THE APPLICATION OF ARTICLES 85 AND 86
OF THE EC TREATY
BY NATIONAL COURTS

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Decentralised enforcement of EC competition law through private litigation is actively encouraged by the Commission and has been the focus of attention for the last six years. Efficient decentralised enforcement would enable the Commission to focus on essentials and to attune competition policy to the Community's rapid economic changes and looming enlargement. This, together with the fact that national courts possess certain powers the Commission lacks, makes decentralised enforcement of EC competition law increasingly necessary and desirable.

Enforcement of EC competition law by national courts is not without problems. These problems are the focal point of the thesis. It is submitted that they constitute the main reason why national courts are still not widely applying EC competition law and, unless some are resolved, may prevent national courts from becoming a realistic alternative forum in the future. The thesis aims to assess most of the existing or expected problems and to propose some constructive solutions. The problems have been divided into two categories.

The first category comprises problems arising at national level including issues of international private law and domestic procedural law, simultaneous application of EC and domestic competition law and the economic nature of EC competition law. The second category is confined to problems caused by the wording and arrangement of Articles 85 and 86. The trifurcation of Article 85, the corresponding division of powers between the Commission and national courts and the possibility of parallel proceedings are all factors preventing national courts from enforcing EC competition law fully and independently.

The assessments made and suggestions offered in this thesis are intended to serve as a contribution to the current debate on how to achieve a better use of the Commission's resources and a more efficient and widespread involvement of national courts in the years to come.
I wish to thank Professor Valentine Korah for her wonderful supervision and unwavering support. With her tremendous knowledge of case law and wide experience in economics and legal practice, she was an invaluable source of inspiration and dialogue. Her comments were always Shockingly accurate. She also pushed me from one deadline to another, something I needed because I had an irresistible tendency to drift off into the periphery.

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Coby van Wijk
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1. INTRODUCTION

1.1. Direct effect of Articles 85 and 86

Articles 85 and 86 of the EC Treaty are the two core provisions of EC competition law. Article 85 (1) prohibits agreements or concerted practices between undertakings that may affect trade between Member States and have as their object or effect the restriction or distortion of competition within the Common Market. Article 85 (2) nullifies provisions in such contracts that restrict competition and Article 85 (3) provides for the possibility of exemption from Article 85 (1) and (2). Article 86 prohibits abuse by one or more undertakings of a dominant position within the Common Market or a substantial part of it in so far as it may affect trade between Member States.

The Commission has the task of monitoring, applying and enforcing the competition rules. It is empowered to investigate infringements and to bring violations to an end. In performing this duty, the Commission is subject to the supervision of the Community Court and, since the adoption of the Single European Act, the Court of First Instance.

In addition to enforcement at EC level, the competition rules can be relied upon at national level in private proceedings before the courts of the Member States. Articles 85 and 86 must be applied directly by national courts without the need for further implementing legislation. The reason lies in the special nature of EC law.

In contrast to general principles of international law and the law of Treaties, all EC law is directly applicable in that it forms an autonomous and integral part of the internal legal order of the Member States and is independent from their national laws¹. Moreover, many provisions of EC law, including Articles 85 and 86, produce direct effect in relations between individuals. As a result, individuals harmed by an infringement of Article 85 or 86 are able to rely upon these provisions and

enforce the prohibitions directly against the offending undertakings in a private action before a national court. The national courts of the Member States, in turn, are under a duty to safeguard the rights and obligations derived from Articles

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^ This was confirmed in 1962, when Regulation 17 (J.O. 1962, 204) was adopted. During the first years of the Community, there were three theories on the direct effect of Articles 85 and 86. See *Picanol, Remedies for Breach of Articles 85 and 86 of the EEC Treaty: a review*, [1983] 2 L.I.E.I. p 2.

One theory was that the provisions set out general principles which had to be made more concrete by regulations issued under Article 87. See for example, *Brasserie Henry Fumck v Kieffer*, Tribunal de Commerce Luxembourg, 8 December 1960, Pasicrisie Luxembourgoise XVIII, p 553. Here the Luxembourg court held that Article 86 of the Treaty was formulated in terms too general and imprecise for the court to apply, although the contracting states intended the provision to be self-executing and impose rights and obligations immediately on individuals (my translation from French).

The second theory contended that, although Articles 85 and 86 were directly applicable, this was only to the extent that these provisions allowed the authorities of the Member States and the Commission to take action against firms breaching the provisions. This theory was partly sustained by the Community Court in its first preliminary ruling on EC competition law: *De Geus v Bosch*, case 13/61, [1962] E.C.R. 45 [1962] C.M.L.R. 1. By the time this case came before the Community Court, Regulation 17 had been adopted and the Court therefore upheld this theory only for the period prior to the date of enactment the Regulation. This led to the doctrine of provisional validity for agreements in existence before Regulation 17 was enacted. Provisional validity is discussed below at 5.2.1.

The adoption of Regulation 17/62 in March 1963 led to the uniform rejection of the first two theories in favour of the third. The third theory, still applicable today, prescribes that both Article 85 and 86 produce direct effect in relations between individuals and create direct rights. National courts of the Member States are required to safeguard these rights and infringements may therefore be the subject of a private action in a national court or arbitration tribunal. It further flowed from general principles of EC law that the substantive provisions of EC competition law must be applied as an independent system, even in cases already subject to domestic competition rules. In doing this, national courts apply their own procedural rules.

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"As the prohibitions of Articles 85 (1) and 86 tend by their very nature to produce direct effects in relations between individuals, these Articles create direct rights in respect of the individuals concerned which the national judges must safeguard".
85 (1) and 86 and in this process, the sanction of nullity laid down in Article 85 (2) may also be applied*.

Another well established characteristic of EC law is its supremacy; it has absolute and unconditional priority over conflicting domestic law of the Member States, irrespective of whether the domestic law was adopted before or after EC law. Supremacy of EC law also means that national courts are bound by the principles laid down by Community law and the decisions of the European Court of Justice$. The enforcement of EC


More generally, Article 5 of the EC Treaty lays down the principle of cooperation:

"Member States shall take all appropriate measures, whether general or particular to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Commission's task. The Community Court used this principle to stress the duty of national courts. See for a recent example: J. van Schindel and J.N.C. van Veen v Stichting Pensioenfonds voor Fysiotherapeuten joined cases C-430/93 and C-431/93 of 14 December 1995, [1996] 1 C.M.L.R. 801, at para 14. See also 2.2.5.3. below.


$ Costa v ENEL, case 6/64, [1964] E.C.R. 585 at 594. The Community Court explained that the EC Member States have limited their sovereign rights in favour of the new Community legal order:

"The final limitation of their sovereign rights results from the transfer of the rights and duties corresponding to the Treaty provisions from the national legal order into the legal order of the Community [...]."

In Simmenthal, case 106/77 [1978] E.C.R. 629 at 645, the duty of national courts was explained:

"A national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing on its own motion to apply any provision of national legislation, even if adopted subsequently, and it is not necessary for the court to
competition law by national courts is first and foremost the result of the direct effect of EC law. The issue of supremacy comes into focus only when the full and uniform application of EC competition law is hindered by contrary provisions of national (competition or other) law*.

Finally, in addition to ordinary national courts and the Commission, EC competition law can be enforced by national competition authorities, provided the national law has conferred the necessary powers on them*. "National authorities" comprise not only national competition authorities but also courts and tribunals charged exclusively with competition cases*. Unlike request or await the prior setting aside of such provisions by legislative or other constitutional means". See further on supremacy of EC law in the context of competition law and on case law from various EC Member States, *Stockmann, EEC Competition Law and Member State Competition Laws*, [1987] Fordham Corporate Law Institute, p 267 ff.


* At this moment (beginning 1998), out of the fifteen Member States, only seven have legislation allowing the relevant national authority to apply Articles 85 and 86, whereas eight do not. The seven that allow the authorities to apply the provisions are: Belgium, France, Germany, Greece, Italy and Portugal and Spain (Portuguese authorities cannot, however, impose fines for infringements of Community law). The eight who do not are: Austria, Denmark, Finland, Ireland, Luxembourg, the Netherlands, Sweden and the United Kingdom. In its Annual Competition Report of 1996, at p 26, the Commission expressly invited these Member States to adopt the required legislation.


"[...]. are not to be regarded as authorities of a Member State; they derive their authority to apply Articles 85 and 86 from the direct effect of the provisions." (para 15) Authorities of the Member States were held to include courts especially entrusted with the task of applying domestic legislation on competition or that of ensuring the legality of
ordinary national courts, national authorities do not derive their competence to enforce EC competition law from the direct effect of Articles 85 and 86. They are expressly empowered by Article 88 of the Treaty and Article 9 of Regulation 17. Whilst the enforcement of EC competition law by national authorities presents interesting considerations and becomes of increasing importance⁹, this book is confined to ordinary national courts only.

1.2. Competence of the Commission and national courts in respect of the application of Articles 85 and 86

1.2.1. The division of Article 85 into three sections

Article 85 differs from Article 86 in that not all conduct falling within its scope is necessarily prohibited. The Article is divided into three sections: Article 85 (1) prohibits anti-competitive agreements and concerted practices, Article 85 (2) renders prohibited restrictions automatically void and Article 85 (3) provides for a possibility of exemption from the application of Articles 85 (1) and (2). Exemption may be granted to agreements or concerted practices that are within the prohibition of Article 85 (1) but nevertheless desirable or


justifiable in view of aims other than competition. The criteria listed in art 85 (3) include a contribution to improving the production or distribution of goods and the promotion of technical or economic progress. At the same time, consumers should be allowed a fair share of the resulting benefit.

Article 86 is not divided into sections. There is no express provision which provides that conduct (or an agreement) involving one or more companies and constituting abuse of a dominant position is automatically void\(^{10}\) and there is no possibility of obtaining an exemption in justified cases as under Article 85 (3). Justification for exclusionary or exploitative conduct prevents the conduct being treated as abusive and Article 86 from being applied\(^{11}\).

1.2.2. Concurrent competence in respect of Articles 85 (1) and 86

The jurisdiction of national courts to decide cases based on Articles 85 and 86 does not depend on the Commission not having opened proceedings\(^{12}\).

Unlike the specialist national competition authorities who loose competence under Community law in favour of the Commission once the latter has initiated a procedure\(^{13}\), the jurisdiction of ordinary national courts is concurrent with the competence of the

\(^{10}\) But see 2.2.5.2. below.

\(^{11}\) See also the last paragraphs of 1.2.3. and 7.1.3. below.


\(^{13}\) Regulation 17/62, art 9 (3) provides:
"As long as the Commission has not initiated any procedure under Articles 2, 3 or 6, the authorities of the Member States shall remain competent to apply Article 85 (1) and Article 86 in accordance with Article 88 of the Treaty; they shall remain competent in this respect notwithstanding that the time limits specified in Article 5 (1) and in Article 7 (2) relating to notification have not expired".
Commission, even where an agreement has been notified or the Commission has started proceedings pursuant to its powers under Articles 2, 3, 6 or 9 (3) of Regulation 17/62.

The reason the Commission gave for this distinction is that, unlike national authorities (and the Commission), national courts are not responsible for matters relating to policy orientation. National courts are responsible for applying the provisions in the context of private litigation; in other words, to safeguard the rights of private individuals in their relations with one another.

The Court confirmed in BRT v Sabam that to deny national courts jurisdiction in cases where the Commission has become involved would deprive individuals of the rights they derive directly from the Treaty. The Community Court thus drew a clear distinction between national courts, applying Articles 85 and 86 by virtue of their direct effect, and authorities of the Member States who derive their competence from Article 88 of the Treaty. As mentioned at 1.1. above, the latter category is to include courts specialised in the application of domestic competition law. Those courts should be clearly distinguished from the ordinary national courts discussed in this book.

1.2.3. Division of competence in respect of Article 85 paras (2) and (3)

The principle of concurrent competence is subject to an important qualification. The competence of the Commission and the


15 See, for example, Plessey Co. plc v General Electric Co. plc and Siemens, (English High Court) [1990] E.C.C. 384, Moritt J:

"[...] there can be no question of the national courts abdicating responsibility in favour of the Commission merely because the Commission have a concurrent jurisdiction. Moreover it is clear that the Commission does not wish them to do so".

jurisdiction of national courts is joint in respect of the application of Article 85 para (1) and Article 86 but not in respect of Article 85 paras (2) and (3).

National courts have exclusive jurisdiction to apply and enforce Article 85 (2) and thus declare provisions that infringe Article 85 (1) null and void despite their possible enforceability under national law'.

The application of Article 85 (3), i.e. the granting of exemptions, is within the sole competence of the Commission,


Sometimes parties to an agreement may choose to ignore its invalidity under Article 85 (2), for example, where both parties are happy to continue to comply with a price fixing cartel. As long as no action is taken by third parties or the Commission, the agreement may be tolerated between them. This is a dangerous practice, however, always bearing the risk of one of the parties having to enforce the agreement against another party, a third party instituting an action in tort in a national court, or of being found out by the Commission. The Commission may open proceedings on its own initiative or following a complaint or information from third parties. The Commission can impose fines of up to a maximum 10% of the parties' turnover of the previous year where it can be established that art 85 or 86 were deliberately or negligently infringed. The turnover has been held to be that of the entire group for all products worldwide (Pioneer, case 100-103/80, [1983] E.C.R. 1825). It has not proved difficult to establish intention or negligence and ignorance of the law is no excuse if the firms ought to have known that their conduct was anti-competitive. The Community Court and the CFI rarely control the level of fines imposed by the Commission, but conclude merely that a firm cannot have been unaware of the fact that the conduct infringed EC competition law. A fine of 75 million ECU was imposed on a single firm in Tetra Pack II, Commission Decision 92/163, [1992] 4 C.M.L.R. 551, appeal CFI: case T 83/91 [1994] E.C.R. II 762, [1995] C.E.C. 34, confirmed on appeal by the Court of First Instance: (C-333/94P), Judgment of 14 November 1996. 248 million ECU in aggregate was imposed on 24 cement producers in The Cement Cartel, case 94/815, O.J. 1994 L 343/1 [1995] 4 C.M.L.R. 327, and 104.4 million on a Steel Beam Cartel, under the ECSC Treaty in The Community v Peine Salzgitter AG and others, [1994] L 116/1, [1994] 5 C.M.L.R. 353. Both decisions are subject to appeal to the Court of First Instance.
subject to appeal to the Community Court. This exclusive power to grant exemptions includes both the adoption of individual exemptions and block exemption Regulations and was effected through the adoption of Regulation 17, Article 9 (1)\(^\text{18}\) and through various empowering Regulations that brought block exemptions within the Commission's exclusive competence\(^\text{19}\).

The trifurcation of art 85 into sub (1), (2) and (3) and the corresponding division of powers between the Commission and national courts in respect of art 85 (2) and (3) give rise to many complications for national courts. National courts are limited in their ability to assess agreements under Article 85 since all they can do is determine whether or not an agreement falls within the scope of Article 85 (1). Strictly speaking, it is not possible to take into account any of the justifications upon which an exemption would be based. The problems caused by this limitation are discussed in part II below.

Since Article 86 is not divided into a prohibition and a possibility of exemption, justification for exclusionary or exploitative conduct prevents the conduct from being treated as abusive and thus the application of Article 86 altogether. Justification is therefore relevant in national courts and their assessment of conduct under Article 86 is not restricted.

\(^{18}\) Art 9 (1) of Regulation 17/62 provides:

\(^{19}\) The adoption of block exemptions is within the Commission's exclusive competence pursuant to: Regulation 19/65 (for all types of distribution and for licensing), Regulation 2821/71, (for R & D and specialisation) Regulation 1534/91 (for the insurance sector), Regulation 151/93 (extension of the scope of specialisation, R & D, patent licensing and know-how licensing) and Regulations 101/68, 4056/86, 3975/87 (various forms of transport).
1.3. Not many cases in national courts so far

At first sight, one would expect that the fact that national courts enjoy concurrent jurisdiction in enforcing EC competition law and are under a duty to safeguard the rights of individuals derived from art 85 and 86 would have made national courts important alternative fora for the enforcement of competition law from early onwards. Decentralised enforcement of EC competition law by national courts is also in line with the principle of subsidiarity which has become such prominent a discussion topic amongst the Member States that, in 1993, it was incorporated explicitly in the EC Treaty.20

Nevertheless, despite the fact that the national courts have been required to apply EC competition law since 1962 when Regulation 17 came into force (or the subsequent date of the pending Member State's accession to the Community) and the Community Court's express confirmation of this requirement in 197421, national courts have not been called upon frequently to apply EC competition law, not even in those states that have

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20 Article A of the Treaty on European Union states that decisions should be taken as closely as possible to the citizen and Article 3 (b) of the EC Treaty (as inserted by the Treaty on European Union) states:

"The Community shall act within the limits of powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty."


22 Information about the number of national proceedings involving Article 85 or 86 is difficult to obtain and the information that does exist is unreliable. See on this problem of inconsistent and incomplete data and the need for a database with national precedents, 2.2.7.4. and 9.5.1. below.

Based on a preliminary survey of some 15,000 decisions of national courts undertaken by the Research and Documentation
been EC members since 1957. Although the situation has changed over the last few years (see 1.4. below), even today the enforcement of EC competition law remains primarily in the hands of the Commission and as yet we cannot rely on a rich body of historically evolving case law from domestic courts."

1.3.1. Commission's sole power to grant exemptions

One reason for the noted lack of involvement of national courts is, of course, the fact that the Commission has the sole power under Article 85 (3) to grant exemptions. It is the only organ

<table>
<thead>
<tr>
<th>Year Range</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>1960 - 1969</td>
<td>43</td>
</tr>
<tr>
<td>1970 - 1979</td>
<td>96</td>
</tr>
<tr>
<td>1980 - 1989</td>
<td>311*</td>
</tr>
<tr>
<td>1990 - 1993</td>
<td>79</td>
</tr>
</tbody>
</table>

See for numbers of national judgments in 1995 and 1996 provided by the statistics division of the Community Court, 1.4.1. below, at footnote 38.

* This figure includes 104 cases concerning the role and activities of State or local monopolies in France during the period 1985 - 1989. It may involve double counting and does not take account of the relevance of Articles 85 and/or 86. Hall, Procedure and Enforcement in EC and US Competition Law, Proceedings of the Leiden Europa Instituut Seminar on User-friendly Competition Law, ed. Slot and McDonnell, 1993, p 41.

Nearly 100 cases were reported to exist in the UK alone for the same period, some 60 of which contain some substantive discussion of EC competition law. All dealt with Articles 85 or 86 except two that concerned Article 90. EEC Competition Law in National Courts, part I, United Kingdom and Italy, by Shaw and Ligustro, ed. Behrens, 1992, p 83.

Compare [1993] Fordham Corporate Law Institute, p 518 where Bourgeois mentions the following figures based on reported final judgments: 61 in 1989, 36 in 1990, 22 in 1991 and 4 in 1993 until October of that year when he presented these figures at the Roundtable. During the same Roundtable, however, Pijnacker referred to an average of some 20 cases each year in the Netherlands where Article 85 or 86 is relied on. Same Chapter, at p 520.

The T.M.C. Asser Institute in the Hague, The Netherlands, used to keep a database of judgments but it is far from complete and has not been updated for quite some years.

See previous footnote and para 1.4.1. footnote 38.
that can receive notifications and those comprise a large part of the workload. But only a tiny proportion of notifications\(^4\) results in individual exemptions. The remainder of enforceable notified agreements is dealt with by way of negative clearance or comfort letter and, apart from the type of comfort letters stating that the agreement merits exemption under Article 85 (3)\(^5\), these involve the scope of Articles 85 (1) and 86, an area in which national courts enjoy concurrent jurisdiction\(^6\). This cannot, therefore, have been the only reason for the reluctance to use domestic private proceedings.

1.3.2. Unfamiliarity with EC competition law and the possibility of litigation

In contrast to the Commission's competition division DG IV who deals exclusively with EC competition law, national courts are not specialised in the direct application of Articles 85 and 86. Many judges, especially senior ones, are of a generation for which courses in EC competition law were not common. Even today it is taught mainly at post graduate level. This relative unfamiliarity may have functioned as a deterrent for quite some time\(^7\).

Unfamiliarity may also have been the reason for a lack of awareness, on the side of parties involved in competition issues, of the possibility to opt for proceedings in national courts. For

\(^4\) The Commission issues on average four or five exemption decisions each year. See 5.4. and 6.1. below.

\(^5\) See on comfort letters, 2.3.2.4., 5.4.1.3., 5.4.2.2. and 5.6. below.

\(^6\) Domestic judges cannot provide upon demand a declaration in the form of negative clearance or a comfort letter stating that the agreement is outside the scope of the prohibition of article 85 or 86 but they can enforce an agreement on the basis that it falls outside the scope of Article 85 or 86 which amounts to much the same thing. In fact, such a decision is often more valuable than negative clearance or a comfort letter. See chapter 5 below.

\(^7\) This applies in particular to Greece even today. See 8.2.3. below.
a long time, firms have tried to comply with EEC law only because of the possibility of complaints by third parties and interference by the Commission (which might impose a fine) after sunk costs have been incurred. Articles 85 and 86 were regarded as imposing obligations rather than creating tangible rights and remedies.

The cases that have been brought before national courts relate mostly to situations where litigation was started on the basis of national law, for example, breach of contract or intellectual property rights and EC competition law was thereby raised as a defence to justify the breach (the "Euro-defence"). Many of the reported and unreported decisions involved preliminary actions such as actions for interim relief, applications for discovery of evidence in intellectual property cases and actions for striking out Euro-defences. In Chemidus Wavin v Teri, for example, the English Court of Appeal applied Article 85 (1) to the terms of a patent license in an action for recovery of royalty payments under that license.

Euro-defences tend not to be very popular with those judges that adhere strongly to the notion of pacta sunt servanda but several have nevertheless succeeded. The majority of cases was settled, however, and never came to court for final decision.

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" See on policies regarding the issues of investment and sunk costs, 5.2.2.1, 6.3.1, 7.1. and 7.2. below.

" An extensive number of examples (including recent ones) from all Member States except Austria and Sweden is provided in: The Application of Article 85 and 86 of the EC Treaty by national courts in the Member States, a report compiled by Braakman, published by the Commission, DG IV, July 1997.

" See, for an example from the UK, Society of Lloyd's v Clementson and another (CA Independent 11 November 1994). Here the appeal against the striking out of the Euro defence was allowed by the Court of Appeal on the basis that it was arguable that Lloyd's infringed Article 85. The Court of Appeal left the matter to be determined finally in a trial. On 7 May 1996, Creswell J held in favour of Lloyds and rejected Mr. Clementson's defence on the facts.

The possibility of relying on EC competition law as a sword, as a ground to start an action against a party allegedly infringing Article 85 or 86 of the EC Treaty in order to stop harmful activities or increase competition, has taken a long time to become known, let alone used. Even today, some thirty-five years after the provisions came into effect, there are not many examples of the latter type of case.

In any event, it used to be relatively easy to complain to the Commission, at little cost and little involvement and the Commission used to be receptive of complaints.

1.4. Change

The situation has changed over the past few years. Although an important part of this book is to illustrate, from chapter 2 onwards, that today there are still many reasons for reluctance on the use of private proceedings, the reasons set out in the previous section have now mostly disappeared.

1.4.1. Increased awareness of EC law in private litigation

Over the last decade, a number of landmark cases in various areas of EC law have gradually increased awareness of the rights of

\[\text{Complaints can be submitted anonymously. This may be an advantage for small business harmed by large influential competitors, who are able to submit facts to the Commission. See 2.1. below.}\]

\[\text{See also Bourgeois, [1993] Fordham Corporate Law Institute p 478. Bourgeois refers to lack of familiarity with EC competition law and the prevailing culture and philosophy of the judiciary and the parties themselves as part of the usual explanation as to why there is relatively little civil litigation implicating Articles 85 and 86 in national courts. He remarked that "it is doubtful whether the last two factors, which played a role in the past, are still significant". He also referred to the continuing legal alignment of the domestic competition laws of the Member States with the EC rules to indicate a large measure of political acceptance throughout the EC of the value of the EC competition provisions. See on this soft harmonisation process of domestic competition laws, 2.3.1. and 2.3.3. below.}\]
individuals created under directly effective EC law. National courts have gained considerable experience and have recognised their responsibilities in the enforcement of EC law in general. They have become more cognizant of the importance of EC law and their decisions have become more explicit. In Woolwich BS v Inland Revenue Commissioners, for example, the long-established common law rule that payments made as a result of an unlawful demand by a public authority were normally unrecoverable was overruled. The majority of the English House of Lords held:

"At a time when Community law is becoming increasingly important, it would be strange if the right of a citizen to recover overpaid charges was to be more restricted under domestic law than it was under European law".

The House of Lords thus confirmed the principle that it is unacceptable that the protection of an individual's rights should vary according to whether those rights arise under domestic law.

National courts have a duty to ensure the legal protection of individuals which arise from the direct effect of EC law. Two requirements were added to this principle: first, procedural conditions and remedies in the protection of these rights may not be less favourable than those relating to similar actions of a domestic nature and, secondly, procedural conditions may under no circumstances make it impossible in practice to exercise the rights which a national court has a duty to protect. Amministrazione delle Finanze dello Stato v San Giorgio, case 199/82, [1983] E.C.R. 3595, [1985] 2 C.M.L.R. 658.

National courts must provide an individual with remedies in damages from the State in cases where the State has breached EC law Francovich and Bonifaci v Italy (Francovich), case 6/90 and 9/90 [1991] E.C.R. I 5357, [1993] 2 C.M.L.R. 66, [1992] I.R.L.R. 84. This is even so where under national law breach of a similar right would only give rise to judicial review under which damages are not normally recoverable.

Remedies must be effective and compensation awarded must have a deterrent effect: Van Colson and Kamann v Lan Nordrhein-Westfalen, case 14/83, [1984] E.C.R. 1891.

A domestic rule which prohibits the granting of interlocutory injunctions against the State must be set aside if that rule is the sole obstacle against the granting of interim relief: R. v Secretary of State for Transport, ex parte Factortame and others (Factortame), case 213/89, [1990] 3 C.M.L.R. 1.

or under Community law\textsuperscript{36}.

Additionally, a new generation of lawyers has now been educated with much greater familiarity of EC law or even full specialisations, not only in respect of the provisions of the Treaty, but also the Community Court's case law.

It is also being more widely recognised that proceedings in national courts offer certain advantages over Commission proceedings. National courts have powers the Commission lacks\textsuperscript{37} such as the power to award damages, to issue an injunction, or to award legal costs.

These developments in combination may have contributed to a modest expansion of the number of proceedings in national courts in the last few years. This cannot be said with certainty, however. It is not possible to estimate the extent of this supposed increase because it is extremely difficult to gather all cases where Article 85 and 86 were considered by national courts from the different Member States. Many cases have led to settlements out of court and those are particularly hard to trace. Moreover, cases in which judgment was rendered have not been recorded so far on a continuing basis, not even within one single Member State and, as a result, no reliable numbers exist\textsuperscript{38}. This situation is criticised at 2.2.7.4. below.


\textsuperscript{37} See on the differences between the powers of national courts and the Commission 2.1. below.

\textsuperscript{38} See for (controversial) numbers up to 1993, 1.3. supra at footnote 22. The Community Court compiled a list of the national judgments that came to its attention in 1995 and 1996. This list was sent by the Commission to the relevant authorities of the Member States in November 1997. The total number of cases decided in 1995 is 114 and in 1996 there have been 96. The numbers are distributed as follows:

<table>
<thead>
<tr>
<th>Member State</th>
<th>1995</th>
<th>1996</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Belgium</td>
<td>17</td>
<td>11</td>
</tr>
<tr>
<td>Germany</td>
<td>6</td>
<td>11</td>
</tr>
<tr>
<td>Denmark</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>Spain</td>
<td>13</td>
<td>11</td>
</tr>
</tbody>
</table>
Some authors report a considerable increase in the number of cases in the last few years\(^9\). It should be recognised, nevertheless, that the Commission is still the preferred forum by far and, in comparison to the number of cases brought to its attention, there is still very little enforcement of EC law by national courts. The next section will explain that the Community Court's judgment in *Automec II* is expected to contribute to a further increase in domestic litigation in the future.

<table>
<thead>
<tr>
<th>Country</th>
<th>1998</th>
<th>1997</th>
</tr>
</thead>
<tbody>
<tr>
<td>France</td>
<td>29</td>
<td>21</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>3</td>
<td>5</td>
</tr>
<tr>
<td>Italy</td>
<td>14</td>
<td>13</td>
</tr>
<tr>
<td>Ireland</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Netherlands</td>
<td>22</td>
<td>15</td>
</tr>
<tr>
<td>Portugal</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Finland</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Sweden</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

It should be emphasised, however, that this number does not represent all judgments made and settlements are not included. Since there is no duty for national courts or Member States to compile and report cases dealing with Articles 85 and 86 and there is no single institution that compiles all decisions of national courts, none of the figures currently available seems reliable.

\(^9\) Green and Robertson, for example, write that in the UK there has been a large increase in national proceedings in the last few years. They estimate that, today in the UK at any one time, there are between 50-75 actions for damages under Article 85 and 86 proceeding through the Courts. *Commercial Agreements and Competition Law*, 2nd ed. 1997, p. 383.

See also Whish, The Enforcement of EC Competition Law in the Domestic Courts of the Member States, *Current and Future Perspectives on EC Competition Law*, 14 European Monographs, 1997, ed. Gormley, p 74: "The competition rules of the Treaty are being invoked with increasing frequency in domestic litigation, although one should perhaps add that the success rate has been variable".

Note, however, that a Commission official said, in November 1997, that the Commission has not noticed any increase in the number of cases that comes to its attention via the annual reports it receives from the Member States and the information it obtains from the Court of Justice.
1.4.2. Rejection of complaints on the basis of priority - Automec II

Increased knowledge and awareness of EC competition law is an important requisite for its application in national courts but it is not the main drive behind the presumed expansion in private litigation. The most important incentive for increased involvement of national courts is practical and has come from the Commission itself. Its relatively small service with limited resources has been burdened by an enormous workload for many years. Today, the Commission can no longer afford to be the exclusive forum for the enforcement of EC competition law and it cannot be receptive to all complaints.

Increasingly, complaints will only be accepted if they are within the Commission's exclusive competence or if the Commission considers them of political, economic, or legal significance. In addition to the cases within its exclusive competence such as those involving large mergers, State aid, State measures, public undertakings and undertakings within Article 90 (1) and (2) of the Treaty, the Commission will concentrate on international cartels, cases raising a new point of law, and all other cases having a particular Community interest. The remainder should be dealt with at national level, where necessary with assistance from the Commission.

In the past, there was no clear way of finally rejecting a complaint but in Automec II, the Court of First Instance

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40 See the scenario described at 1.5. below.

41 Notice on cooperation between national authorities and the Commission in handling cases falling within the scope of Article 85 or 86, O.J. C 313, 15.10.97, p 3, paras 33 - 36.


43 Article 6 of Regulation 99/63 is the only provision governing the rejection of a complaint. The Article provides as follows:

"Where the Commission, having received an application pursuant to Article 3 (2) of Regulation 17, considers that
explicitly confirmed the discretion of the Commission to reject complaints on the basis of priorities". It held that, in matters in respect of which the Commission is not exclusively competent, the Commission is entitled to set priorities in its enforcement activities. In particular, it is not obliged, in cases brought to its attention by way of complaint submitted under Article 3 of Regulation 17, to proceed to a decision on the

on the basis of the information in its possession there are insufficient grounds for granting the application, it shall inform the applicants of its reason and fix a time limit for them to submit any further comments in writing". The Article requires the Commission to give a preliminary view to the complainant prior to any rejection of the complaint. If the Commission does not produce a view, the complainant can use the procedure under Article 175 to compel the Commission to respond under Article 6. Article 6 also requires the Commission to permit the complainant time in which to adduce new evidence. An "Article 6" letter is therefore not a final decision.

The Court of First Instance held that an Article 6 letter is not a recommendation or opinion for the purposes of Article 175 (3) (Asia Motor France, case T-28/90 [1992] 5 C.M.L.R. 431 at para 29) but instead an act constituting the definition of the Commission's position within the meaning of Article 175 which renders an action for failure to act under that Article inadmissible (GEMA, case 125/78 [1979] E.C.R. 3173, [1980] 2 C.M.L.R. 177, para 17). The Court did not determine whether an Article 6 letter constituted a decision which might be challenged in an action for annulment under Article 173. It was not until its judgment in Automec II that the Court expressly concluded that an Article 6 letter is not a decision, see below, next footnote.

In order to deal with the uncertainty, the Commission adopted the practice to issue formal decisions in which it confirmed the rejection in the Article 6 letter upon request of the complainant in order to enable the complainant to challenge the matter under Article 173. Such decisions confirming the rejection of the complaint need not contain a ruling on the existence of the alleged infringement (GEMA, [1980] 2 C.M.L.R. 177 at p 195) and later confirmed in Automec II, para 75) and do not estop the Commission from investigating the alleged infringement at a later date. Although it was done regularly, this practice could not be adopted by the Commission as policy to set priorities until the Court confirmed its legality in Automec II, para 47.

substance of the complaint under that same Regulation*®.

This means that undertakings have no direct right to obtain a decision from the Commission on the existence of the infringement, except where the Commission has exclusive competence as under Article 85 (3). In summary, the judgment ruled that the Commission can reject a complaint where:

- the matter is not of sufficient importance to the Community to be treated by the Commission, and

- can be handled in a national court and,

- absent a showing to the contrary, the national court seems able to give satisfactory protection to safeguard rights derived from Article 85 (1)2".

Provided that the Commission considers a complaint carefully and gives a good reason in its letter under Article 6 of Regulation 99/63*® for not pursuing it, the Commission can

"Slot indicated that this may not be the case for shipping since Article 10 of block exemption Regulation 4056/86 reads "Acting on receipt of a complaint or on its own initiative, the Commission shall initiate procedures to terminate any infringement of the provisions of Articles 85 (1) or 86 of the Treaty by enforcing Article 7 of this Regulation.[...]". In contrast, Article 3 of Regulation 17 reads: "Where the Commission [...] finds that there is an infringement of Article 85 or Article 86 of the Treaty, it may by decision require undertakings or associations of undertakings concerned to bring such infringement to an end".


"Paras 88 - 97 of the judgment.

"See footnote 43 supra. The reasons must be fairly precise. See BEUC and National Consumer Council v Commission, case T 37/92, 18 May 1994, [1994] E.C.R. II 258, where the Court of First Instance did not consider the reasons given by the Commission sufficient.
refuse to proceed to a formal decision on the substance in cases which can be dealt with by national courts. Such good reasons (required under Article 190 of the Treaty) may not be confined to referring in the abstract to a lack of sufficient Community interest. The Commission is subject to an obligation to balance the significance of the alleged infringement as regards the functioning of the common market, the probability of its being able to establish the existence of the infringement and the extent of the investigative measures required for it to perform its task of making sure that Articles 85 and 86 are observed. It is by reviewing the lawfulness of those reasons that the Community Court exercises its responsibility for judicial review of the Commission's action.

The Commission should also take into account any proceedings already started before the national courts and the extent to which the national courts in such proceedings are able adequately to safeguard the rights of the complainant. In Automec II, proceedings initiated by the complainant were already pending in a domestic Italian court and this court was considered to be in a good position to rule on the contractual relationship between the parties.

The judgment poses the question as to what is satisfactory protection. The Community Court held that the Commission does not have to assess whether, in view of the complexity of the case, a particular national court is able to ensure correct

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"Point 68 of the judgment in BEUC (previous footnote). See also Roger Tremblay, Francois Lucazeau and Harry Kerstenberg v Commission, case T-5/93, [1995] II E.C.R. 185, [1996] 4 C.M.L.R. 305, point 62, and BEMIM v Commission, case T 114/92 [1995] E.C.R. II 147 at para 80. In the latter case, the Court of First Instance held at para 86 that where the effects of the infringements alleged in a complaint are essentially confined to the territory of one Member State and where proceedings have been brought before the court by the complainant, the Commission is entitled to reject the complaint for lack of any sufficient Community interest, provided that the rights of the complainant can be adequately safeguarded.

"See also 3.1.1.2. below for criticism on the noted lack of reasoning in the decisions of the Commission and the judgments of the Community Courts."
interpretation of Article 85 and 86. But the Commission should consider in view of the complexity of the case, whether the court is reasonably able to gather the factual evidence, and whether disclosure is not restricted by domestic rules. It appears, however, that the Commission's discretion is mainly subject to the availability of adequate remedies before national courts.

What remedies are considered adequate? The types and extent of remedies available vary considerably throughout the Community. Questions such as to what extent the Commission is obliged to investigate whether effective national remedies are available and whether the law is clear before making a decision not to pursue the case will only be resolved once brought before the Community Court.

In Tremblay, see footnote 48 supra, the Court of First Instance considered at point 67 that:

"the fact that the national court might encounter difficulties in interpreting Articles 85 and 86 is not, in view of the possibilities available under Article 177 of the Treaty, a factor which the Commission is required to take into account." The Community Court subsequently dismissed the appeal, case C 91/95 of 24.10.96. [1996] I E.C.R. 5547.

Tremblay, see previous footnote, point 68.

In paras 93 and 94 of Automec II, The Community Court stated:

"although the national court does not have the power to order an end to any infringement it finds and to impose fines on the enterprises responsible, as the Commission can, it is nevertheless for the national court to apply Article 85 (2) EEC in relations between individuals. By making express provisions for this civil sanction, the Treaty postulates that national law gives the court power to preserve the rights of enterprises which are victims of anti-competitive practices. In the present case the applicant has produced nothing to indicate that Italian law provides no legal remedy which could enable the Italian Court to safeguard its rights in a satisfactory manner." See further D.F. Hall, Enforcement of EC Competition Law by National Courts, Procedure and Enforcement in EC and US Competition Law, Proceedings of the Leiden Europa Institute Seminar on User-friendly Competition Law Ed. Slot and McDonnell, p 47.

See below at 2.2.5.5.
Another, more general, question that arises is whether the court is required to provide remedies under all circumstances. As mentioned at 1.1. above, national courts have a duty to safeguard the rights and obligations derived from Articles 85 (1) and 86. This means that they must make available all of the remedies under national law to the enforcement of the directly effective Articles 85 and 86. Community law also prescribes that remedies must be non-discriminatory, real and no less effective than they would have been in similar circumstances under domestic law. But what if domestic law does not provide any remedies for breach of competition rules? Should the court provide new remedies for cases based on EC law?

At this moment, a definite answer does not exist. When translating the principles established in *Factortame* and *Francovich* in a broader sense, together with the duty of cooperation set out in Article 5 of the Treaty, it is possible to derive justification for an affirmative answer. It seems that Community law may require national courts to give remedies not available in a domestic context where the full effectiveness of Community law may be jeopardised without such remedy. It seems a small step from a duty to provide effective remedies for breaches of EC law and to set aside a domestic rule that forms the sole obstacle against the granting of such remedies, to a duty to apply a proper remedy in cases where domestic law does not provide for any.

An injunction may in some cases suffice since the national court must apply Article 85 (2). The consequences of the nullity of the restrictive clauses might automatically involve

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54 See 1.4.1. footnote 34 supra.
55 See footnote 34 supra.
56 See also Kerse, *EC Antitrust Procedure*, 1994, p 358.
57 Compare also 2.2.5.3 below, discussing the van Schijndel judgment.
58 In *Cutsford v Mansfield Inns*, [1986] 1 C.M.L.R. 1, the plaintiff would not have had any remedies under national law but an injunction was granted.
existing domestic remedies governing the nullity of contractual clauses". The remaining uncertainty can only be resolved through further judgments by the Community Court.

The judgment in Automec II appears to have led to the following position in respect of the rejection of complaints. The complainant is entitled (if necessary by way of the procedure under Article 175) to receive a statement of the Commission under Article 6 of Regulation 99/63\(^\circ\), stating the reasons why the Commission intends to reject the complaint. The complainant is entitled to submit comments. He may produce further evidence and/or good reasons as to why the Commission should deal with the substance.

If the Commission, having considered the comments, reaches a final view rejecting the complaint, the complainant can ask the Commission for a definitive measure confirming this rejection which would enable him to apply for judicial review by the Court of First Instance under Article 173\(^i\). Provided the complainant has a serious case to bring before the Court, he might get such a decision confirming the rejection of the complaint but the Court has not yet answered the question whether a complainant is actually entitled to it.

The opinion of Advocate General David Edward in Automec II went further than the judgment and dealt with the issue. He argued that a complainant is entitled to a decision rejecting the complaint which it may challenge under Article 173 of the Treaty. Where such decision is refused, an action might lie against the Commission for failure to act under Article 175 of the Treaty.

