless it is first established that the agreement is prohibited by article 85(1). Government of the Republic of Italy v. Council & Comm'n of the EEC, 2 CMR § 8048, at 7718 (EEC Ct. Justice July 13, 1966). The proposed group exemption applies only to bilateral agreements concluded between parties, each of whom is located in a different member state or between parties one of whom is located within the Common Market and one of whom is located without that territory. Proposed Group Exemption art. 1(a) supra, at 8274.

122 See text accompanying notes 52-60 supra.


124 Id. at 7696.
statement occurs in the opinion of the court in a case considering exclusive distributorship agreements. In the next sentence the court states:

[T]hat is why, in order to determine whether a clause "granting an exclusive selling right" falls within the field of application of Article 85, it is necessary to know whether it is capable of partitioning the market in certain products between Member States and of thus rendering the economic interpretation sought by the Treaty more difficult.125

Thus the general statement of the court quoted previously should be confined, in all probability, to facts before the court. With respect to exclusive distributorship agreements at least, the proper view of the court's interpretation of "liable to affect trade between the Member States" should be that the agreement exhibits such an effect if it represents an impediment to the integration of the six national markets. An analysis of the purposes of the Treaty of Rome supports the view of the court that an agreement is within the jurisdiction of the Community if it can be viewed as an impediment to the integration of those markets.

One reason why states impose quantitative restrictions and tariffs upon imported goods is to protect their industries from the competition of foreign industries.126 The protection of domestic industries can be beneficial if, for example, the state desires to shelter an infant industry from competition until it is strong enough to compete on the same basis with stronger foreign firms already established in that industry, or if the state desires to encourage its citizens to invest their capital in a particular industry. More often than not, however, tariffs and quantitative restrictions are harmful in that the protection of domestic industries from the competition of more efficient foreign firms insulates the domestic industries from the pressure to innovate and lower costs. Therefore, one objective of the Treaty of Rome seemingly was to remove the obstacles to competition between industries located in the individual member states resulting from state action. Domestic industries, unprotected by tariffs and quantitative restrictions, would thus be subjected to greater pressure to innovate.127


126 Other reasons may be fiscal in nature.

127 Of course, the removal of trade barriers has other advantages as well. For
If the barriers to free trade erected by state action are to be removed and if the objective noted above is to be realized, the replacement of the barriers erected by state action with barriers erected by private action must not be permitted. To this end, one objective of the treaty articles concerned with competition is to supplement the other articles of the treaty by serving to prevent private action from restricting the free movement of goods between the member states.

In light of this purpose, the court is undoubtedly correct in holding that, at least, agreements which impede the integration of the six national markets should be within the jurisdiction of the Community. The court is also correct, as this is a question of jurisdiction and not of legality, in its view that if the agreement is an impediment to integration, the fact that the agreement also increases trade between the member states is immaterial.\(^{129}\)

It should be noted that the interpretation of the court does not require, as does the interpretation of the Commission, that the agreement represent a perceptible impediment which is of some importance.\(^{130}\) Under the court's interpretation, therefore, it would appear that an exclusive distributorship agreement is "liable to affect trade between the Member States" and is thus within the jurisdiction of the Community even if the manufacturer could not have effectively entered the market in any other manner (as demonstrated either by an investigation into the manufacturer's financial resources or by the existence of attempted parallel imports). However, this does not mean that an exclusive distributorship agreement is prohibited pursuant to article 85(1) if the manufacturer could not have effectively entered the market in any other manner. Under the interpretation of "prevent, restrict, or distort competition" adopted

\(^{128}\) It is submitted that the court did not hold that only those agreements which impede the integration of the six national markets are within the jurisdiction of the Community. This question, it is submitted, was left open by the court. This is indicated by the use of the introductory words "it is necessary to know" (not sufficient to know) in Société Technique Minière v. Machinenbau Ulm GmbH, 2 CMR 7696 (EEC Ct. Justice June 30, 1966) and, particularly, by the use of the introductory words "it is important to know" (not sufficient to know) in Etablissements Costen & Grundig-Verkaufs-GmbH v. Commission of the EEC, 2 CMR 8046, at 7652 (EEC Ct. Justice July 13, 1966). It may be, however, that this will be the interpretation ultimately adopted by the court.

\(^{129}\) Id. at 7652.