To summarise, a complainant is not entitled to a formal final decision from the Commission under Article 3 of Regulation 99/63 when redress is available in a national court. This

\(^9\) Paragraphs 93 and 94 of the Judgment in Automec II, see footnote 52 above and 2.2.5.2. below.

\(^10\) See footnote 43 supra.

position has been confirmed recently in Tremblay42. As it stands now, it seems that the complainant is also not entitled to a formal decision confirming the rejection of the complaint but that he may well receive one when he wants to bring an action under Article 173.

In essence, Automec II empowers the Commission to decide for itself which cases have priority in terms of the Community, assessed by reference to the facts of the case and the matters of law in issue. The doctrine seems to entrust the Commission with an efficient tool to force decentralised enforcement of EC competition law for cases which have no particular significance. Since national courts are under a duty to deal with cases brought before them, their involvement will be increased by the Commission's refusals provided that the complainants in question decide to litigate. It is expected that the Commission will rely increasingly on the judgment to reduce its workload (including some long-running investigations) and to get national courts more involved43.

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43 Recent examples where the doctrine of Automec II was confirmed by the Court of First Instance are:

BEUC v Commission, case T 37/92, 18 May 1994, [1994] E.C.R. II 258. The Court of First Instance confirmed the Commission's discretion to reject a complaint on the basis of priorities but considered the reasons for this rejection insufficient and annulled the Commission's decision in its letter.


Tremblay, see previous footnote at points 60 - 75.

In this case the Commission referred the case to national courts for lack of a sufficient interest after 14 years of investigation. The Court held that this was not in breach with the principle of legal certainty, despite the fact that the Commission had during all these years never raised the issue of lack of sufficient interest. The Court held that the parties were deemed, when lodging their complaint, to know that they had no right to obtain from the Commission a decision finding that the practices of SACEM which they criticised constituted an infringement of Article 85 and/or 86 (points 76 - 82). Confirmed by the Community Court, case C 91/95, [1996] I E.C.R. 5547.
1.4.3. Further drive for decentralisation - the Commission's Notice

Having ascertained the right to set priorities in the enforcement of EC competition law, the Commission took further steps to encourage the use of private actions by issuing a Notice on cooperation between the Commission and national courts in the application of Articles 85 and 86. The Notice summarises various principles established by the Community Court and sets out the views and policies of the Commission in respect of a more decentralised enforcement of EC competition law. The aim of the Notice is twofold:

- to encourage greater involvement of national courts, and

- to implement and explain the guidelines for national courts that have been established by the Community Court.

See also on the same issue: Bureau européen des médias de l'industrie musicale (BEMIM) v Commission, case T-114/92 of 24 January 1995 [1995] E.C.R. II 147, [1995] 1 C.E.C. 592 at para 80. In this case, the Court also accepted the Commission's decision not to pursue SACEM's unfair pricing policy on the ground of lack of Community interest in a problem that was confined to France. The French competition authority subsequently condemned the pricing policy.

See also SFEI and Others v Commission, case T 77/95, [1997] ECR II 1, paras 29 and 55.

See also, most recently, the Community Court in Commission and French Republic v Ladbroke Racing Ltd, joined cases C 359/95 and C 379/95, judgment of 11 November 1997, not yet reported. In this case, the Community Court set aside the previous judgment of the Court of First Instance annulling part of a Commission decision rejecting a complaint. The annulled part concerned the Commission's rejection of a complaint against Pari Mutuel Urbain (PMU) on the basis that Articles 85 and 86 did not apply and that the case lacked Community interest. The Court of First Instance stated that the Commission should have examined the compatibility of French legislation applicable to PMU with the Treaty rules on competition. The Community Court held that the compatibility of national legislation with Articles 85 and 86 is only relevant when the conduct of an undertaking complying with that national legislation is considered to be within Article 85 or 86.

The Notice reflects the judgment in *Automex II* and emphasises the Commission's intention to focus on cases of legal or economic significance. At the same time, the Notice explains the rationale of powers between the Commission and national courts. Whereas national courts have the task to safeguard subjective rights of individuals in their relations with one another, the Commission's task is to develop EC competition policy and to act in the public interest rather than in the interest of undertakings®®.

The Commission also attempts to encourage the use of private litigation in a positive way by setting out a number of advantages of proceedings before national courts above those before the Commission“.

Most of the Notice incorporates another landmark judgment, *Delimitis v Henniger Bräu“*, in which the Community Court established the jurisdiction and responsibilities of national courts in relation to the substantive application of Article 85 and block exemptions. The judgment is summarised at section 1.5.3. below. As far as the Notice itself is concerned, it must be emphasised that it is for the Community Court under Article 177 and not the Commission to determine Community law®®, so the Notice contains little for which there is not already authority

“See also: Van der Woude in his lecture of 5 November 1996 during the Third Annual Advanced Conference on EC Competition Law, organised by IBC UK Conferences Ltd, Brussels, p 4 of the paper handed out.

I have some second thoughts as to whether this division of tasks between the Commission and national courts is so clear-cut. The issue of national courts having a duty (or discretion) to raise Article 85 and 86 of their own motion, in cases where domestic concepts of public interest set aside the domestic procedural limitation caused by the concept of passivity of judges, discussed at 2.2.5.3. below, demonstrates in my view that national courts may also apply EC competition law having regard to the public interest and not just in respect of the interest of the parties.

“See 2.1. below.


““ This is recognised in paras 2, 39 and 47 of the Notice.
in existing Community Court case law. The Commission itself has described it as being intended to "remind national judges of the powers which they already possess". Nevertheless, by compiling the various guidelines, principles and policies into one document, the Notice has greatly contributed to raising awareness of the possibility of private litigation.

1.5. Evaluation of decentralised enforcement; problems for national courts applying EC competition law

Decentralisation of the application and enforcement of EC competition law may seem appropriate at a time when principles such as subsidiarity, transparency and devolution have been propelled by certain Member States to a status of utmost priority, at the expense, perhaps intentionally, of much more pressing Community issues. The question whether such wider political rationales, often based on underlying fears for loss of sovereignty, benefit a competitive single market with a level playing field for business cannot be addressed within the limited scope of this book. Besides, it may be too late for that now that most Member States have accepted that devolution is desirable and the principle of subsidiarity has been incorporated in Article 3 (b) of the Treaty on European Union.

Although the urge for subsidiarity may well be a natural development in a close Union with a manageable number of Member States and a completed set of legislative measures establishing a unified single market, serious doubts may be expressed as to its positive effect on the new plans to expand the Union Eastward. It is submitted that the calls for devolution and expansion should not have come at the same time and that a proper system of subsidiarity and devolution should first be implemented and experienced before thinking of expanding in such a big

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Decentralised enforcement of EC competition law has been brought to the foreground only in the last couple of years as a result of the judgment in *Automec II*, the Notice on cooperation with national courts⁷¹ and, most recently, the Notice on cooperation with national authorities⁷². It might be advisable to wait and see how the various problems and divergencies will manifest themselves and to remedy the most pressing ones before imposing the burden on Eastern European judges and authorities.

Meanwhile, it is submitted that decentralised enforcement of EC competition law in the Community is justified and desirable. Its main justification has nothing to do with politics; the Commission urgently needs a reduction of its workload and, unless its task force is greatly expanded, delegation to national judges seems warranted on that ground alone.

The long delays business face in the application of the competition rules by the Commission are frustrating innovation and investment. Companies applying for exemption or confirmation of legality for their often innovative or risky agreements have to wait too long for a green light and this is partly due to the large number of complaints about infringements most of which could be handled by national courts.

Decentralised enforcement of EC competition law is also merited on other, more fundamental, grounds. A Community-wide network of enforcers increases compliance with Articles 85 and 86 which, in turn, enhances the competitiveness of the European industry and facilitates a more streamlined development of EC competition policy in line with the Community's economic changes and the challenges that lie ahead.

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⁷⁰ See for the expected effect on the Commission's workload 6.2.1 below.

⁷¹ See previous section.

⁷² Notice on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Article 85 or 86 of the EC Treaty. O.J. C313/3 of 15.10.97.
The scenario envisaged is as follows:

First, the Commission focuses on the areas in which it has exclusive competencies". In respect of Articles 85 and 86, where it does not have exclusive competence, it determines its priorities by evaluating the Community interest and by focusing on the elimination of problems hampering the aims set out in Articles 2 and 3 (g) of the Treaty. In this context, the national courts would play a complementary role: once an infringement has been terminated by the Commission, subsequent questions of contractual performance or of damages can be dealt with in private litigation.

Secondly, the Commission would refuse to intervene in respect of competition problems of no Community interest. These would include cases whose main thrust lies in the territory of a Single Member State, the "national cases"". It is in respect of those cases that national courts (and national authorities) could play a central role. According to the Commission, they may be even better placed to deal with the matter. Where it is important to clarify the law, the Commission might decide to intervene in one case and leave national courts (and authorities) to deal with similar ones". In doing so, there would be close cooperation between the two administrations.

Such a development, together with the fact that the Commission lacks certain powers that national courts possess make a decentralised enforcement of EC competition law increasingly desirable and necessary". The advantages seem to outweigh the risk of divergent or inaccurate applications which, in any event, can be controlled through Article 177 references and individual decisions by the Commission.

A more decentralised enforcement of EC competition law by

1 See 1.4.2. supra.

2 See 2.2.8. and 2.3.2. below.


4 Marenco, see previous footnote.
national judges, however, is certainly not without problems. It is submitted that these problems constitute the main reason today why national courts are still not dealing with EC competition law widely and, unless some of them are resolved, may prevent national courts from becoming realistic alternative fora in the future”. Many of the problems have been recognised by various authors and speakers discussing the enforcement of EC competition law by national courts. However, the vast majority of articles published and talks presented at seminars have only signalled some selected (actual or potential) problems that may arise in private litigation. This book is a modest attempt to go further by compiling and analysing most of the problems experienced or expected, and by proposing some constructive solutions.

1.5.1. Aim of the book

This book aims to:

- identify, categorise and analyse the problems for national courts,
- evaluate the available guidance from the Community Court's case law, the Commission's Decisions and Notices and publications by established authors in the field,
- assess whether national courts can be a realistic alternative forum for the enforcement of EC competition law,
- suggest possible solutions for the most pressing problems.

"See also [1993] Fordham Corporate Law Institute, Bourgeois at p 478 and Roundtable Three, from p 512 onwards, notably the remarks of Judge Bellamy, p 512 - 516.
1.5.2. Plan for the book

For decentralisation of EC competition law to work successfully, a first requirement is that national proceedings form a workable tool in enforcing EC competition law and that national judges can apply and assess the economic criteria incorporated in the provisions. A second, perhaps more important, condition is that the national court has sufficient powers effectively to apply and enforce the provisions of EC competition law. This book has been divided into two parts along the lines of these two main conditions.

Part I (chapters 2, 3 and 4) focuses on national proceedings and the domestic context. Chapter 2 addresses the procedural and practical problems which come into focus once Article 85 or 86 is applied by a national court. By nature, EC competition law concerns trade, actual or potential, between two or more different Member States. Compared to the Commission, the fact-finding and other powers of national courts are limited in cross border cases. Cross border cases also create issues of jurisdiction and enforcement. There are complications involving the application of domestic procedural laws and remedies as well as the possibility of simultaneous application of domestic competition laws. Overlap of EC competition law and domestic competition law may result in multiple controls and conflicting decisions. There is also a risk of diverging case law both within one and the same Member State and between Member States and this, together with the differing domestic procedural laws and remedies in different Member States, may result in forum shopping.

Chapters 3 and 4 highlight the problems for national courts arising from the specific nature of EC competition law. EC competition law is economic by nature and its application often involves not just an assessment of the situation between the parties to the litigation but also an assessment of the effect (actual or potential) of the conduct in question on the market as a whole. The latter can be a complicated undertaking for judges, not being economists, operating within the boundaries of national proceedings.
Moreover, EC law requires a teleological interpretation which assumes a thorough knowledge of EC law, its history and intention and of the existing body of case law of the Community Courts. It will be demonstrated that the guidance in the application and interpretation of the provisions from the Community Court by way of preliminary rulings and from the Commission by way of cooperation or assistance has its own shortcomings and poses new problems.

Part II addresses the second and, it is submitted, most important category of problems: those involving the substantive application of the rules. These problems originate at EC level as opposed to domestic level. When comparing national courts with the Commission, the question arises whether national courts have been entrusted with sufficient powers effectively to enforce EC competition law. The structure of Article 85, its trifurcation into sections (1), (2) and (3) and the attribution of competence between the Commission and national courts in respect of Article 85 (2) and (3) create severe limitations for national courts.

As a result of the basic rule that national courts and the Commission enjoy concurrent jurisdiction in respect of Articles 85 (1) and 86, parallel application of the same provisions by national courts and the Commission may lead to conflicting decisions. Conflicting decisions should be avoided as a principle of Community law but this principle must be reconciled, at the same time, not only with the obligation of national courts to rule on claims made before them, but also with automatic nullity by virtue of Article 85 (2).

Consequently, national courts are restricted from applying EC competition law efficiently and realistically. It will be shown that the wide interpretation of the prohibition of Article 85 (1), more specifically, the concept of "restriction of competition" hitherto practised by the Commission and, to a lesser extent, the Community Courts prevents national courts from enforcing essentially pro-competitive agreements directly. A stay of proceedings may be necessary in many situations where, on a practical economic view, the agreement is clearly enforceable. This category of problems and the reactions by the Commission and


the Community Court are considered in part II of this book, in chapters 5, 6 and 7.

1.5.3. The central role of Delimitis v Henniger Bräu - a summary

In respect of most of the problems considered in this book, but especially those described in Part II, the Community Court's judgment in *Delimitis v Henniger Bräu*¹ is of central importance. A brief introductory summary is therefore provided at this place.

The judgment is a preliminary ruling under Article 177 of the Treaty, requested by a German Oberlandesgericht (Court of Appeal) as a test case. It concerned a local exclusive beer purchasing agreement in respect of which the small sum of DM 6000 was disputed. Mr. Delimitis, owner of a pub, sued his exclusive supplier and landlord, brewer Henniger Bräu claiming, *inter alia*, that the agreement was void under Article 85 (2) of the EC Treaty because it did not come within the terms of the block exemption for exclusive purchasing agreements².

The German court submitted seven fundamental questions to the Community Court which were divided in three sections: A, B and C. Section A concerned the substantive assessment of the agreement by the national court under Article 85 (1)³⁰. Section B involved the scope and interpretation of the block exemption⁴¹ and Section C related to the jurisdiction of national courts in respect of the application of block exemptions and, more generally, Article 85⁵².

In answering the questions, the Community Court established new rules in respect of all three sections.

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² Regulation 1984/83. See for more details on the facts 5.5.1. below.

³⁰ See 7.2. below.

⁴¹ See 5.5.2. below.

⁵² See 5.5.3. below.
1.5.3.1. Section A - the assessment of vertical agreements under Article 85 (1)

As regards section A, the assessment of the exclusive beer purchasing agreement under Article 85 (1), the Community Court went further than in any of its previous judgments. It ruled that exclusive purchasing agreements do not have the object of restricting competition and have that effect only in very unusual circumstances”, namely, where they foreclose third parties and make a significant contribution to foreclosure. This is true also in cases where the agreement is part of a network of similar agreements made with the same and other suppliers. As long as the relevant market is not foreclosed, the agreement can be enforced. Where the market is found to be foreclosed but the contribution of the parties (or the network to which they belong) to this foreclosure is insignificant, the agreement can also be enforced, regardless of its exact wording and restrictiveness its clauses.

The Court ruled that, in order to establish foreclosure of the market or a contribution to foreclosure, a full economic appraisal of the agreement and its real and concrete effects on the market was necessary. This judgment is the strongest reinforcement of the Community Court so far of a requirement to appraise agreements in their legal and economic context“.

The judgment was concerned only with exclusive purchasing agreements, but its wording is broad and it may enable national courts to enforce many exclusive vertical agreements that previously required exemption, either by individual or block exemption. This may greatly enhance the powers and efficiency of national courts in applying EC competition law. It may no longer be necessary to notify such agreements or to distort them in order to come within a particular block exemption.

See 7.2.1.3., 7.2.1.4. and 7.2.2. below.

See 3.1., 7.2.1. and 7.2.2. below.
1.5.3.2. Section B - the interpretation of block exemptions

The Court's answer to section B, about the interpretation of the block exemption, is also fundamental. The agreement in issue went further than the provisions set out in the block exemption in two minor respects". The Court interpreted the block exemption strictly so as not to usurp the Commission's exclusive competence in the field of Article 85 (3). It ruled that block exemptions should be interpreted strictly by national courts. A block exemption ceases to be applicable in its entirety if the agreement does not come within its four corners". The Community Courts and national courts cannot modify its scope by extending its sphere of application to agreements not covered by it". In that case, the agreement must be assessed under Article 85 (1).

Before the judgment, the removal of the benefit of a block exemption might have resulted in the presumption that Article 85 (1) would apply (otherwise no exemption would have been necessary)". The assessment might have been confined to

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" See 5.5.2. below.

" See 5.2.2.1 and 5.2.2.2. below.

" The Community Court ruled (as part of section C), that a national court does not have the power to treat an agreement as valid on the basis that there are only minor divergences from a block exemption. The Court held that the direct applicability of block exemptions may not lead the national courts to modify the scope of the exemption regulations by extending their sphere of application to agreements not covered by them. Any such extension, no matter how small its scope, would affect the manner in which the Commission exercises its legislative competence. The Court thus preferred to give national courts more discretion in deciding whether an agreement was caught by Article 85 (1) over a power to extend the application of a block exemption which would involve a limited jurisdiction of the national court in respect of Article 85 (3). See 5.5.3. below.

establishing whether any of the restrictions on conduct in the agreement are caught by the prohibition and whether these can be severed from its remainder. Section A, however, indicates that such an agreement infringes Article 85 (1) only where the market is found to be foreclosed and the agreement contributes significantly to that foreclosure. The result of this full market assessment may be that many agreements can be enforced by national courts despite the fact that they do not come within a block exemption.

1.5.3.3. Section C - the jurisdiction of national courts

In answering Section C, involving the jurisdiction of national courts, the Court evaluated the consequences of the shared competence between national courts and the Commission in respect of Article 85 (1) and the exclusive competence of the Commission in respect of Article 85 (3) and provided the guidelines upon which the Commission's Notice on cooperation with national courts has been built®®.

The Court acknowledged that this shared competence involves the risk of national courts taking decisions which conflict with those taken or envisaged by the Commission. Since conflicting decisions are contrary to the principle of legal certainty they should be avoided when national courts give decisions on agreements or practices which may subsequently be the subject of a decision by the Commission.

The Court ruled that the national court may proceed and rule on the agreement in issue where:

- the agreement falls clearly outside the scope of Article 85 (1) since there is scarcely any risk of the Commission taking a different decision.

®® See 1.4.3. supra.

comfort letter on the basis that the reasons for blacklisting reciprocal exclusive dealing did not apply in this particular case.
the agreement is clearly contrary to Article 85 (1) and, regard being had to the exemption regulations and the Commission's previous decisions, the agreement may on no account be the subject of an exemption decision under Article 85 (3).

The Court ruled that proceedings should be stayed and, where necessary, interim measures imposed where:

- the national court finds that the contract in issue is notified or exempted from notification and it considers in the light of the Commission's rules and decision-making practice that the agreement may be the subject of an exemption decision.

- there is a risk of conflicting decisions in the context of the application of Article 85 (1) or 86.

The Court's ruling in respect of sections A and B is extremely helpful for national courts in that it enhances their power to assess agreements under Article 85 fully and independently. The guidelines established under section C have clarified several jurisdictional issues, but it remains to be seen to what extent they alleviate the problems national courts are facing in applying EC competition law next to the Commission.

In part II of this book, the judgment will subjected to a detailed analysis\(^9\) and an attempt will be made to assess its consequences for national courts. It will be demonstrated that several problems have remained unresolved\(^1\) and that new problems have arisen as a result of the guidelines established

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\(^9\) See in particular 5.5. and 7.2 below.

\(^1\) See, for example, comfort letters stating that the agreement merits exemption. In Delimitis, the Community Court has now formally required national courts to stay proceedings, but this has not resolved anything since this, in practice, there was almost nothing else a national court could do, see 5.6 below.
"See, for example, on the issue of having to stay proceedings in all cases where conflict with a Commission decision is possible, 5.3., 5.5.3.3., 5.5.4. and 5.6. below. The result may be that national courts may have to stay more often than before. For practical problems arising from cooperation with, and assistance from, the Commission, see 5.7. below. Complications arising from the duty to make a full market analysis in every case are discussed at 7.2.2.2. below."
PART I. DOMESTIC PROCEDURAL PROBLEMS, JURISDICTIONAL PROBLEMS AND PROBLEMS RESULTING FROM THE ECONOMIC NATURE OF EC COMPETITION LAW AND THE NEED TO INTERPRET EC LAW TELMOLOGICALLY
2. DOMESTIC PROCEDURAL PROBLEMS AND JURISDICTIONAL PROBLEMS

2.1. Differences between the powers of national courts and the Commission - advantages and disadvantages

Why should a firm injured by breach of the competition rules choose a domestic court to bring an action rather than complain to the Commission? One recently evolved reason is that it may not be possible to persuade the Commission to deal with a complaint in the wake of the Automec II judgment. A national court is obliged to decide on each case brought before it, whilst Automec has now explicitly granted the Commission the discretion to reduce its case load by refusing complaints on the basis of priorities. But there may be other reasons to choose for proceedings in a national court.

Private proceedings before a national court offer a number of advantages over the Commission procedure:

- Unlike the Commission, the judge can award damages, or interim relief ex parte. Where a plaintiff has already been the victim of anti-competitive behaviour, compensation for past losses may be as important as injunctive relief to prevent future losses.

Two remarks should be made at this point.

First, in respect of damages, the Community Court has consistently held that national courts must provide adequate remedies for breach of Community law no worse than those available under national law. There is as yet no case, however, in which the Court of Justice explicitly confirms national courts' power to award damages.

\footnote{See 1.4.2. supra.}

\footnote{Most of the cases were against governments, see for example, \textit{Francovich and Bonifaci v Italy}, cases 6/90 and 9/90, [1993] 2 C.M.L.R. 66. See 1.4.1. supra, footnote 34.}
In Banks¹, the issue came for before the Community Court but in respect of the Coal and Steel Treaty. Advocate General van Gerven concluded that damages lay for infringement of the competition rules of the ECSC Treaty as a matter of Community law and not of national law. Although the case was an ECSC case, he made clear that the result would be the same under the EC Treaty. He argued (at point 44) that such a rule for reparation:

"would play a significant role in making the EC competition rules more operational and in enabling national courts to fully safeguard the rights arising out of the direct effect of Articles 85 and 86".

The Community Court differentiated the two Treaties and did not, therefore, address the issue under the EC Treaty but it did not reverse the Advocate General on the point of damages.

The Court of First Instance, recently, referred in Leclerc² and BEMIM³ to the possibility of suing for damages in national courts and, in Guérin⁴, the Community Court did the same. The position is also explicitly accepted by the Commission⁵.

Today, it can be safely stated that actions for damages do now lie for breach of Articles 85 or 86. Damages have been

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⁴ Guérin Automobiles v Commission, case C 282/95, judgment of 18 March 1997, [1997] 5 C.M.L.R. 447. The Community Court considered that:
"any undertaking which considers that it has suffered damage as a result of restrictive practices may rely before the national courts, particularly where the Commission decides not to act on a complaint, on the rights conferred to it by Article 85 (1) and Article 86 of the Treaty, which produce direct effect in relations between individuals".
⁵ Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 EEC, O.J. 1993 C 39/6, [1993] 4 C.M.L.R. 12, para 16. See 1.4.3. supra and 5.5. and 5.6. below.
awarded by national courts in France® and in the Netherlands® and German courts have held that the plaintiffs were entitled to damages under Article 85 against the defendant®.

Secondly, in respect of interim relief, it should be noted that both the Commission and domestic courts can award interim relief but in most Member States, especially in England and Scotland, it may be easier and faster obtained from a domestic court than the Commission. The Commission has rarely adopted interim measures despite a ruling of the Community Court and a Commission statement in Camera Care v Commission® that interim relief is available. The Commission has to go through many internal hoops in making an interim decision that postpone the final decision. Case handlers ask one not to request interim

®  Glenlivit V Macallan.  Paris Court of Appeal, 30 March 1992, Europe July 1992 No 223. Damages were awarded for action in breach of Article 85 (1). See also by the same court, the judgment in Poisson, 22 September 1992, Europe February 1993 No 91. See also Labinal v Mors and Westland Aerospace, judgment of 19 May 1993, Europe, July 1993 No 299, by, again, the Paris Court of Appeal, on an application for damages based, in part, on an infringement of Article 86, later upheld by the Court of Cassation, 14 February 1995, Europe, April 1995 No 146.

®  Theal BV and Cecil E. Watts Ltd v J.D. Wilkes.  Amsterdam Court of Appeal, 11 January 1979, unreported. The Court awarded damages to a distributor who had been excluded from the sale of certain goods as a result of export prohibitions and the assignment of trade mark rights so as to preclude parallel import. Braakman, The application of Articles 85 and 86 of the EC Treaty by the national courts in the Member States, report compiled by Braakman and published by the Commission DG IV, july 1997, Chapter on The Netherlands, para 119.

BMW case, Bundesgerichtshof, [1980] E.C.C 213, (reference EC proceedings: BMW Belgium v Commission, cases 32 and 36-82/78, [1980] 1 C.M.L.R. 370), see also BT and Viag v Deutsche Telekom, court of first instance in Düsseldorf, Financial Times, 18 April 1997. In this case, the defendant had implemented a joint venture before the conditions for exemption imposed by the Commission had been fulfilled. See on simultaneous involvement by the Commission 5.5.2., 5.3. and 5.5.2.4. below.

relief for that reason because how ever much officials press proceedings, it will take a long time and divert the case handler from completing the final decision. The Commission itself\textsuperscript{12} stressed that interim measures may be more easily and quickly obtained in national courts\textsuperscript{13}.

Other reasons often given for preferring action in national courts are that:

- In contrast to the Commission, national courts of most Member States can grant restitution.

- Plaintiffs are more in control of the procedure. They can stop it at any time and negotiate with the other side about ending proceedings. They run less risk of finding themselves included in the investigation by the Commission. There is still the possibility for the litigants to submit a complaint to the Commission. The Commission, however, is likely to refuse to deal with a complaint submitted by the plaintiff in national proceedings. The Commission has also indicated that, in some circumstances, it may regard the existence of national proceedings a reason for not commencing its own investigations\textsuperscript{14}.

\textsuperscript{12} Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 EEC, O.J. 1993 C 39/6, [1993] 4 C.M.L.R. 12, para 16.


\textsuperscript{14} See the 15th Report on Competition Policy [1985] point 38; 16th Report on Competition Policy [1986] point 41; \textit{Aluminium} [1987] 3 C.M.L.R. 813 para 18.2; \textit{Building and Construction Industry in the Netherlands} [1992] O.J. L 92/1. Since Automec II, this view may be applied increasingly but not in cases considered to have a Community interest or where the complainant was a defendant in the national court. For an example where the Commission continued an EC-wide investigation notwithstanding national litigation: \textit{Schöller}, Decision 94/405/EEC, [1993] O.J.
The plaintiff can combine a claim under EC law with other arguments based on domestic law, for example, an action in contract and/or tort, as well as domestic competition law.

Legal costs can be awarded to the successful party but, of course, this also includes the risk of loosing and consequently having to pay the other party's cost.

In cases where the party infringing the competition rules has obtained a comfort letter, it may still be possible to apply for an injunction in a national court. The effect of the infringement, for example, may be more noticeable in one particular area and the Commission might have issued the comfort letter on the basis of a different, more general, assessment of the conduct. Comfort letters do not bind national courts which may leave a possibility for an injunction where a national court disagrees with the Commission's view. This situation is discussed at 2.3.2.4. and in chapter 5 below.

The procedure before the Commission has other advantages:

- It is often cheaper. An action in, for example, the English High Court is expensive whereas a complaint to the Commission may be entirely costless in cases where a single letter suffices to start off an investigation. Even where professional assistance is sought for a complaint, the expense may be less than the commencement of national proceedings. It is also cheaper if the case is lost: a plaintiff in litigation relying on Article 85 and especially Article 86 may have as an adversary a defendant with much broader shoulders. The possibility of loosing a case in a national court and bearing the other side's costs can act as a serious disincentive to private litigation.

It may be easier. Complainants could basically set the procedure in motion by sending the Commission a letter but the Commission may dismiss the complaint. If the Commission decides to take the procedure further, the complainant may play an insignificant role and is relieved from the burden of proof. Often, however, the complaint does not involve blatant infringements which might spur the Commission into action. Instead, the drafting of the complaint may involve complex issues of fact finding and economic assessment, tightly written. The Commission is very busy and rarely uses Article 11 or 14 of Regulation 17 which means that, in practice, the complainant will usually have to find the evidence.

Complaints can be launched anonymously which may be an advantage for small firms fearing retaliation by large vertically integrated competitors in a position to cut off supplies. But the Commission seldom acts without some evidence of infringement that it can use.

The Commission's fact-finding and investigative powers under Regulation 17 are much wider. The Commission can obtain evidence from all over the Community without having to comply with the various procedural domestic rules. This is an important consideration in cross-border complaints where obtaining evidence can be a major stumbling block in private proceedings (see 2.2.5 below). The process of discovery in common law countries will not be as effective as under the Commission's investigation. There are no equivalent proceedings in civil law. A claim in a national court may be difficult to establish, especially where the infringement and/or the damage occurred in several countries.

\[^{11}\text{Automec II. See 1.4.2. supra.}\]
The Commission can deal with cross border claims in a single decision. At national level, it may have to involve separate judgments in several countries.

No causal nexus is required between the action and damage complained of but without it the Commission is unlikely to devote resources to the complaint.⁴°

A cease and desist order is possible for cross-border claims which is more difficult for national courts.

The Commission can grant an individual exemption, although it is more likely to issue a comfort letter or merely to dismiss a complaint.

Parallel procedures in national courts may be stayed pending the Commission's decision.

⁴° And the Community Court will not admit a claim for compensation for damage caused by the Commission. In Guérin Automobiles v Commission, case T 195/95, [1997] 5 C.M.L.R. 447, the Court of First Instance dismissed, by order of 11 March 1996 [1996] E.C.R. II 171, an application seeking a declaration for failure to act as inadmissible and, in its judgment of 6 May 1997, dismissed a claim for compensation for damage. The Court considered that:

"an applicant seeking compensation for damage caused by a Community institution must state the evidence from which the conduct alleged against the institution can be identified, the reasons for which the applicant considers that there is a causal link between the conduct and the damage it claims to have suffered, and the nature and extent of that damage [...].

Neither the reasoning nor the application considered as a whole enables a causal link between the Commission's alleged failure to act and the damage claimed by the applicant to be identified with the requisite clarity and precision."


See 2.3.2.4., 5.4. and 5.6. below.
The choice of procedure may depend on the purpose for which EC competition law is being invoked (as a shield or as a sword) and the desired result in a particular case. When the Commission route is preferred, some considerations should be taken into account.

First, the Commission is not obliged to act upon a complaint as confirmed by the Community Court in Automec II\(^*\).

Secondly, it should be remembered that once the Commission deals with the case, it is out of the hands of the complainant; the complainant has no say in the resolution of the infringement and the outcome could be entirely different from what was desired originally. The Commission will communicate, and may even enter into negotiations, with the party accused whereupon that party may modify its agreement or conduct so as to make it acceptable for the Commission. Instead of an order to cease the practice, the Commission may accept a modification or grant an individual exemption leaving the complainant without any compensation.

It seems that withdrawal of the complaint is likely to stop the proceedings, however. The Commission is so short of resources that, nowadays, it is unlikely to pursue a complaint once it is withdrawn, unless it relates to a price fixing cartel that is likely to continue. In Guérin, one of the reasons for not pursuing a complaint was that the conduct had stopped\(^*\).

When considering an infringement action before a national

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\(^*\) See 1.4.2. supra and 5.6.2. below.


See also BEUC & National Consumer Council v Commission, case T 37/92, [1994] E.C.R. II-285. Here one of the reasons for the not pursuing the complaint was that the agreement in issue would come to an end as a result of a commercial commitment between the Community and Japan. The Court of First Instance did not agree that this political commitment, coupled with a transitional period of application, entitled the Commission to reply that the agreement in issue would necessarily be put to an end. The Court did not consider this, and the further reasons given, to be sufficient and annulled the decision contained in the letter of the Commission. See for reasons the Commission must give 1.4.2. above.
court, thus using art 85 or 86 as a sword to attack the illegal
conduct, it should be kept in mind that the burden of proof that
illegal behaviour exists rests with the plaintiff and obtaining
evidence can be most difficult, especially where it is spread
over different Member States. This issue is discussed in the next
section.

2.2. Issues of private international law and domestic procedural
law

2.2.1. Trade between Member States

EC competition law deals with conduct of parties that may affect
trade between Member States. Many cases dealing with EC
competition law will therefore involve some cross-border element,
for example, because the parties involved in the disputed conduct
are based in different Member States, the product is marketed in
more than one State, or the conduct extends to more than one
State. This brings into focus issues of private international law
and procedure and choice of forum.

2.2.2. Which court will deal with the case?

The key question in international litigation over EC competition
law is which court will deal with the case. This is of main
importance because it will be the domestic procedural laws of
this particular court, the lex fori, that will regulate:

- the proceedings: the gathering and admissibility of
evidence, the service of a summons, the demand for
information, or the carrying out of an investigation, and

- the actual consequences of an infringement. EC law goes as
far as prescribing that restrictive provisions in contracts
are automatically void (art 85 (2)) and agreements
infringing article 86 are also unenforceable on grounds of
illegality\textsuperscript{20} but the extent of the nullity, involving doctrines of severance\textsuperscript{21}, and the further consequences, including injunctions, interim relief and declarations and damages, are again left to the lex fori; the domestic law of the court that decides the case. Interim relief is frequently the determining consideration for forum shoppers.

2.2.3. Differences in domestic laws of different EC Member States

The domestic procedural rules of the Member States differ substantially in respect of the issues listed in the previous section. A study was made for the Commission by a team of experts as early as in 1960\textsuperscript{22} and the conclusion was that, the domestic procedural laws of the Member States enable individuals harmed by violations of Articles 85 or 86 to obtain the recourse available for breaches of domestic law such as indemnity, cease and desist order, restraining order, and publication of the judgment, regardless of the substantial differences that exist between the substantive procedural laws of each Member State. The Commission considered this to be sufficient and no further harmonising measures were thought necessary.

So, although in cases of infringements of the EC competition rules the Member States seem capable of providing recourse by virtue of their domestic procedural rules, the actual outcome of litigation will differ substantially since the recourse is dependent on the domestic law regulating the litigation. As a


\textsuperscript{21} See 2.2.5.2, 2.2.5.3. and 2.2.5.4. below.

\textsuperscript{22} Free translation from French, études de la CEE (Série Concurrence No 1) La Reparation des Conséquences dommageables d'une violation des articles 85 et 86. The Commission has updated this study since but the conclusion remained the same: it is not necessary to introduce legislative measures to harmonise the situation since each member state is able and prepared to make its domestic recourse available in cases where EC competition law is infringed. See also 2.2.7.3. below.
result, the choice of jurisdiction may be decisive for the success of a court action.

2.2.4. It is possible to choose a court

Parties to an agreement who are based in different Member States may include a jurisdiction clause selecting a particular court in a particular country to decide all competition law disputes.

In cases where no such clause was agreed or where there is no agreement but instead some disputed behaviour, the Brussels Convention on Jurisdiction and Enforcement in Civil and Commercial Matters (or one of its related Accession Agreements) provides that the appropriate forum is that of the domicile of the defendant (Article 2), even in cases where the infringement occurred in another State. If a number of defendants is domiciled in different contracting States, the action may be brought in any of those States. The Convention allows additional fora, in Article 5, some of which could be of relevance for matters based upon Article 85 or 86:

- in matters relating to a contract, the court of the place of the performance of the obligation in question,

- in matters relating to tort, the court of the place where

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23 Article 17 of the Brussels Convention, see next footnote. The question is, however, whether such clauses are always binding when the validity of a contract is questioned or enforced under EC competition law.

24 Brussels Convention of 27 September 1968, O.J. No L 304, of 30.10.78, p 77, and its associated accession agreements: one for the UK and Ireland, one for Greece, one for Spain and Portugal (San Sebastian Convention of 1989), one for the (then) EFTA countries (Lugano Convention of 1988) and one for the latest EC members: Austria, Sweden, Finland and Denmark (Convention of 1996). The latest associated accession agreements are in the process of being ratified by all signatory States.

25 Article 6 (1).
the harmful event occurred²⁶,

- in matters arising out of the operations of a branch, agency or other establishment, the court of the place where that establishment is situated.

In situations where one or more of these provisions apply, the plaintiff has a choice to seize either the court of the State where the defendant is domiciled or one of the fora prescribed by Article 5. The court of a Member State accordingly seized must assume jurisdiction and apply Article 85 and 86 as part of the proper law". These additional choices may be welcome in cases where the conduct that needs to be restrained takes place in a State other than that of the domicile of the defendant. The evidence may be located there too.

2.2.5. Specific procedural problems

2.2.5.1. Evidence and information

A plaintiff having to produce evidence in a national action is clearly limited by what is allowed under the national law of the court, the lex fori. In some countries, it is difficult to obtain leave to get evidence. In civil law countries, there is usually no possibility of discovery. Under English law, it may not be possible to obtain information on discovery as there is privilege against disclosing information that may render a person liable to penalties such as those the Commission can impose under

²⁶ In Bier v Mines de Potasse d' Alsace, case 21/76 [1976] E.C.R. 1735, [1977] 1 C.M.L.R. 284, the Community Court construed this as meaning either the place of the event causing damage or the place where the damage occurred.

²⁷ Where the cause of action is breach of statutory duty (art 86) the only appropriate forum appears to be the court of the contracting State in which the defendant is domiciled, unless a tort is alleged as a result of this breach in which case perhaps one could seize the court of the State where the harmful event occurred.
Regulation 17\textsuperscript{28}. The plaintiff may run the risk that whatever is produced as evidence may be dismissed as inadmissible, as hearsay, or as evidence which was wrongfully obtained. In the UK, these problems exist and the rules governing evidence and discovery are inadequate to deal with EC competition law. Much of the evidence obtained may be regarded as hearsay.

Where evidence must be obtained from a country other than that of the forum, it is necessary to comply with the foreign procedural rules and ultimately this may involve separate judgments in several countries.

It is becoming increasingly common practice for one Member State to assist another in the enforcement of the latter's law within its jurisdiction. The Hague Convention on the Taking of Evidence Abroad\textsuperscript{29} also provides assistance in that it deals to a certain extent with evidence from other jurisdictions. However, even in cases of full cooperation, obtaining evidence may pose a major obstacle in national proceedings and may lead to a choice of forum applying the most flexible procedural rules, especially as regards discovery.

2.2.5.2. The effect of automatic nullity under Article 85 (2) and of infringement of Article 86

When a court considers an infringement of article 85 has taken place, Article 85 (2) renders the anti-competitive provisions in an agreement void and unenforceable\textsuperscript{30}.

There is no provision similar to Article 85 (2) in Article 86. The reason may be that the provision is mainly directed at unilateral behaviour by a dominant firm as opposed to the bi-


\textsuperscript{29} Cmd 3991 (1968).

or multilateral practices addressed in Article 85. There may nevertheless be agreements involving dominant parties that abuse their dominance by excluding competitors and those should, in principle, be unenforceable under Article 86\(^{31}\). Where the abuse constitutes, for example, a loyalty rebate or a restrictive contract clause, only the offending provision is void. Agreements exempted by a block exemption can subsequently be condemned by a national court under article 86.

The nullity of the restrictive provisions enshrined in Article 85 (2) means that these restrictions have no effect on the relationship between the contracting parties and cannot be

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\(^{31}\) In BRT v Sabam and NV Fonior, case 127/73, [1974] E.C.R. 51, [1974] 2 C.M.L.R. 238 the Community Court condemned certain restrictions imposed by a performing rights society on its members (authors, composers and publishers). The restrictions that were considered to infringe Article 86 were those that could not be justified by the need for the society to strengthen its powers when negotiating with national radio and television stations, etc over copyright licenses.

The Commission has on some occasions attempted to condemn collective dominance where two or more firms acted under a cartel agreement. See Italian Flat Glass [1990] 4 C.M.L.R. 535, Appeal: cases T-68/89, 77/89 and 78/89 [1992] E.C.R. II-1403. In this case the Commission condemned the conduct on the basis of both Articles 85 and 86. In appeal, the Court of First Instance held that the Commission could not recycle the facts from which it has established an agreement contrary to Article 85 (1) to establish a dominant position. The Court accepted, however, the possibility of collective dominance. It gave an example were two or more independent firms jointly have, through agreements or licenses, a technological lead affording them to behave independently on the market.

In Compagnie Maritime Belge SA and Others v Commission, cases T 24-26/93 and T 28/93, judgment of 8 October 1996, [1997] 4 C.M.L.R. 273, the Court of First Instance upheld a finding by the Commission of collective dominance on the basis of agreements, largely exempt for maritime transport, and on the basis of tight coordination in conference committees. The Court held:

"it is settled case law that Article 86 is capable of applying to situations in which several undertakings together hold a dominant position on the relevant market [...] [T]he Commission has sufficiently shown that is was necessary to assess the position of Cewal members on the relevant market collectively."

See also on collective dominance, 3.1.1.1. below, discussing oligopolistic markets and illustrating that Article 86 and the Merger Regulation might not be used to condemn collective dominance in the future.
pleaded in respect of third parties. Nullity under Article 85 (2) therefore means complete invalidity. It is absolute in nature, especially as anyone can invoke it". It is also unlimited in time in that it catches all past and future effects of the agreements and decisions subject to it. It is not therefore subject to any statute of limitations and the right to invoke it cannot be forfeited".

The further consequences are determined by national laws via the national conflict rules. In Technique Minière, the Community Court held that:

"the automatic nullity provided for in Article 85 (2) applies to all contractual provisions which are incompatible with Article 85 (1). The consequences of that nullity for all other elements in the agreement are not the concern of Community law".

Advocate General Roemer in the same case explained the issue more fully:

"the law of the Treaty on competition only touches with nullity those parts of the agreement which have a bearing from the point of competition law. For the rest it is not necessary in our opinion, to settle on the level of Community law, i.e. uniformly for all Member States, the question of the effects of the partial nullity of an agreement on the whole of the undertakings included in the contract. For that question it is the applicable national law which can claim precedence (it should be determined according to the rules of private international law)".

The fact that the consequences of the nullity are governed by the proper national law, may result in contractual sanctions

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differing in each Member State. The consequences are not confined to contract but may include delictual sanctions. They may affect transfers of property, give rise to tortious liability, or attract remedies appropriate to a breach of statutory duty. The consequences may also extend to other parts of the agreement, for example, for any orders or deliveries made and for resulting financial obligations. The diversity in domestic laws governing these issues leads to a different outcome in different Member States.

The most important consequence of the nullity of anti-competitive restrictions in contracts may be the way in which the remnants of the agreement will be treated. The issue of severance is discussed at 2.2.5.4 below.

Finally, before applying Article 85 (2) it is important that national courts verify that the agreement in issue is not "old" or "exempt from notification". Such agreements enjoy provisional validity and national courts should treat them as valid and enforceable pending the Commission's decision.

National courts should also at all times observe the connection between Article 85 (1) and (3) when applying the nullity provision. This means that they have to be cautious in respect of new notified agreements or agreements that are the subject of Commission proceedings as the Commission might exempt the agreements retroactively under Article 85 (3).

These two aforementioned issues concern the substantive application of Article 85 and are discussed in part II below. See on the definition of old agreements and the doctrine of provisional validity 5.2.1. and on simultaneous involvement of the Commission 5.2. - 5.6 below. Suffice to state at this place that national courts should only hand down a ruling of nullity if they are convinced that Article 85 (1) is applicable but Article 85 (3) is not.

2.2.5.3. The issue of a national court applying Article 85 (2) of its own motion

An interesting issue is whether national courts must also apply Article 85 (1) and (2) where these provisions are not pleaded by the parties because of the automatic nullity of Article 85 (2). Does the duty of national courts to safeguard the rights and obligations derived from the direct effect of Articles 85 and 86 include mandatory application of these provisions where this is not requested?

In Van Schijndel¹⁷, the Community Court considered the power of a national court to raise Article 85 or 86 of its own motion. The parties in cassation, physiotherapists disputing compulsory membership to an occupational pension scheme, applied to the Hoge Raad to have a judgment from the lower court quashed. For the first time in the proceedings, they contended that the lower court should have considered, if necessary of its own motion, the question of the compatibility of the compulsory membership with higher ranking rules of Community law, including Articles 85 and 86 of the EC Treaty. Three principles of Dutch law applied:

First, Dutch procedural law provides that a plea in cassation by its nature excludes new arguments unless on pure points of law (which do not require an examination of the facts). In their plea before the Hoge Raad, the parties relied on various facts and circumstances which had not been established by the lower courts, nor relied upon by the parties before the lower courts.

Secondly, Article 48 of the Netherlands Code of Civil Procedure requires courts to raise points of law, if necessary of their own motion.

Finally, Dutch law includes the principle of judicial passivity in cases involving civil rights and obligations freely

entered into by the parties. Additional pleas on points of law cannot require courts to go beyond the ambit of the dispute defined by the parties themselves nor to rely on facts or circumstances other than those on which the claim is based.

The Court of Justice considered that where, by virtue of domestic law, courts must raise, or have a discretion to raise of their own motion points of law based on binding domestic rules which have not been raised by the parties, such an obligation also exists where binding, directly applicable, Community rules are concerned.’

The Court then considered that each case which raises the question whether a national procedural provision renders application of Community law difficult must be analysed:

“by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis, the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration”\(^3\).

The Court then considered the circumstances in issue in which the domestic law principle that a court must or may raise points of its own motion is limited by its obligation to keep to the subject-matter and the facts put before it. The Court considered this limitation to be justified by the principle that:

“in a civil suit, it is for the parties to take the initiative, the court being able to act of its motion only in exceptional cases where the public interest requires its intervention”\(^4\).

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\(^3\) Point 13 and 14. The Court referred to the principle of cooperation set out in Article 5 of the Treaty and to the duty of national courts to ensure the legal protection derived from directly effective Community law as confirmed in Factortame, case C 213/89 [1990] E.C.R. I 2433.

\(^4\) Point 19.

\(^5\) Point 21.
According to the Court, that principle reflects conceptions prevailing in most Member States as to the relations between the State and the individual, the rights of defence and proper conduct of proceedings, in particular, protection from the delays inherent in examination of new pleas. Consequently, the Court ruled that Community law:

"does not require national courts to raise of their own motion an issue concerning the breach of provisions of Community law where examination of that issue would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves and relying on the facts and circumstances other than those on which the party with an interest in application of those provisions basis its claim.".

The Community Court thus ruled that where domestic law allows or requires national courts to raise points of law of their own motion, the courts have a duty to do the same in respect of Articles 85 and 86 but where the same courts have been assigned a passive role, they no longer have this duty.

The central issue seems to be the distinction between the role of national courts and that of the Commission. Whereas the Commission is primarily involved in enforcing the rules and monitoring compliance, the task of national courts is twofold: on the one hand, they should remain passive in settling private disputes but, on the other hand, they should also ensure that individuals' rights arising out of the Treaty are being properly protected. The latter task may in some circumstances conflict directly with the former. It is not surprising, therefore, that the judgment seems paradoxical too.

On the one hand, by confirming that the national court should apply the competition rules of its own motion in fora where the domestic procedural rules oblige or allow it to raise points of law, the Community Court extends the duty of national courts to safeguard rights derived from Article 85 and 86 to

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40 Point 21.

41 Point 22.
situations where these are not pleaded by the interested party".

On the other hand, in fora such as the Netherlands where the domestic procedural rules assign a passive role to judges, the Court accepts a limitation of that same duty to situations where these rights are explicitly claimed and pleaded". In such fora, the ruling limits the automatic effect of Article 85 (2) to cases where this is pleaded or where exceptional circumstances require its application. In all other cases, the national courts of such fora are free to resolve the issue solely according to applicable national law.

In an earlier Dutch case, the Court of Arnhem had held, of its own motion, that relevant provisions of agreements in the Dutch building industry were unenforceable by virtue of Article 85 (2)". The judgment in Van Schijndel seems to have reduced the chances of this happening again in the Netherlands.

Although the judgment does leave room for exceptions in individual circumstances, the Community Court explicitly stated that the extent of the discretion of a national court to apply the prohibition of Article 85 (1) of its own motion depends on

" In Peterbroeck, Van Campenhout & Cie SCS v Belgian State, case C-312/93, [1995] E.C.R. I 4599, the Court expressly facilitated this extended duty by ruling that domestic procedural rules preventing the national court from considering points of Community law (in this case Article 52 of the Treaty) of its own motion are precluded when the latter has not been invoked by the litigant within a certain period (the time limit for raising a new plea was 60 days).

This is consistent with the wording in Simmenthal, case 106/77 [1978] E.C.R. 629 at 645 [1978] 3 C.M.L.R. 263 at 284:

"A national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means".

The domestic principle of passivity of judges was not discussed in Peterbroeck. See previous footnote.

" Vereniging ter Behartiging van Kunststof Gevelelementen - Fabrikanten v de Oude IJssel Bouwconstructies BV, judgment of 10.9.92 (unreported)."
the applicable domestic procedural law. Domestic procedural principles governing public interest, legal certainty, proper conduct of procedure, the relation between State and individual, the rights of the defence and proper conduct of proceedings, all play a decisive role in assessing whether or not a national court will decide to raise Article 85 or 86. Although these conceptions may prevail in most Member States, their actual content and application in practice may differ considerably.

The discretionary powers of judges in each Member State will differ therefore, regardless of the fact that the general conceptions may appear similar. Again, this situation gives rise to legal uncertainty and possibly different levels of enforcement of EC provisions in different fora.

2.2.5.4. Severance

Although the effect on trade by a contract as a whole is being examined in view of Article 85 (1)\(^{\text{**}}\), it are in principle only those provisions of the agreement which restrict competition that are null and void under Article 85 (2), provided they are severable from the agreement\(^{\text{**}}\). As mentioned at 2.2.5.2. above, the effect of the nullity of the infringing provisions on the remainder of the agreement is not governed by Community law but

\[\text{Peterbroeck, see footnote 42 supra, is an example where Belgian case law allowed for exceptions for new pleas alleging breach of a limited number of principles of domestic law, in particular time-bar of the right to charge tax and the force of res judicata.}\]

\[\text{The effect on trade may not have been caused by the particular restriction of competition (only). In Windsurfing v Commission, case 193/83 [1986] E.C.R. 611, the Court held that if the agreement as a whole affects trade between Member States, Article 85 may be infringed even if the restrictions of competition do not affect such trade.}\]

by applicable national law®. The Community Court did not lay down a Community-wide principle of severance and it is thus a matter for the national court, applying domestic doctrines of severance to decide whether enough remains of the contract to be enforceable.

Where the infringing provisions cannot be severed, the entire agreement will be void. This is mostly the case where the parts infringing EC competition law cannot be considered separately from the other parts of the agreement, in other words, if the other parts form a compensation for the prohibited part or if those other parts have no individual possibility of existence. It does not seem possible to sever an agreement in order to bring it within a block exemption®.

The doctrine of severance pursuant to application of article 85 (2) is something which should be kept in mind when entering into -, or drafting a contract which might be challengeable under EC competition law®. It may not always be desirable that the remainder of an agreement stands. The bargaining power may have shifted as a result of the nullity of certain clauses. The result of subsequent litigation might be the enforcement of the residue of the agreement which does not include the features for which

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"the automatic nullity provided in art 85 (2) applies to all contractual provisions which are incompatible with art 85 (1). The consequences of that nullity on all other elements in the agreement are not the concern of Community law".

® Delimitis has done away with this possibility for the national court when the Community Court ruled that the agreement as a whole will have to come within the four corners of the block exemption. See paragraph 38 and 39 of the judgment, discussed at 5.5.2.2. below.

° Some firms provide for detailed clauses in the contract to apply, in so far as the law permits, in the event of severance.
it was originally concluded\(^1\). It will depend on the forum’s doctrine of severance and the discretion of the judge how far the remainder of an agreement must differ from the original agreement before a national court will decline to enforce it.

The fact that the effect of invalidity is left to national doctrines of severance allows for divergencies throughout the Community and may lead to different levels of protection in different Member States. Whish commented:

"It is undesirable that a procedural issue such as this should be left to national law: it means that the enforceability of a contract may vary from one Member State to another, whereas the impact of Article 85 (2) ought to have uniform effect throughout the EEC"\(^2\).

At 2.2.5.2. above, mention was made of the same nullifying effect in respect of contractual terms infringing Article 86. The impact of this invalidity raises the same question of severability\(^3\).

It is submitted that it might not be too complicated, in terms of legality, for the Community Court to issue guidelines in case law, for a harmonised doctrine of severance to apply in

\(^{1}\) See also Butterworth's Competition Law, XI, ed. Smith, para 149. In Chemidus Wavin Ltd v Soc. pour la Transformation et l'Exploitation des Résines Industrielles SA, [1977] FSR 181, [1978] 3 C.M.L.R. 514 at 519, Lord Justice Buckley said:

"It seems to me that in applying Article 85 to an English contract one may well have to consider whether, after the excisions required by the Article of the Treaty have been made from the contract, the contract could be said to fail for lack of consideration or any ground, or whether the contract could be so changed in its character as not to be the sort of contract that the parties intended to enter into at all."

A similar uncertainty in respect of how to deal with a comfort letter and the issue of severance was expressed by Deputy Judge Barnes QC in Inntrepreneur Estates Ltd v Mason (unreported, judgment of 11 March 1993), [1993] 2 C.M.L.R. 293.


\(^{3}\) At least the task of a national judge is not complicated here by provisional validity for old agreements or notification of the agreement to the Commission. See 5.2.1. and 5.2. - 5.6 below.
the event of infringements of Article 85 or 86. It seems that Article 3 (g) and Article 5 of the Treaty would provide sufficient justification for such guidelines. So far, the Court has refrained from doing so.

In practice, many cases involve the performance of contractual obligations and Article 85 is thereby invoked as a defence. If this defence succeeds, the court may decide to simply dismiss the claim and refuse to enforce the contractual obligation in issue. The question of how the nullity of the clause the plaintiff sought to enforce may affect the remainder of the agreement may then not arise.

2.2.5.5. Remedies

Remedies, arising out of infringements of Article 85 (1) or 86, may include injunctions (mandatory or prohibitive), declarations that the agreement is not within Article 85 or 86, restitution and damages. Claims can arise under both private and public law but this is a somewhat artificial distinction made under English law. It does not matter whether the body sued is a public or private undertaking. Both are subject to Articles 85 and 86 although some public bodies may in certain circumstances be able to rely on a defence based on Article 90 (2) of the EC Treaty.

National courts must make use of their own domestic rules to give effect to the rights derived from Community law.

“See for its comments on severance in Delimitis 5.5.2.3. below.


Restitution of moneys paid under a contract void under Article 85 (1) might be difficult to obtain since it is unlawful to enter into an agreement prohibited by art 85 in the first place, see Goff and Jones: The Law of Restitution, 3rd ed, 1986.

See 2.1. supra. See on remedies generally and in the context of UK law, Green and Robertson, Commercial Agreements and Competition Law, 2nd ed, 1997, p 386 –392.
Community law only prescribes that remedies must be non-discriminatory, real and no less effective than they would have been in similar circumstances under domestic law. This principle was spelled out by the Community Court in Rewe v Hauptzollamt Kiel and Amministrazione delle Finanze dello Stato v San Georgio. See also 1.4.2. supra and paragraphs 10 and 11 of the Commission's Notice on cooperation with national courts.

Again, the available remedies will differ in each forum. Some may allow exemplary damages and restitutionary remedies. Most EC Member States allow remedies based on contract and tort, subject to small divergencies, but in the UK, a breach of Community law is classified as a breach of statutory duty.

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2.2.5.6. Quantification of Damages

The quantification of damages in private litigation may often be burdensome, involving issues such as remoteness and causation. It is quite difficult to establish what would have happened, had the infringing behaviour not occurred: would there have been a noticeable penetration or expansion of the market by the plaintiff, for example, or was the increase in the defendant's market share the result of the alleged infringement and, if so, would it have accrued to the plaintiff had the infringement not occurred? Some fora will allow for more flexibility than others but, on the whole, parties using EC law must provide very precise and convincing evidence in national courts. Again the same problems as to admissibility or the obtaining of evidence apply and differences of resolution will be seen throughout the Community.

2.2.6. Forum shopping

The tools available in national procedural laws to bring a successful action vary considerably from country to country. Together with the fact that the rules of private international law allow for a choice of national court, this creates scope for forum shopping. Before embarking on bringing an action in a foreign jurisdiction, litigants may decide to explore the various jurisdictional issues that may arise. These include an assessment of the possible fora and the available causes of action and remedies available in each, especially interim relief. The location of relevant evidence, the language of the proceedings and any possible domestic procedural hurdles may all play a role in determining the forum before which to start an action.

From a Community point of view, forum shopping is clearly undesirable. It directly frustrates the principle of a Single Market and the aims set out in Articles 3 (g) and 5 of the EC Treaty envisaging uniform application and enforcement of EC competition law in order to establish the same conditions for business and competition throughout the Community.
It is submitted that, although there are more factors that prevent uniform enforcement of EC competition law and that consequently create scope for forum shopping, the problems discussed in the previous sections alone justify action by Community institutions.

2.2.7. Solutions

2.2.7.1. Article 177 rulings

The problems could be relieved in due course by the Community Court in preliminary rulings under Article 177 of the Treaty. In particular, some clear guidelines from the Community Court on a more harmonised approach to severance and remedies would be helpful. It could take a very long time, however, before a particular issue arises before the Court and until then, uncertainty rules.

Many, if not most, cases involving Articles 85 and 86 concern interlocutory proceedings and in respect of those cases there tends to be some resistance to references for preliminary rulings. The time required for such rulings makes them unsuitable for interlocutory proceedings. The Community Court has held that the obligation to refer under Article 177 para 3:

"does not apply in interlocutory actions provided that each of the parties is entitled to institute proceedings on the substance and that during such proceedings any question of Community law provisionally decided in the summary proceedings may be reexamined and be the subject of a reference under Article 177".

" See 2.3.3. below.

" And the Community Court tends strictly to confine its rulings to the issues precisely requested. See 2.2.7.3. below.

2.2.7.2. Commission Notices

Another option would be for the Commission to issue further Notices offering guidance and assistance to Member States in the enforcement of EC competition law or recommending mutual assistance or cooperation between national courts.

2.2.7.3. Legislation under Article 87, 100, or 100A of the Treaty

Another, perhaps more effective, possibility would be the adoption of Regulations or Directives under article 87 (2) (e) of the Treaty or under Article 100 or 100A to harmonise the most important substantive procedural rules of the Member States relating to time limits, discovery, evidence, severance and remedies in EC competition law cases. The various compliance Directives adopted in the field of public procurement may form an exemplary precedent\(^\text{®®}\). Even in the US, however, the different States have not harmonised their rules of procedure, but the Field Codes and Restatement have reduced the differences.

The *Deringer Report* as early as in 1960 considered that the question of remedies for breach of Articles 85 and 86 should be included in Regulation 17 but thought that no uniform rule should be proposed until a study of the laws if the Member States had been made\(^\text{®®}\). We saw at 2.2.3. above that such a study was made for the Commission and that the conclusion was moderately positive in that each Member State could, in theory, provide remedies under domestic law for breaches of Articles 85 or 86 regardless the substantial differences between the procedural laws of the Member States\(^\text{®®}\). This positive conclusion may have deterred the Commission from taking any legislative initiatives


\[^\text{®®}\] See 2.2.3. above, footnote 22.
in this matter.

Kerse noted that, although a uniform solution may be thought desirable, there is much to be said for waiting until inadequacies or shortcomings of national law are clearly demonstrated. This is true but, considering the substantial confusion that currently still exists, it is submitted that it may take a very long time before these shortcomings have crystallised in judgments. The current case-by-case solution through preliminary rulings is also taking too long. Not all requests for such rulings are granted and, if they are, the Community Court seems not often prepared to grasp opportunities to deal with the above issues in a wider sense. It tends to confine its rulings to the issues precisely requested.

In the Banks case, for example, the Advocate General was clearly prepared to deal in a general way (not only under the ECSC Treaty) with the issue of damages and the binding effect on national courts of formal negative clearances and comfort letters issued by the Commission, but the Court refused to go beyond the ambit of the specific situation and the provisions of the ECSC Treaty and did not go into the issue of damages under EC law.

The principle of subsidiarity, the Commission's active policy of encouraging decentralisation by virtue of attaching priorities to its case load and its Notices on cooperation with national courts and national authorities have brought domestic proceedings to the foreground and it is submitted that

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11 See 1.3. and 1.5. supra.
12 See 1.4.2. supra.
14 Notice on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Article 85 or 86 of the EC Treaty. O.J. C313/3 of 15.10.97.
specific legislative measures on the enforcement of EC competition law are needed soon in order to counter the growth of a general aversion against domestic proceedings because they seem ineffective, indiscriminate, or overly complicated".

2.2.7.4. Database of judgments by national courts of the Member States

Whilst considering the need for measures to harmonise procedural rules, it might be useful if a database were set up containing all EC competition law decisions rendered by all national courts in the EC.

At this moment there is no organised compilation of national judgments. Each year, the Commission urges the Member States to inform it of cases decided under Article 85 and 86. Some Member States send all the decisions involving Articles 85 and 86, some only send the most important cases and some send none at all because the numbers are not compiled and recorded within the Member State itself. Some of the cases received by the Commission are discussed in its Annual Reports on Competition Policy. The Community Court compiles its own statistics of cases that have come to its attention by way of its function.

The database could be compiled in the original languages with short summaries in one or two of the main languages enabling identification of the central issues. Alternatively, a multilingual service could be set up at the Commission, that could, upon request, perform the search for similar precedents or provide assistance.

This database would help the Commission to identify the

"See also Winterstein: A Community Right in Damages for Breach of EC Competition Rules? [1995] 1 E.C.L.R. 46, at 52:
"It would indeed be a strange irony if the result of an increasingly decentralised enforcement of the EC competition rules were to be an undermining of their practical effectiveness."

He also remarked that, in addition to basing the claim for damages on Community law alone, a further step would be to contemplate common procedural rules for pleading claims of damages (footnote 21 on p 52 of his article)."
areas in which the scope for divergence is greatest and where action should be taken to address the situation. The domestic procedural rules that differ most could be remedied by harmonising legislation.

The database would also be useful to national courts having to apply Article 85 or 86 in that it would enable them to compare (economic) assessments made and decisions taken by other courts on similar issues. It could also help them in deciding whether or not to make a reference for a preliminary ruling. This could facilitate a more uniform approach by the judges themselves, not in respect of those areas in which they are tied by procedural rules or restricted by parallel proceedings before the Commission, but in respect of those areas in which they enjoy some discretion.

2.2.8. Evaluation

In complicated actions across borders and those involving non-EC parties, the Commission is the preferred forum since it has the power to deal with cross-border infringements in one decision and it can enforce this decision within the territory of the EC as a whole.

Despite the "cross-frontier" nature of EC competition law, a large number of "national cases" fall within the scope of Article 85 or 86 as well. Activities or agreements by parties established within the same Member State and/or conduct taking

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" See chapter 3 below.

" See on the demarcation line between EC competition law and domestic competition law 2.3.2. below.

place within a single Member State" may nevertheless affect trade between Member States, for example, because the potential effect of the conduct is a restriction on imports from -, or exports to other Member States®®, or because the conduct forecloses entry by foreign competitors"", or, more generally,


" In Consten and Grundig v Commission, case 56 & 58/64, [1966] E.C.R. 299 at point 341, for example, the Court held:

"[... ] the contract between Grundig and Consten, on the one hand by preventing undertakings other than Consten from importing Grundig products into France, and on the other hand by prohibiting Consten from re-exporting these products to other countries of the common market, indisputably affects trade between Member States".


" Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis, case 161/84, [1986] E.C.R. 353. Here the Court held at para 27 that clauses in distribution franchise agreements which cause a partitioning of the market between franchisor and franchisee or between franchisees are capable of affecting interstate trade, even if concluded between companies within the same Member State, to the extent that they prevent the franchisees from setting themselves up in other Member States. See also Brasserie de Haecht SA v Wilkin (1), case 23/67, [1968] C.M.L.R. 26. Here there was a tie of one single café to a small Belgian brewery. The Court held that, if most Belgian cafés were tied in this way, it might be difficult for other firms to enter the Belgian market. For more examples see, Butterworth's Competition Law, Part I, ed. Freeman and Whish, I [264], I [244] and I [283].
impedes the economic interpenetration envisaged in the Treaty\textsuperscript{2}.

In \textit{Cementhandelaren}, a recommendation by a trade association of Dutch cement traders relating to prices at which cement should be sold in the Netherlands was confined to one Member State but was considered to fall within the scope of EC competition law. In answer to the argument of the cement traders that the agreement did not apply to exports, the Community Court stated:

"An agreement extending the whole or a substantial part of the territory of a Member State by its very nature has the effect of reinforcing the compartmentalisation of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about and protecting domestic production. [...] In particular, the provisions of the agreement [...] make it difficult for producers or sellers from other Member States to be active in or penetrate the Netherlands' market"\textsuperscript{4}.

The issue was further explained by the Community Court and Advocate General Mischo in \textit{Belasco v Commission}\textsuperscript{5}. They considered that it was difficult to maintain high prices within one country unless import is impeded. In other words, a cartel

\textsuperscript{2} In the draft to the Notice of 1997, revising the 1986 Notice on agreements of minor importance, COM (96) 722 final, paragraph 3 of the explanatory note, the Commission reiterated this possibility:

"Even so called "national" agreements in which only the undertakings of one Member State participate and which were created with the sole aim of regulating the production or marketing of products in that member state, are covered by Article 85 (1) when they cover the whole or the greater part of the national territory, because they grant an artificial protection to national industry and therefore impede the economic interpenetration envisaged in the Treaty".

This paragraph did not appear in the final version of the Notice, O.J. C 372/4 of 9.12.97. This Notice is discussed at 3.1.2.2. and 6.3.3. below.


will not work unless one can keep foreigners out. This in itself suffices for affirming that the conduct may affect trade between Member States.

Numerous "national cases" have been before the Commission and the Community Court and since both have adopted a wide approach to the concept of "trade between Member States", very few cases have escaped application of Article 85 by parties relying successfully on their agreement having no appreciable effect on interstate trade®®. This subject is discussed further at 2.3.2. and 2.3.3. describing the boundary between EC competition law and national competition law.

®® I am aware of only two examples: Groupement de Fabricants de Papier Peints de Belgique v Commission, case 73/74, [1975] E.C.R. 1491, [1976] 1 C.M.L.R. 589. Here the Community Court overturned the Commission's decision because it had not sufficiently explained the way in which a national system of collective resale price maintenance affected trade between Member States. In Hugin Kassaregister AB and Hugin Cash Registers Ltd v Commission, case 22/78, [1979] E.C.R. 1869, [1979] 3 C.M.L.R. 345, the Commission's decision was overturned because the Community Court could not see how interstate trade was affected by a refusal of a Swedish producer to supply product to a UK based firm who exclusively operated in a part of the UK market. At para 17, the Court explained the boundary between the areas covered by Community competition law and national law as it thought was intended by the condition "effect on trade between Member States":

"Community law covers any agreement or practice which is capable of constituting a threat to freedom of trade between Member States, in particular by partitioning the national markets or by affecting the structure of competition within the common market. On the other hand, conduct, the effects of which are confined to the territory of one Member State, is governed by the national legal order".

This relatively limited view of the scope of the concept "trade between Member States" was strange because an export ban to Germany had been included in the agreement and, in the case of export bans, there is virtually an automatic presumption that Article 85 applies. The view expressed in Hugin was followed by the Court of First Instance in BBC v Commission, case T-70/89, [1991] E.C.R. II 535, [1991] 4 C.M.L.R. 669, paragraph 64, but has on subsequent occasions been extended. See, for example, Binon & Cie SA v Agence et Messagerie de la Presse SA, case 342/83, [1985] E.C.R. 2015, [1985] 3 C.M.L.R. 800 at para 9; and Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillingallis, case 161/84, [1986] E.C.R. 353 see footnote 81 supra. See Kerse, EC Antitrust Procedure, 3rd ed, 1994, p 12.
In respect of "national" cases, there are no obstacles of private international law such as obtaining evidence or enforcing injunctions or judgments abroad and there will be no scope for forum shopping in respect of procedural rules®. It is here that national courts (and national authorities) can truly form an alternative forum for the enforcement of EC competition law. However, there are other problems. It is exactly in those "national cases" that possible overlap with domestic competition law is most apparent. This is the subject of the next section.

2.3. The application of EC competition law vis-a-vis national competition law

2.3.1. Laws of the Member States

The EC Member States each have their own domestic competition laws®. For some thirty years, these laws were scarcely affected

® See 2.3.3. below.

® The competition laws of the fifteen Member States are:

Belgium: Loi du 5 août 1991 sur la protection de la concurrence économique. Articles 2 and 3 are similar to Articles 85 and 86.
Denmark: Konkurrenceloven (Competition Act), Statute 370 of 7.6.89, Consolidated version: Order no 114 of 3.3.1993 - amendments expected.
France: Ordonnance n/86-1243 du 1.12.86 modifiée relative à la liberté des prix et de la concurrence, Amended by Act of 1 July 1996.
Germany: Gesetz gegen Wettbewerbsbeschränkungen (GWB) - in the process of being amended.
Italy: Legge no 287 della concurrenza of 14.10.90.
by Community law, "save to the extent that national law takes into account the ease of trade between Member States in assessing conditions of supply and demand"[8].

This situation is changing rapidly. During the last few years, the competition rules of most Member States have undergone or are undergoing major changes. These changes are aimed at more similarity with the regime set out in Article 85 and 86 (and the Merger Regulation).

The Member States that recently joined the EC (Sweden, Denmark and Austria but not Finland) have introduced or are introducing competition laws which directly reflect Articles 85 and 86.

At this moment, the laws of Belgium, France, Greece, Ireland, Italy, Luxembourg, Portugal, Spain, Sweden and the Netherlands are similar to Articles 85 and 86. It will be illustrated at 4.2.1. below, that the Italian Statute even requires interpretation according to Community law (and so do the laws of Finland and Sweden) and at 2.3.2. and 2.3.3.1. below that


Spain: Ley 16/1989 de Defensa de la Competencia (The Competition Protection Act) of 17.7.89.

Sweden: Konkurrensanlagen 1993:20 of 14.1.93. Close resemblance to Articles 85 and 86.


Italian competition law does not apply to cases within the scope of Articles 85 and 86.

The competition rules of Austria, Denmark, Finland, Germany, and the UK are, at the moment, still substantially different but all of them, except Finland, are currently considering reforms to bring them more in line with Community law. The latter two, being old members of the EC, are quite familiar with the direct application of Articles 85 and 86 next to the domestic rules.

The converging trend in the domestic laws of the Member States certainly facilitates compliance by firms with both EC competition law and the domestic competition rules of all Member States in which they pursue business. But despite the growing similarity of the domestic rules, their actual application to restrictive agreements nevertheless continues to reflect the purposes of the Member State in question and differs from the Commission's application of the EC rules.

In France and Italy, for example, domestic rules take a favourable view of vertical distribution systems and exclusivity in sales or distribution contracts does not in itself restrict competition. The different cultural, social and political

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90 In these countries, a violation of the rules on restrictions of competition such as under Article 85 is based on some type of abuse. In the UK, for example, restraints are contrary to the public interest whilst in Denmark a dominant influence may be exerted. See the Commission's Green Paper on vertical restraints in EC Competition policy of 22.01.97, [1997] 4 C.M.L.R. 519.

91 There is a draft Bill circulating widely in the UK for comment, likely to be enacted in 1998. It is similar to Articles 85 and 86 but the old rules on Mergers will continue.

92 The Commission's Green Paper on vertical restraints, at p 61, see footnote 90 supra.

93 Interesting is that the rules of Italy and France and also of Germany and the UK require a "rule of reason" (see 7.2.1.2. below) type of economic analysis in the first instance to determine whether a violation actually exists rather than in determining eligibility for exemption. In doing this, they rely heavily on economic analysis, especially the economic impact of the agreement in the relevant market. See 6.3.2.1. and 8.1. below.
structures in the different Member States have resulted in national approaches to competition that vary considerably and it is expected that this diversity will remain despite the growing convergence of the rules". Kerse noted:

"Whilst national laws may be designed to deal with the same sort of circumstances (i.e. restrictive practices, cartels, dominant positions) as Community law, their purpose will, generally, be specific to the Member State in question and may not however necessarily reflect the same interests and objectives as the Community's".

2.3.2. EC competition law or domestic competition law or both?

EC law does not apply to all anti-competitive behaviour and practices falling outside its scope may be caught by domestic law. Only an agreement or conduct that may affect trade between Member States can fall within the scope of EC competition law. In Consten and Grundig the Community Court stated:

"The concept of an agreement which may affect trade between Member States is intended to define, in the law governing cartels, the boundary between the areas respectively covered by Community law and national law"

In practice, the boundaries between the different fields of application of Community competition law and national competition law are blurred, not only in respect of the territorial application as explained at 2.2.8. above", but also in respect of the substantive application, see 2.3.3.1. (under D) below. Simultaneous application of Article 85 or 86 and domestic

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" See 3.2. and 3.3. below on differences in economic considerations between the Member States.


" The condition is often fulfilled even where the parties, the agreement, and its consequences are confined to one single Member State.
competition law is, in principle, compatible with the rationale of EC law. Application of domestic law is not precluded in cases where EC competition law applies, but conflicts between the two sets of rules must be resolved by applying the principle that Community law takes precedence. The condition "trade between Member States" therefore limits not only the scope of Community law but also that of national law to the extent that Community law conflicts with it and takes precedence. The more loosely the phrase "may affect trade between Member States" is interpreted, the greater will be the risk of conflict and thus "the subordination of national competition law to that of the EC."

Interesting is the unique situation in Italy. By providing that its provisions do not apply to practices falling within the scope of the EC or ECSC rules, the Italian Competition Act 1990 attempts to avoid the concurrent application of EC and domestic

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"[...] The same agreement may, in principle, be the object of two parallel proceedings, one before the Community authorities under Article 85 of the EEC Treaty, the other before the national authorities under national law.

[...] However, if the ultimate general aim of the Treaty is to be respected, this parallel application of the national system can only be allowed in so far as it does not prejudice the universal application throughout the Common Market of the Community rules on cartels and on the full effect of the measures adopted in implementation of those rules.

[...] (C)onflicts between the rules of the Community and national rules in the matter of law on cartels must be resolved by applying the principle that Community law takes precedence."


competition law and thus the possibility of conflict. This option is discussed in more detail at 2.3.3.1. below.

The criterion "may affect trade between Member States" has, from the start, been interpreted widely by both the Commission and the Community Court. This is not surprising as it enables it to make policy decisions necessary for the establishment of the Single Market and the other aims set out in the Treaty but the consequences include a huge workload for the Commission owing to the numerous notifications.

At the same time, the substantive scope of the prohibition of Article 85 (1): the concept of "restriction of competition", is also interpreted widely, especially by the Commission. Consequently, most agreements containing some restriction on conduct (even pro-competitive or insignificant ones) are considered to fall within the prohibition of Article 85 (1) and require exemption, rather than negative clearance to be enforceable. As a result, the discretion of national courts is limited: the more agreements are considered within the prohibition of Article 85 (1), the less a national court can do as it is not empowered to apply Article 85 (3). This issue involves the substantive application of Article 85 by national courts which is discussed throughout part II below. The issue is also addressed in the context of overlap with domestic competition law at 2.3.3.1. below under D.

In applying a wide interpretation of the concept of "trade between Member States", the Commission has not often provided clear reasoning and inconsistencies do exist, even in the

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101 See in respect of cases confined to one Member State 2.2.8. above.

102 See 5.4, 5.6.3, 6.1 and 6.2 below.

103 See on this issue in the context of economic analysis, 3.1.2.1. below.

104 Notably, chapter 5.
jurisprudence of the Community Court. There are basically two different tests that have been used by both.

First, there is the "deflection of trade" test where "it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States".

Secondly, there is the "structural" test where the phrase "may affect trade between Member States" is satisfied by "any alteration in the structure of competition within the common market".

For the earliest and best criticism on the haphazard selection of one of the two criteria by the Commission and the Community Court in respect of the concept "may affect trade between Member States", see the publications of the late Judge Joliet and Professor Korah. Contrary to everyone else, except Advocate General Roemer, they have been critical of the Consten and Grundig judgment right from the start. Joliet, then assistant at Liège, cogently criticised the situation as early as 31 years ago in his book: *The Rule of Reason in Antitrust Law* (1967) and was noted by Professor Korah to describe vividly in a public, on the concept of trade between Member States: "The Court goes like a yo-yo". See the dedication in the front of Korah's *Cases and Materials on EC Competition Law*, 1996. See also on this issue 2.3.3. and 3.1. below and throughout part II.


Both tests are related to the integration of the market. The first test has been used more and seems to prevail today but both tests relate to a similar result: an agreement or conduct will fall within the scope of EC competition law if it is foreseeable that the pattern of trade or the structure of competition within the Community may be affected. In the case of export or import bans from one Member State to another, there is virtually an automatic presumption that the criterion is satisfied. In other cases, a detailed analysis of the relevant market and the likely effects of the agreement in question may be needed.

The conclusion should be that, at the moment, there is always a possibility of overlap of EC competition law with one or more domestic competition law systems. This poses a problem for national courts where the two competition systems conflict, more specifically, where an agreement or conduct is subject to an EC authorization and a domestic prohibition.

The current position seems to preclude national courts from applying prohibitions of domestic competition law to agreements that benefit from an individual exemption or a block exemption Regulation. The same may apply even in the event of comfort letters that close the file by stating that the agreement merits exemption. Consequently, national courts may have to set aside the prohibiting provisions of national law and enforce the agreement by virtue of the principle of supremacy of EC law.

The possibilities that may occur in the simultaneous application of domestic and EC competition law will each be discussed individually in the following sections.

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108 Kerse, Antitrust Procedure, 1994, p 13. See for this analysis in respect of national courts 3.1.1.2. and 3.1.1.3. below.

109 See for criticism in respect of this situation and the resulting conflict with the principle of subsidiarity 2.3.3.1. under C below, notably the remarks of Kerse and Whish.

110 See 2.3.2.4. below.

111 See 2.3.2.4. under D, 5.3. and 5.5.3.3. below.
2.3.2.1. Double authorization

Overlap may result in double authorization. This is the easiest and most desirable overlap situation, the agreement is allowed under all applicable doctrines of competition law.

2.3.2.2. Double jeopardy

Overlap may also result in double jeopardy in that the practice could constitute two infringements: of EC competition law and domestic law (or even more if the domestic laws of more Member States apply) with sanctions imposed under each.

These infringements could be based on similar or different prohibitions in the two sets of rules. A restrictive agreement could be prohibited under Article 85 (1) because it affects trade between Member States and, for example, under section 6 (1) of the UK Restrictive Trade Practices Act 1976 which prohibits many anti-competitive agreements between competitors.

Double jeopardy should not lead to double fines or penalties. The Community Court established that in imposing penalties, the Commission and national authorities will have to take account of other penalties already imposed by the other. In quantifying damages, however, national courts will only have to consider domestic law since damages are to compensate and fines are to punish. Fines could only offset exemplary damages.

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114 Green and Robertson, Commercial Agreements and Competition Law, 2nd ed. 1997, p 394. See also The application of Articles 85 and 86 of the EC Treaty by national courts in the Member States, compiled by Braakman, published by the Commission DG IV, July 1997.
It is not certain whether the Commission is required to consider damages awarded, or likely to be awarded, in domestic litigation in assessing fines under Regulation 17 but the answer seems negative\textsuperscript{11}. The principle of no double punitive sanctions would apply as a general principle of EC law.

2.3.2.3. EC prohibition and domestic authorization

Overlap may also result in two quite dissimilar assessments of the disputed behaviour. Behaviour that seems to pose no problem within the cross-border oriented EC rules may be unacceptable in the territory of one particular Member State or the other way around. Articles 85 and 86 are directly applicable and the nature of EC law provides that in cases of conflict between national law and EC law, the EC provisions prevail. Case law of the European Court of Justice provides that national competition laws should be administered in conformity with Community law and without prejudice to the principle of unrestricted and uniform application of Articles 85 and 86 as set out in Article 5 of the EC Treaty and subsequent case law of the Community Court. Member States should abstain from enacting or enforcing laws which could jeopardise the effectiveness of the rules on competition\textsuperscript{116}.