\(^{130}\) Ibid.
by the court, it is probable that an exclusive distributorship agreement in these circumstances would not be prohibited by article 85(1).

It should also be noted that according to the court's construction of "liable to affect trade between the Member States" it is possible that an agreement between two enterprises located within the same member state may be subject to Community jurisdiction. For example, if two French enterprises in competition with each other agree that one of the enterprises shall export its products only to Germany and the Netherlands and the other enterprise agrees that it shall export its products only to the Benelux countries, the agreement has the effect of replacing national trade barriers with barriers erected by private agreement. It appears doubtful, however, that at the present time the Commission would exercise this jurisdictional authority even if it could be said to possess jurisdiction over this type of agreement.

III. CONCLUSION

A major portion of the Commission's efforts in applying article 85 have been devoted to the consideration of exclusive agreements. Moreover, all of the decisions of the Court of Justice involving article 85 have concerned, either directly or indirectly, this type of agreement. In light of the foregoing analysis of these efforts and decisions, some tentative conclusions concerning the interpretation of article 85(1) and the particular application of this article to exclusive dealing agreements may be noted.

Article 85(1) of the Treaty of Rome prohibits all agreements between enterprises which are liable to affect trade between the member states and "which are designed to prevent, restrict, or distort competition within the Common Market or which have this effect." Article 85(2) provides that all agreements which come

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181 See text accompanying note 56 supra.
182 See EEC Council Reg. 17, art. 5, 1 CMR ¶ 2441 (1965). Notification is required only for agreements between enterprises located in different member states. See also Proposed Group Exemption art. 1, 2 CMR ¶ 9125, at 8274 (Aug. 26, 1966) which applies solely to agreements between enterprises located in different member states.
183 EEC Treaty art. 88, 1 CMR ¶ 2251 (1965).
within the scope of article 85(1) and which cannot be exempted by article 85(3) are "automatically" null and void.

If an agreement is liable to affect trade between the member states, it is within the jurisdictional authority of the Community and thus must be examined to determine whether it is intended to prevent, restrict, or distort competition within the Common Market or whether it has this effect. The Treaty of Rome has as its prime objective the integration of the six national markets of the member states into one common market. This objective is to be accomplished not only by the elimination of tariffs and quantitative restrictions but also by the prevention of agreements which would replace these impediments resulting from state action with other impediments resulting from the operation of private agreements. In accord with this interpretation of the role of article 85 in the integration process, a horizontal or vertical agreement is "liable to affect trade between the Member States" within the meaning of article 85(1) if the agreement can be viewed as threatening the achievement of the objectives of the treaty.\textsuperscript{135}

Accordingly, an exclusive dealing contract between a manufacturer located in one member state and its wholly owned, independently managed subsidiary located in another member state or between a manufacturer located in one member state and an independent dealer located in another member state can be considered as subject to the jurisdictional authority of the Community.\textsuperscript{136} An exclusive dealing contract prevents the manufacturer from delivering directly to anyone other than the exclusive dealer located within the contract territory. Therefore, an exclusive dealing contract can be viewed as an attempt to erect trade barriers by private agreement and therefore liable to affect trade between the member states, within the meaning of article 85(1).

An agreement may be said to prevent, restrict, or distort competition if, the effects of the agreement or even the mere agreement itself in light of the economic context within which it is to be implemented, is such that the agreement can be viewed as intending or effectuating the elimination, restriction, or distortion of the competitive rivalry between firms located within the Common Market which would occur absent the agreement.\textsuperscript{137}

An exclusive dealing agreement between parties located in dif-
different member states may theoretically be considered to prevent, restrict, or distort competition. Pursuant to an exclusive dealing contract, a manufacturer agrees not to deliver directly to third parties located within the contract territory. These third parties (parallel importers), if they desire to compete with the exclusive dealer for the sale of the manufacturer's product to the consumer, must purchase the goods indirectly from parties located without the contract territory. The costs incurred by these parallel importers will always be greater than the costs incurred by the exclusive dealer who purchases the goods directly from the manufacturer. The parallel importers will theoretically be unable to sell the goods at a price which is less than the price at which the goods are sold by the exclusive dealer and still generate a profit (unless, of course, the parallel importer is considerably more efficient than the exclusive dealer). Thus, an exclusive agreement may theoretically impair intrabrand competition.  