\textsuperscript{11} Green and Robertson, ibid. Automec II (see 1.4.2. above) implies, however, that if a firm has a judgment in damages, the Commission is not very likely to open proceedings unless Article 85 (3) is invoked or the case is of Community interest. Whilst the national court may be interested in damages only within the jurisdiction, the Commission may be concerned about that in other Member States.

\textsuperscript{116} The prohibitions contained in Article 85 (1) and 86 are intended first and foremost to abolish obstacles to interstate trade and therefore to guarantee the unity of the internal European market (Article 2 and 3 (g) of the Treaty). The exemptions from the prohibition in favour of arrangements that contribute to improving the production or distribution of goods or to promoting technical or economic progress specified in Article 85 (3), on the other hand, constitute positive, albeit indirect, interventions in order to promote the harmonious and balanced development of economic life within the Community (Article 2). The force of these provisions and the measures adopted in order to apply them must not be reduced by legal acts on the part of States. Otherwise the effectiveness of the legal
This means that where there is an EC prohibition and a domestic authorization, the situation is simple; national measures that order, declare to be generally binding, confirm, promote, or simply permit such agreements or practices will therefore be ineffectual. The agreement cannot be enforced in a national court. Moreover, the courts of Member States are bound not to observe the provisions and measures of national law that are incompatible with Community law in the event of a conflict. Nor can a Commission order, either final or interim, be overturned in one Member State by a national court.

2.3.2.4. EC authorization and domestic prohibition

In case of an EC authorization and a domestic prohibition, problems arise. Although the domestic laws are becoming increasingly similar to the EC rules, several Member States still have different criteria in their domestic laws as to what constitutes anti-competitive behaviour. Compare, for example the criterion of "public interest" in the UK Restrictive Trade Practices Act 1976 with the main thrust of EC competition order of the Community would be impaired and the attainment of the objectives of the Treaty would be placed at risk. Walt Wilhelm, case 14/68, [1969] E.C.R. 1, at 14, op. cit.


120 See 2.3.1. supra.

121 The Act deals with horizontal agreements. Agreements containing restrictions in the form specified in the Act have to be registered and may be referred to the Restrictive Practices Court by the Office of Fair Trading, irrespective of whether they restrict competition. Instead, these agreements are presumed to be contrary to the public interest unless it can be proven that they have beneficial effects which outweigh the detriment that may exist from operating the restrictions. The benefits that may
law: the establishment of a common market, and the concepts of "restriction of competition" and "affect trade between Member States" set out in Articles 85 and 86. Another example is the concept of "dominance" under Article 86. In the UK, firms that satisfy the criteria of the Fair Trading Act 1973 may be singled out for investigation by the Monopolies and Mergers Commission or by the Director of Fair Trading under the Competition Act 1980.

The result may be that certain behaviour by companies that are not caught by Article 85 (perhaps by virtue of a negative clearance from the Commission), exempted under Article 85 (3), or outside Article 86, is nevertheless prohibited under domestic competition law.

Where conduct outside the scope of Article 86 is caught by domestic law, there is no problem since the two sets of law do not conflict in that situation.

In respect of Article 85, however, the situation is more complex. The various types of EC authorizations will each be discussed separately.

A. Negative clearance

Where the agreement falls outside the scope of Articles 85 and 86, it seems that there is no objection to the application of stricter national law since there cannot, by definition, be any conflict between the two sets of rules. The Community Court made this clear in the Perfumes cases where the Commission had issued a comfort letter stating that in its view, the

be invoked include the necessity of the agreement: for consumer protection, for protection of the party involved against countervailing power, or for maintaining employment or exports. A large number of agreements are exempted without a competition objective.


agreement in question did not affect trade between Member States and fell outside the scope of Article 85.

There are other types of clearances, however, where the Commission or the Community Court refused to apply Article 85 to an agreement because much of the agreement was considered compatible with Article 85 (1). This happened in Metro v Commission124, for example, where the Court upheld a negative clearance from the Commission by stating that, subject to certain conditions125, selective distribution systems that aim at the attainment of a legitimate goal capable of improving competition in relation to factors other than price constitute an element of competition which is in conformity with Article 85 (1). The Court thereby introduced a new doctrine for "simple selective distribution systems" which provided a basis for subsequent cases126.

A comparable situation arises in cases where the Community Court considers agreements outside the scope of Article 85 on the basis of its doctrine of "ancillary restraints"127 or its doctrine on "exclusive purchasing agreements" as confirmed in Delimitis128 stating that such agreements do not have as their object the restriction of competition and they do have that effect only in unusual circumstances.


125 The conditions were that resellers are chosen on the basis of objective criteria of a qualitative nature relating to the technical qualifications of the reseller and his staff and the suitability of his trading premises and that such conditions are laid down uniformly for all potential resellers and are not applied in a discriminatory fashion, [1978] 2 C.M.L.R. 1 at para 21.


127 See 3.1.1.1, 5.2.2.1., 6.3.1. and in particular, 7.1. below.

128 See 1.5.3. supra and 7.2. below.
In situations like this, where special doctrines are applied to essentially pro-competitive agreements to prevent them from being caught by Article 85, the refusal by the Commission or the Community Court to apply the EC rules could be understood "to invest the agreement in question with a validity at Community level which overrides the stricter provisions of domestic law".129

It is submitted that this line of thought is very convincing, especially since the domestic competition laws more and more reflect Articles 85 and 86. The agreement has been fully assessed under Article 85 and, as a result, it has been found compatible with that provision. In fact, one could speak of a "positive clearance".130

However, the Perfume cases referred to above seem to hamper this line of thought, at least where the reason for non-application is that:

- the agreement falls below the de minimis rule as set out by the Commission in the Notice on agreements of minor importance, see 3.1.1.2. and 6.3.3. below,

- the agreement benefits from a negative clearance from the Commission, or

- the agreement benefits from a comfort letter from the Commission stating that the agreement does not come within the scope of Articles 85 or 86 (see on comfort letters stating that the agreement merits exemption this same section, under D.)

In those situations, stricter provisions of domestic competition law can be applied. It will be illustrated at 2.3.3.1. under D below that it might be worth to reexamine this

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position by excluding from it those negative clearances that consider an agreement compatible with Article 85 (1) on the basis of a substantive assessment.

B. Individual exemption

Where the Commission has granted an individual exemption under Article 85 (3), the situation is complicated. In *Walt Wilhelm* the Court held that, in order to achieve the objectives of the Treaty, the Community authorities are permitted "to carry out certain positive, though indirect action with a view to promoting a harmonious development of economic activities within the whole Community". This reference to positive indirect action has been used to support different views on how to treat the problem of exemptions.

The first view is that individual exemptions are purely permissive. An exemption from the Commission is not an application of Community law but a concession from its application. All an exemption under Article 85 (3) does is removing certain conduct from the ambit of Article 85 (1). Positive though indirect action is, in this view, interpreted as meaning other measures under the Treaty such as Directives under Article 102. An exemption does not therefore preclude the application of stricter national law.

The second view is that individual exemptions are an active

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112 Markert, Some Legal and Administrative Problems of the Co-Existence of Community and National Competition Law in the EEC, [1974] C.M.L. Rev. 11. Markert was head of the legal service of the Bundeskartellamt and concerned that German law might be pre-empted by group exemptions, for instance for specialisation, where the Commission just wanted to reduce its workload. This may have been a policy disguised as legal argument.

113 See Advocate General Roemer's opinion in *Walt Wilhelm v Bundeskartellamt*, case 14/68 [1969] E.C.R. 1, [1969] C.M.L.R. 100 at p 23. He described the exemption process as one: "where certain positive aspects of an agreement may prevail over the Community prohibition and the application of Article 85 (1) is waived" (emphasis in original).
(positive) finding in the sense envisaged by the Community Court in *Walt Wilhelm*. The agreement has been found desirable and therefore binds national courts. Exemption thus ceases national prohibitions from being legally effective\(^{134}\).

Some compromise views have also evolved stating that national law may disregard exemptions in certain circumstances only\(^{135}\).

A detailed description of the different views and theories would go beyond the scope of this book. There is excellent literature\(^ {136}\). No matter how different the existing views on the subject are, there has been a common consensus amongst all authors that the position as regards the status and effects of Community exemptions in relation to domestic competition laws is unclear. "It is undecided whether all, some or none need be respected by national law and, if so, to what extent"\(^ {137}\).

Recently, however, the second view was promoted by the Commission and Advocate General Tesauro in *Bundeskartellamt v Volkswagen and VAG Leasing* and in *BMW v ALD*, not only in respect of individual exemption decisions but also in respect of block exemptions (see below under C). This position may have a large impact on national courts. It deserves some critical attention.

\(^{134}\) *Braakman* and *Schröter* at p 24 and 25 of the Introduction to: *The Application of Article 85 and 86 of the EC Treaty by National Courts in the Member States*. Compiled by *Braakman*, Publication of the Commission, DG IV, July 1997. They make distinction between individual and block exemptions.


Whish wrote in respect of the second view that exemptions may not just be:

"a grudging concession on the part of the Commission but rather have a positive role in the economic policy of the EEC; the language of Article 85 (3) itself seems to support this view. Furthermore, in the case of an individual exemption, the Commission has to have considered the very agreement in question, and to have given it its imprimatur; this would not be the case in respect of an agreement that falls within a block exemption".  

The last sentence distinguishes the status, in relation to domestic competition law, of individual exemptions from block exemptions.

Block exemption Regulations enable large numbers of agreements to be are exempted en block on the basis of, often meagre, general policy considerations listed in the recitals. It is arguable that these should not preclude stricter domestic laws, see below under C.

In contrast, the process of adopting an individual exemption decision implies that the Commission will have gone at great lengths to consider the specific agreement in its legal and economic context and consequently has made a positive finding to exempt the agreement from the general prohibition of Article 85 (1) because the agreement is considered desirable in terms of Article 85 (3). These considerations support the opinion that individual exemptions should preclude the application of stricter domestic law.

However, it is submitted that the distinction is not so clear in practice. The Commission adopts on average only four or five exemption decisions each year. The remainder of notifications is dealt with by way of comfort letters closing the file which often contain very few substantive policy considerations. It has been cogently argued by Korah that, despite so few being adopted, most individual exemption decisions lack thorough analysis and reasoning and the legal conclusions

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139 See 5.4. below.
do not relate to the specific facts. Much could be done to improve their clarity and quality as, currently, the Commission misses a chance to educate business, lawyers, its own officials and, last but not least, national courts.

So far, however, this opportunity has not been grasped often and the reasoning and considerations expressed do not differ much from those in the recitals of the block exemptions. Moreover, the precedence value of the decisions may be limited owing to the fact that most are heavily fact-dependent and it may be argued that this value is not undermined by the application of stricter domestic law.

Interesting to note is that the Commission's views appear to have made a u-turn. It used to consider exemptions (both individual and block exemptions) as:

"the only Commission measures which prevent the application of domestic competition law where this would have the effect of prohibiting or annulling an agreement exempted under Article 85 (3)".

However, in a subsequent press release the Commission admitted that, in some cases, its exemptions may be subjected to

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140 See 3.1.1.2., footnote 20 below.

141 Korah, *EC Competition law and Practice*, 6th ed. 1997, p 301 ff at 302:

"By seldom spelling out the economic and legal arguments more precisely in its decisions and in the recitals to its regulations, the Commission loses a wonderful chance to educate not only business and its advisers, but also its own officials, national authorities, national courts and the Community Courts. [...] The Commission should be an expert and experienced body and should develop its policy openly. Well-analysed reasoning need not add to the length of a decision, as the Commission can limit the factual part of the decision to what is relevant for or against the conclusion."

142 Kerse, *EC Anti Trust Procedure*, 1994, submission in footnote 68 at p 386.

further national rules" and in the draft of the Commission's Notice on cooperation with national courts, the Commission said that only those national prohibitions that prejudice the "essential basis" of the Commission's individual exemption must be set aside but this remark did not appear in the final version of the Notice."\(^{144}\)

The reason for this policy change may have been the Commission's active encouragement, in the last decennium, of national courts as alternative fora for the enforcement of EC competition law. Since national courts are unable to issue exemptions, they may be able to support the Commission by using domestic competition law. The risk posed by the possibility that, in this process, some exemption decisions may be tainted by stricter domestic provisions may be taken for granted. With so few exemption decisions each year, this situation is not expected to arise often in any event. To make individual exemptions preclude stricter provisions of domestic laws would have a much larger impact since comfort letters stating that the agreement merits exemption may then also have to be followed (see below under D).

C. Block exemptions

Block exemptions appear less precisely aimed than individual exemptions because they exempt large groups of agreements "en bloc" as a matter of general policy to free DG IV's limited resources from having to monitor individually, common kinds of agreement.

It is arguable, therefore, that stricter provisions of domestic competition law may be applied, in individual

\(^{144}\) IP/90/472 of June 1990.

\(^{145}\) Compare the draft, point 12, with the Commission's actual Notice, O.J. 1993 C 39/6, [1993] 4 C.M.L.R. 12, point 12. See 1.4.3. supra and 5.5. and 5.6. below.
circumstances, to agreements benefitting from their protection. This has been done in the past. The UK beer supply report is an example illustrating that the UK's Monopolies and Mergers Commission has not hesitated to look into those agreements and treat them more severely. The Commission allowed this to happen and was happy with the result.

Another justification for this view is the fact that some of the block exemptions include, or used to include, recitals expressly contemplating the application of stricter national competition laws.

Opponents to the view that a block exemption is merely a concession from the application of Article 85 (1), have argued that the recitals to each block exemption Regulation elaborate the reasons why particular agreements should be permitted and that this should be seen as a positive act on the part of the Commission from which national courts should not derogate through

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14 An example of a stricter domestic rule is the UK Patents Act 1977, s 44 which forbids tie-ins in patent licenses which, in some circumstances, would be permitted by Regulation 2349/84 and its successor: the Technology Licensing Regulation 240/96. Whish, Competition Law, 3rd ed 1993, p 40.

147 Report on the Supply of Beer for Retail Sale in the UK, (1989) Cm. 651. The MMC considered that some parts of Regulation 1984/83 (it did not say which) could not be considered sufficiently strict and could, by virtue of UK domestic law, be restricted further. According to the MMC, it followed from general principles of EC law that stricter domestic law could be used to halt adverse effects in the UK (point 12.118). Orders were made on the basis of the report, SI 2390/1989 and SI 2258/1989, that went further then the Commission could have done. See Korah and Rothnie, Exclusive Distribution and the EEC Competition Rules (2nd ed) 1992, at 8.26. See also Swift and Anderson, Developments in United Kingdom Competition Law and its Relationship with EC Law, [1991] Fordham Corporate Law Institute, at 528. In later reports, the MMC demonstrated a similarly independent attitude in respect of the Commission's policies. See Kon and Bara, A Fragrant Success before the MMC, [1994] 3 E.C.L.R. 165.


149 See recital 19 to Regulation 1984/83 and recital 29 to Regulation 123/85. When the latter Regulation was replaced, upon expiry, by Regulation 1475/95, the recital in question was left out.
application of domestic laws.

It is submitted that this argument is even less convincing in respect of block exemption Regulations than in respect of individual exemption decisions (see above under B). The policy of the Commission was primarily to reduce its workload by disposing of the masses of notified agreements which, in themselves, would not necessarily have restricted competition in the first place, had the Commission not from the start interpreted the substantive scope Article 85 (1) so widely and had the notification system not been intended to monitor all agreements having some impact on competition or interstate trade.

Whish mentions another argument in support of the view that block exemptions may pre-empt stricter domestic rules.

"The block exemptions all confer power on the Commission to withdraw the benefit of the block exemption in particular circumstances. To allow a national authority to apply its stricter provisions would seem to run counter to this"\textsuperscript{150}.

Today, however, the Commission is actively encouraging national courts to apply EC competition law (see section C above) and, although national courts cannot help the Commission in its application of Article 85 (3)\textsuperscript{151}, by not pre-empting national courts from applying stricter domestic rules to certain agreements that appear to benefit from a block exemption, the national courts could again support the Commission. The domestic competition laws of more and more Member States become similar to Articles 85 and 86 and a domestic condemnation, in a particular Member State, of an agreement benefitting from a block exemption may involve much the same rationales as would a Commission decision to withdraw the benefit of a block exemption. This, again, may be a partial reason for the u-turn in the Commission's policy (see previous section C above).

Nonetheless, in the recent cases BMW v ALD and Bundeskartellamt v Volkswagen and VAG Leasing before the

\textsuperscript{150} Whish, Competition Law, 3rd Ed. 1993, p 40.

\textsuperscript{151} See 1.2.2. and 1.2.3. above.
Community Court, Advocate General Tesauro argued, in unequivocal terms, that the application of a block exemption and the existence of an individual exemption foreclosed action by national authorities under domestic competition law.\(^\text{152}\)

Unfortunately, the Community Court did not reach the issue. It ruled that the agreements in question fell outside the relevant block exemption and consequently infringed article 85. The opinion of the Advocate General should therefore retain some persuasive authority. He took the view that:

"Since the agreements in question are liable to affect trade between Member States and therefore fall in principle within the prohibition set out in Article 85 (1), the [block] exemption granted to them cannot but prevent the national authorities from ignoring the positive assessment put on them by the Community authorities. Otherwise, not only would a given agreement be treated differently depending on the law of each Member State, thus detracting from the uniform application of Community law, but the full effectiveness of the Community measure - which an exemption under Article 85 (3) undoubtedly is - would also be disregarded.

Neither does it appear to me that a different conclusion may be reached with regard to agreements protected, not under individual exemption but under an exemption regulation. In that connection, it is sufficient to observe that exemption regulations - in the same way as Articles 85 and 86 - produce direct effects in relations between individuals and create rights directly in respect of the individuals concerned which the national courts must safeguard.

A National court is therefore bound not to take decisions which are incompatible with the provisions of an exempting regulation by extending its scope in relation to agreements which are covered by the exemption; if need be, it should first make a reference to the Court of Justice for a preliminary ruling under Article 177 of the Treaty.\(^\text{153}\)."

The Advocate General said that even a domestic prohibition based on "particular circumstances" would counter the principle


\(^{153}\) Points 38 and 39.
of supremacy of EC law unless they are of such a kind as to not give rise to any conflict between national law and Community law. He also referred to recital 29 in Regulation 123/85 as being contradictory and thought that the best interpretation would be that agreements, which are eligible for exemption under a provision of the Regulation, may be prohibited by national law, but only on the condition that this is expressly provided for by some other provision of the Regulation. It should be noted that in Regulation 1475/95, replacing Regulation 123/85, the recital was left out.

Until the Community Court has addressed the issue, the views set out in this opinion may be considered as an authoritative guideline but it should be kept in mind that Advocate Generals Roemer and Reischl have differed on this issue in the past. Advocate General Roemer stated in his opinion in Walt Wilhelm:

"If national authorities thwart the Community exemption through the application of a national rule of prohibition, they no more threaten the objectives of the Treaty than do the parties to an agreement when they refrain from applying it, which can occur at any time. This conclusion applies as a general rule because in principle cartels cannot be considered as instruments of the organisation of the Common Market."

Should the opinion of Advocate General Tesauro one day be confirmed by the Community Court, which seems probable, the consequences for national courts will be momentous. They will have to enforce agreements benefitting from an individual or block exemption and ignore prohibiting provisions of domestic law. The consequence for business is that such agreements will not be subjected to the multiple control of stricter domestic provisions in the different Member States in which they operate.

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154 See points 40 and 41.


and that national courts can ignore domestic prohibitions in private litigation.

Finally, it has never been suggested that an individual exemption or a block exemption Regulation precludes domestic actions in the field of lack of capacity, fraud or other provision of national law (commercial, fiscal, criminal etc.) not based on protecting competition which may be relevant.57

D. Comfort letters

In its draft Notice on cooperation with national courts, the Commission stated that comfort letters58 appear not to preclude the application of stricter domestic competition law. Again, this aspect did not appear in the version of the Notice finally adopted. For a long time, there has been consensus that a particular practice which has been authorised under EC competition law by way of comfort letter could still be subject to stricter domestic laws of the Member States involved but it seems that this view may have changed at least partially.

Generally, a comfort letter is not regarded as a positive, though indirect, action as referred to by the Community Court in Walt Wilhelmu.59 There merely state that the Commission does not wish to consider the issue further and that it closes the file. Comfort letters stating that the agreement does not fall within Article 85 or 86 pose no problem, see section A above since the EC rules do not apply.

Problems arise where a national judge is faced with an agreement prohibited by domestic competition law but for which a comfort letter was granted stating that the agreement merits exemption under Article 85 (3). The agreement, which has not (yet) been exempted by the Commission would not only be subject


58 See on comfort letters, 5.4.1.3., 5.4.2.2. and 5.6. below.

to domestic competition law but it would also be within the scope of Article 85 (1), since otherwise it would not need exemption.

Conflict could thus occur not only between domestic law and EC law but also within the boundaries of EC law itself, as applied by the Commission and by national courts. The latter situation has been addressed in some detail by the Community Court in Delimitis v Henniger Bräu where the Court held that, in the circumstance where EC law is applied by both national courts and the Commission, a national court should abstain from applying Article 85 (2) and stay the proceedings in order to avoid conflict with a later Commission decision. The judgment is discussed extensively in Part II below.

The former situation, however, concerning conflict with domestic competition law, was not addressed in Delimitis and still requires a judgment from the Community Court, not only in respect agreements that benefit from a comfort letter stating that the agreement merits exemption and in respect of block exemptions and individual exemptions as shown in the previous sections, but also in respect of notified agreements that may result in individual exemptions.

It is submitted that if the position (as stated by Advocate General Tesauro under C above) is that individual exemptions and block exemptions prevail over stricter domestic competition law, it would seem correct for national courts to treat comfort letters stating that the agreement merits exemption and notified agreements that seem eligible for exemption in the same way or at least to adjourn and consult the Commission.

"It would be unfortunate if the legal position varied according to the point at which the Commission's assessment of an agreement is terminated. In practice, far more cases

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140 This issue is discussed in detail in Part II of this book, be it in respect of EC competition law only - the situation in which national courts are asked to apply Article 85 to an agreement which is eligible for exemption.


142 See 5.3. and, in particular, 5.5.
are settled by comfort letter than by a decision and the distinctions between these two methods of disposal ought to be kept to a minimum"\(^{143}\).

Moreover, it will be illustrated at 5.6.2., 5.6.4. and 5.6.4.1. below that the Commission's assessment of the agreement may not be terminated in the case of comfort letters stating that the agreement merits exemption. A consequence of the judgment in Automec II\(^{144}\) is that the Commission can be required to reopen the file and grant a formal exemption decision in cases where the agreement is challenged in a national court under Article 85.

It is not certain whether one can also insist on a formal exemption in cases where the agreement is challenged under domestic competition law. If formal exemptions are considered to set aside domestic prohibitions, however, it would be unfair to distinguish between parties that benefit from such exemption and those that would have received one had the Commission not closed its file.

It is hoped that these issues will be brought before the Community Court soon as, regardless the outcome, it would remove the current uncertainty. Should the Court enforce the view of Advocate General Tesauro, it is submitted that having regard to the principles of equality and legal certainty, it should also extend the implications of the judgment in Automec II by enabling parties in possession of a comfort letter stating that the agreement merits exemption to insist on a formal exemption decision where the agreement is challenged under domestic competition law. Meanwhile, it might be wise for litigants to consider carefully whether one should rely on domestic competition law only or to refer to EC competition law as well.

2.3.3. Evaluation and propositions

The position that a business activity which is tolerated under EC competition law, by virtue of negative clearance or comfort


\(^{144}\) See 5.6.2. below.
letter, could still be subject to the domestic laws of the Member States involved, may lead to various difficulties.

Cross-border activities could be the subject of the domestic rules of more than just one Member State, which may lead to different assessments of the same agreement in different territories. Although moving in the direction of rules similar to the EC competition rules, it was shown at 2.3.1. above that the competition law regimes in the different Member States still differ in purpose, substance and strictness.

This results in dissimilar trading conditions in different areas of the Community and again creates scope for forum shopping, be it of another type than that mentioned at 2.2.6. and 2.2.8. above. Rather than choosing to submit to a Member State's court which seems to offer the best domestic procedural tools in litigation over EC competition law, firms may decide to appraise the different fora in respect of the substantive domestic competition rules and the way in which the latter are applied and enforced before deciding to invest, establish an office or pursue business in a particular member state.

The relationship between individual exemptions, block exemptions and comfort letters stating that the agreement merits exemption on the one hand and prohibitions under domestic competition law on the other has not been addressed by the Community Court as yet. The current position appears to subordinate domestic prohibitions to EC exemptions, both individual and block exemptions. This position has the advantage that it avoids conflict between EC and domestic competition law and provides agreements benefitting from exemption with one stop shop protection against stricter provisions of domestic competition laws. It also involves drawbacks, however, mainly for national courts and the Commission.

The attitude of courts in the UK remains uncertain but the courts of most continental Member States are reported to have accepted, as yet mainly only in theory, that Commission exemptions and block exemptions are binding and take precedence
over stricter domestic competition law\textsuperscript{166}. Although the issue has not arisen often, an increase in cases before national courts, as may now be expected, may have important consequences.

First, once the overriding effect of individual exemptions and block exemptions over domestic competition law as promoted by Advocate General Tesauro becomes better known, it may lead to companies increasingly notifying to the Commission for individual exemptions since those would provide a one stop shop by protecting them from the prohibitions of the domestic competition laws in all the Member States. The Commission, however, is more likely to grant a comfort letter. It is not certain whether, in respect of comfort letters stating that the agreement merits exemption, the possibility of requiring the Commission to formalise these letters as implied in \textit{Automec II}\textsuperscript{167} would also include cases involving domestic competition law. Should this be the case, as submitted in the previous section, firms may be even more inclined to notify.

Secondly, the theory set out in the opinion Advocate General Tesauro will increase the importance of block exemptions as those may have a similar protective effect against domestic competition law as exemptions. In Part II below, it will be explained that it is difficult to draft a commercially sound agreement within the terms of a block exemption\textsuperscript{168}. The Community Court has added to this problem recently by interpreting the scope and application of block exemptions narrowly. A single clause that goes beyond its scope may remove the benefit of the block exemption in its entirety\textsuperscript{169}. However, since the benefit from a

\textsuperscript{166} The Application of Article 85 and 86 of the EC Treaty by national courts of the Member States, Report compiled by Braakman, published by the Commission, DG IV, July 1997.

\textsuperscript{166} See 5.6.2. below.

\textsuperscript{167} Unless their traditional scope is expanded as proposed in the Commission's Green Paper on vertical restraints, COM (69) 721 final, [1997] 4 C.M.L.R. 519. See 6.3.2. below.

\textsuperscript{168} \textit{Delimitis v Henniger Bräu (Delimitis)}, case C 234/89, [1991] E.C.R. 935, [1992] 5 C.M.L.R. 210, see 1.5.3. supra and, in particular, 5.5.2.1. and 5.5.3 below.
block exemption may now provide protection against the stricter domestic competition laws of all Member States, firms setting up EC-wide agreements will try even harder to fit within the strait-jacket provisions of a block exemption. It will be argued at 6.3.2, 6.3.4. and 9.4.3.3. under B below that this heavy reliance on legislative strait-jacket provisions is an unfortunate development in that it hampers contractual creativity and restricts the jurisdiction of national courts.

2.3.3.1. Aspects that reduce the potential for conflict between domestic and EC competition law

Having assessed the potential for conflict between domestic and EC competition law and the possible consequences for national courts and business, the conclusion must be that the current situation is far from satisfactory. This section describes some interrelated factors that may substantially reduce the problems.

A. The soft harmonisation process

The first factor bound to reduce the problem of conflict between domestic and EC competition law is that many Member States have moved towards domestic competition laws similar to Articles 85 and 86. Provided this soft harmonisation process will continue, not only in respect of the substance of the rules, but also as regards their interpretation and application, the possibility of conflict with EC competition law will be reduced.

The problems involving the application of both systems next to each other still remain, however. Undertakings may still be tried twice or more owing to this multi-stop shop approach. The outcome may be different at EC level and at domestic level despite the substantive similarity of the rules. This is due to the difference in philosophy between the two legal systems, combined with differences in interpretation and ideology.

EC competition law is aimed at achieving a system of undistorted competition in the common market. In order to attain a common market, all barriers impeding the integration of markets
should be eliminated. Domestic competition law is not concerned with the establishment of a common domestic market since such a common market is considered already in existence, but rather the enforcement of generally-accepted principles of fair and workable competition. Although these two different philosophies have many points in common and in part pursue the same goals, the approach is different from an ideological viewpoint; since anti trust law is a shifting mixture of legal principles and economic and government socio-political value judgments, such an ideological difference may lead to different actions.

B. Reduction of the scope of domestic competition law

The second factor that, in combination with the aforementioned soft harmonisation process, may reduce the potential for conflict between domestic and EC competition law is the Italian example.

Article 1.1. of the Italian Competition Act 1990 Act states that its provisions shall apply to undertakings, abuses of a dominant position, and concentrations which do not fall within the scope of corresponding ECSC and EC rules. In order to verify whether a practice falls within the scope of EC law, the only element to be verified is whether it may produce an effect on trade between Member States.

The Italian legislature has taken the unusual step of imposing on itself a jurisdiction restraint exceeding that which would be required for the purpose of respecting the principle of supremacy of EC law over national laws. This places Italy in a unique position compared to the other Member States. By

footnotes:

169 Articles 2 and 3 (g) of the Treaty.
170 Pavesio and De Rosa op. cit., introduction to the Italian section of: The application of Article 85 and 86 of the EC Treaty by national courts in the Member States, compiled by Braakman, published by the Commission DG IV, July 1997. See on differences in economic considerations between different Member States, 3.2. below.
171 Pavesio and De Rosa, ibid.
reducing the possibility of simultaneous application of the two sets of rules this option avoids conflict and the uncertainty involving a two-stop shop approach.

One drawback is that it involves a heavy reliance on the concept of "trade between Member States". It will therefore work efficiently only if the Commission and the Community Court would clearly determine at which point they consider the application of Articles 85 and 86 to stop and that of domestic law to begin. This point should be made clearer by means of a more concrete and realistic meaning of the "deflection of trade" and "structural" tests currently applied\(^{176}\). The new Notice on agreements of minor importance\(^{173}\) may help to some extent in that it determines the line below which EC competition law will not be applied by the Commission.

Another drawback of this approach is that it requires the Member States to give up a substantial part of the scope of application of their domestic competition law in favour of EC competition law, an area in which the Commission enjoys concurrent competencies and a monopoly in respect of Article 85 (3) which may determine the outcome of private litigation in parallel proceedings decisively\(^{174}\). This may be difficult for Member States to accept unless they get something in return.

One option\(^{175}\) is to introduce a system of exclusive competencies which would confine the Commission's competence to cross-border actions and that of national courts (and national authorities) to national cases. This would be in line with the scenario of a decentralised enforcement.

It is submitted, however, that such a division of competencies could only be realised within the existing wide scope of EC competition law if the exemption monopoly of the

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\(^{172}\) See 2.3.2. supra.

\(^{173}\) O.J. C 372/13 of 9.12.97, see 6.3.3. below.

\(^{174}\) See chapter 5 below.

\(^{175}\) As suggested by Paulis, Robert Schuman Centre Annual on European Competition Law, Working Paper VII, p 197 at 199 and 203.
Commission is changed by enabling national courts to apply Article 85 (3) to cases in which they should provide a one-stop-shop. Such exemptions would, however, only apply within the territory of a single Member State and the Commission is not likely to give up its exemption monopoly, which leaves one other option: a reduction in the current wide interpretation of the scope of EC competition law. This option would be most effective in combination with the Italian model as indicated by Siragusa and Acasellati-Sforzolini:

"It [the Italian model] avoids the risk of competition being enforced in an inconsistent manner as between Italy and the Community, thanks to substantive provisions that are modelled on EC competition law and which should be interpreted in accordance with it. But above all, by excluding the application of Italian competition law to cases covered by EC law, the Law avoids the risk of conflict inherent in the "two-stop shop" approach. If the ECJ accepts the possibility open to it to interpret more narrowly the scope of application of EC law, the model proposed in the Law could permit the Commission and the Member States' national courts and authorities to share more equally and more efficiently the responsibility for competition law enforcement in the Community".

The option of a narrower interpretation of the scope of EC competition law, however, could also stand on its own as the third factor that reduces the risk of overlap and conflict between the two systems.

C. Reduction of the scope of EC competition law

At this moment, there is always a possibility of overlap of EC competition law with one or more domestic competition law systems as a result of the wide scope of Articles 85 and 86. It has been argued that this is outdated and conflicts with the current

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desires for a decentralised enforcement of EC competition law. Kerse\textsuperscript{177} queried whether the principle of subsidiarity will be considered by the Community Court as a cause for redefining the boundary between Community law and national law. Indeed, we saw at 1.3. supra, that the principle of subsidiarity prescribes that:

"in areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty."

Whish\textsuperscript{178} also wrote:

"It is conceivable that the principle of subsidiarity, which will be found in Article 3 (b) of the Maastricht Treaty on European Union, may mean that a stricter approach will be taken to the inter-state trade clause in the future, thereby effectively handling jurisdiction over some cases back to the Member States".

The Single Market was completed in 1992. For more than 35 years since the adoption of Regulation 17, the Commission, by way of the notification procedure and block exemptions, and the Community Court, by way of rulings, have had the opportunity, to establish market integration and to develop their policies in line with the aims of the Treaty and the objectives of the common market\textsuperscript{179}. These policies are now well known by business and their lawyers.

Moreover, most of the national competition laws now reflect Articles 85 and 86 and the provisions themselves will increasingly be applied directly by national courts as a result

\textsuperscript{177} EC Antitrust Procedure, 3rd ed, 1994, p 381 footnote 50.

\textsuperscript{178} Competition Law, 3rd ed 1993, p 215.

\textsuperscript{179} See 6.3. below.
of the Commission's power to set priorities established in Automec II.

A narrower interpretation of the scope of the EC competition rules would reduce the risk of overlap and conflict between EC and domestic competition law. It would also release the Commission to focus on new things such as the liberalisation of special sectors like telecommunications, energy and banking; the competitive aspects of the Monetary Union (which may require the Commission to monitor state aid as this might be used as an alternative to devaluation); or the planned expansion of the Community by admitting new Member States.

These arguments are convincing and lead to the question in what form the idea of a narrower scope of EC competition law should be proposed. It is submitted that a reduction of the scope of all the conditions of application of EC competition law would be too extensive and contrary to the principles of a common market and an effective and decentralised enforcement of EC competition law. Although it would reduce the amount of overlap with domestic competition law and the risk of conflicting decisions, it would do so by reducing the overall application of EC competition law by national courts and the Commission. It would enlarge the field occupied by domestic law with its multiple controls and differing treatments of the same situation in different Member States and its prohibitions and exemptions stopping at the border of each State.

The uniform rules of EC competition law have proved vital in establishing a common market and a level playing field for business. It is submitted that a decentralised enforcement of the uniform EC competition rules is to be preferred over an increased application and enforcement of domestic competition law.

D. Reduction of the substantive scope of Article 85 (1)

The idea of a narrower scope of EC competition law should therefore be qualified by focusing on the specific problems, i.e.

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180 See under A (the soft harmonisation process) supra.
those hampering a decentralised application of EC competition law and those posing a risk of conflict between EC and domestic competition law, notably between EC authorizations and domestic prohibitions. These problems concern Article 85 and not Article 86.  

A division can be made between the jurisdictional scope of Articles 85 (1) and 86, involving the concept of "trade between Member States" on the one hand, and the substantive scope of Article 85 (1), involving the condition of "restriction of competition" on the other.  

It is submitted that the current wide concept of "trade between Member States" should be maintained and clarified but that the substantive scope of Article 85 (1) should be narrowed by redefining the concept of "restriction of competition".  

An agreement containing a restriction on conduct does not necessarily have the object or effect of restricting competition contrary to Article 85 (1). Many agreements that currently require exemption should be enforceable in national courts. This would reduce the need for notification, exemptions, comfort letters and the need to distort agreements to come within group exemptions. It would, however, not avoid the multiple stop effect caused by domestic prohibitions. Should the need arise, this effect could be mitigated in three ways.  

First, by redefining the relationship between domestic prohibitions and the types of clearance referred to at 2.3.2.4. under A above. Those "positive clearances" by the Commission, involving an assessment of the agreement under Article 85 followed by a finding a compatibility, could be given the same status as exemptions (preempting domestic prohibitions) on the

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181 EC authorizations are not possible under Article 86 and the decentralised application of Article 86 poses no jurisdictional problems for national courts. They have the power to apply the Article fully.  

182 The Commission recently reduced the scope of application of Article 85 by changing its Notice on agreements of minor importance as discussed at 3.3. and 6.3.3. below.
basis that they are also "positive findings"\(^\text{183}\) or "positive assessments"\(^\text{184}\). Under the proposed narrower interpretation of the substantive scope of Article 85 (1) there will be more of such clearances replacing many of the current exemptions. To upgrade their status may require a change in Regulation 17\(^\text{185}\), and would imply an extended interpretation of the Community Court's judgment in \textit{Walt Wilhelm}\(^\text{186}\) and perhaps also \textit{Perfumes}\(^\text{187}\) but it would enhance efficiency and reduce the problem of conflicting decisions.

Secondly, by aligning the interpretation of domestic competition law and EC competition law, including the proposed, narrower, interpretation of the concept of "restriction of competition". Since nearly all domestic laws now resemble Articles 85 and 86 and nine track exactly the wording of the provisions\(^\text{188}\), the same interpretation applied to both systems seems natural. This would facilitate double control by national judges in that the same or a similar assessment would suffice for both systems, thereby achieving a more efficient and streamlined enforcement of the rules of both systems. The domestic competition laws of Sweden, Finland and Italy already require interpretation in accordance EC competition law. It will be illustrated at 6.3.2.1. below that as regards vertical restraints, the domestic competition laws already apply a narrower interpretation of what constitutes a "restriction of

\(^{183}\) See \textit{Walt Wilhelm}, 2.3.2.4. under B supra.

\(^{184}\) This expression was used by Advocate General Tesauro in his opinion in BMW v ALD and Bundestarkellamt v Volkswagen and VAG Leasing quoted at 2.3.2.4. under C.


\(^{186}\) See 2.3.2. footnote 98, and 2.3.2.4 under B, in particular footnote 116 supra.

\(^{187}\) See 2.3.2.4. under A supra.

\(^{188}\) \textit{Dreher, Robert Schumann Centre Annual on European Competition Law 1996}, ed \textit{Ehlermann} and \textit{Laudati}, 1997, p 242. Dreher mentions eight, but this was before the adoption of the Dutch competition law which came into force on 1.1.98.
competition" and this should accelerate the proposed narrower interpretation of the substantive scope of Article 85 (1).

Third, by combining a narrower interpretation of the substantive scope of Article 85 (1) with the Italian model as argued under B above. This combined option would completely resolve the uncertainty caused by double or multiple control. Unfortunately, the realisation of this combined option does not seem likely, even in the long term.

The adoption of a narrower interpretation of the substantive scope of Article 85 (1) in isolation, however, is a realistic possibility and would alleviate many of the problems described in this chapter. It would not require any changes in EC or domestic legislation nor affect the Commission's exemption monopoly but it would reduce the Commission's workload since fewer exemptions would be needed. It would enhance the ability of national courts to deal with cases under Article 85 (1) more fully and reduce the risk of parallel proceedings involving the Commission which causes the problems discussed in Part II of this book (from chapter five onwards). Part II examines the substantive application of Articles 85 and 86 by national courts. In that context, a narrower interpretation of the substantive scope of Article 85 (1) is advocated at 6.3. and at 7.1. and 7.2. it is shown that the Community Court has already required such interpretation in some of its judgments.
3. PROBLEMS FOR NATIONAL COURTS RESULTING FROM THE ECONOMIC NATURE OF EC COMPETITION LAW

3.1. The economic nature of EC competition law

This chapter and the next are focused on some of the difficulties a national court may face in applying EC competition law.

The application of EC competition law involves methods and legal assessments that differ considerably from the litigation national courts deal with normally.

Art 85 (1) prohibits agreements or concerted practices that may affect trade between Member States and have as their object or effect the distortion or restriction of competition.

Article 86 prohibits abuse of a dominant position. For article 86 to apply it is not sufficient to prove that there is, or will be, a dominant position (which in itself is a very difficult exercise); the dominant position must actually be abused.

As in all judicial tasks, a national court will have to assess the conduct challenged in view of the circumstances and facts available. The difference with normal litigation, however, is that the appraisal in respect of EC competition law will have to be economic rather than only legal because Articles 85 and 86 embrace micro economic concepts such as market power, trade between Member States, barriers to market entry, restrictions of competition, interchangeability, and substitutability on the demand side (and sometimes the supply side).

EC competition law also differs from normal litigation in that it is not confined to the interests of the parties concerned. In deciding whether an agreement restricts competition it is not sufficient to examine its provisions in isolation and to test them against the wording of Article 85 or 86. One needs to appraise the market and the commercial reasons for inserting the restrictive provisions. Assessments, for example, of the

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1 Kapteyn and Verloren van Themaat: Introduction to the Law of the European Communities, 1989, 2nd ed. p. 170: "Community law is predominantly economic law".
economic strength of a party or the degree of anti-competitiveness of the conduct in question often relate not so much to the particular situation between the parties engaged in the litigation but to economic effects of the disputed conduct on the common market as a whole or a substantial part of it.

Judge René Jollet of the Community Court succinctly depicted EC competition law as:

"[...] a field in itself, which requires a very special skill in sorting out and analysing the facts, an understanding of the pricing mechanisms, a knowledge of how business actually operates and, last but not least, policy evaluations".

For national judges who have a legal, rather than an economic background, such examinations may prove difficult¹.

In respect of the few types of conduct expressly prohibited in Article 85 (1), such as price-fixing, or in respect of conduct clearly covered by well-developed precedents or Regulations,²


¹ It is not only difficult to assess the economic information but also to obtain it. It may be hard to obtain sufficient market information and statistical facts, and even harder to collect information as to the extent of the effect of the conduct, taking into account that the power to collect such material may be severely limited by jurisdictional and procedural restrictions (see chapter 2 above).

⁴ See also Sutherland:
"[C]ases requiring a purely legal assessment, for example those involving the application of a block exemption regulation or unmistakable, well-established infringements of the competition rules [...] should normally not pose any problem for national judges".


Block exemptions may be easy for judges to apply because they tend to lack flexibility. Emphasis is put on analysis of clauses and not so much on the economic impact of the agreements. Block exemptions must be interpreted narrowly, however. A single clause going beyond its scope may remove its protection in which case a thorough economic analysis may be necessary to see whether Article 85 (1) applies. Moreover, if market share ceilings are imposed in forthcoming block exemptions, the courts' task may be even harder.
the assessment may not seem too complicated. A relatively limited analysis and reasoning, combined with some references to leading case law or Regulations may in such cases suffice to reach a decision whether or not to enforce the conduct.

Even this category of apparently clear cases, however, may pose difficulties. It may not be certain whether the restrictive conduct is capable of restricting competition or trade between Member States. In such circumstances, a detailed analysis of the market or other economic aspects may nevertheless be necessary. Chapter 7 below, discussing the Community Court's considerations in Delimitis, illustrates that, even in cases that seem quite well regulated, a lengthy economic assessment of the market may be necessary. In Delimitis, a block exemption existed for the type of agreement disputed but the assessment went far beyond the apparently simple dilemma whether the agreement could benefit from the block exemption or not. The assessment was widened to the issue whether the agreement fell within the scope of the prohibition of Article 85 (1) at all and this involved a full economic market analysis.

There are no simple rules indicating what kind of economic analysis and how much of it is required for an appropriate assessment of conduct under Article 85 or 86. The relevant analysis depends on the legal and factual circumstances of the case and for national judges it may be difficult to recognise the underlying economic considerations.

Moreover, the application of Article 85 or 86 may (and often

\textsuperscript{5} See also 3.1.2.1. below.

\textsuperscript{4} Complexities arise, for example, in cases where the law in relation to the conduct in question is less developed or inconsistent, where there is doubt as to the anti-competitiveness of the conduct in question, or where complex economic problems arise as a result of the difficult or special nature of the sector, product, or markets concerned. Community law is often opaque and often lacks reasoning, especially on grounds of policy. See on this lack of reasoning 3.1.1.2. below.

\textsuperscript{7} Schröter, Antitrust Analysis under Article 85 (1) and (3), [1987] Fordham Corporate Law Institute, p 670.
should) require appraisal of conduct ex ante - at the time the undertaking has to decide whether or not to commit itself to invest. At that time, the parties may rely heavily on the contract to ensure that they will be able to appropriate the benefits of their investment. They may need protection from firms taking a free ride on their investment. Distributors or dealers may require an exclusive territory if a brand owner is to penetrate the market of another Member State.

Economists tend to think ex ante because they are interested in incentives being in the right place and in optimising economic activity. National judges, on the other hand, may not be used to dealing with such types of appraisal owing to the fact that most litigation concerns actual rather than potential issues.

Unlike those in North America, few European Universities outside the UK teach the economics of law and if they do teach economics it is often an optional subject, taught as a separate discipline unrelated to law, or taught at postgraduate level only. Few practising lawyers have been taught to look not just at justice between the parties but to assess the effects of the transaction or activity on the economy as a whole.

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9 As explained many times by Judge Easterbrook, formerly Professor at the University of Chicago and now judge on the 7th Circuit of the US.

10 See 3.1.1.3. below.

11 At the Erasmus University of Rotterdam, the Netherlands, for example, economics is an obligatory subject during the first year of the law studies. Until the end of the 1980s, the subject was considered of major importance to the law studies owing the University's historical economic background. It comprised a large part of the propedeuse exam, covering all main facets of economics including the American theories. Unfortunately, recent cutbacks resulted in a reduction of the scope and weight of subject. Principles of micro economics are still taught today but only a small proportion is reserved for price theory.

3.1.1. Factors aggravating the difficulties for national courts

Two factors are bound to aggravate the difficulties involved in economic analysis, even for those judges who are familiar with such analysis.

3.1.1.1. Recent economic changes - globalisation and technological developments

First, the economy is rapidly changing and has become increasingly complex over the last few years\(^\text{13}\). In many sectors, the economic conditions prevailing today cannot be compared with those which existed even ten years ago. Firms have to adjust to an economy in which consumers can compare daily the goods and services available in a world which has shrunk with the development of communications and trade.

The internationalisation of trade and the growing integration of economies have promoted Community firms to shift their strategy towards international cooperation. These changes have gone hand in hand with extremely rapid advances in technology. Recent analysis carried out for the Commission highlights a tendency towards reduced concentration in national markets, coupled with increased concentration at Community level\(^\text{14}\). Firms are entering into mergers and cooperative arrangements in order to achieve the critical size required, notably in terms of finance and for research and development purposes. These cooperative arrangements are often entered into in an oligopolistic market with substantial entry barriers.

This trend will lead to more cases under Article 85 and 86, not least because competitors will be more likely to lodge complaints which, as a result of the Commission's policy on

\(^{13}\) This paragraph was derived from the introduction to the 26th Report on Competition, 1996, SEC (97) 628 final.

\(^{14}\) Commission Communication: The Impact and Effectiveness of the Single Market, COM (96) 520 of 30.10.96.
priorities", may be rejected and referred to national courts. The number of cases will not only increase as a result of this trend but the cases will also be more complicated given the complexity of the markets to be analysed.

It should be noted that the EC Treaty does not provide competition rules appropriate to oligopolistic markets\(^\text{1}\). The Commission has, in the last few years, used the concept of joint-, or collective dominance both under the Merger Regulation and Article 86 to remedy this situation and to fill the gap in legislation\(^\text{2}\).

It may be the case, however, that this possibility to regulate oligopolistic markets under the Mergers Regulation and Article 86 may soon disappear, if the Community Court follows the Opinion of Advocate General Tesauro in France v Commission\(^\text{3}\). The Advocate General stated that the concept of collective dominance was not mentioned in the text of the Merger Regulation or intended by the Member States legislating through the Council and, although such a concept may be desirable, it is not up to the Court to fill the gap in legislation by extending the law\(^\text{3}\). Until the law has been changed, the Commission, the Community Court and national courts may therefore be unable to sanction unilateral conduct that strengthens an oligopolistic market.

\(^{15}\) See 1.4.2. supra.


\(^{17}\) See for case law 2.2.5.2. supra, note 31.


\(^{19}\) Paras 81 - 93 and 98 of the opinion.
Defining markets and identifying the key factors governing competition are a constant challenge, particularly in markets which are in a state of rapid transition. Technological innovation blurs the traditional distinctions between the various product markets and promotes the emergence of new markets whose geographical boundaries are similarly in a state of flux.

This places increased demands on national courts in terms of economic analysis, in particular, in respect of market definition (which should not be arbitrary), analysis of market power and the taking into account of potential competition.

Those national judges that are familiar with the economics of law may have been taught the principles years ago during their studies when the aforementioned economic changes did not exist. It takes considerable time to become a judge and, once practising law, there may not have been much time nor any need (when practising domestic law of all sorts) to keep abreast of new developments in economics. Continuing education will have related to developments in law.

3.1.1.2. Lack of reasoning at EC level

Secondly, the difficulties for national courts in making economic appraisals are aggravated by a manifest lack of reasoning at EC level26. The Commission does not often set out the economic

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26 See Korah in many of her publications, for example, EEC Competition Law and Practice, 6th ed 1997, p 301 -324. See also Van Bael, Insufficient Judicial Control of EC Competition Law Enforcement, [1992] Fordham Corporate Law Institute, Chapter 27.

analysis required to connect the specific facts to the legal conclusion. It tends to recite many primary facts and then give its legal appraisal which is seldom connected to specific facts\textsuperscript{11}. This gives the Commission a large discretion in deciding competition cases.

The Court of First Instance and the Community Court do not have jurisdiction to rehear cases on appeal from the Commission. They operate within the framework of Article 173 of the EC Treaty, which essentially provides for a judicial review structure of the legality of the Commission's decisions on grounds of lack of competence, procedural error, breach of the Treaty, or misuse of powers. Additionally, The Community Court can give preliminary rulings under Article 177 on the interpretation of the law but those are supposed to be abstract and not applications of the law.

Within a review under Article 173, the most important task (for which the Court of First instance was even set up) is to review the facts of the case. In doing this, The Court of First Instance gives particular care to the primary facts, for example, whether a particular event occurred or whether a particular agreement was made or not, in order to establish whether the evidence supports the factual basis for the Commission's decision. The economic facts and the assessment of economic evidence are considered far less important.

The Community Court even set out a line of authority that complicated economic assessments are in the first instance for the Commission, and the Court of Justice traditionally would interfere only in cases of manifest error. This practice confirms the Commission's discretion rather than confining it.

The Court of First Instance, however, has gone further in some cases by requiring the Commission to set out its reasons more coherently in accordance with Article 190 of the Treaty\textsuperscript{12}.

\textsuperscript{11} See also 2.3.2.4. supra, under B.

\textsuperscript{12} See for example SYTRAVAL, case T 95/94, [1995] E.C.R. II 2651, a controversial judgment, where the Court of First Instance quashed a Commission decision rejecting a complaint that various transactions amounted to state aid. The Court held in para 52,
and by reviewing the facts more thoroughly to ensure that the
Commission has established the facts alleged”.

Such cases, reviewing the way in which the Commission dealt
with the facts and the extent to which it gave reasons for its
decision, are helpful to national courts as they provide them
with guidelines and examples as to what extent of economic
assessment and reasoning will be required. The effect of the
endeavours of the Court of First Instance must not be overstated,
however. The Court of First Instance has not required the
Commission to give very full reasons for its conclusions and some

54, and 62:

"[...] the statement of reasons required by Article 190
must disclose in a clear and unequivocal fashion the
reasoning followed by the Community authority which adopted
the measure in question [...] the question whether the
statement of reasons for a decision meets the requirements
of Article 190 of the Treaty must be assessed with regard
not only to its wording but also to its context and to all
the legal rules governing the matter in question [...]"

"The judicial review which such a statement of reasons
must allow is not, in the present case, a review of the
question whether there has been a manifest error of
assessment [...]"

"[...] Whilst it is clear from the case-law that the
Commission is not required to discuss all the issues of
fact and law raised by the parties [...] it is non the
less obliged to give a reasoned answer to each of the
objections raised in the complaint, if only by referring
where appropriate to the de minimis rule where the point is
so insignificant as not to warrant the Commission spending
any time on it [...]."

See p. 6 of the paper presented by Korah, referred to at footnote
16 supra.

22 Judge Bellamy of the Court of First Instance, [1993]
Fordham Corporate Law Institute, p 502 and 503, considered the
question whether a decision is properly reasoned in terms of
Article 190 of the Treaty part of the work of the Court of first
Instance. He suggested that:

"there is and will be effective judicial review over the
way the Commission has carried out its appreciation of
important economic elements".

See, for example, Métropole [1996] E.C.R. II 649 and Société
Nationales des Chemins de Fer Française v Commission, case T 79
and 80/95 [1997] 4 C.M.L.R. 334. where, for the first time, the
Court of First Instance quashed two decisions of the Commission
granting exemptions. See Korah, EC Competition Law and Practice,
judgments have been formalistic⁴. The control by the Court of First Instance over competition law today is still limited and leaves the Commission a substantial discretion over the economic appraisal of those facts⁵ and in reaching its conclusions.

The result is unpredictability. The large discretion of the Commission resulting from its lack of reasoning, combined with inconsistent case law from the Community Courts, makes it hard to predict the likely attitude of the Court or the Commission to an agreement. This is frustrating for national courts.

First, the already difficult task of economic analysis is not relieved by a sufficient number of exemplary precedents from the Commission or the Community Court, explaining how much and what type of economic analysis should be used for what type of conclusions.

Secondly, the uncertainty as to the likely attitude of the Commission or the Court will frustrate attempts by national courts to realise uniform devolution in EC competition law enforcement and to avoid conflict in parallel proceedings between their decisions and those made at EC level. Given the broad language and vague economic terms in which the competition rules are written, it is important that the law is developed on the basis of clear and consistent decisions at Community level, setting out the economic analysis and the reasons on which the conclusions have been based⁶.


⁵ Korah, see footnote 23 supra at p 320.

⁶ See 2.4.2.3. at B, supra.
3.1.2. Examples of economic considerations in EC competition law

3.1.2.1. The object and effect of the restrictive conduct

An appraisal under Article 85 of the likely object and effect of the conduct envisaged or practised by a firm depends on its market context and on whether it is necessary to make viable some transaction that is not in itself anti-competitive. It may be necessary to appraise the market, the commercial conditions and the reasons for inserting restrictive provisions in order to assess whether the restrictions have as their object of effect the distortion of competition.

As mentioned at 3.1. above, in those few cases where it is clear that the agreement has the object of distorting competition, the economic analysis can often remain limited. The Community Court[^27] and the Commission[^28] have made a clear


[^28]: In its new Notice on agreements of minor importance, adopted in October 1997, O.J. C 372/13 of 9.12.97, at point 11, the Commission explicitly distinguishes a category of particularly serious restrictions on competition: horizontal agreements which have as their object price-fixing or production or sales quotas, market sharing or sharing of sources of supply and vertical agreements which have as their object to fix resale prices or to confer territorial protection.

These agreements may be prohibited by Article 85 (1) even if below the de minimis thresholds. The Commission reserved to itself the option to intervene in such cases but it added that in the first instance it is for the national authorities and courts to take action on any such agreements and it will only intervene in cases involving a Community interest.

Extending the scope of application of Article 85 (1) to agreements below the thresholds contradicts the ruling of the Community Court in Völk v Vervaecke, case 5/69 [1969] E.C.R. 295, see 3.1.2.2. footnote 53 below, where the markets were partitioned.

The Commission also stated in its Green Paper on vertical
distinction between restrictions of competition which they treat as serious, from the less serious in respect of which the practical effect on trade should be taken into account.

In respect of agreements in the first category, the Court considered it sufficient to deal with the agreement's anti-competitive object and an examination of the effects of the agreement on the market was considered superfluous. This dealing with the agreement's anti-competitive object, however, should be done by objective reference to its contents and taking into consideration its economic context. The subjective ideas of the parties take second place. An attempt to distort competition that is doomed to failure will not, therefore, be caught by the prohibition.

Establishing an agreement's anti-competitive object may thus nevertheless involve some amount of analysis. The perceived anti-competitive effect may have to be quantified in some way by assessing the nature of the agreement, the nature of the product, the position of the agreement in question in relation to other restraints, [1997] 4 C.M.L.R. 519, at para 21, that, subject to the de minimis rule, resale price maintenance and absolute territorial protection for exclusive distributors are invariably to be treated as anti-competitive.

Consten and Grundig v Commission, case 56 and 58/64 [1966] E.C.R. 299. In this case the Court perceived the conduct (absolute territorial protection and exclusivity provisions) ex post, from 1964 when the Commission adopted its decision and not ex ante when the agreement was made and Consten had to penetrate the French market. See for detailed critical analyses, many publications of Korah, for example, EC Competition Law and Practice, 6th ed 1997, p 62 ff. See Braakman and Schröter in the introduction, p 38, to: The Application of Articles 85 and 86 of the EC Treaty by National Courts in the Member States, compiled by Braakman, Published by the Commission, DG IV, July 1997. They cite more case law in which the Community Court applied the principle that "if it is ascertained that the object was to limit competition, the effects [...] on market conditions no longer have to be determined."

similar agreements adopted by the parties, or even other parties. This assessment, although more limited than in the absence of an anti-competitive object, nevertheless requires substantial economic insight from national judges.

A full market analysis under Article 85 is always necessary and essential where the anti-competitiveness of an agreement must be determined by reference to its effect rather than its object. This is determined on the basis of the competition that would exist in the absence of the restriction taking account of the economic context. The Community Court held in Technique Minière that if an agreement, considered in its legal and economic context, does not have the object of restricting competition:

"the consequences of an agreement should then be considered and for it to be caught by the prohibition it is then necessary to find that those factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent. The competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute. In particular it may be doubted whether there is an interference with competition if the

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11 Société Technique Minière v Maschinenbau Ulm [1966] E.C.R. 235 at para 250. The Court held that to decide whether a vertical exclusive dealing agreement is:

"prohibited by reason of its object or its effect (emphasis added), it is appropriate to take into account in particular the nature and quantity, limited or otherwise, of the products covered by the agreement, the position and importance of the grantor and the concessionaire on the market for the products concerned, the isolated nature of the disputed agreement or, alternatively, its position in a series of agreements, the severity of the clauses intended to protect the exclusive dealership or, alternatively, the opportunities allowed for their commercial competitors in the same products by way of parallel re-exportation and importation."

See also De Norre v Concordia, case 47/76 [1977] E.C.R. 65 where a similar consideration was made.

said agreement seems really necessary for the penetration of a new area by an undertaking.

Such analysis will prove difficult for lawyers not familiar with economics as it requires a comparative assessment of the extent to which market is competitive. The conditions of competition in the presence of the agreement in question must be compared to those that would prevail in its absence. Establishing the hypothetical conditions involves even more knowledge of economic concepts than assessing the existing conditions.

The final sentence of the quotation from the Community Court in Technique Minière refers to the doctrine of ancillary restraints. Under this doctrine, clauses that make a transaction viable have been held not to infringe Article 85 (1) and need no exemption.

This doctrine should be distinguished from the general division between the object and effect of an agreement as it may relate to both. It is applied to exclude the application of the prohibition of Article 85 (1) in those circumstances where certain restrictions of conduct are essential for making an essentially pro-competitive transaction viable. The particular restrictive clause may well have the object of restricting competition but the overall object of the agreement may be pro-competitive. Any competition restricted as a result of the infringing clause, would not have been possible because the firm could not have penetrated the relevant market without it.

In that case, the doctrine of ancillary restraints applies and the economic context again plays a determining role as it does in cases where the agreement must be determined be reference to the effects on competition. In Technique Minière, the firm could not have penetrated the other Member State without cooperation from a local exclusive dealer who in turn required protection to induce investment.


See also 3.1.2.3. below.

See 5.2.2.1., 7.1. and 7.1.1. below.
Today, the decisions of the Commission and judgments of the Community Court that consider any important restriction on conduct as having the object or effect of restricting competition still outnumber those that apply the doctrine of ancillary restraints. Nevertheless, the Court has continued to apply this doctrine in a substantial number of cases and there is nothing preventing it from continuing to do so in the future.

Consequently, it is submitted that the doctrine should be applied by national courts, regardless of whether the restrictions would have the object or effect of restricting competition, in those cases where enforcing the agreement is appropriate. Again, the application of the doctrine involves complex economic analyses which national judges may find difficult. Moreover, judges are used to enforcing what the parties have agreed, not deciding whether a clause is necessary to make a transaction viable.

An aggravating aspect is that the Commission tends to reserve the considerations relevant to the ancillary restraints doctrine for its analysis under Article 85 (3) - the decision whether or not to grant an exemption - rather than in deciding whether or not the agreement comes within the scope of Article 85 (1) in the first place. National courts have no power to apply Article 85 (3) and should therefore apply the doctrine as intended by the Community Court: in deciding whether or not an agreement is caught by Article 85 (1).

For Article 86 to apply, the firm must both enjoy a dominant position and abuse it. To ascertain dominance, the relevant market must be analysed in that context from two perspectives:

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See, for example, Windsurfing, case 193/83 [1986] E.C.R. 611 paras 45-46, 57, 74, 81 and 93.

See for examples 7.1. below.

See 7.1.3. below.

See 6.3., 6.3.1. and 7.1.2. below.

The doctrine is discussed in more detail and in relation to this particular issue at 5.2.2.1 and at 7.1. and 7.1.3. below.
the product market and the geographic market\(^1\). This issue is discussed in the next section, 3.1.2.2.

Unlike the analysis under Article 85 (1), a distinction between the object and effect of the conduct does not exist under Article 86. The application of article 86 requires an exhaustive economic analysis whenever a firm has a large market share. The analysis serves to assess the competitive constraints on its conduct and to establish whether the effect of the disputed conduct constitutes abuse in that it either reduces competition\(^2\), affecting actual and/or potential competitors\(^3\) whether or not this may harm consumers, or constitutes unfair competition, affecting those with whom the dominant firm deals\(^4\). In other words, abuse may constitute both anti-

\(^1\) A third, the temporal market, may also be relevant in that competitive conditions may vary from season to season, for example, as a result of weather conditions or consumer preferences. Consequently, a firm may find itself exposed to competition during particular periods of the year only. Article 86 could apply during the periods that the firm is able to act independently. In United Brands, the cross-elasticity of bananas was found to fluctuate from summer to winter and the firm may not have been dominant in the summer months during which other fruit was plentiful. The Commission however just identified the one temporal market and held that United Brands was dominant. On appeal, the Court did not deal with the issue. United Brands Company (Re), 76/353/EEC, O.J. 1976, L95/1, [1976] 1 C.M.L.R. D2 8. On appeal, United Brands Company Co. and United Brands Continental BV v Commission, case 27/76, [1978] E.C.R. 207, [1978] 1 C.M.L.R. 429.


\(^4\) This category includes unfair or excessive pricing as condemned by the Commission in United Brands, 76/353/EEC [1976] 1 C.M.L.R. D28. On appeal, the Community Court accepted that excessive prices may infringe Article 86 (paras 248-249 of the judgment) but quashed the Commission's decision (case 27/76 [1978] E.C.R. 207). The Court accepted that there may be
competitive and exploitative behaviour. Expert advice from economists is often needed in order to prepare an action or defence under Article 86 and for national judges to decide such cases, a thorough understanding of the economic issues submitted is vital.

3.1.2.2. Market shares - Notice on market definition, appreciable effect, de minimis rule, cumulative effect and dominance

The parties' position on the relevant market is important in respect of both Articles 85 and 86 in that it sheds light on whether the agreement or conduct may noticeably alter the conditions of competition for third parties and consumers or on whether a firm is dominant. This is important as not all anti-competitive conduct is caught by Article 85 (1) or Article 86. For Article 86 to apply, the party involved must be dominant and the delimitation of the relevant product market is therefore of crucial importance”. For article 85 (1) to apply, the actual or intended effects on competition and on trade between Member States must be appreciable“. Again, the relevant market and the firm's share of it are helpful in determining this appreciability.

The calculation of market shares in respect of both Article 85 and 86 is complex, never straightforward and often arbitrary. Until recently, the calculation of market shares was based primarily on consumer preference, i.e. equivalence in terms of quality, price and intended use and on homogenous conditions of justifications for high prices. In deciding whether there are excessive charges, the Court held that it may be necessary to compare with charges made in other markets, see also Lucazeau v SACEM, case 110/88 [1989] E.C.R. 2521 at para 25. Korah noted that this comparison may prove difficult as conditions (such as labour or fuel costs) are frequently so varied in different parts of Europe that foreign experience may prove of limited value. EC Competition Law and Practice, 6th ed, 1997, p 112.


- See 2.2.8. and 2.3.2. above.
competition as expressed in the Community definitions of the relevant product market and the relevant geographic market.

The relevant product market comprises all those products and/or services which are regarded interchangeable or substitutable by the consumer by reason of the products' characteristics, their price and their intended use.

The relevant geographic market comprises the area within which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogenous, and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different there.

Over the years, the Commission has shown a tendency towards defining the market narrowly in order to ensure a wide application of Article 85 (1) and, especially, 86. As to Article 86, for example, spare parts for a firm's product have been held to constitute a separate market in which that firm has a monopoly. Bananas were considered a separate market as they were found interchangeable with oranges and with apples only to a limited extent, despite evidence of banana prices and sales figures dropping during the seasons for summer fruit and oranges.

On 3 October 1997, the Commission adopted a Notice on the definition of the relevant market for the purposes of Community competition law. The Notice is aimed at providing guidelines on how to define the relevant market. Although it cites the

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"See 2.2.8, 2.3.2. and 2.3.3. under C supra, and 5.5.3.1., 5.5.4. and 6.3. below on its narrow interpretation of markets and, more generally, its wide interpretation of the scope of Articles 85 and 86.


The aforementioned established product -, and geographic market definitions as practised habitually by the Commission and formulated in forms A/B and CO\textsuperscript{51}, it somewhat downplays the importance of the characteristics and intended use of the products concerned. Instead, it assigns an important, albeit non-exclusive, role to the analysis of what economists refer to as a SSNIPS test\textsuperscript{52}: what would be the effects of a small but significant non-transitory increase in prices on demand (and/or supply) substitution. As designed for EC competition law, this test is based on substitutes almost entirely on the demand side.

The Notice is discussed further at 6.3.3.1. below. Suffices to state at this place that the determination of the relevant market, necessary to calculate market power, is a task predominantly economic in nature. For national judges, not being economists, this may be a difficult exercise. The Commission has a large margin of discretion and it is hard to predict how it would approach a particular case.

Section A below, concentrates on market shares in the context of Article 85, whilst those relating to Article 86 will be discussed at section B.

A. Article 85 (1)

The Community Court confirmed the condition of appreciability for the application of Article 85 (1) in Völk v Vervaecke\textsuperscript{53}. Völk produced washing machines in Germany and enjoyed a market share of less than 1%. The Court ruled that even absolute territorial protection granted to its exclusive distributors in Belgium and Luxembourg would not infringe article 85 (1) because it did not

\textsuperscript{51} Section II, para 1.

\textsuperscript{52} See the papers of Venit, The Commission's Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law, and Korah, Article 86: Is there still a safe Harbour for Competition on the Basis of Performance? Both papers were delivered at IBC's 4th Annual Advanced Conference on EC Competition Law, 4 and 5 November 1997, Radisson Hotel, Brussels.

noticeably restrict competition and affect inter-state trade.

As early as in 1968, the Commission issued a Notice on agreements of minor importance with a de minimis rule consisting of a market share ceiling and a turnover threshold below which conduct may be regarded as not having an appreciable effect on trade. In the version of 1994, the market share ceiling for an appreciable effect was fixed at 5% of the relevant market and the turnover threshold was 300 million ECU aggregate annual turnover.

The Notice was revised in October 1997. The new Notice provides for the abolition of the turnover threshold and makes a distinction between horizontal and vertical agreements. The market share threshold for horizontal agreements (those made between parties operating at the same level of trade, for example two manufacturers of competing products) has remained at 5% and for vertical agreements (those operating at different economic levels, for example, a supplier and distributor) the threshold has been raised to 10%. See for more details on this new Notice 6.3.3. below.

The Notice is not binding on national courts or the Community Court and should not be relied on by national courts in isolation. National courts tend to follow the Commission's Notices but it should be kept in mind that the Community Court has on some occasions regarded agreements involving smaller market shares than those set out in the Commission's Notice as having an appreciable effect on trade. This can be the case in

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6 Schröter, Antitrust Analysis under Article 85 (1) and (3), [1987] Fordham Corporate Law Institute, p 676.

7 See for example Musique Diffusion Francaise v Commission, joined cases 100-103/80, 1983 E.C.R. 1825, para 84-87 and Hasselblad (G.B.) Ltd v Commission, case 86/82, 1984 E.C.R. 883,
special circumstances, for example, where the market is fragmented. A party holding a relatively small market share but considerably larger than that of the other competitors may still be in a position perceptibly to influence the market.

The Community Court has never ruled on the merits of the de minimis Notice\(^*\). The Commission seems to have derived the justification for the Notice from the aforementioned Völk Judgment but the underlying idea behind that judgment was to allow the small German washing machine manufacturer to penetrate the Belgium/Luxembourg market with the aid of an equally small exclusive distributor. In such cases, the Court and the Commission have adopted an economic approach whereby certain agreements that only serve to strengthen competition are not prohibited by Article 85 (1).

The value of the Notice on agreements of minor importance lies mainly in the Commission's practice of following it when vetting notified agreements and in the fact that it limits the Commission's discretionary powers to intervene as a public authority. It may therefore serve as a general guideline for business and national courts to establish which agreements the Commission generally considers to be of minor importance and thus outside the scope of Article 85 (1).

The Commission has tended to define the relevant market narrowly in order to ensure a wide application of Article 85 (1)\(^*\) and it is not expected to change this practice overnight. As a result, there may be differences between the interpretation of the Notice by firms and by the Commission. When the Notice is being relied upon before a national court, the judge may again para 20-22.

\(^*\) Moreover, Advocate Generals have been noted to tell the Court to ignore the Notice and the Court has done so, for example, in Sugar:Cooperatieve Vereniging Suiker Unie UA v Commission, cases 40-48, 50, 54-56, 111 & 113-114/73, [1975] E.C.R. 1663, [1976] 1 C.M.L.R. 295, where one of the fines imposed by the Commission was quashed. The firm might have thought it was covered by the Notice on agency agreements. See also footnote 60 below.

\(^*\) See 3.1.1.2. supra.
adopt another market definition.

Finally, whilst the Notice may be of some guidance in determining whether an agreement or practice may be cleared for lack of appreciable effect, it should not be relied upon in isolation in concluding that an agreement or concerted practice containing restrictions is within the scope of the prohibition of Article 85 (1). In establishing whether the agreement or practice restricts competition, an economic assessment of the market is necessary. Market shares constitute only a part of such assessment60.

In isolation, an agreement may not fall within the scope of Article 85 (1) but under the theory of cumulative effects, networks of agreements are taken together in order to permit a realistic evaluation of their impact on competition or trade. The result may be that the cumulative effect of the agreement does infringe Article 85 (1) because it is found to restrict competition61. The theory of cumulative effects has been applied by the Community Court to exclusive purchasing agreements where the question is whether sufficient outlets are to remain, or will soon become available, to enable new entry or expansion by other firms. The extent to which this theory may catch small firms that are part of a larger distribution or franchise network depends on whether the analysis of "restriction of competition" is effected realistically.

60 See 5.6.4.1. for criticism in respect of the Commission's policy in respect of the situation where market shares have risen. See 6.3.3. for a further discussion on the Notice and criticism on the isolated use of market share ceilings to determine whether an agreement comes within the scope of Article 85 (1). See 7.2. for the market analysis under Article 85 (1) required by the Community Court in Delimitis and 8.1.1. where, in the ice cream cases, the Court of First Instance condemned the Commission for relying on the Notice on agreements of minor importance and for failing to apply the test required by Delimitis.

In *Delimitis v Henniger Bräu*¹, the Community Court provided a comprehensive test for beer supply agreements that are part of a network². The Court held that such exclusive purchasing agreements are prohibited if two cumulative conditions are met:

"The first is that, having regard to the economic and legal context of the agreement at issue, it is difficult for competitors who could enter the market or increase their market share to gain access to the national market for the distribution of beer in premises for the sale and consumption of drinks. The fact that, in that market, the agreement is one of a number of similar agreements having a cumulative effect on competition constitutes only one factor amongst others in assessing whether access to that market is indeed difficult.

The second condition is that the agreement in issue must make a significant contribution to the sealing-off effect brought about by the totality of those agreements in their legal and economic context. The extent of the contribution made by the individual agreement depends on the position of the contracting parties in the relevant market and on the duration of the agreement."³

The theory of cumulative effect has been incorporated in the Commission's Notice on agreements of minor importance⁴ preventing the application of the *de minimis* rule in cases where a cumulative effect exists.

**B. Article 86**

The wording of Article 86 itself illustrates the importance of market definition by including a threshold requirement, namely that an undertaking must be *dominant* in order to come within its

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² See 7.2.1. below.

³ Paras 19-23.

⁴ Point 18.
scope". The central issue is to determine whether the firm in question is "a small fish in a big pond, a big fish in a small pond, or even, a big fish in a big pond".

Obviously, no turnover threshold similar to that which needs to be applied in relation to Article 85 (1) has been developed to define dominance since the special nature of a particular product concerned may render companies with small turnover figures dominant in the relevant market. However, in the case law of the Community Court presumptions have also been developed as to what market share percentage may indicate a dominant position. Percentages of 50% or higher raise a presumption of dominance but dominance has been found with shares as low as 40% where other factors are present.

Again, these shares may serve as a guideline for national courts but are no absolute figure. It is necessary to take into account the circumstances of the specific case and consider factors such as the level relative to the nearest competitor(s), the composition and number of competitors and conditions threatening or entrenching the dominant position. Other factors may be the financial strength of the undertaking and its degree of vertical integration in so far as this guarantees it privileged access to procurement or sales markets and a technological or commercial advantage over competitors.

"A test was laid down by the Community Court (also used by the Commission) in United Brands v Commission, case 27/76 [1978] E.C.R. 207, at para 38:

"[...] The dominant position thus referred to relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave independently of its competitors, customers and ultimately of its consumers".

"Green and Robertson, Commercial Agreements and Competition Law, 2nd ed, 1997, p 325.

"AKZO, case 62/86 [1991] E.C.R. I 3359, paras 59-61. The Court stated, however, that the Commission was right to consider other factors.

"United Brands, case 27/76 [1978] E.C.R. 207, paras 125-129. United Brands supplied between 41 and 45 percent of the relevant market. This was several times as much as that supplied
Although there have been some cases where very high market shares in isolation were considered sufficient to establish dominance⁷⁰, the Commission and the Community Court tend to focus on the aforementioned factors and on barriers to entry to assess the existence of a dominant position⁷¹.

The aforementioned new Notice on Market Definition states explicitly that conditions to entry will be analysed while appraising the dominant position in the relevant market but only when potential competition is as immediate and effective as substitutes on the demand side⁷².

The appraisals under Article 86 are clearly complex and impose a large burden on national courts.

by the next largest competitor. Other factors were: United Brands had developed a more prolific and disease-resistant variety of bananas; it owned plantations in different geographical areas which enabled it to ensure regularity in supply; it owned refrigerated vessels to ship half the bananas it sent to Europe; and the Chiquita branded bananas were found to fetch substantially more than unbranded and rival ones. The cumulative advantage of all these factors led to the conclusion by the Commission and the Court that United Brands was dominant.

⁷⁰ See, for example, Hoffmann-La Roche (Vitamins), case 85/76, [1979] E.C.R. 461 at 521 para 41, where the Court made a finding of dominance solely on the basis of the large market share of Hoffmann-La Roche (around 80%). The Court went on to state that further indications were necessary to establish dominance over other vitamins where the market shares were in their forties or fifties such as Vitamin H where Japanese competitors were kept out only by reducing prices. See also Michelin, Commission decision O.J. 1981, L 353/33, [1982] 1 C.M.L.R. 634. Community Court, case 322/81, [1983] E.C.R. 3461, [1985] 1 C.M.L.R. 282.

⁷¹ But in United Brands, case 27/76 [1978] E.C.R. 207 paras 125-129, the barriers to entry listed by the Commission did not seem high and dominance was nevertheless established. See for a critical assessment Korah, EC Competition Law and Practice, 6th ed, 1997, p 90.

⁷² Last para of section II of the Notice. See also 6.3.3.1. below.
3.1.2.3. Actual or potential competition

The concept of potential competition may pose particular difficulties for national courts. Both articles 85 and 86 include conduct which may affect trade between Member States or competition. This condition is especially relevant for national courts as they may be confronted mostly with "national cases", where most the of issues relate to the territory of a single Member State and where potential effects on trade between Member States may be the only determining factor in establishing whether the agreement or conduct comes within the scope of Article 85 or 86.

At 3.1. above, mention was made of the fact that the application of article 85 or 86 may require the appraisal of conduct ex ante. This may involve an appraisal of the potential effects on intra Community trade and competition at a certain point in history. It is then necessary to compare what has occurred with the hypothetical situation that would have occurred in the absence of the conduct challenged. Ascertaining a hypothetical situation is not a routine undertaking in civil judgments. Nevertheless, in order to judge restrictions realistically from an economic point of view it is important to analyse them ex ante; at the time an undertaking is considering whether or not to commit itself to investment.

More often, however, the appraisal by the Commission of the conduct is done ex post (whilst the conduct is taking place or has taken place). The actual effects of the conduct on trade and

73 Today, the latter condition (may affect competition) may not be as relevant as it used to be. In Vacuum Interrupters Ltd, Commission Decision 77/160, [1977] 1 C.M.L.R. D 67, the agreement was held by the Commission to have a potential effect on competition and the way in which interstate trade might have developed. This view was subject to much criticism but was nevertheless confirmed by the Community Court in AEG-Telefunken v Commission, case 107/82, [1983] E.C.R. 3151, [1984] 3 C.M.L.R. 325, para 60.

74 See 2.2.8. and 2.3.2. supra.

75 See also 3.1.2.1. supra.
competition are compared with what might happen if the conduct were to cease. This is unfortunate as many incentives, developed to create or increase competition, will seem perfectly legitimate and desirable ex ante, but restrictive of competition ex post.

An example is formed by intellectual property rights. Perceived ex post, after the investments in innovation have been made, their exclusivity may be anti-competitive as they constitute entry barriers. Perceived ex ante, when a firm is deciding whether to invest in innovation, the expectation of such rights may increase competition as it induces investment. If no exclusive rights were to exist, innovation that is easily copied by free riders (those who copy without incurring the costs of research and development), may not take place at all. Additionally, investments in innovation may also be discouraged when they cannot be recovered as a result of parallel imports into areas for which the patent could not be obtained.

Both types of appraisal are difficult in any event because their practical application involves the task of defining and identifying of potential competitors. Decisive is whether potential competitors are - , will be -, or would have been capable of entering the market, either from within the territory or from outside. This requires a thorough economic analysis, taking into account the structure of the potential competitor's business, its access to sources of supply, production and distribution facilities, its financial and technological capacity and the risks involved in setting up a new business. The

"Korah, EC Competition Law and Practice, 6th ed, 1997, p 15 and 16. See also 5.5.2.1 and 7.1.2. below.

"See for example the judgment in Merck and Co. Inc. and Beacham v Primecrown Ltd, case C 267 & 268/95, [1996] E.C.R. I 000, [1997] 1 C.M.L.R. 83. In this case the Community Court held that the exercise of the UK patent was not justified within the meaning of Article 36 to restrain importation of pharmaceutical products imported from Spain where it had not been possible to obtain a patent and where prices were limited by price control to a level much lower than in some Member States, unless it was under a duty to sell in the country of export.

"Schröter, Antitrust Analysis under Article 85 (1) and (3), [1987] Fordham Corporate Law Institute, p 674.
assessment often requires a thorough knowledge of economic theory and market mechanisms in general and of the economic conditions and business practice in the relevant product sector.

3.2. Economic considerations vary in each Member State

The open drafting of Articles 85 and 86 allows for flexibility and adjustment to the individual case. However, it also allows for a fair amount of discretion in economic analysis and interpretation of concepts and facts which may result in divergencies in the decisions of national courts throughout the Community.

Economic considerations are inseparable from other issues such as political, social and human demands. Different social and political structures in the fora of the different Member States contribute to the expectation that the national approaches to competition may vary considerably.