However, a theoretical restriction or prevention of intrabrand competition is apparently not sufficient to cause the agreement to be prohibited by article 85 (1). A determination of the intent of the parties, as indicated by an analysis of the terms of the agreement in light of the economic context in which it is to be implemented, must reveal a "sufficient" degree of injury to competition. If an analysis of the agreement itself does not reveal a "sufficient" degree of injury to competition, the agreement will not be prohibited by article 85 (1) unless the agreement actually results in a prevention or "perceptible" restriction of competition.

It would thus appear that exclusive dealing agreements are not per se violations of article 85 (1). For example, if the manufacturer possesses a relatively small position on the market or if the manufacturer's product is relatively new, it may be determined that parallel imports would not have occurred in the absence of the agreement. It would therefore appear, in light of the agreement's projected economic impact, that it is not intended to restrict competition. Moreover, if parallel imports would not have occurred in the absence of the agreement, then the agreement cannot be said to prevent competition between the parallel importer and the exclusive dealer. Finally, if parallel imports would not have occurred in the absence of the agreement, third parties will not, pre-

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138 See text accompanying notes 52-64 supra.
139 See text accompanying notes 65-67 supra.
140 See text accompanying notes 68-74 supra.
sumably, complain about the agreement, and the parties should not find it necessary to institute legal proceedings to prevent parallel imports. The agreement would thus appear not to "perceptibly" restrict competition. Therefore, it would seem that in these circumstances, the agreement would not be prohibited by article 85(1).

In light of the purpose of the rules governing competition contained in the Treaty of Rome, it is clear that the court was correct in holding that article 85(1) of the treaty applies to vertical agreements as well as to horizontal agreements. The court was also correct, in light of this purpose and in light of the express wording of article 85(1), in holding that article 85 and not article 86 applies to exclusive dealing agreements. However, due to the less stringent requirements of article 86, the court's decision on this point may stimulate a number of vertical integrations.

The court's interpretation of the jurisdictional clause contained in article 85(1) ("liable to affect trade between the Member States"), in light of the type of agreement before the court, is also correct. If the objectives of the treaty are to be achieved, private agreements which impede the achievement of these objectives must be prevented. Because the Community institutions were specifically created in order to facilitate the realization of the treaty objectives, it is desirable that the Community be granted the most extensive jurisdictional authority with respect to private agreements which threaten the achievement of Community goals as is consistent with the treaty's delicate division of authority between the Community and the individual member states.

The court's incorporation of a "rule of reason" into its interpretation of article 85(1) may be subject to criticism. It may be true that, from the point of view of competitive theory, an exclusive dealing agreement under certain circumstances may represent the only manner in which the manufacturer may enter a new market and may thus be beneficial to competition. However, it would appear that if an exclusive agreement is to be permitted under these circumstances, the appropriate means of granting permission would be by virtue of article 85(3) which, as the court itself noted, is to be applied separately and apart from article 85(1).

The incorporation of a "rule of reason" into article 85(1) may

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141 In light of these purposes, the Commission's hostility to agreements prohibiting parallel imports and reexports, see Decision of the Comm'n on Grundig-Consten Agreement, 1 CMR ¶ 2743 (EEC Comm'n 1962); Proposed Group Exemption arts. 2(5), 2(6), 2 CMR ¶ 9125, at 8275 (Aug. 26, 1966), which is undoubtedly correct.

142 See text accompanying notes 38-50 supra.
perhaps be explained in an attempt to maintain a balance in the division of authority between the Community and the judiciary of the individual member states. However, the flexibility now possessed by the national courts in their application of article 85(1) may jeopardize the accomplishment of the treaty's goals and may open the door to many varying interpretations of article 85(1). Moreover, this flexibility and the possible consequent variance in interpretation may encourage individuals to shun the difficulties involved in notifying the Commission of their agreements.

Just as the European Economic Community represented a new international phenomenon, so the rules of competition contained in the Treaty of Rome represented a relatively new phenomenon in Western Europe. Because the experience of the American judiciary in interpreting the antitrust laws of the United States was not entirely apposite to the interpretation of the Treaty of Rome, the Commission and the court were in the position of beginning anew in their attempt to interpret article 85 as it applies to exclusive dealing agreements. It must therefore be admitted that although the decisions of the court and those of the Commission are not entirely satisfactory, they certainly represent a significant contribution to the attempt to fuse the six formerly independent national markets into one common market.