An example is the Italian and French positive attitude towards state involvement and state aids compared with the British encouragement of privatisation and decentralisation. German policies are largely based on "liberal ideas of free markets without being oblivious to social and human demands". Such contrasts in policy approaches are expected to show in decisions of courts of different Member States especially since they are noticeable even within the Commission itself. This was clearly demonstrated by the differences in views between the English former Commissioner of Competition, Sir Leon Brittan and the German Commissioner of the Internal Market and Industrial Affairs, Mr. Bangemann. Whereas for Sir Leon the overriding

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" See for an illustrative example their dispute over the decision of the Mergers Task Force to block the De Havilland takeover by ATR, the joint venture between Aerospaciale of France and Alenia of Italy. Commission Decision IV/M.053 of 2.10.91 and 5.12.91, L 334/49. See for the discussions: Week in Europe, 3.10.91, and 10.10.91, Financial Times 22.9.91, 1.10.91, 3.10.91, 7.10.91 and 11.10.91."
factor was to ensure competition, thereby frequently clashing with the French and Italian governments, Mr. Bangemann used to pay more attention to social and industrial issues. The current competition Commissioner, Mr. van Miert, comes from Belgium and seems to be more in line with the French and Italian views.

If cultural and political differences filter through in the neutral post of Commissioner of the Community, it can be expected that, at national level, such differences are even more prominent. The domestic competition laws of the Member States are a reflection of the differences and, despite the fact that most Member States have adjusted their domestic competition law in line with articles 85 and 86, the outcome is still rather diverse due to the underlying political and economical differences.

Differences in the economic, social and industrial programmes of the governments of the respective Member States are not only reflected in domestic legislation but also in the way business is organised within the territory. National courts are no doubt influenced or restricted by the legal and political approaches towards market structures and competition and it will be difficult for them to transcend their domestic culture and apply EC competition law in accordance with the Treaty principles and the European spirit behind it.

This problem is aggravated by the fact that the Commission has not displayed a truly consistent competition policy. Even within its own departments, views differ considerably and DG IV officials apply somewhat different policies from those in the Mergers Task Force (the latter appears to have adopted a more economic approach right from the start). There is very little control over the policy in DG IV, enabling inconsistencies to remain. Moreover since the members of the Commission serve in terms, its composition changes regularly.

It could be argued that divergencies in approaches of the national courts will be mitigated by the fact that the broad provisions of articles 85 and 86 must be applied and interpreted

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See for example Van Bael, Insufficient Judicial Control of EC Competition Law Enforcement, [1992] Fordham Corporate Law Institute, Ch. 27. See also 3.1.1.2. supra.
according to the overall economic principles set out in the Treaty and in binding Community precedents and not according to domestic political attitudes. It remains to be seen, however, to what extent the prescribed method of interpretation will bind the judges to the system and aims of Community law and thus to what extent their freedom of policy choice is limited. This is discussed in chapter 4 below.

3.3. Evaluation

Unfamiliarity with -, or differing attitudes to economic concepts, combined with the broad drafting of Articles 85 and 86 and lack of reasoning by the Commission and the Community Court, allow for a substantial divergence in decisions of national courts. It also leaves room for error or decisions which conflict with those that would have been envisaged by the Commission or the Community Court. Moreover, it may also form the basis for differences between decisions by the Commission and the Community Court.

Interesting in this respect is the ice cream war involving several cases in different countries dealing with freezer and outlet exclusivity. It is an illustration of the way in which different fora have analysed the same situation in different ways. The economic issues were similar in all cases, in particular, the issue whether freezer exclusivity can form a barrier to entry into the ice cream market and whether it can restrict retail price competition and, indirectly, wholesale price competition. In principle, freezer exclusivity does not prevent a retailer from selling rival brands but, in those cases where it is difficult to install another freezer, it may come very close to outlet exclusivity, involving an exclusive purchasing obligation.

In the Irish case of Masterfoods Ltd T/A Mars Ireland v HB Ice Cream Ltd, HB sued Mars for encouraging Irish retailers to

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" Articles 2, 3 and 5 of the EC Treaty.

stock Mars ice creams in freezer cabinets provided by HB. Mars relied on EC competition law in claiming that the exclusivity restriction regarding the use of the freezers infringed Articles 85 and 86.

The Irish High Court made an extensive assessment of the case under both Articles 85 and 86, quoting case law of the Community Court. It was the most comprehensive analysis of EC competition law issues ever undertaken by an Irish court. At 8.1.1. below, this analysis is described in the context of the Community Court's judgment in Delimitis.

While the action in Ireland was still at a hearing, the Commission made a Decision ordering interim measures in respect of a similar dispute in the ice cream market in Germany on the basis that the German market for impulse ice cream did not display the characteristics of effective competition. This Decision was considered in the course of the judgment in the Irish proceedings.

The conclusion of the Irish judge was nevertheless that Mars' action had to fail on the grounds that an infringement of Article 85 or 86 had not been established. The court considered that freezer exclusivity was not incompatible with Articles 85 and 86 and that HB property's rights in the freezers should be upheld. These rights were protected by article 222 of

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**" Commission decision of 25 March 1992. Mars/Langnese and Schöller, IV/34.072. In this Decision, the Commission granted interim measures restraining Langnese and Schöller from enforcing outlet exclusivity, not freezer exclusivity.**

**" The freezer exclusivity agreement was considered not to partition territories. It was therefore different from tied house agreements as in the brewer industry, exclusive distributorships and selective distribution and franchise agreements. Moreover, freezer exclusivity, unlike outlet exclusivity, was considered not to prevent the sale of rival products and consequently not to foreclose the market. See 8.1.1. below.

As regards Article 86, the court determined that HB was dominant and that it effectively dictated the level of prices. It nevertheless ruled that a freezer exclusivity clause, either alone, or in combination with the dominant firm's pricing policy, did not create a barrier to entry. There was, therefore, no abuse of the dominant position and no infringement of Article 86. See Robertson and Williams, An Ice Cream War: The Law and Economics of Freezer Exclusivity I, [1995] 1 E.C.L.R. 7 at 19 and 20.
the Treaty of Rome and forcible inclusion of Mars ice creams would violate these rights.

The Decision of the Commission ordering interim measures in the German case was subsequently amended on appeal by the President of the Court of First Instance®®. The interim measures were found to cause substantial and irreversible injury to the two manufacturer's distribution systems and interim relief was therefore granted against the interim measures ordered by the Commission.

The Commission subsequently condemned the agreements involving freezer and outlet exclusivity under Article 85 (1) in its final Decisions in Langnese and Schöller". Fierce criticism ensued claiming that businesses are being tried twice for the same offence®®. The Commission's decision was also criticised for lacking proper analysis under Article 85 (1) and for being unclear in that it did not tell whether it condemned outlet exclusivity only or also freezer exclusivity®®.

The issue became ever more complicated. Masterfoods since appealed to the Irish Supreme Court®®. The Monopolies and Mergers Commission investigated the issue of freezer exclusivity in the UK and decided not to intervene because the practice of


®® Unilever is the parent company of Walls in the UK, Langnese-Iglo in Germany, and HB in Ireland.

®® Korah, Exclusive Purchasing Obligations: Mars v Langnese and Schöller, [1994] 3 E.C.L.R. 171. The Commission Decision appeared to condemn only outlet exclusivity expressly but made no distinction between freezer and outlet exclusivity in refusing exemption.

®® Supreme Court Ref. 301/92. According to an officer of the Supreme Court, Dublin, the case is listed for a hearing on Wednesday, 10th June, 1998.
freezer exclusivity could not be expected to operate against the public interest¹¹.

At EC level, the decisions made by the Commission in respect of the German cases were appealed against. The Court of First Instance upheld the decisions of the Commission that Article 85 (1) had been infringed but reversed the part of the Commission's reasoning where it failed to make a proper analysis under Article 85 (1)⁹. The Court instead applied the test laid down in Delimitis¹° requiring a full market analysis under Article 85 (1) and condemned the Commission for failing to use it⁹. This aspect of the German ice cream cases is also discussed at 8.1.1. below. One of them is now under appeal to the Court of Justice²³.

Meanwhile, in Van Den Berg Foods Ltd⁴, the Commission has condemned freezer exclusivity in the Irish market as contrary to Article 85 (1) where it is neither likely that the freezers would be replaced by the retailer's own or by a competitor's, nor

¹¹ Ice Cream: A report on the supply in the UK of ice cream for immediate consumption, Cm 2524, 14 January 1994, published by the Department of Trade and Industry, March 1994. The MMC found that since the savings to the customer in having a free cabinet were reflected in a higher price charged for ice cream supplied, this did not in practice exclude other suppliers from the impulse ice cream market.

⁹ Instead, the Commission had relied on its Notice on agreements of minor importance to determine whether the effect on trade between Member States was appreciable. See on the Notice 3.1.2.2. and 6.3.3. below.

²³ See 1.5.3. (under A) supra, and 7.2. below.


⁵ Langnese-Iglo v Commission, case C 279/95 P, Advocate General Ruiz-Jarabo Colomer delivered his Opinion on 13 November 1997. He proposed the appeal to be declared partly inadmissible and a dismissal of the admissible pleas and the cross-appeal.

⁶ O.J. 1995 C 211/4. Exemption would only be merited if the freezer was charged for separately and did not provide a price incentive to accept exclusivity. Different prices should thus be charged to retailers with and without free cabinets.
commercially feasible for additional freezers to be installed". The saga seems endless" and the scope for divergence seems endless too.

Although interesting, the substantive issues of the ice cream saga cannot not be discussed in great detail within the scope of this book". At this place, the saga serves only as an example to illustrate the potential for divergence, not only between national courts of different Member States but also between national courts, national authorities, the Commission and the Court of First Instance. At 8.1.1. below, the economic analysis performed by the Commission, the Court of First Instance and the Irish High Court in the ice cream cases are examined in the context of the Community Court's judgment in Delimitis.

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* See Commission Press Releases IP/95/229 and IP/97/147. See also Press Release IP/94/221 in respect of the French market.

** Court proceedings are taking place in Greece, Portugal and Denmark and competition authorities are considering the issue in France and Denmark. See Robertson and Williams, footnote 85 supra and next footnote, p 9.

4. TELEOLOGICAL INTERPRETATION OF EC LAW

4.1. Some comments and suggestions in respect of the teleological interpretation method

The interpretation of EC law is intended to be teleological, i.e. having regard to the history, background and spirit as well as the letter of both the provision concerned and the constitutional principles behind it. In applying this method, it is necessary to examine the wording of a provision in a broad meaning and discover the general intention of the legislator (ratio legis) which lies behind the words.

This is similar to the method applied generally in most civil law jurisdictions with a Roman law background. It is substantially different from the "literal" interpretation method.


2 The Corpus Iuris Civilis of Emperor Justinian was drafted in the sixth century. The reception period of the European countries, was many centuries later. In order to make old rules of Byzantine origin applicable to other cultures in new times, it was necessary to "gloss" them, in other words: old words had to be adapted to meet new needs. This glossing was done by adopting an open approach towards the meaning of the provisions rather than a literal construction. This explains the free attitude towards legislation of most continental judges from very early onwards.

There are many different "schools" of law in civil jurisdictions, each promoting its own views and doctrines on "finding the law". Nowadays it can be said that the common core of these theories is the acceptance of the sense of justice as a guiding factor in legal decision making which leads to the conception of an intuitive finding of the solution to the legal dispute, in a value oriented way. Within this teleological method, the history and background of a codified provision together with the "reasonable" (not actual) intentions of the legislator are very important factors. The judge interprets the Act and may expand its scope beyond its original provisions.
under which one closely examines the wording and phrases upon the supposition that the legislator has given perfect expression to his will. The latter method historically prevails in common law jurisdictions, see below at 4.4.

The teleological interpretation method as practised by the national judges in most civil law traditions and by the Community Courts bears the risk of an over-flexible approach to rules which may lead to different judges making different decisions on the basis of the same broad rule. This, in turn, may lead to uncertainty as to what constitutes the law. This risk is countered to some extent by the role of precedents. Although not absolutely binding in a civil law system, former decisions, especially those from higher courts in the same jurisdiction, tend to have strong value for national courts. The same applies at EC level for the Community Courts in respect of their earlier decisions. In respect of EC law applied at domestic level by civil law judges, a true precedent system applies because the judgments of the Community Court are binding.

A disadvantage of the teleological interpretation method as applied in civil law jurisdictions, it is submitted, is that, with the exception of Spain, judges are not under an explicit duty to explain the reasons for their decision or why they choose not to rely on a precedent. As a result, the judgments may lack proper reasoning, be it more so in some Member States than in

The advantage of this method from the legislator's point of view is that it eliminates the risk of the judiciary making new law under the pretence of interpretation. This casts a burden on the legislature to make its intention explicit so that the Acts are clear guidelines. In order to safeguard this principle, an interpretation section is often provided in Acts. A disadvantage of this method of interpretation is that codified laws are drafted in a certain period of time when there are specific economic, sociological and moral values. These factors may change and become out-dated. Whilst case law is an excellent means to adapt the law to changes in society, precisely written Acts and strict rules as to their interpretation may result in a rigid system which allows no room for adequate reactions. The drafting of legislation is a time-consuming task and amendments or replacements will be slower than developments in society.

See footnote 7 below.
others. This applies also in respect of Community law to the decisions of the Commission and the judgments of the Community Court. It would be desirable if UK and US case law were studied more closely to recognise the importance of reasons in judgments. The common law tradition has been to give many reasons; textual, precedential, and of policy.

There are good aspects in the precedent system as practised in common law jurisdictions which could be used to improve the development of civil law and of Community law. Some kind of universal duty for continental judges and the Commission and Community Courts to explain why they choose to override existing principles, for example, would enhance the reliability and development of the law.

Additionally, the common law feature of "dissenting" and "concurring" opinions is an advanced facility which, in a limited sense, can be compared to the opinion of the Advocate General or the "Notes", accompanying continental judgments. Dissenting and concurring opinions are very important features of a flexible system and it might be useful to consider whether it would not be possible to introduce these in the Community Court judgments.

The French and Danish Supreme Courts used to provide virtually no reasons of policy although the situation has been reported to have improved these days. The Italian Constitutional Court articulates its reasons habitually. The Irish Supreme Court debates the policy issues very openly and German and Spanish Constitutional Courts give far fuller reasons than usually given by the Community Court. Both Courts allow and publish dissents.

See 3.1.1.2. supra.

This duty exists for all judgments in Spain, by virtue of Article 120 (3) of the Spanish Constitution.

4.2. Examples of teleological interpretation in case law

4.2.1. Issues of translation

For EC competition law, the teleological interpretation method means that both Articles 85 and 86 and their implementing Regulations must be read with the broad objectives of the Treaty of Rome and the amendments introduced by the Maastricht Treaty in mind, in particular Articles 2 and 3 (g). This also applies to national courts of the Member States. They will have to interpret Articles 85 and 86 in light of what they see as the Community principles applying to the case before them.

Issues of interpretation may arise not only as a result of the broad wording of the Treaty provisions but also as a result of translation. *Ferriere Nord Spa v Commission*, a simple example with an obvious outcome, demonstrates that this implies that even clear and unambiguous aspects in the official Treaty Articles themselves, as issued in the different languages of the Community, may not be interpreted in isolation but, instead, should be compared to the other language versions.

The case involved an appeal, before the Court of Justice against the judgment of the Court of First Instance\(^9\) which refused to annul a the Commission Decision in respect of Article 85\(^10\). The appellant maintained that the Court of First Instance erred in law in interpreting and applying Article 85 (1) by not taking into account the Italian version of Article 85 (1).

As a result of its use of the coordinating conjunction "e", the Italian version of Article 85 (1) states that an agreement must have as its object and effect the prevention, restriction or distortion of competition, with the result that the provision lays down a cumulative, and not an alternative, condition. The appellant claimed that the reasoning of the Court of First Instance was based on case-law not relating to the Italian

\(^9\) Case C 219/95, 17.7.97, [1997] I E.C.R. 4411.


version of Article 85. The other language versions should be called in aid only where the meaning of one version of a provision is not clear, which is not the case here.

The Court stated that the difference in the Italian version cannot cast doubt on the interpretation of Article 85.

"it is settled case law that Community provisions must be interpreted and applied uniformly in the light of the versions existing in the other Community languages. This is unaffected by the fact that, as it happens, the Italian version of Article 85, considered on its own, is clear and unambiguous, since all the other language versions expressly render the condition set out in Article 85 (1) of the Treaty in the form of the alternative".

Sometimes, however, translation issues are more complex^". Whilst the Community Court uses the teleological interpretation method for its judgments, it may sometimes be necessary to use the same method to interpret the meaning and consequences of a judgment of the Community Court.

In Delimitis^^, uncertainty about the English translation of one single word necessitated not only a comparison with other languages but also an assessment of the ruling as a whole in order to establish the proper interpretation intended by the Community Court. A literal interpretation of the English version of the judgment would have resulted in a substantially different meaning.

In addressing the general notion that exclusive purchasing agreements restricted or distorted competition, the Court reasoned in the English translation:

"Even if such agreements do not have the object of restricting competition, within the meaning of Article 85 (1), it is nevertheless necessary to ascertain whether they have the effect of preventing, restricting or distorting

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12 I am indebted to Professor Korah for this point who was in turn attended to it by her UCL colleague Margot Horspool who is an instantaneous interpreter as well as a lawyer and a law teacher.

The wording "even if" used above seemed strange. Nowhere throughout its reasoning did the Community Court state that such agreements may have as their object the restriction of competition and the use of the word "even" therefore appeared wrong. The French text was "si", which might mean "if" or "although". But the German authentic text used "wenngleich" which clearly means "although".

Purely from the printed English translation, the Court appears to have meant that such agreements may not have as their object to restrict competition. This would have been consistent with Technique Minière in which the Community Court stated that it was necessary to read the words object and effect disjunctively. Only if it was clear that the object was not to distort competition would it be necessary to proceed to the second stage and assess whether the effect of the agreement might distort competition.

However, upon more reflection in the context of the whole judgment, Delimitis went further than earlier case law in that the Community Court did not make a substantive assessment of the

"Para 13 of the Judgment.


"In the context of the judgment, the word if could mean if, for the sake of argument or if, depending on the circumstances or we think that it does not have an anti-competitive object but we are not prepared to commit ourselves at this stage. It is suggested that the last possibility is the most likely".


"If the Court did mean although paragraph 13 is a strong statement. Beer contracts cannot be held to infringe Article 85 (1) on the basis of their object. It is possible, however, that some of the judges were misled by the use of si in the French version and intended to make a more tentative statement".

object of the agreement. Instead, the Court automatically accepted that beer supply agreements do not have an anti-competitive object and moved straight to the second level, the assessment of the effect of the agreement. Throughout paras 10-13 of the judgment, the Court used the plural term "beer supply agreements", rather than "the beer agreement in question" which means that the Court does not generally regard such agreements as having the object of restricting competition.

Consequently, the conclusion was that the translation should therefore have been "although" as in the German translation. This conclusion is now generally accepted."

4.2.2. Stretching of the law

This aspect of the Delimitis judgment shows that the teleological interpretation method is not limited to issues of translation. It may also involve a stretching of the law. The prevailing interpretation of the judgment in Delimitis appears to be an intention, of the Community Court, to relax the previous EC policy on exclusive purchasing agreements by making them more easily enforceable. Today, this stretching of the law is done only rarely by the Community Court.

In the early days, the Community Court was known to develop new law by means of teleological interpretation. A few times between the 1960s and the 1980s, the Community Court even used the system of teleological interpretation to legislate or, in

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17 Korah, See footnote 15 above at note 30, p 170. See also her casebook: Cases and Materials on EC Competition Law, 1996, p. 325, point 3.


19 Van Gerven in: Verloren van Themaat et al: Europees Kartelrecht Anno 1973, 1973, p 211, saw the judgment in Continental Can (see below footnote 22) as the high point of "legislative activity".
other words, "to deduce solutions from Community law for concrete problems which should have been dealt with by the Community legislator". The reason for this legislative activity may have been that there was political stalemate in the Council on many legislative measures and that a more active role in furthering economic integration was necessary.

In *Continental Can*, an acquisition by a dominant firm of a potential competitor was prohibited by the Commission under Article 86 because it would eliminate existing and potential competition. The Community Court quashed the decision on its facts but nevertheless confirmed the Commission's power to control acquisitions by firms already dominant when these substantially reduced competition.

It went as far as holding that both articles 85 and 86 should be construed in the light of articles 2 and 3 (f) of the Treaty even where there is a clear literal interpretation to the contrary. The Commission has not since exercised this power to control mergers given by the Court but it has stopped some big mergers in the 1970s by threatening to initiate proceedings under 86. It wanted to be able to monitor mergers before they were consummated and before they led to a dominant position. At the end of 1989, the Council adopted the Merger

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23 Now 3 (g).

24 See for an elaborate examination of Continental Can, the interpretation of art 85 and 86 and art 3 (f) of the Treaty, Korah, (1973) 26 Current Legal Problems 82, and EEC Competition Law and Practice, 6th ed, 1997, paras 1.2.4. and 3.3.2.

25 See 2.2.5.2. and 3.1.1.1. supra in respect of collective dominance.
Regulation 4064/89\textsuperscript{16}.

Although the above situation in Continental Can is an extreme example, there have been more cases in the 1970s in which the Community Court construed Articles 85 and 86 in the light of Articles 2 and 3 of the Treaty resulting in an interpretation contrary to a more literal interpretation and thus in an extension of the law\textsuperscript{17}.

On a quite separate note, mention should be made of a few cases in which the Court required purposive interpretation by national courts of provisions of domestic law in order to ensure their compliance with EC law\textsuperscript{18}. This issue is not expected to arise often in the context of competition law and if it does, it will nearly always be the result of a referral to the Community


\textsuperscript{17} See for example Hoffmann-La Roche v Commission, case 85/76, [1979] E.C.R. 461 para 123, where even a small reduction in competition was considered to be abuse of a dominant position. The opinions of Advocate General Roemer were famous for their progressiveness and economic deliberations. They were sometimes followed by the Court. See, for example, Consten and Grundig, case 56 & 48/64, [1966] E.C.R. 299 (not followed), Brasserie de Haecht v Wilkin I, case 23/67, [1967] E.C.R. 407 (followed), Parke Davis, case 24/67, [1968] E.C.R. 55 (followed). His opinions were also fundamental for the Court's judgments in Walt Wilhelm, see 2.3.2.4. under C supra and Technique Minière, see 2.2.5.2. supra.

\textsuperscript{18} Marleasing SA v La Commercial Internacional de Alimentacion SA, case C106/89, [1992] 1 C.M.L.R. 305. In this preliminary ruling requested by a Spanish court, the Community Court applied a purposive construction rule to ensure compliance of a provision of domestic law with an EC Directive:

"the obligation arising from a Directive to achieve the result envisaged by the Directive and their duty under art 5 [of the EC Treaty] to take all appropriate measures, whether general or particular, to ensure fulfilment of that obligation, is binding on all the authorities of the Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the Directive, the national court called upon to interpret it is bound to do so in every way possible in the light of the text and the aim of the Directive, to achieve the results envisaged by it and thus to comply with art 189 (3) of the Treaty".
Court in an Article 177 reference.

4.3. Community Court has displayed less legislative activity during the last twenty years.

It could be argued that the application of the teleological interpretation method could result in national courts engaging, be it voluntarily or unknowingly, in similar judicial activity. This does not seem a realistic fear, however.

A national judge, may be more concerned to apply the letter of the law as opposed to achieving a result - in the dispute before him - which balances competition policy with other Community objectives. The national judge may not even be aware of gaps or defects in legislation and decide simply to apply the law as he finds it.

More importantly, the Community Court itself seems to have moved away from this legislative activity in the last few years and has become conservative in the area of competition. It does not seem willing to reverse itself

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29 Query as to whether the soft harmonisation process of domestic competition laws could result, in the future, in a requirement for national courts to purposely interpret those domestic provisions in line with Articles 85 and 86 and secondary legislation issued by the Council or the Commission. Italian competition law includes such requirement, see 2.3.3.1. supra.


31 Delimitis and a few other recent cases seem to form an exception but none goes as far as legislating areas not sufficiently governed by EC competition rules. The relaxation imposed by the Community Court in Delimitis was combined with a requirement of a full analysis, even in cases of insignificant agreements, before deciding whether or not Article 85 (1) applies and by a strict interpretation of block exemptions as well as a strong statement that national courts should not usurp the exclusive powers of the Commission under Article 85 (3). See 5.5.3.1. and 5.6.4. below where it is demonstrated that this seems a retreat from the more lenient view of the Commission in Concordia.

32 Korah, EC Competition Law and Practice, 6th ed. 1997, at 1.5.2.1. and 12.3.4. - 12.5.
overtly unless there is a substantial majority for change and it tends to more narrow interpretation.

Today, legislation can be more easily adopted by the Council than in the early days. Additionally, with market integration nearly achieved, the Court may no longer feel a need to develop the law as vigorously as before. Regularly, it is argued in the judgments that it is for the legislature and not for the Commission or the Community Court to extend the law.

This is illustrated by the opinion of Advocate General Tesauro in France v Commission where he considered a gap in the Treaty not to be a justification for the Community Court to extend the law in respect of oligopolies.

4.4. Consequences for national courts

As illustrated at 4.1. above, the need for teleological interpretation may pose an additional burden on common law judges who, by tradition, administer a more restrictive interpretation of legislative provisions and have been given less discretion to "find" the law. This is due to the differences in both constitutional and legal structure; the sovereignty of Parliament in the United Kingdom invokes the need for judges to interpret legislative measures quite strictly.

Additionally, the case law foundations of common law have led to the approach that codification is meant to regulate only those areas and situations specifically identified by Parliament that were not sufficiently covered by case law or badly in need of regulation. The scope and meaning of provisions of codified law were not to be extended by judges as this would, in fact, put them in the chair of the legislator which would encroach upon the exclusive legislative powers of Parliament and also it would run the risk of trespassing areas where existing case law applies.

This approach towards legislation in the UK is noticeable

not only in the interpretation of codified provisions, but also
in the drafting of codified law itself. It is drafted with a
limited application in mind, explaining precisely the situation
it purports to regulate. This can be seen in the way Community
Directives are interpreted and implemented into domestic
legislation. The recent troubles with the Transfer of
Undertakings Directive (Acquired Rights Directive) are a clear
illustration of the problems caused in the UK by the broad
wording of EC law.

When applying EC competition law, common law courts (and the
civil law courts of some countries) will thus have to employ
foreign methods of interpretation. Although this has been done
many times and is increasingly becoming a necessity, it will
remain to be seen to what extent the contents of the decisions
and considerations employed in the various UK courts will differ
from those of their continental counterparts, not least because
there is also a difference in the extent to which a court may
exercise an active and investigating role during court
proceedings.

By tradition, the continental courts, with the exception of
Denmark, tend to be more inquisitorial as opposed to the

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15 The scope of Directive had been interpreted too narrowly
which led to several challenges and an abundance of litigation.

16 See Litster v Forth Dry Dock & Engineering Co. Ltd.
[1990] AC 546. The question arose of the conformity of national
law (Scots law in this case) with a European Directive. The House
of Lords held that the relevant law was expressly promulgated in
order to implement European obligations and was accordingly to
be interpreted in a European way, even if this meant writing
words into the national regulations. The purposive construction
rule was applied. Lord Denning was noted to be in favour of
abandoning the English rules of interpretation completely and
adopting the continental teleological method. Cases based on EC
competition law such as Garden Cottage Foods v Milk Marketing
Board, [1983] 3 C.M.L.R. 43 and Cutsforth v Mansfield Inns Ltd.
[1986] 1 C.M.L.R. 1, have necessarily involved teleological
interpretation and this was done without major difficulty.

17 See: The Application of Articles 85 and 86 of the EC
Treaty by the National Courts of the Member States, compiled by
Braakman, published by the Commission, DG IV, July 1997,
contribution for Denmark by Holgersen and Ruback Larssen.
approach of English courts which is more adversarial. The common law courts and those of Denmark have by nature been more reluctant to interfere in the business activities of companies and the contracts they enter into than the continental courts. It also seems that approach in the civil law countries towards the direct effect of EC law in general is less sceptical.

It is not difficult to see the potential for divergence and lack of legal certainty. EC law does, however, impose limitations within which the judges must operate the system of teleological interpretation. No matter how free the national judges (especially those of civil law jurisdictions) may feel, they are limited in their freedom of policy choice by the aims of Community law, the boundaries of the Community Court's binding interpretative rulings and the guidelines adopted by the Commission pursuant to articles 85 and 86.

It is hoped that national courts of both common and civil law traditions will pay sufficient attention to the precedents of the Community Courts and, when in doubt, refer the case for a preliminary ruling under Article 177.

At the same time, it is hoped that the Community Court will take up the opportunities to develop the law in accordance with sensible economic policy rather than to confine itself to purely textual criteria and conclusions. Unfortunately, the division of

See also Lasok, footnote 15, above at p. 200:
"[...] in England laissez-faire attitudes are well entrenched and have traditionally been antipathetic to interference in the ways of businessmen (even where those ways have favoured the growth of cartels) [...]"


functions between the national court and the Community Court restrains the latter from the facts but the Court should deal with policy issues and reason its decisions more extensively⁴¹.

⁴¹ See 3.1.1.2. supra.
PART II. PROBLEMS ORIGINATING AT EC LEVEL - THE TRIFURCATION OF ARTICLE 85, NULLITY UNDER ARTICLE 85 (2) AND THE POSSIBILITY OF COMMISSION INVOLVEMENT IN THE SAME CASE
5. THE TRIFURCATION OF ARTICLE 85 - CONSEQUENCES FOR THE NATIONAL COURTS

5.1. Restricted jurisdiction in respect of Article 85

Like the preceding chapters, the second half of this book also concentrates on restraints hampering a decentralised enforcement of EC competition law by national courts but, in contrast to those arising at domestic level, this part is focused on restraints originating at EC level. It will be illustrated that the wide interpretation of Article 85, its trifurcation into three sections and the corresponding division of powers between the Commission and national courts in respect of Article 85 para (2) and (3)\(^1\) have unfortunate implications for national courts as well as the Commission.

This chapter highlights some implications for national courts whilst the consequences for the Commission are discussed at chapter 6. Most sections are focused on the situation in which there are, or may be, parallel proceedings before a national court and the Commission in respect of the same EC competition rules.

For national courts, a major drawback of the dichotomy of jurisdiction in respect of Articles 85 (2) and (3) is that they find themselves severely limited in their application of Article 85 and the assessments of conduct falling within its scope. In general terms, the power of a national court asked to enforce or nullify restrictive provisions in an agreement is confined to a consideration whether or not the agreement falls within the scope of the prohibition of Article 85 (1)\(^2\). If it does, the court will have to apply Article 85 (2) to the restrictive clauses, owing to the prescribed automatic effect of that provision\(^3\).

\(^1\) See 1.2. supra.

\(^2\) Some agreements or conduct prohibited by Article 85 (1) have no legal effects to nullify, but nullity is important for vertical agreements where the interests of the parties may differ and their bargaining power may change over time.

\(^3\) See 2.2.5.2 and 2.2.5.3. supra.
In proceedings leading to formal Commission decisions, restrictive agreements or practices often undergo a two step-scrutiny: the first assessment serves to determine whether the conduct or agreement falls within the scope of the prohibition of Article 85 (1) and the second to consider whether the conduct or agreement is eligible for exemption under Article 85 (3).

Owing to the limitation of their jurisdiction to appraisals under Article 85 (1) and (2), national courts cannot, strictly speaking, perform the second half of the economic analysis because an appraisal under Article 85 (3) is reserved exclusively for the Commission in a decision whether or not to grant an exemption. The assessment of national courts is limited to what is necessary to establish whether or not an infringement of Article 85 (1) is taking place.

The overall effect of many agreements is pro-competitive despite some restrictions of conduct. As a result of the wide interpretation of the prohibition (notably, the concept of "restriction of competition") practised by the Commission, however, most agreements containing some restriction on conduct are caught by Article 85 (1) and require exemption to be enforceable. This leaves national courts asked to apply Article 85 with very little discretion. The automatic nullity of the restrictive provisions by virtue of Article 85 (2) prevents them from being able to enforce such agreements as a whole, unsevered.

It will be demonstrated throughout the following chapters, however, that the automatic effect of Article 85 (2) is subject to several qualifications. The agreement may, for example, benefit from provisional validity, an individual exemption or a block exemption, in which case a national court may nevertheless enforce an agreement that falls within Article 85 (1). These possibilities will be considered first. Additionally, the

* At 2.2.5.2 and 2.2.5.4 above it was shown that the enforcement of agreements from which restrictive elements have been severed may cause many undesirable complications not only for national courts, who will have to decide whether enough remains to enforce, but also for the parties, since the bargaining power have may shifted considerably.
discretion of national courts to decide whether an agreement is
cought by Article 85 (1) has been enlarged somewhat by the
Community Court through several decisions that have narrowed the
scope of the prohibition of Article 85 (1). These are discussed
in Chapter 7 below.

5.2. Automatic nullity does not always apply

The straightforward application of Article 85 (2) is blocked in
cases where the Commission is, has been, or may become involved
in the same case, particularly where Article 85 (3) may be of
relevance.

Where an agreement benefits from an individual or block
exemption, Article 85 (2) does not apply to its restrictive
provisions and the agreement should be enforced by the national

The national court may apply the doctrines developed by
the Community Court, notably the doctrine of ancillary restraints
and the full economic analysis as prescribed in Delimitis, which,
in certain circumstances, make it easier to regard pro-
competitive agreements containing provisions restrictive of
conduct as falling outside Article 85 (1) in the first place, see
for a description of the doctrine of ancillary restraints
3.1.1.1. supra, and 5.2.2.1 and 7.1. below. For the doctrine
established in Delimitis see 7.2. below.

1 C.M.L.R. 511.

National courts have jurisdiction to decide whether an
agreement falls within a block exemption and enforce agreements
C.M.L.R. 224. Fonderies Roubaix-Wattrelos SA v Société Novelle
Fonderies A Roux, case 63/75, [1976] 1 C.M.L.R. 538 case 63/75,

There is currently some discussion as to whether a
Commission decision condemning or clearing under Article 85 (1)
or 86 is also binding on national courts asked to apply EC
competition law. Whereas exemption decisions concern the
exclusive competence of the Commission, the other types of
decisions such as a condemnation or negative clearance do not and
may therefore not be binding. In respect of a condemnation, the
national court has little discretion to take another view since
it cannot enforce agreements within Article 85 (1). It could
however, take the view that the agreement is outside Article 85
(1). In case of a negative clearance, the court may be able to
take the opposite view and nullify the agreement. However, the
court, unless is it void for fraud or other defences under national law.

Parallel proceedings may also have been brought before the Commission although no decision has been issued as yet. In addition to bringing proceedings in one or more of the national courts, plaintiffs suffering from anti-competitive conduct may send a complaint to the Commission in an attempt to avoid the limitations of relying exclusively on the jurisdiction of the court'. After Automec II\textsuperscript{16}, however, this practice may have become rare. Parallel proceedings involving a complaint are not likely to affect the automatic nullity of restrictive provisions under Article 85 (2) since there is not much risk of conflicting decisions. A national court will not be inclined to enforce an agreement in respect of which the Commission has initiated proceedings.

Alternatively, the agreement may have been notified before or during the domestic proceedings. Parties wishing to enforce their agreement in a domestic court may notify it to the Commission for negative clearance or individual exemption. This national court is bound by a duty to avoid conflicting decisions. This issue was discussed by the Advocate General in Banks - H.J. Banks & Co Ltd v British Coal Corp, case C 128/92, [1994] E.C.R. I 1209, but unfortunately not by the Community Court. The issue may be academic as, in practice, the national court may be happy to follow the Commission decision. It saves it from having to make a full independent analysis. The effect of decisions and clearances by the Commission and block exemptions on national courts asked to apply domestic competition law was discussed at 2.3.2. and 2.3.3. supra.

\footnote{See for the differences in powers of the national courts and the Commission, section 2.1. supra. Note however, that in England, this freedom to rely on two jurisdictions may be restricted. \textit{Sir Godfray Le Quesne QC}, sitting as deputy judge of the Queen's Bench Division, held that a defendant should not be required to argue his case simultaneously in two jurisdictions. ICS v Institute of Personnel Management, case (1993), unreported, cited by Evans-Lombe J in \textit{MTV Europe v BMG Records (UK) Ltd} [1995] BCC 216. \textit{Green and Robertson, Commercial Agreements and Competition Law}, 2nd ed. 1997, p 391.}

may also be done in cases where the agreement is challenged in a national court in the hope that by inducing the Commission to initiate proceedings, the proceedings in the national court could be delayed or influenced. Should the proceedings before the Commission result in exemption under Article 85 (3), conflict with a national court's nullification under Article 85 (2) would again arise.

Conflicting decisions should be avoided in order to safeguard the Community law principle of legal certainty. This issue is discussed at 5.2.2. and 5.5. below but first a distinction should be drawn between "old" and "new" notified agreements since the former are provisionally valid.

5.2.1. Notified old agreements - doctrine of provisional validity

The doctrine of provisional validity introduced a qualification to the principle that Article 85 (2) applies automatically to agreements within Article 85 (1). Briefly summarised, in accordance with Article 7 of Regulation 17 and the principle of legal certainty, the Community Court ruled in the Bosch case:

11 Compare the "dilatory notifications" made to prevent or block proceedings before national authorities, Commission Notice on cooperation with national authorities, O.J. C 313, of 15.10.97, p 3, point 55. The Commission will not give such notifications priority. See on the possibility to notify after a national court has rendered a decision, 5.5.4 below.

12 The principle of legal certainty means that the application of the law to a specific situation must be predictable. This is a firmly established principle of EC law.

13 De Geus v Bosch, Case 13/61, [1962] E.C.R. 45, [1962] C.M.L.R. 1. The Community Court relied on the principle of legal certainty which it derived from the general principles of law in Member States and ruled that agreements made before Regulation 17 came into force and duly notified should be treated as provisionally valid until the Commission had issued a decision. This provisional validity was justified also on the ground that Article 7 of Regulation 17 provides for retrospective validation if the agreement is later altered so as not to infringe Article 85 (1) or to merit exemption. Regulation 17 was passed after the start of proceedings in De Geus v Bosch so there was time to verify the situation.
that agreements that have either been duly notified to the Commission or are excused from notification under Article 4 (2) of Regulation 17 enjoy provisional validity until the Commission has issued a decision.

In subsequent cases, the Court went further and ruled that, until that time, the notified agreement should be given its full legal effect and be treated by a national court as legally enforceable.

For the doctrine to apply, however, the agreement in question must not only be notified or exempt from notification but it must also be old, i.e. made before the date of entry into force.

Pursuant to Article 4 (2)(1) of Regulation 17, an agreement is exempt from notification when only undertakings from a single Member State are parties to it and it does not relate to imports or exports between Member States.


In De Bloos, see previous footnote, the agreement included an export ban which would have prevented not only the group exemption Regulation 67/67 from applying, but also the Commission from granting an exemption. Nevertheless the Community Court ruled that at paras 8-16:

"during the period between notification and the date on which the Commission takes a decision, courts before which proceedings are brought relating to an old agreement duly notified or exempted from notification, must give such an agreement the legal effects thereto under the law applicable to the contract, and those effects cannot be called in question by any objection which may be raised concerning its compatibility with Article 85 (1)."

During the period prior to the Commission's decision on a duly notified old agreement, a national court was therefore held to have no jurisdiction to make a finding of nullity under Article 85 (2), not even for the future. Provisional validity enabled these agreements to be enforced under domestic contract law despite infringement of Article 85 (1).

The doctrine thus increased legal certainty in respect of old agreements and clarified the situation for national courts. National courts could not invoke EC competition law to adjourn the case in order to enable the Commission to condemn it. Instead, a party wanting to rely on the nullity of the agreement had to make a complaint to the Commission and wait for the Commission to condemn it before deciding to infringe it. Korah, Provisional Validity and the Rule of Reason, [1981] 3 Northwestern Journal of Int'l L&B, p 320 at 332.
force of Regulation 17/62: 13 March 1962. This was decided in Brasserie de Haecht v Wilkin II\(^7\) by an explicit rejection by the Community Court of provisional validity for new agreements\(^8\).

One reason for this limitation to old agreements is that the doctrine of provisional validity represents a compromise developed by the Community Court between, on the one hand, the need for legal certainty\(^9\) underlying the special provisions for such agreements laid down in Article 7 of Regulation 17\(^10\) and, on the other hand, the intention of Article 85 (2) which is to attach severe sanctions to the prohibition\(^11\).

\(^7\) Case 48/72) [1973] E.C.R. 77.

\(^8\) [1973] E.C.R. 77 at 86 and 87. After having observed that there were no transitional provisions in Regulation 17 and that the national court was required to treat agreements within Article 85 (1) as void without enjoying the power to grant retrospective exemptions as conferred on the Commission, the Court decided to confirm provisional validity for old agreements but in respect of new agreements that fall within Article 85 (1), the Court held, at paras 9 and 10, that these are invalid even before being condemned by the Commission:

"In the case of old agreements, the general principle of contractual certainty requires, particularly when the agreement has been notified in accordance with the provisions of Regulation No 17, that the [national] court may only declare it to be automatically void after the Commission has taken a decision by virtue of that Regulation. In the case of new agreements, as the Regulation assumes that so long as the Commission has not taken a decision the agreement can only be implemented at the parties' own risk, it follows that notifications in accordance with Article 4 (1) of Regulation No 17 do not have suspensive effect."

\(^9\) For national courts the doctrine had the advantage of clarity: notified old agreements might be enforced regardless the risk of conflict in the form of a subsequent Commission condemnation.

\(^10\) This Article provides for retrospective validation of old agreements if the agreement is later altered so as to not infringe Article 85 (1) or to merit exemption.

A second reason was that the doctrine was difficult to reconcile with Article 85 (2) of the Treaty.

Thirdly, the extent of the validity was unclear too: what if the Commission would later condemn an agreement which was enforced earlier by a national court? Presumably, the validity for the period before the decision will remain, otherwise the position for the parties would be impossible: a national court would, upon request, have to enforce the contract and the same contract might later be condemned by the Commission with retroactive effect. The issue was never decided.

Finally, the Commission, short of resources, preferred to rely on the automatic nullity of Article 85 (2) rather than having to intervene in every case enjoying provisional validity. The Community Court therefore limited the doctrine of provisional validity to old agreements only and held that notification of new agreements did not have suspensive effect.

In later case law, provisional validity was also held to apply in the same way to new agreements that are exact reproductions of a standard contract concluded before 13 May 1963 and duly notified.

Although the Community Court never expressed a view as to whether the doctrine of provisional validity applies to "accession agreements" (agreements which became subject to EC law after 13 May 1963).

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22 Waelbroeck, 4 Le Droit de la Communauté Economique Européen, Concurrence, Megret, 1972 at 161 - 178. This book was written before de Haecht II and probably accounts for the judgment. The second edition of this book came out in 1996 under the same title, Vol. 4 Concurrence, Brussels.

23 See on retrospective exemption in respect of new agreements 5.2.2. and 5.5.4. below.

24 Parfums Rochas v Bitsch, case 1/70, [1970] E.C.R. 515, [1971] C.M.L.R. 104, at para 6. Note, moreover, VBRR v Eldi, case 106/79, [1980] E.C.R. 1137, [1980] 3 C.M.L.R. 719 where an agreement which was not an exact copy of an old agreement was held to enjoy provisional validity. The case concerned an agreement which, after it was notified in 1962, had been made less restrictive but which was modified again at a later stage in order to make it more restrictive. The Community Court treated the agreement nevertheless as an old agreement enjoying provisional validity because the agreement was not more restrictive than it had been at the moment it was notified.
competition law owing to accession of new Member States), it is commonly accepted that it does. Duly notified agreements entered into before the relevant date of accession of a Member State and notified within six months of accession enjoy provisional validity.

In *De Bloos*\(^2\), the doctrine was held to end where the Commission has taken a decision. However, in *Lancôme*\(^2\), the Community Court decided that legal certainty no longer necessitated provisional validity for old agreements where the

\(2\) In 1973, the Commission argued that it should apply to accession agreements (*Third Report on Competition Policy*, p 19). A literal reading of Article 25 of Regulation 17/62, added in 1972 and adapted by each of the accession Treaties, supports this view and it has been applied subsequently at national level. See for example, an English court in *Esso Petroleum Co Ltd v Kingswood Motors (Addlestone) Ltd*, [1974] QB 142. This case concerned an exclusive purchasing contract concluded in 1969. The Judge referred to the classification in Regulation 17 between old and new agreements:

"in the original regulation that meant agreements which had been entered into before the making of the Regulation in 1962 and after, but as that Regulation is adapted to apply to the countries who entered the Community on January 1 1973, the Regulation has the effect of treating pre-1973 agreements as old agreements and post 1973-agreements as new agreements. We are therefore concerned with an old agreement".

The Judge then relied on *Bilger v Jehle*, case 43/69, [1970] E.C.R. 127, and concluded that the agreement was exempt from notification under Article 4 (2)(1) of Regulation 17 since it did not concern import or export between Member States. He then concluded on the basis of *Brasserie de Haecht (II)*, case 48/72, [1973] E.C.R. 77, that the agreement was clearly enforceable pending a Commission decision. See also: *L'Oréal v De Nieuwe* [1980] E.C.R. 3775, [1981] 2 C.M.L.R. 235.

\(2\) *De Bloos v Bouyer*, see footnotes 15 and 16 supra.


"An administrative letter informing the person concerned that the Commission is of the opinion that there are no grounds for it to take action with regard to agreements which have been notified pursuant to the provisions of Article 85 (1) has the effect of terminating the period of provisional validity accorded from the date of notification to agreements made prior to 13 March 1962 notified within the period laid down in Article 5 (1) of Regulation No. 17 or exempted from notification".
Commission had notified the parties that it intended to close the file on the matter since it was now unlikely that the Commission would validate the agreement retrospectively\(^8\). This appears to mean that provisional validity also ends when the Commission issues an informal decision in the form of a comfort letter. Comfort letters are discussed at 5.4.1.3. and 5.4.2.2. below.

This statement of the Community Court that provisional validity was no longer necessary because retrospective validation was unlikely is difficult to reconcile with its earlier decision in De Bloos in which provisional validity was held to apply during the period between notification and the Commission decision regardless whether or not the Commission would issue an exemption or condemn the agreement\(^*\).

The ending of provisional validity affects the rights of the parties and it is therefore arguable that, as a result of this ruling, comfort letters having this effect equal a decision. This issue is discussed at 5.5.3.2. below in the context of the judgment in Delimitis.

Nevertheless, the Court added in Lancôme that the national court might take into account the Commission's view expressed in the comfort letter that the agreement was outside Article 85 (1) but that it was not bound by it\(^9\). The result of this statement

\(^{18}\) The Community Court ruled in para 50, p 252:
"After the adoption of such an attitude, which indicates that the Commission does not contemplate taking an individual decision on the notified agreements in question, it is unlikely that the Commission would subsequently exercise in favour of those agreements its power to apply article 85 (3) with, where appropriate, retroactive effect for the period prior to their notification, as permitted by article 6 (2) of Regulation 17. There is, therefore, no longer any reason to release national courts, before which the direct effect of the prohibition in article 85 (1) is relied upon, from the duty of giving judgment".


"The opinions expressed in such a letter are not binding on the national courts but constitute a factor which the latter may take into account in examining whether the agreements are in accordance with the provisions of Article
is anomalous: after drafting (or amending) their agreement to satisfy the Commission, Lancôme was unable to enforce the agreement in domestic litigation, whereas if the Commission had not reacted at all the agreement would have enjoyed provisional validity and been enforceable.

In Lancôme the Commission sent a comfort letter closing the file on the ground that in the Commission's view the agreement was not caught by Article 85 (1) owing to the firm's small market share in each Member State. It may be argued that other types of comfort letters do not bring provisional validity to an end, for instance, such as issued in Rovin stating that the agreement merits exemption.

The reason the Court gave in Lancôme for ending provisional validity was that the Commission was unlikely to reopen its file and exempt the agreement retrospectively. There was, therefore, no longer any reason to release national courts from the duty of giving judgment. This is true in respect of the comfort letter issued in Lancôme but not of comfort letters stating that the agreement merits exemption.

In respect of the type of comfort letter issued in Lancôme, a national court of the same view could proceed to enforce the agreement. Agreements benefitting from a comfort letter stating that the agreement merits exemption are difficult for national courts to enforce as they imply that the agreement is forbidden by Article 85 (1). This issue is discussed in respect of new

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85."


12 Also in Giry v Guerlain, see footnote 30 supra.


14 See 5.4.1.3, 5.4.2.2, and 5.6. below.

15 See footnote 28 supra.
agreements at 5.3., 5.4.1.3., 5.4.2.2., 5.6. and 5.6.4. below".

Moreover, it will be demonstrated at 5.6.2. below, that, as a result of Automec II', such comfort letters may well be followed by a formal decision should their validity be raised in a national court. Automec II may therefore overrule Lancôme, at least where it might have applied to a comfort letter stating that the agreement merits exemption.

The Community Court's ruling in Delimitis also contradicts Lancôme where it indicates that the national court is no longer released from its duty to give judgment once a comfort letter has been granted. Delimitis prescribes that in respect of an agreement clearly contrary to article 85 (1) a national court is only allowed to proceed if the agreement may on no account be the subject of an exemption decision under article 85 (3). See 5.6. footnote 116 and 5.6.4. below.

5.2.2. New notified agreements that may be eligible for exemption

New agreements" that have been notified do not enjoy provisional validity. Implementation of new notified agreements can only take place at the parties' risk and notification has no validating effect. When rejecting the doctrine of provisional validity for new agreements, the Court considered in Brasserie de Haecht v Wilkin II" that the resulting lack of legal certainty and the long delays by the Commission could not prevail against the interest of a party alleging that the contract is

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" At 5.6.4. below it is argued that national courts should have jurisdiction to enforce such comfort letters.


" Those entered into after the date Regulation 17 came into force, or the date of the pending Member States' accession to the Community.

void°.

In cases where parallel proceedings before the Commission result in subsequent exemption under Article 85 (3), conflict would arise if a national court had earlier held the agreement void under Article 85 (2). Article 6 of Regulation 17 provides that notified agreements may be exempted by the Commission with retroactive effect, from the date of notification.

Moreover, agreements that are exempt from notification by virtue of Article 4 (2) of Regulation 17 may also be exempted retroactively by the Commission from the date they came into existence. Although interpreted narrowly, agreements exempt from notification may include many of the "national cases", the very cases for which national courts should be the preferred forum". In respect of these cases, the parties can seek an exemption with retroactive effect from the date of its existence without having to notify first.

The possibility of an exemption for the future is thus always existent, even in cases that are not notified or exempt from notification, because the parties may decide to notify during domestic proceedings or even after a judgment has become res judicata, as discussed at 5.5.4 below.

The risk of conflict between decisions of the national court and the Commission is greatest for notified agreements that are, or may be, caught by Article 85 (1) but that are nevertheless eligible for exemption. An agreement might include certain restraints imposed on the parties, but its overall effect might

"Whilst the principle of legal certainty requires that, in applying the prohibitions of Article 85, the sometimes considerable delays by the Commission in exercising its powers should be taken into account, this cannot, however, absolve the court from the obligation of deciding on the claims of interested parties who invoke the automatic nullity".

°° See for the text of Article 4 (2)(1), 5.2.1. supra at footnote 14. See on national courts being the preferred forum in "national cases", the scenario of decentralised enforcement of EC competition law described at 1.5.above. See on "national cases" and the concept of "trade between Member States" 2.2.8 above.
be pro-competitive. There are many such agreements.

5.2.2.1. Exemptible vertical agreements containing ancillary restraints

Vertical agreements, such as exclusive licenses of intellectual property rights and exclusive distribution or purchasing agreements, may serve to induce investment in innovation, efficient production, distribution or marketing. Those agreements often produce a net pro-competitive effect. The restrictions appearing in them often are ancillary to the pro-competitive transaction that enables penetration of a market. Without the restraints, however, the agreements might not be viable.

Investment may be a key element in the introduction of new products and competition but, at the same time, raises the need for ancillary restraints. The development and production of a new product usually involves a risk of failure and may require substantial initial investment. The risk of failure of a project must be counter-balanced by a chance to make high profits should the project succeed. One party or both parties may have to be protected from competitors at least in the beginning.

Protection is especially required where it concerns innovation which is easily copied, for example, by reverse engineering as in the case of medicinal products. Competitors who market such copies at lower prices are called "free riders" because they take a free ride on the investment of the innovator. Free riders pose serious competition problems, not only in respect of intellectual property but in all agreements where investments are protected by means of exclusive rights. In the short run, free riders increase competition by enlarging the choice of available product and by marketing at lower prices. In the long

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"Schechter, The Rule of Reason in European Competition Law, [1982] 2 L.I.E.I. 1 at 19, wrote:
"In sum, the prospects of vertical restrictions generally producing anti-competitive effects are slight, and the prospects for an enhancement of competition are great. It should be axiomatic to say that every vertical restraint should be carefully examined before it is proscribed". 
run, however, they discourage the very investments that create competition.

A similar line of argument applies to exclusive dealing agreements. The dealer who is about to market a new or little known product will have to invest in stocks, finding retailers and in promoting the product whilst the return on investments may be uncertain or take years. It may be impossible to penetrate the market efficiently unless he is protected from free riders benefitting from the investments made in establishing the brand, particularly in the early years of the venture. The ability to enforce exclusivity may therefore prove essential.

In conclusion, an important consideration in vertical agreements is that for this type of agreement to be viable, some protection in the form of ancillary restraints may be required to attract the collaboration and it should be noted that, especially in its early years, no competition is restricted that would exist without these restraints.

5.2.2.2. Exemptible horizontal agreements

Like vertical agreements, horizontal agreements may not necessarily be anti-competitive either but the considerations in horizontal agreements are different. R&D projects, specialisation agreements and production joint ventures, for example, enable two companies to co-operate and achieve together what could not have been achieved individually. The joint venture or collaboration may increase competition faster and more efficiently than had the parents proceeded independently, especially in cases where the parties have complementary resources such as technology, or where the minimum efficient scale is large in relation to the expected increase in demand. If that situation, the joint venture may be pro-competitive.

At the same time, however, the joint venture is likely to prevent or deter either party from entering the market on its own and from competing with the other and may reduce the number of independent firms in concentrated markets.
In deciding whether the joint venture infringes EC competition law, the value of the actual or potential competition between the parties must be weighed against the more effective competition of the joint venture. The balance may fall in favour of the joint venture, again, as with vertical agreements, especially in the early years of its functioning. The need to enforce is more apparent in vertical contracts, however, where bargaining power is more likely to shift.

5.3. Stay of proceedings in cases where application of Article 85 (2) may conflict with an exemption

What should a national court do when asked to enforce or nullify a notified agreement or an agreement exempt from notification that contains restrictions on conduct but that is nevertheless pro-competitive? Should it ignore some of the Commission's precedents and hold that the essentially pro-competitive agreement does not come within Article 85 (1)?

It will be demonstrated at 7.1. and 7.2 below that, in some particular circumstances, there is much to be said for this since the Community Court has, in several decisions, increased the discretion for national courts to decide that an agreement falls outside Article 85 (1).

What should be done, however, if the national judge takes the view that the agreement is clearly within Article 85 (1) but eligible for exemption? The court does not have the power to enforce such agreements on the basis that they are likely to be exempted by the Commission as that would involve the scope of Article 85 (3).

The only solution is to stay the proceedings, grant interim relief, and wait for the Commission to decide but this involves the risk for the national court of unnecessarily evading its obligation to decide the case.

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\[43\] This assessment ex ante is a vital part of a complete appraisal of an agreement's compatibility with EC competition law. See 3.1. and 3.1.1.3. supra, and 7.1.2. below.
In *Brasserie de Haecht II*", the Community Court touched on this issue.

"In such cases it devolves on the court to judge, subject to the possible application of Article 177, whether there is cause to suspend the proceedings in order to allow the parties to obtain the Commission's standpoint, unless it establishes either that the agreement does not have any perceptible effect on competition or trade between Member States or that there is no doubt that the agreement is incompatible with Article 85".

The Community Court did not rule that a national court is obliged to stay proceedings. In *Delimitis v Henniger Bräu*", however, the Community Court went further and stated that the national court must adjourn in all cases where a conflicting Commission decision is likely and it cases agreements clearly within Article 85 (1) the court may only proceed if the agreement may on no account be exempted.

This statement relieves national courts from having to make the difficult decision whether or not to stay proceedings as required in *Brasserie de Haecht II*. It does not, however, relieve the court from the difficult task of establishing whether conflict is possible and likely. Especially in cases where exemption by the Commission is possible, this involves a complex appraisal of the agreement in the light of Article 85 (3), similar to that being made by the Commission under the latter's exclusive competence. This is a considerable effort, involving an economic assessment in the context of the socio-economic criteria set out in Article 85 (3), which does not enable the court to enforce the agreement but only serves as a justification to adjourn".

Having to stay proceedings in cases where the Commission might exempt and, indeed, in all cases where a conflicting


"Case 234/89 [1992] 5 C.M.L.R. 210 at para 50. See 5.5.3.2. below.

"See for criticism 5.4.2.2. and 5.6.4. below."
decision is possible is not particularly helpful to national
courts. It deprives them of their power and independence to apply
EC competition law, whilst at the same time, it reinstates the
Commission's dominance in enforcing EC competition law. It
hampers swift and effective decentralised enforcement of EC law.
The need to adjourn makes litigation slower and more hazardous
for the plaintiff". For the Commission, it increases the
pressure to deal with notified cases by way of decision". This
is contrary to its current practice as will be shown in the next
section.

5.4. The Commission's workload

A reason for reserving the powers under Article 85 (3)
exclusively for the Commission is that, at the time the Treaty
first came into effect, competition law in the six member states
was in a primitive state". Italy, Belgium and Luxembourg had no
legislation at all. The Netherlands had relied on low tariffs and
had only the Economic Competition Act which required registration
of some restrictive agreements and horizontal co-operation but
exemptions were almost invariably granted.

The only two countries with competition rules of any
substance were Germany and France and their laws differed
considerably. The French price decree, adopted just after the
war, was intended to regulate the black market and to support
regulation rather than to ensure free competition. It was more
hostile towards vertical distribution agreements than towards
horizontal agreements. Refusals to supply or deal were criminal.

Germany on the other hand, had an elaborate competition
system which prohibited any significant restriction on conduct
between competitors, subject at that time to specified exemptions
and exceptions. The rules were harsher on horizontal cartels

" See for other drawbacks, 5.6.2. below.

" See 5.6.2. below.

" See for a description of the current competition laws of
the Member States, 2.3.1. supra.
whilst vertical agreements were treated moderately. Vertical agreements had to be subjected to careful analysis in respects of their effects on the market before condemning them.

All in all, the extent of regulation of competition varied so widely throughout the Community that, in order to provide consistency between member states and to realise the aims of the Treaty, notably, to establish market integration, the Commission decided to keep the powers of appraisal in its own hands®.

Another reason why the Commission considered exclusive competence necessary was that decisions "which necessarily imply complex evaluations of economic matters and which may have important implications in the whole common market ought to be taken by the competent political body of the Community rather than national courts or competition authorities".

The drawback was an enormous caseload from the moment Regulation 17 was adopted®. Since all behaviour within Article 85 (1) required exemption and thus notification, the result was thousands of notifications and complaints since 1962. By 1965, the Commission had received some 40,000 notifications. Less than a thousand related to horizontal cartels and 31,000 concerned exclusive distribution agreements alone.

Practice had shown that the granting of formal exemptions was a difficult and time consuming process. Consequently, the Commission has granted only very few exemptions. On average, some four or five have been granted per year®. In a market currently


58  Schröter, Antitrust Analysis under Article 85 (1) and (3), [1987] Fordham Corporate Law Institute, p 664. See 2.3.2., 2.3.3. and 3.1. supra.


with some 360 million consumers, this number is almost absurd and it has led to years of delay and uncertainty for undertakings awaiting a decision.

5.4.1. The Commission's solution

Soon after the introduction of Regulation 17, it became clear that the workload and the resulting backlog needed reduction urgently. Many of the agreements notified were quite straightforward and of little importance to the development of EC competition law. The Commission began to take measures in the form of block exemptions, short form exemptions and comfort letters to expedite its proceedings and to reduce the number of new notifications. Nowadays, many common agreements are affected by one or more of these devices. It may be useful at this place to briefly describe each measure.

5.4.1.1. Block exemptions

Until 1965, the Commission was able to exempt agreements only individually. Regulations 19/65 and 2821/71, however, empowered the Commission to adopt Regulations exempting categories of agreements en block for many types of agreement commonly used in business⁴. The block exemptions subsequently adopted enable

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⁴ The block exemptions adopted under Regulation 19/65, currently in force, are:
- Exclusive distribution agreements (Regulation 1983/83, O.J. 1983 L 173, p 1)
- Exclusive purchasing agreements (Regulation 1984/83, O.J. 1983 L 173, p 5)
- Franchising agreements (Regulation 4087/88, O.J. 1988 L 359, p 46),
- Motor vehicle distribution and servicing agreements (Regulation 1475/95, O.J. 1995 L 145, p 25),
- Technology transfer agreements (Regulation 240/96, O.J. 1996 L 31, p 2)

Block exemptions adopted pursuant to Regulation 2821/71 and currently in force are:
- Specialisation agreements (Regulation 417/85, O.J. 1985 L 53, p 1),
- Research and development agreements (Regulation 418/85, O.J. 1985 L 53, p 5). See also 1.2.3. footnote 19 supra.
large numbers of agreements to be exempted under Article 85 (3) without the need to notify®.

5.4.1.2. Short form exemptions

Short form exemptions were introduced to reduce the backlog of cases, save translation time and costs, and speed up the processing of notifications. They constitute a shortened version of an individual exemption. The adoption of a short form exemption must be preceded by a Notice in the Official Journal, pursuant to Article 19 (3) of Regulation 17, in which the Commission publishes some information about the agreement and the sector concerned, invites comments, and expresses its intention to exempt. If no comments are received, a very short legal appraisal® is published granting the exemption®.

5.4.1.3. Comfort letters

Nowadays, the vast majority of notifications is dealt with by way of comfort letter. These administrative letters inform the parties that the Commission sees no reason to take further action and that it closes the file.

Comfort letters allow for a more speedy and less formalistic Commission procedure than that required for a formal decision such as a negative clearance under Article 85 (1) or an

® Detailed critical and practical explanations of most block exemptions can be found in the monographs of Korah and more descriptive explanations are included in the handbooks on EC competition law such as those from Whish, Kerse, Bellamy and Child, Butterworth’s, Goyder, Green and Robertson.

® This appraisal must take into account the economic context of the agreement or it may be quashed on appeal as in Groupement des Fabricants de Papiers Peints, case 73/74 [1975] E.C.R. 1491, para 27.

individual exemption under Article 85 (3). A comfort letter is merely a reflection of the Commission's view (or that of one of its senior officials) as to how the agreement might be treated had the file not been closed but instead a formal decision (in the form of negative clearance or individual exemption) been adopted.

5.4.2. Impact on national courts

What is the impact of block exemptions, short form exemptions and comfort letters on national courts' ability to apply Article 85 and how does it affect the risk of conflicting decisions?

Provided they contain sufficient reasoning to satisfy Article 190 of the Treaty, short form exemptions pose little difficulty because they are decisions and can be enforced by national courts. Very few are issued. Block exemptions and comfort letters, on the other hand, have caused complications.

5.4.2.1. Block exemptions

Block exemptions have direct effect and national courts have the power to enforce agreements complying with their provisions. This seems like a substantial enlargement of the national court's jurisdiction to enforce agreements that are within the scope of Article 85 (1). However, the text of block exemptions is often unclear or rigid. Agreements rarely reflect the exact text of block exemptions and often have to contain additional restrictions on conduct for them to be practicable which may or

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" In Guérlain, case 253/78 [1980] E.C.R. 2511, the Community Court held that comfort letters are not legally binding as a negative clearance or an individual exemption.

may not restrict competition. Moreover, the Community Court ruled in Delimitis that block exemptions must be interpreted strictly. This aspect of the Community Court's ruling is discussed in more detail at section 5.5.3.1. below.

5.4.2.2. Comfort letters

In the Perfume cases of 1980(60) the Community Court ruled that comfort letters do not bind national courts or have any legal effect upon them (apart from the fact that they end provisional validity of old agreements(41)) but that they may be taken into account(52). In principle, it is thus possible, but not obligatory, for national courts to use the comfort letter in reaching their decision(53). In most cases, however, the national

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(41) See 5.2.1 supra.

(52) Guerlain, see footnote 60 supra at para 13:
"Such letters, [...] do not have the effect of preventing national courts, [...] from reaching a different finding as regards the agreements concerned on the basis of the information before them. Whilst it does not bind the national courts, the opinion transmitted in such letters nevertheless constitutes a factor which the national court may take into account in examining whether the agreement or conduct in question are in accordance with the provisions of Article 85"

The Community Court assessed a comfort letter stating that the agreement did not infringe Article 85 (1) because of the supplier's small share of the market.

(53) This situation has not been changed by the fact that, in response to the judgments in Perfumes, the Commission announced its intention sometimes to publish the essential content of agreements in the Official Journal before issuing comfort letters in order to enhance the declaratory value of such letters. See Notice on procedures concerning applications for negative clearance pursuant to Article 2 of Regulation 17, [1982] O.J. C 343/4 and Notice on procedures concerning notification pursuant to article 4 of Regulation 17, [1983] O.J. C 295/7. The idea of this procedure was that, upon publication of the agreement, third parties would have the possibility to comment which would make
court will want to follow the view of the Commission set out in comfort letter. There are three main categories of comfort letter stating that the Commission sees no reason to proceed and closes its file:

- those stating that the agreement does not infringe Article 85 (1) (indicating that the agreement is eligible for negative clearance, for example, because of small market shares, or because competition or trade between Member States is not affected,

- those stating that the agreement falls within a block exemption, and

- those stating that the agreement merits exemption under Article 85 (3)."^

There is one other category of comfort letters like the one in Europages in respect of which it cannot be established whether it belongs to the first or to the third category because it is not clear whether the Commission considers that the provisions are outside Article 85, or that they merit exemption. In October 1997, however, a Commission official indicated that this practice will not be continued and that comfort letters will in the future clearly indicate whether they belong to the first or third category.

the raising of objections at a later stage less likely. In practice, such "formal comfort letters" have been sent rarely in cases of doubt or complex situations. Siragusa, Notifications of Agreements in the EEC - to Notify or not to Notify, [1986] Fordham Corporate Law Institute, p 258-259; Whish, Competition Law, 3rd ed, 1993, p 311.

" As in Guérain see footnote 60 supra.


A. First category

The first type of comfort letter stating that the agreement falls outside Article 85 (1), for example, as in Guérlain⁷, because of the small market share of the participants does not cause jurisdictional problems for national courts as they concern solely the scope of Article 85 (1).

Problems may arise where an agreement benefitting from this type of comfort letter has been successful and market shares have risen since the granting of the comfort letter. In such cases, national courts faced with litigation may decide not to follow the view of the comfort letter because the agreement may have since come within the scope of Article 85 (1). If a court is in doubt as to whether the comfort letter should be followed, a complex analysis of the market and the effects of the agreement on it may be unavoidable to determine whether the agreement is still outside Article 85 (1).

The inherent threat of such ex post⁸ assessment may constitute a serious problem for parties who invested substantial amounts at the time the agreement was established whilst relying on the comfort letter stating that the agreement was outside EC competition law⁹.

B. Second category

The second type of comfort letters, i.e. those stating that the agreement falls within a block exemption, is not expected to pose major problems for national courts either. On the contrary, they can be quite helpful since it is often hard to determine with

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⁷ See footnote 60 supra.

⁸ See on ex post and ex ante assessments 3.1. and 3.1.1.3. supra and 7.1.2. below.

⁹ This risk involving a rise in market share applies also to a re-assessment by the Commission of comfort letters stating that the agreement merits exemption. See 5.6.2. and 5.6.4.1. below.
certainty whether an agreement benefits from a block exemption.

C. Third category

The third type of comfort letter, that which closes the file stating that the agreement merits exemption, used to constitute a most unfortunate device both for business and national courts, especially before the judgment in Automec II which has reduced the problem of nullity. Today, such a letter still cause complications, delays and costs which, it is submitted, are unnecessary. It neither clears, nor exempts an agreement, but merely reflects the Commission's view that, on balance, an agreement would receive an exemption had the Commission not closed the file. This may imply that the agreement does infringe Article 85 (1) but that the Commission intends to do nothing about it.

When asked to enforce an agreement benefitting from such a comfort letter, what would a court have to do? To follow the letter and enforce the agreement would, according to the view prevailing today, involve the application of Article 85 (3) which is outside their jurisdiction. Strictly speaking, owing to the automatic effect of Article 85 (2), all a national court can do is, either to treat them bluntly as falling outside Article 85 (1) which can be done in certain circumstances as described at 7.1 and 7.2 below, or, as indicated at 5.3. above, to stay the proceedings and ask the Commission to reopen the file and make a formal decision.

This situation is far from satisfactory and it is argued at

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10 See 5.5.2 below.
11 See 5.6.2 and 6.2.2 below.
12 See 5.6. below, in particular, 5.6.4.
13 This view is criticized at 5.6.4. below.
14 It will be illustrated at 5.6.2 below that as a result of the judgment in Automec II, the Commission will then be obliged to proceed.
5.6.4. below that national courts should be able to enforce such comfort letters.

5.5. Delimitis v Henniger Bräu and the Commission's Notice - guidance in respect of shared competence and powers in respect of Article 85 (3)

In Delimitis most of these issues relating to the division of competence between the Commission and national courts were addressed.

5.5.1. The facts

Delimitis concerned a local agreement brought as a test case. Mr. Delimitis, applicant in the main proceedings, ran a beer house in Frankfurt. Henniger Bräu owned the premises and rented them to Delimitis under a standard-form beer supply agreement under which the tenant agreed to buy all his requirement of beer and soft drinks from Henniger Bräu.

In 1986 Mr. Delimitis terminated the agreement for reasons of health. In accordance with the agreement, the brewery deducted from the rent deposit to be paid back to Mr. Delimitis, an amount of just over DM 6,000 representing the outstanding rent due, a flat sum for failure to comply with the obligation to make minimum purchases and various other items.

Mr. Delimitis disputed the amount of the deduction and sued the brewery claiming, inter alia, that the agreement was void

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6 Clause 6 of the agreement stated that the range of products to be obtained by the publican was determined from time to time on the basis of the current price list of the brewery. A so-called "access clause" in the agreement permitted the publican to buy beers and soft drinks offered by undertakings established in other Member States. The publican was required to purchase a minimum quantity of 132 hectolitres of beer a year from the supplier. In the event that he bought less, he would have to pay a penalty for non-performance. In 1985, when the agreement was entered into, Mr. Delimitis put down a rent deposit.
under Article 85 (2) of the EC Treaty because it did not come within the terms of the block exemption for such agreements.

At first instance, the Landesgericht Frankfurt am Main dismissed the action. It considered that the agreement did not affect trade between Member States within the meaning of Article 85 (1) on the ground that it left the publican free to obtain supplies from other Member States. In the Landesgericht's opinion it was therefore immaterial whether the agreement observed the conditions of block exemption Regulation 1984/83.

On appeal, the Oberlandesgericht referred the case to the Community Court for a preliminary ruling. Seven questions were submitted which can be divided into three sections: A (four questions), B (two questions) and C (one question). Section A concerns the substantive assessment of the agreement by the national court under Article 85 (1) and is discussed at 7.2. below. Sections B and C concern the scope of block exemptions, the jurisdiction of national courts in respect of block exemptions and Article 85 and the division between the jurisdiction of national courts and the competence of Commission in respect of Article 85. These sections are discussed here. A short summary of the judgment as a whole can be found at 1.5.3. supra.

5.5.2. Section B - The interpretation of Regulation 1984/83, Articles 6 and 8, by national courts

The two questions raised in section B concerned the interpretation of the exclusive purchasing block exemption Regulation 1984/83, in particular, Articles 6 and 8 thereof. The block exemption applies to exclusive purchasing agreements of short and medium duration in all sectors of the economy. It includes a section (title II, Articles 6, 7 and 8) with special rules for long-term exclusive purchasing agreements entered into for the resale of beer in premises used for the sale and consumption of drinks.

The agreement in the Delimitis case went further than the provisions set out in the block exemption in at least two minor
respects".

First, the contract products were set out in the price lists that might be prepared from time to time rather than in the actual agreement as required under the block exemption\(^7\), thereby enabling the landlord to extend the tie unilaterally.

Secondly, a more favourable conditions clause for soft drinks which is required under the block exemption\(^7\), had not been included. Under such clause the reseller has the right to obtain soft drinks, supplied under the agreement, from other undertakings where these undertakings offer them on more favourable conditions which the supplier does not meet.

The questions of the German court related to those divergencies from the block exemption:

First, would the conditions for application of the block exemption\(^8\) be fulfilled if the drinks covered by the

\(^7\) Advocate General Van Gerven identified some other restrictions that might take the agreement outside the block exemption regulation. Para 12 of his opinion, [1992] 5 C.M.L.R. p 229.

\(^8\) Article 6 (1) of the block exemption explicitly refers to drinks specified in the agreement. See footnote 80 below.

\(^7\) Under Article 8 (2) (b), the agreement must provide for the reseller to have the right to obtain: "drinks, except beer, supplied under the agreement from other undertakings where these undertakings offer them on more favourable conditions which the supplier does not meet".

\(^8\) Notably Article 6 (1):
"Pursuant to Article 85 (3) of the Treaty, and subject to Articles 7 to 9 of this Regulation, it is hereby declared that Article 85 (1) of the Treaty shall not apply to agreements to which only two undertakings are party and whereby one party, the reseller, agrees with the other, the supplier, in consideration for the according of special commercial or financial advantages, to purchase only from the supplier, an undertaking connected with the supplier or another undertaking entrusted by the supplier with the distribution of his goods, certain beers, or certain beers and certain other drinks, specified in the agreement for resale in premises used for the sale and consumption of drinks and designated in the agreement." (my emphasis)
agreement are not listed in the text of the actual contract?

Secondly, would the agreement as a whole fall outside the block exemption if a favourable conditions clause is not included or would only the particular restriction be void?

5.5.2.1. First question: strict interpretation of block exemption?

The Court followed Advocate General Van Gerven and required a strict interpretation of the block exemption so as not to affect the Commission's exclusive competence in the field of Article 85 (3). It will be illustrated at 5.5.3.1. that its wording was strong, forcibly guarding the Commission's exclusive power to grant exemptions and to implement competition policy.

The Court's answer to the question was short and clear:

"The conditions for the application of Article 6 (1) of regulation 1984/83 are not satisfied if the drinks covered by the exclusive purchasing terms are not listed in the text of the agreement itself but are stated to be those set out in the price list of the brewery or its subsidiaries, as amended from time to time".

5.5.2.2. Second question: agreement as a whole outside the block exemption or only the particular restriction?

In respect of the second question, the Court reasoned that for the Regulation to apply, a more favourable conditions clause should be included where a beer supply agreement relates to premises which the supplier lets to the reseller. The Court ruled that the block exemption ceases to be applicable in its

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1 Para 3, p 254.

2 See footnote 79 supra.

3 Para 38, p 250.
entirety if those conditions are not met". The Court's answer to the second question under section B was, therefore, that:

"The block exemption does not apply to a beer supply agreement which entails a purchasing obligation for drinks other than beer where that agreement does not meet the requirement laid down in Article 8 (2) (b) of that regulation (ie the inclusion of a more favourable conditions clause)".

The conclusion is thus that block exemptions should be interpreted strictly by national courts and a block exemption does not apply to agreements that do not come within its four corners.

5.5.2.3. Severance

The Court emphasised that the fact that a beer supply agreement does not enjoy the protection of a block exemption does not necessary mean that the agreement as a whole is void under Article 85 (2). It explained that the doctrine of severance as ruled in Technique Minière may apply:

"It is only those aspects of the agreement which are prohibited by Article 85 (1) that are void. The agreement as a whole is void only if those parts of the agreement are not severable from the agreement itself".

As explained at 2.2.5.2. and 2.2.5.4. above, it is for the national courts to apply domestic doctrines of severance and to decide whether the remainder can be enforced.

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" Para 39, p 250.
" Point 4, p 254.
" Para 40, p 250.
5.5.2.4. Possibility to ask for an exemption

The Court also indicated®® that the parties to an agreement which does not enjoy the benefit of a block exemption may always ask the Commission to grant an individual exemption, or they may argue that the agreement is covered by another block exemption as in VAG v Magne®®.

The question whether parties can also notify for individual exemption after a national court has held that the block exemption did not apply and that the agreement infringed Article 85 (1) is examined at 5.5.4. below.

5.5.3. Section C - Does a national court have the power to extend the scope of the block exemption to agreements that diverge slightly?

Section C comprised the final question of the judgment which was of a more general nature. It concerned the extent of the jurisdiction of national courts to apply block exemptions:

Does a beer purchasing agreement which falls under Article 85 (1) and does not meet the conditions under Regulation 1984/83 always require a specific exemption or does the national court have the power to treat the agreement as valid where there is a minor divergence from the aforesaid Regulation?

Rather than to allow the national court the freedom to stretch the application of a block exemption to agreements that are close to complying with it, the Court choose another solution in Delimitis. In the earlier parts of the judgment (section A), discussed at 7.2. below, the Court had enabled the national court to analyse the restrictive clauses in the agreement in a way

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®® Para 41, p 250.

resulting in few such agreements infringing Article 85 (1) in the first place.

The Court thus preferred to give national courts more discretion in deciding whether an agreement was caught by the prohibition of Article 85 (1) over a power to extend the application of a block exemption which would involve a limited jurisdiction in respect of Article 85 (3). The Court forcefully limited the scope of the block exemption and respected the Commission's exclusive powers in respect of the application of Article 85 (3) by again interpreting the exclusive purchasing block exemption strictly. The Court ruled:

The direct applicability of those provisions may not, however, lead the national courts to modify the scope of the exemption Regulations by extending their sphere of application to agreements not covered by them. Any such extension, whatever its scope, would affect the manner in which the Commission exercises its legislative competence."

Advocate General Van Gerven also stressed the central role of the Commission in granting exemptions under Article 85 (3) by adding that group exemptions derogate from Article 85 (1) and are adopted by virtue of a policy decision taken after mature reflection and consultation and each element should be considered significant. He concluded that neither the national court nor the Community Court should usurp the Commission's powers and extend the scope of such a Regulation beyond the normal

Para 46, p 251. See also: Advocate General van Gerven in para 5, p 221:
"It is not for the national court, or for the Court of Justice in the context of a reference for a preliminary ruling, to alter or add to the contents of a generic exemption issued by the Commission. The issue of such an exemption is a matter of policy which falls within the exclusive competence of the Commission. Consequently, when an agreement is not covered by the terms of a block exemption Regulation, that block exemption, in itself a derogation from the prohibition under Article 85 (1), and therefore to be strictly interpreted, may on no account be extended." (emphasis added).

Point 10 of the opinion.
interpretation of its provisions.

5.5.3.1. Commission solely responsible for the application of Article 85 (3)

The Court recalled the principal rules on the division between the powers of the Commission and national courts, underlining that the Commission is the body responsible for the implementation and orientation of Community competition policy. It is for the Commission to adopt, subject to review by the Court of First Instance and the Community Court, individual decisions and block exemption Regulations. The performance of this task necessarily entails complex economic assessments, in particular, in order to assess whether an agreement falls under Article 85 (3). Pursuant to Article 9 (1) of Regulation 17, the Commission has exclusive competence to adopt decisions in implementation of Article 85 (3).

The Court continued by stating that in respect of Article 85 (1) and 86, the Commission shares its competence with national courts. The Court referred to BRT v Sabam explaining that Article 85 (1) and 86 produce direct effect and create direct rights which the national courts are required to protect. The same is true for block exemption Regulations as established in Roubaix v Roux but this does not entitle national court to modify their scope.

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"Para 44 p 251. See also Advocate General van Gerven in para 5 p 221 and 222:
"For their part the national courts are empowered, without limitation as to time, to apply Article 85 (1) (and Article 86), since those provision of the Treaty have direct effect, and, where Article 85 (1) is unreservedly applicable, also to make a declaration of nullity pursuant to Article 85 (2)."


5.5.3.2. The issue of shared competence - conflicting decisions

The Court proceeded to evaluate the consequences for national courts of the shared competence of national courts and the Commission in respect of Article 85 (1) and the exclusive competence of the Commission in respect of Article 85 (3)®®. The Court acknowledged that this shared competence involves the risk of national courts taking decisions which conflict with those taken or envisaged by the Commission in the implementation of Articles 85 (1) and 86 and also of Article 85 (3). The Court reasoned:

"such conflicting decisions would be contrary to the general principle of legal certainty and must, therefore, be avoided when national courts give decisions on agreements or practices which may subsequently be the subject of a decision by the Commission"®®.

The Court referred only to subsequent decisions of the Commission and not to informal comfort letters". The Court, however, referred also to a decision when discussing provisional validity of old agreements.

®® Advocate General van Gerven considered this aspect more sparsely. He mentioned that a national court should only make a declaration of nullity were Article 85 (1) is unreservedly applicable see footnote 92 supra. In para 7, he discussed the potential of conflicting decisions but limited himself to the narrower context of Delimitis:

"The possibility that the Commission may exempt an agreement with retroactive effect - without being bound by a period of time as regards agreements not subject to notification - may lead to conflicting decisions, for example if a national court has in the meantime declared the agreement void under Article 85 (2) without taking into account the continuing possibility of an exemption [...]"

®® Para 47, p 252.

At para 48, it stated:

"Those agreements in fact enjoy provisional validity until the Commission has given a decision: Case 99/79, Lancôme v Etos".

Here, the Court seems to confuse a formal decision with a comfort letter. As discussed at 5.2.1. above, in Lancôme, provisional validity was held to end after the Commission had issued a comfort letter. A comfort letter was held not to be a decision and not to have legal effect, save to deprive an old agreement of its provisional validity®®.

Nevertheless, the ending of provisional validity does affect the rights of the parties and it may therefore be arguable that comfort letters amount to a decision®®. The Community Court has been prepared in its case law to construe the notion of measures having legal effect broadly and required each case to be assessed on the substance rather than the form®®. In Prodigarma I, the Court has furthermore held that where the procedural rights of the parties and third parties were reserved, there would not be a decision®®. In Cimenteries®, the Community Court held


®® See Kerse: "[...] The Court of Justice also held that the effect of such a letter from the Commission indicating that the file on a notified agreement is to be closed [...] will be to withdraw any provisional validity the agreement may have. The position of the parties to the agreement may be affected as a result and it might be argued that therefore the letter constitutes a decision".


®® See the opinion of Advocate General Roemer in Cimenteries, see footnote 102 below, in which he stated that it is important to look at the facts and circumstances of each case.

that a letter signed by a Commission official in application of Article 15 (6) of Regulation 17 informing the undertakings concerned that their agreement had been preliminary examined and found to fall within Article 85 (1) but to be unsuitable for an exemption was a decision\textsuperscript{\ref{footnote101}}.

As regards comfort letters, this issue has not been resolved by the Community Court in Delimitis, or indeed any of the Court's judgments. The Commission itself drew a distinction between the practice of issuing comfort letters and letters such as issued in Cimenteries. It acknowledged the lack of powers of the Director General and the Director to make decisions. In Cimenteries, however, the letter had not only been signed by the Commissioner for Competition but also considered by the Commissioners acting collegiately.

The issue remains uncertain. There has been no hint in any of the Community Court's judgments of the possibility of comfort letters affecting the position of the parties and no consideration has been given to the possible implications of formal requirements and delegation of powers\textsuperscript{\ref{footnote104}}.

It appears that, in the view of the Community Court, the possibility of a subsequent comfort letter would not pose a situation which must be avoided by national courts as there is no risk of conflicting decisions.


\textsuperscript{\ref{footnote103}} The Court held:
"The undertakings ceased to be protected by Article 15 (5) which exempted them from fines, and came under the contrary rules of Article 15 (2) which thenceforth exposed them to the risk of fines. This measure deprived them of the advantages of a legal situation which Article 15 (5) attached to the notification of the agreement, and exposed them to a grave financial risk. Thus the said measure affected the interests of the undertakings by bringing about a distinct change in their position. It is unequivocally a measure which precedes legal effects touching the interests of the undertakings concerned and which is binding on them. It thus constitutes not a mere opinion but a decision."

\textsuperscript{\ref{footnote104}} Kerse, see footnote 99 supra, p 332 op. cit. See also 5.6.4. and 5.6.4.2. below.
In order to reconcile the need to avoid conflicting decisions with the court's duty to rule on the claims of a party to proceedings that the agreement is automatically void, the Court described two situations in which national courts should proceed to judgment:

- "if the conditions of Article 85 (1) are clearly not satisfied (the agreement falls outside the scope of Article 85 (1)) and there is, consequently, scarcely any risk of the Commission taking a different decision, the national court may continue the proceedings and rule on the agreement in issue\textsuperscript{105}. The national court should thus proceed on the basis that the agreement is enforceable under EC competition law and decide the case under national law.

- At the other extreme, a national court should also proceed where an agreement is clearly contrary to Article 85 (1) and "regard being had to the exemption Regulations and the Commission's previous decisions, the agreement may on no account be the subject of an exemption decision under Article 85 (3)\textsuperscript{106}. In that case, the national judge should refrain from enforcing the anti-competitive provisions of the agreement and, depending on their severability, nullify the particular provisions or the entire agreement under Article 85 (2).

The Court noted that an exemption decision may only be taken by the Commission in respect of an agreement which has been notified or is exempted from notification under Article 4 (2) of Regulation 17.

The Court returned to the context of Delimitis and stated that a beer supply agreement may satisfy the conditions for exemption from notification, even where it forms an integral part

\textsuperscript{105} Para 51, p 252.

\textsuperscript{106} Para 50, p 252.
of a series of similar contracts\textsuperscript{107} as established in Bilger v Jehle\textsuperscript{108}.

So in Delimitis, the Commission appears to have had the power to issue a subsequent exemption decision. If the agreement were found to infringe Article 85 (1), the likelihood of such a subsequent decision would have to be assessed. A national judge can then only proceed to judgment and apply Article 85 (2) if it can establish that the Commission will on no account issue such an exemption decision.

5.5.3.3. Stay of proceedings

The Court ruled that proceedings should be stayed where:

- the national court finds that the contract in issue is notified or is exempted from notification and it considers in the light of the Commission rules and decision-making practice that the agreement may be the subject of an exemption decision\textsuperscript{109}.

- there is a risk of conflicting decisions in the context of the application of Article 85 (1) or 86\textsuperscript{110}.

In those cases, the court should adjourn and, where necessary, take interim measures pursuant to its national rules of procedure. In granting interlocutory relief, the national judge should attempt to avoid conflict with the Commission's future decisions.

\textsuperscript{107} Para 51, p 252.


\textsuperscript{109} Para 52, p 253.

\textsuperscript{110} Para 52, p 253.
To the specific question raised in section C (see 5.5.3. above) the Court answered:

"A national court may not extend the scope of Regulation 1984/83 to agreements which do not explicitly meet the conditions for exemption laid down in that regulation. Nor may the national court declare Article 85 (1) inapplicable to such an agreement under Article 85 (3). It may, however, declare the agreement void under Article 85 (2) if it is certain that the agreement could not be the subject of an exemption decision under Article 85 (3)."

5.5.4. Effect Delimitis judgment on national courts

The above statements of the Court have the effect of limiting the discretion and extent of jurisdiction of national courts in three respects:

First, the national court is strictly bound to the text of a block exemption and it cannot enforce an agreement which comes close to the block exemption unless the agreement falls outside the scope of the prohibition of Article 85 (1) altogether. The exclusive power of the Commission in respect of Article 85 (3) has thus been restated.

Secondly, the discretion of national courts in respect of Article 85 (1) has been narrowed in that it may be more difficult to proceed to judgment in cases where it is not completely clear whether or not the agreement infringes Article 85 (1). The Court allows national courts to proceed only if the agreement falls clearly outside Article 85 (1) and there is scarcely any risk of the Commission taking a different decision. In cases such as Delimitis where the effects of the agreement require extensive market analysis, it may often be difficult to conclude that an agreement clearly falls in-, or outside Article 85 (1) in which case court would have to stay.

Thirdly, national courts are restricted by the Court's statement in that they cannot nullify a notified agreement (or an agreement exempted from notification) which is beyond doubt anti-competitive unless it has established that exemption by the

\[^{111}\text{Para 55, p 253 and para 56, p 254.}\]
Commission is impossible. By ruling that the national court may only nullify an agreement falling within the scope of Article 85 (1) if that agreement may on no account be the subject of an exemption by the Commission, the Community Court went extremely far. Note that Advocate General van Gerven does not use the words "on no account". Instead, he said:

"[...] and most probably, in the light of the Commission's practice, will not be eligible for a declaration of inapplicability under Article 85 (3)"\(^{112}\).

Especially in situations where the agreement in question is new, it will be difficult to establish whether the Commission might exempt since there is no existing Commission practice or policy to rely on. A party demanding nullification of an agreement may suffer substantial damage as a result of the effects of the agreement and, in cases where the agreement has been notified, a stay of proceedings to enable the parties to obtain a ruling from the Commission may increase the damage.

The Court referred to the possibility of granting interlocutory relief\(^ {113}\) but in granting such relief a national court should again attempt to avoid conflict with the Commission's possible future decisions.

The question arises what should a national court do in cases where it is asked to rule on an agreement clearly falling within Article 85 (1) which has not been notified, is not exempted from notification, and is not covered by a block exemption but which merits exemption. Might the parties notify the agreement after the court's decision to apply Article 85 (2)? Can the Commission then exempt the agreement for the future despite the court having nullified it?

The Commission can exempt only from the date of notification (save for agreements within Article 4 (2) or 5 (2) of Regulation 17) and an exemption would therefore have the effect of rendering invalid the judgment from that date only. There is thus no risk

\(^{112}\) Para 7 p 225.

\(^{113}\) Para 52.
of the Commission exempting a new agreement retrospectively and, strictly speaking, there are no conflicting decisions since there has been no simultaneous involvement of the two authorities. Moreover, damages awarded by a national court usually relate to the period before the start of proceedings.

Subsequent notification followed by an exemption from the Commission, however, might have the effect of rendering invalid the court's judgment for the future: from the moment of notification. The Commission could thus serve as an artificial appeal instance.

This may be a hypothetical situation but it is possible to imagine a situation where the court, in the opinion of the Commission, has come to a wrong conclusion and, again, strictly speaking, there would be no conflict because the later decision of the Commission relates to a later period.

Perhaps the Commission would in such cases inform the parties of the possibility to appeal in a national court if time allows (most judgments relate to the date of the writ). However, although under Automec II the Commission can refuse to proceed to a decision in respect of complaints and refer to the possibility to bring the case before a national court, the Commission does not seem to be able to refuse to handle notifications. Once an exemption is granted the national court may have to give leave to reapply.

5.6. Comfort letters

In none of the above guidelines did the Court address the situation where a national court is asked to assess an agreement which already benefits from a comfort letter stating that the agreement merits exemption. Delimitis appears to confirm earlier case law that in a situation where a court is faced with the existence of such a comfort letter, the court is not bound by it but the letter may nevertheless constitute a factor which the court may take into account in assessing the conduct in question.
However, it is submitted that this freedom to take into account or ignore the comfort letter makes no sense for comfort letters stating that the agreement merits exemption. The national judge seems blocked from proceeding on its own regardless of whether or not he adopts the view set out in the comfort letter for two reasons:

First, despite not being binding, he cannot bluntly ignore the view in the comfort letter and proceed to enforce the prohibition of Article 85 (1) and apply Article 85 (2). To do so would not only affect legal certainty, it would also bring the parties in possession of such a comfort letter in a worse position than parties who notified their anti-competitive agreement but who have not yet received any reaction from the Commission. Delimitis prescribes that, in respect of a notified agreement clearly contrary to Article 85 (1), a national court is only allowed to proceed if "the agreement may on no account be the subject of an exemption decision under Article 85 (3)". The EC law principles of equality of treatment and legal certainty would demand that courts apply the same rule to agreements benefitting from this type of comfort letter. Moreover, the existence of a comfort letter stating that the Commission would exempt had it not closed the file certainly points to the possibility of an exemption, especially after the judgment in Automec II as illustrated at 5.6.2 below.

Secondly, the national judge cannot enforce the agreement on the basis that it is clearly exemptible as, under current law, this might qualify as granting an exemption for which he has no jurisdiction. This view is criticised at 5.6.4 below where it is argued that enforcing a comfort letter stating that the agreement merits exemption would not amount to treading into the area of Article 85 (3).

According to the general rules set out in Delimitis, the court would have to stay proceedings and ask the Commission to
reopen the file and issue a decision or refer the case to the Community Court for a preliminary ruling.

The fact, therefore, that domestic courts were held not to be bound by comfort letters has neither given them any freedom nor served any purpose. On the contrary, it blocks national courts from being able to do anything but to stay proceedings and wait for the Commission or Community Court to adopt a decision which, ironically, will bind them.

It is submitted, however, that the judgment in Delimitis does leave one other possibility for national courts to enforce agreements benefitting from a comfort letter stating that the agreement merits exemption. This would be bluntly to disregard the comfort letter by relying on its non-binding effect and to treat the agreement as outside the prohibition of Article 85 (1) on the basis of precedents from the Community Courts. This possibility was briefly mentioned at 5.3. above and is discussed in more detail at 7.1. and 7.2. below. It will be illustrated that, despite the Court's silence on the issue of comfort letters, the very judgment in Delimitis itself (the Court's ruling under Section A) forms the most prominent precedent for this approach.

Delimitis clarified some of the problems caused by judgment in Lancôme, discussed at 5.2.1. supra, where the latter appeared to suggest that national courts have a duty to proceed to apply article 85 (1) once a comfort letter has been granted. The Community Court ruled in para 50, p 252 of Lancôme:

"After the adoption of such an attitude, which indicates that the Commission does not contemplate taking an individual decision on the notified agreements in question, it is unlikely that the Commission would subsequently exercise in favour of those agreements its power to apply article 85 (3) with, where appropriate, retroactive effect for the period prior to their notification, as permitted by article 6 (2) of Regulation 17. There is, therefore, no longer any reason to release national courts, before which the direct effect of the prohibition in article 85 (1) is relied upon, from the duty of giving judgment".

It is clear that Lancôme cannot apply to article 85 (3) comfort letters as this would contravene the ruling in Delimitis that in respect of an agreement clearly contrary to article 85 (1) a national court is only allowed to proceed if the agreement may on no account be the subject of an exemption decision under article 85 (3).
5.6.1. The Commission's Notice and comfort letters

The Commission's Notice on cooperation with national courts differs slightly from Delimitis in that it does mention comfort letters. At paragraph 20, it states that where the agreement has been the subject of a decision, opinion, or other official statement issued by an administrative authority and in particular the Commission:

"such statements provide the national courts with significant information for reaching judgment, even if they are not formally bound by them".

It is surprising the Commission did not attempt to address the specific problems surrounding comfort letters stating that the agreement merits exemption, especially since in the same Notice (at para 14) it expressly confirms its intention to use comfort letters as a rule to dispose of notifications involving no Community interest and its eagerness to avoid diverging enforcement of competition rules. Instead, the Commission suffices with a meagre hint in respect of this type of comfort letter:

"The national court is required to respect the exemption decisions taken by the Commission. Consequently it must treat the agreement, decision, or concerted practice at issue as compatible with Community law and fully recognise its civil law effects. In this respect mention should be made of comfort letters in which the Commission services state that the conditions for applying Article 85 (3) have been met. The Commission considers that national courts may take account of such comfort letters as factual elements (para 25a).

What does this mean? The Commission says nothing more on the subject. Does it mean that in the Commission's view the national court should be allowed to enforce agreements benefitting from such a comfort letter? Or, more radically, does it mean the Commission thinks these views should be binding on national

In its current form, the Notice sends out controversial messages: national courts are not bound by comfort letters (para 20) and they may not apply Article 85 (3) (para 8), but they should avoid conflicting decisions (para 18) and ought to take Article 85 (3) type comfort letters into account both as factual elements (para 25 (a)) and as significant information for reaching judgment (para 20).

The Commission's Green Paper on vertical agreements, published as recently as in 1997 and discussed at 6.3.2. below, does not clarify the situation either. It just refers to para 25 (a) of the Notice.

"These comfort letters are highly persuasive because they indicate the Commission's assessment of the agreement. Thus a national court may be confronted with the question of the legality of an agreement for which the Commission has granted a comfort letter stating that the agreement merits exemption. In such a case, the court "may take account of these letters as factual elements" (para 190, p 59 of the Green Paper).

5.6.2. Automec II - tool to force Commission to reopen the file

The problems relating to comfort letters stating that the agreement merits exemption may have been partly resolved by the judgment in Automec II.\footnote{Bourgeois, EC Competition Law and Member States Courts, [1993] Fordham Corporate Law Institute, at p 488. \footnote{Automec Srl v Commission, case T-24/90, [1992] E.C.R. II 2223, [1992] 5 C.M.L.R. 431.}

As explained at 1.4.2. above, Automec II gave the Commission the discretion to reduce its workload by enabling it to dismiss complaints not within its exclusive remit on the ground that it had other priorities, provided that it gives sufficient reasons.

In the case of comfort letters stating that the agreement merits exemption, however, Automec II seems to have the opposite effect in that it provides national courts with a tool to force the Commission to reopen the file and issue a formal decision.
under Article 85 (3) quickly. Para 75 of the judgment implies that the Commission may be required by the parties to proceed to a formal decision where the matter lies within its exclusive competence:

"It follows that the Commission cannot be required to give a ruling in that connection unless the subject-matter of the complaint is within its exclusive remit, such as the withdrawal of an exemption granted pursuant to Article 85 (3) of the EEC".

The adoption of an individual exemption also lies within the exclusive competence of the Commission. The Commission therefore has a duty to issue a formal decision to parties whose comfort letter becomes the subject of litigation since the inability of national courts to apply Article 85 (3) would imply that there is no adequate alternative in a national court.

In its Green Paper on vertical restraints, discussed at 6.3.2. below, the Commission acknowledged that:

"a comfort letter demonstrates an informal commitment by the Commission that if it were to become necessary, a formal decision would be issued" (p. 58).

The judgment may substantially reduce the problem of comfort letters for national courts because it is a means of requiring the Commission to reopen the file and proceed to a formal decision. The judgment will also affect the Community Court's judgment in Lancôme, discussed at 5.2.1. above, where the Court held that comfort letters closing the file bring provisional validity to an end since retrospective exemption seems unlikely.

Parties who wish to enforce the agreement can now ask the Commission to issue a formal exemption decision. If, after a reasonable period (which must depend on the facts, say six months), the Commission has not reacted, either party may send a letter calling upon the Commission to act. According to Article 175 of the Treaty, the Commission will then have to react within two months otherwise an action may be brought before the Community Court for failure to act and the Commission can be held
liable for the costs of bringing such an action. It will be explained at 5.6.4.1. below that, unless circumstances have changed to a major extent or it had been told lies, the Commission will abide by the views set out in the comfort letter and adopt an individual exemption decision.

Drawbacks remain, however. Korah mentions three:

"Where the transaction is very successful, the parties may obtain far higher market shares than previously and this might be treated as a change of circumstances, enabling the Commission to take a different view in its final decision."

Secondly, the need to require a decision would make litigation slower and more hazardous, and so reduce the chances of the plaintiff obtaining a favourable settlement. Thirdly, the remedies if the Commission does not actually adopt a decision are weak. The applicant would be entitled only to the costs of bringing an action under Article 175."

For national courts, the main drawback of having to stay proceedings to await a formal Commission decision pressed for by the parties by virtue of the regime established in Automec II is the same as that stated in 5.3. above: it deprives them of their power and independence to apply EC competition law whilst, at the same time, it reinstates the Commission's dominance in enforcing EC competition law. It also hampers a swift and effective decentralised enforcement of EC law.

5.6.3. Ironic effect - increased workload for Commission

All in all, comfort letters closing the file by stating that the agreement merits exemption are not a very efficient means of

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122 See for criticism on the Commission's discretion to decide differently where circumstances have changed 5.6.4.1. below.
reducing the Commission's workload\textsuperscript{123} and to achieve decentralisation. Those agreements that become the subject of litigation may arrive back at the Commission's desk and require handling fast by way of formal decision. True, not all comfort letters are followed by litigation, possibly only one percent, but those may concern exactly the type of so called non-priority cases that the Commission said in its Notice on cooperation with national courts it wishes to delegate to national courts.

5.6.4. Courts should be able to enforce comfort letters stating that the agreement merits exemption

It is submitted that the most desirable solution would be to allow national courts to enforce agreements benefitting from comfort letters stating that the agreement merits exemption. The national court should stay the proceedings and approach the Commission only in cases where, upon its own assessment of the agreement under Article 85 (3), it disagrees with the view expressed in the comfort letter and considers that the agreement may not be eligible for individual exemption. This would make the enforcement of EC competition law easier for the national court whilst, at the same time, it would ensure that the Commission remained the first and only authority to indicate whether a particular agreement may qualify under Article 85 (3) without having to spend the amount of time involved in an official exemption.

In Delimitis, the Community Court confirmed that national courts should not affect the manner in which the Commission exercises its legislative competence\textsuperscript{124}. It is arguable that, in enforcing comfort letters stating that the agreement merits exemption, they would not be usurping the exclusive power of the Commission over Article 85 (3).

\textsuperscript{123} See 5.4.1.3. supra.

\textsuperscript{124} Para 46, p 251.
The Perfume cases of 1980\(^{125}\), especially Lancôme discussed at 5.2.1. above, stating that comfort letters do not bind national courts are hard to reconcile with the dictum in Delimitis requiring national courts to ensure legal certainty by avoiding conflicting decisions. Whilst the Community Court in Delimitis was probably referring to subsequent conflicting formal Commission decisions, the principle of legal certainty is also infringed when a national judge decides to nullify an agreement for which a letter has been issued stating that it would have been exempted had the Commission had sufficient resources to process the file.

In Delimitis, the Court referred to the duty to avoid decisions which would conflict with those taken or envisaged by the Commission. It is arguable that a comfort letter stating that the agreement merits exemption contains an indication of a decision envisaged by the Commission (had, in the words of Automec II\(^{126}\), the case been of sufficient Community interest).

The Perfumes cases concerned comfort letters of only the clearing kind. To rule that Article 85 (3) comfort letters are binding would not, it is submitted, involve overruling those cases completely since the non-binding effect of comfort letters of the clearing type could be maintained. Instead, it would mean a mere qualification of the rulings based on the fact that comfort letters stating that the agreement merits exemption involve the exclusive competence of the Commission in respect of Article 85 (3).

A decision by a national court not to follow such a preliminary assessment by the Commission in respect of Article 85 (3) would affect the Commission's exclusive competence more


\(^{126}\) Automec Srl v Commission, see 1.4.2. and 5.6.2. supra.
than a decision to follow this assessment.

The argument against allowing and encouraging national courts to enforce agreements benefitting from a comfort letter stating that the agreement merits exemption is that this would amount to granting an exemption and thus national courts stepping into the domain of exclusive competence of the Commission. The ruling in *Delimitis* strongly guarded the exclusive domain of the Commission in respect of Article 85 (3) and the Commission's Notice on cooperation with national courts does the same (para 7 and 8). Instead, as demonstrated at 7.2. below, the Court advocated a more flexible interpretation of Article 85 (1) in *Delimitis*.

It is submitted that a policy of allowing courts to apply the scope of the prohibition of Article 85 (1) more narrowly should be supported by a strong injunction not to embark on what is left of the domain of Article 85 (3). In other words, comfort letters should then be binding or it should at least be possible to follow them in order to preserve what little say the Commission has left in respect of Article 85 (3)\(^{127}\). Does the possibility of a decision by a national court not to take into account the Commission's view (expressed in the comfort letter) on an issue which concerns its exclusive domain not amount to the national court usurping the powers of the Commission?

In respect of Article 85 (3) a distinction can be made between positive and negative jurisdiction of national courts to apply Article 85 (3)\(^{128}\). It is clear that under current law national courts are empowered to apply Article 85 (3) negatively: to determine that application of Article 85 (3) is unlikely and to draw legal conclusions from its non-applicability to an agreement. In *Delimitis*, the Court confirmed a limited positive jurisdiction by requiring national courts to draw conclusions

\(^{127}\) See the Commission's arguments in *Concordia*, footnote 131 below.

from the likely application of Article 85 (3). It held that a national court should take positive action by staying its proceedings and waiting for a Commission decision in cases where the agreement had been notified or was exempt from notification and might well be exempted.

This view expressed in Delimitis is far more strict that of the Commission in Concordia. In this case, the Commission argued that national courts should enjoy, under certain circumstances, express positive authority to supplement its own primary responsibility in the application of Article 85 (3). One of the questions referred to the Community Court in Concordia was whether national courts were permitted in their consideration of Article 85 (3) to decide that Article 85 (3) is not applicable or whether they were under a duty to suspend proceedings when exemption under Article 85 (3) is possible.

The Court found it unnecessary to deal specifically with this question since the agreement was not notified and exemption was thus not possible but both Advocate General Mayras and the Commission discussed the issue. The Commission argued that national courts should take note of the practice of the Commission and the Community Court in relation to the interpretation of Article 85 (3).

In contrast to the Advocate General who limited the national court's jurisdiction to the power to suspend the case and this only where the Commission had initiated proceedings, the Commission recognised, that, normally, a national court upholding the validity of a contested agreement would not be granting an exemption since the judgment of the court is not effective ergo omnes and is not binding on the Commission. The Commission continued to argue, as regards agreements that are not subject to notification and have not been the subject of a Commission procedure, that the power of a national court to give an anticipatory clearance does not jeopardize the uniform application of Community law.

Delimitis, in contrast, appears to dictate that a national

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court faced with a new agreement that is neither notified nor exempt from notification but that merits exemption should apply Article 85 (1) and (2) since there is no risk of conflicting decisions. To hold that a national court only needs to consider Article 85 (3) where the agreement has been notified, is exempt from notification, or benefits from a comfort letter, and to prescribe that a court should bluntly apply Article 85 (1) and (2) to non-notified agreements, poses a serious risk of exposing many, if not most, decisions based on Article 85 (1) to the possibility of subsequent exemptions.

Often parties do not notify their agreement because they assume or were wrongly advised that it falls outside Article 85 (1) or benefits from a block exemption. As illustrated at 5.5.4. above, parties could decide to notify the nullified agreement and use the Commission as an artificial appeal instance. The Commission is not bound by decisions of national courts and could decide to issue an exemption.

In its oral pleadings in Concordia, the Commission argued that, provided a national court "proceeds with the greatest circumspection" where Community practice and case law leave no reasonable doubt that a particular agreement is entitled to benefit from an exemption under Article 85 (3), it is entitled to dismiss the objection of nullity raised by one of the parties and as a result the agreement can be enforced both between the parties and against third parties.

Whether or not the national court can be said to have (limited) positive jurisdiction in respect of Article 85 (3), the fact is that Delimitis dictates that an assessment has to be made under Article 85 (3) to determine whether (retroactive) exemption is possible. National courts will therefore have to be able to make these complicated economic assessments of Article 85 (3) so expressly retained for the Commission.

To then hold that an Article 85 (3) comfort letter is not

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110 For example, because they rely erroneously on a Commission Notice.

binding on national courts is to imply that the court's negative jurisdiction is so strong that it overrules the Commission's view. Instead, it would be much better to give national courts jurisdiction to follow the comfort letter and enforce the agreement. The court should stay the proceedings and approach the Commission only in the situation where it disagrees with the comfort letter and considers that the agreement is not eligible for exemption.

The argument of the Commission in Concordia that a national court which upholds the validity of a contested agreement would not be granting an exemption because the judgment of the court is not effective ergo omnes and is not binding on the Commission may be used to argue that a national court can follow a comfort letter. This would not amount to an exemption by the national court but merely to the enforcement of an agreement which has already been (preliminary) assessed under Article 85 (3) by the Commission.

Regulation 17, Article 9 (1) provides that the Commission has the sole power "to declare Article 85 (1) inapplicable pursuant to Article 85 (3) of the Treaty". The provision does not define "declare". Stating that the agreement merits exemption implies that the conditions for application of Article 85 (3) appear to have been met. All the national court does is to enforce this view. It does not declare Article 85 (3) applicable but just confirms the Commission's provisional declaration and treat it as fact. To enable national courts to disregard the Commission's view in respect of the application of Article 85 (3) is indirectly allowing national courts into the domain of Article 85 (3) by making a decision that Article 85 (3) does not apply.

The issue remains highly controversial. Allowing national courts to enforce agreements benefitting from a comfort letter stating that the agreement merits exemption arguably affects the rights of parties and consequently amounts to a decision. It was demonstrated at 5.5.3.2. above, however, that it is equally arguable that the actual issuing of a comfort letter constitutes a decision by the Commission because the letter also affects the rights of the parties. It should thus be arguable that national
courts can follow such "decisions".

Finally, Braakman and Schröter\(^{122}\) refer to a distinction between two types of comfort letters with respect to their legal significance according to the relevant rulings of the Community Court in the *Perfumes* cases of 1980:

"If a letter is sent by a body belonging to the Commission even though all interested third parties have not previously been given the opportunity to submit their observations under Article 19 (3) of Regulation No. 17, the Advisory Committee on Restrictive Practices and Monopolies has not been heard as laid down in Article 10 (3) to (6) of the Regulation and the publication specified in Article 21 (1) of the Regulation has not occurred either, it cannot be asserted by or against third parties. The courts of Member States are prevented from treating such a comfort letter in the same way as a formal exemption\(^ {122}\)."

If, on the other hand, a letter with the same contents is sent instead of a formal exemption, with the express agreement of the Commissioner responsible for competition, at the end of a formal procedure in which the rights of third parties and Member States have been observed, it is impossible to deny it a certain de facto effect. The question as to whether this entitles national courts to treat the arrangement in question as legally valid or merely to ignore the finding that it is unlawful and void has yet to be clarified."

This distinction is comparable with the distinction referred to at 5.5.3.2. above in respect of *Cimenteries*. It is submitted that the second type of comfort letter facilitates enforcement by national courts more but the arguments set out in the above section in favour of enforcement by national courts of agreements benefitting from comfort letters apply equally to letters of the former type.

It is a pity that neither the Court in *Delimitis* nor the Commission in its Notice addressed any of the above issues.

\(^{122}\) On p 123 of the Introduction to: *The Application of Articles 85 and 86 of the EC Treaty by National Courts in the Member States*, compiled by Braakman, Publication of the Commission, DG IV, July 1997. Compare also 5.4.2.2. footnote 63 supra.

Although the judgment in *Automec II*\(^{134}\) may have resolved some of the difficulties by enabling parties to insist on a formal decision under Article 85 (3), waiting for such a decision causes unnecessary delays and extra work for the Commission.

The most desirable solution would, it is submitted, be not to rely on parties to force the Commission to take a formal decision but, instead, plainly to allow national courts to enforce agreements benefitting from comfort letters stating that the agreement merits exemption. National courts should stay proceedings only in cases where they disagree with their contents or where problems relating to third parties arise.

The new Notice on cooperation with national authorities appears to support this view\(^{135}\). At point 21, the Commission states:

"In the case of a comfort letter in which the Directorate-General for Competition expresses the opinion that an agreement does restrict competition within the meaning of Article 85 (1) but qualifies for exemption under Article 85 (3), the Commission will call upon national authorities to consult it before they decide whether to adopt a different decision under Community or national law". (emphasis added)

Meanwhile it is desirable that the Commission should issue more comfort letters of the second, more formal type, mentioned above. This issue is discussed further at 5.6.4.2. below.

5.6.4.1. The Commission will abide by comfort letters

The arguments set out in the previous section to enable national courts to follow the Commission's comfort letters stating that the agreement merits exemption are further strengthened by the fact that a reopening of the file by virtue of the doctrine of *Automec II*\(^{134}\) is likely to result in a formal exemption.

\(^{134}\) See 5.6.2. supra.

\(^{135}\) Notice on cooperation between national authorities and the Commission in handling cases falling within the scope of Articles 86 and 86 of the EC Treaty, 15.10.97, O.J. C 313, p 3.

\(^{136}\) See 5.6.2. supra.
Comfort letters are considered binding on the Commission itself provided the facts and circumstances have not changed. Sir Leon Brittan stated in a Speech in 1992 that the Commission would abide by its views expressed in the comfort letter unless it had been told lies or circumstances had changed.

In the Green Paper on vertical restraints, discussed at 6.3.2. below, the Commission confirmed Sir Leon's words:

"Comfort letters carry considerable authority although they do not provide complete legal certainty. Companies can reasonably rely upon comfort letters for several reasons. First, they indicate the Commission's prima facie favourable opinion and its lack of interest to pursue the case further, at least in the immediate future. The Commission would not revoke a comfort letter or take a decision at odds with one unless a major change in the facts or circumstances were to occur. These are the same conditions under which the Commission might withdraw the benefit of a formally granted exemption decision." (p. 58, emphasis added).

The circumstances under which the Commission can withdraw the benefit of an exemption decision are set out in Article 8 of Regulation 17:

"a) where there has been a change in any of the facts which were fundamental in the making of the decision,

b) where the parties commit a breach of any obligation attached to the decision,

c) where the decision is based on incorrect information or was induced by deceit,

d) where the parties abuse the exemption from the provisions of Article 85 (1) of the Treaty granted to them by the decision."

It may be argued that a change in the facts or circumstances includes the situation where the transaction has been very successful and the market share has increased. In this situation, the Commission could decide to take another view and refuse to

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grant a formal exemption\(^{13}\).

It is submitted that, unless such increase relates only to levels indicating dominance (thus involving Article 86), this would not be fair and might reduce the incentives to the more risky kinds of investment.

Whilst, in the case of comfort letters of the clearing kind\(^{19}\), the argument that market shares have risen may justifiably lead to a different opinion at a later stage: first the agreement did not come within the scope of EC competition law and now it does. This might (in some circumstances\(^{14}\)) constitute a change of one of the fundamental facts in making the decision as listed under "a)" above because the agreement may now have an appreciable effect on trade between Member States\(^{14}\).

This argument, however, should not be used to withdraw protection given by a comfort letter stating that the agreement merits exemption. At the time the comfort letter was written, the agreement was already considered to be within the scope of Article 85 (1) and a rise in market shares should not make a difference, at least not until the point that it may constitute dominance.

Had the Commission issued a formal exemption decision, rather than a comfort letter, retrospective condemnation on the basis of a rise in market shares would have been highly unlikely. Additionally, if private litigation had been initiated at an

\(^{13}\) Korah, EEC Competition Law and Practice, 6th ed, 1997, p 164. See 5.6.2. supra.

\(^{19}\) See 5.4.2.2. supra, under First Category (comfort letters stating that the agreement does not fall within the scope of Article 85).

\(^{14}\) Whilst market shares can be used negatively: i.e. to decide that an agreement does not fall within the scope of Article 85 or 86, they should not be relied upon exclusively to determine whether an agreement is caught by the provisions. See on exclusive reliance on market shares to establish the application of Article 85 (1), the separate argument in the next paragraph of this section.

\(^{14}\) Nevertheless the same criticism in respect of this reasoning "ex post" applies as described below in respect of comfort letters stating that the agreement merits exemption.
earlier stage at which market shares had not risen as much, the circumstances might not have been considered to have changed and the Commission would have formalised its comfort letter.

The inherent threat of such ex post assessment and condemnation of agreements previously expressly considered eligible for exemption is contrary to the principle of legal certainty and a healthy innovative and competitive climate. It would constitute a serious problem for parties who invested substantial amounts and took considerable risks at the time the agreement was established in reliance on the protection of the comfort letter. The result would be that such comfort letters (stating that exemption is merited) provide no protection for agreements that prove successful.

A separate argument in support of the above criticism is that market shares in isolation should not be used to determine an appreciable effect on trade between Member States and thus to determine whether Article 85 (1) applies. Market shares could be

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See on ex post versus ex ante assessments 3.1. and 3.1.1.3. supra and 7.1.2. below.

See Consten and Grundig v Commission, case 56 & 58/64 [1966] E.C.R. 299, for an example of an ex post condemnation (in 1964) of an attempt by the German firm Grundig to penetrate the French market (in 1957) with its dictaphones and similar products by virtue of an exclusive distribution agreement with Consten. Although in this case there had been no comfort letter stating that the agreement merited exemption, the arguments used in this case to refuse an exemption are clear examples of ex post reasoning and the negative consequences for pioneering firms.

The Commission and Community Court perceived the issue from 1964 and not ex ante at the time the agreement was made in 1957 and Consten still had to establish a name in France. At that time, considerable investment had to be made and great risks were taken. French import quota existed and where thought to remain for ten years (although they were abolished in 1961), costs were sunk and free riders were a distinct possibility.

Restrictions in the agreement were therefore necessary to counter these risks and to provide incentives for Consten to invest. They included exclusive territorial protection granted to Consten, an exclusive purchasing obligation on Consten and associated export bans on other dealers of Grundig. All were considered to restrict competition. See for a detailed critical analysis of this case many of the publications of Korah, for example, Exclusive Distribution and the EEC Competition Rules, 1992, p 36 ff; EC Competition Law and Practice, 6th ed 1997, p 56, 62 and 63.
decisive in determining that an agreement falls outside the scope of Article 85 but they should not be used exclusively to determine the opposite: i.e. that the agreement is caught by the prohibition of Article 85 (1)\textsuperscript{144}. At 7.2. below, it is illustrated that *Delimitis* prescribes another test, that of foreclosure, which requires a full market analysis rather than just market share percentages to determine an infringement of Article 85 (1). As will be illustrated at 8.1.1. below, in *Langnese* and *Schöller*\textsuperscript{145}, the Commission's reasoning was reversed by the Court of First Instance in respect of its exclusive reliance on market shares. Instead, the Court applied the test laid down in *Delimitis*.

Nevertheless, in *Langnese*\textsuperscript{146}, the Court of First Instance concluded that, since the Commission's provisional analysis of market conditions on which a comfort letter had been based had changed due to the entry of new competitors, and barriers to market access existed which the Commission had not been aware of at the time it issued the comfort letter, the Commission's reopening of a procedure after it had issue a comfort letter was justified.

It remains to be seen how the issue of formalising comfort letters by individual exemption decisions will be handled by the Commission. It is hoped that the Commission will not use the single argument of a rise in market shares to revoke its earlier view that the agreement merits exemption.

In any event, comfort letters are binding on the Commission in the vast majority of cases where the facts and circumstances have not changed to a major extent. The work involved in reopening the file and formalising the exemption in these cases

\textsuperscript{144} This argument is mentioned also at 6.3.4. below in respect of the value of the new Notice on agreements of minor importance.


\textsuperscript{146} Paras 38-40.
is therefore superfluous in that the Commission will only confirm what it has said earlier. To enable national courts to enforce all these comfort letters would thus involve very little risk of conflict.

When faced with a comfort letter, the courts themselves could establish whether circumstances had changed since the date of the letter. This would not involve a task of a nature that should be reserved specifically for the Commission as it would be confined to a comparison of the present facts and circumstances of the case with those that existed at the date the comfort letter was issued. Where no changes are found, the national court should enforce the comfort letter. Where changes are found, the court could adjourn and ask the Commission to reopen the file.

This practice would enable the Commission to keep issuing comfort letters as a main tool to process its workload without the risk of having them returned on its desk by national courts requesting a reopening of the file and a formal decision under the doctrine developed in Automec II.

5.6.4.2. Some amendments may be necessary

It is often argued that if national courts were allowed to enforce agreements benefitting from comfort letters stating that the agreement merits exemption, the Commission would have to amend its current practices of issuing comfort letters.

The Commission would have to ensure that comfort letters involving Article 85 (3) are made sufficiently carefully, at a high level within its internal ranks, in order to ensure that the view of the Commission is truly reflected. Furthermore, the letter would have to contain sufficient reasoning to amount to a valid decision and to enable national courts to follow it. Finally, they should all be published or followed up with a Notice.

\[147\] The Commission indicated at para 190, p 59 of its Green Paper on vertical restraints (see 6.3.2. below) that the legal certainty provided by a comfort letter is stronger if a Notice
The consequences of realising this may have been the main motivation for not allowing courts to enforce comfort letters stating that the agreement merits exemption. Within this view, the Commission would have to take so much care preparing the letter that they would not save resources.

Today, many comfort letters do not accommodate the interests of third parties and, from a legal point of view, lack the procedural safeguards and the legal significance of a formal decision. They also demonstrate a manifest lack of economic analysis and reasoning owing to their shortness. They do not improve legal certainty as much as a formal decision would whilst, ironically, legal certainty was one of the very reasons why the Commission kept the appraisal of Article 85 (3) to itself. An overhaul of the practice is therefore desirable in any event despite the resulting burden on resources.

Additionally, it is submitted that the inclusion of sound reasons and the writing of cogent arguments should not have to add to the length of the document and, over the time, experience gained in preparing such letters should save time. Their publication however could cause substantial delays as would the opportunity for third parties to submit observations. Having to reopen proceedings and proceed to a formal exemption, however, in cases where national courts are involved is also time consuming.

Finally, it is submitted that the arguments setting out the shortcomings of comfort letters should not be used to justify the view that national courts should not enforce comfort letters stating that the agreement merits exemption. National courts are already free to enforce the other types of comfort letters. Moreover, since comfort letters are considered binding on the Commission (except where facts or circumstances have changed to a major extent, see 5.6.4.1. supra), the Commission cannot decide to assess the case more carefully the second time around when reopening the file and then decide to change its mind.

The arguments that comfort letters will have to be written has been published pursuant to Regulation 17, Article 19 (3), which has not elicited adverse comments from third parties.
more carefully thus apply in any event, regardless of whether or not the court can directly enforce them.

5.6.5. Should courts have the power to apply Article 85 (3) in general?

Could one even go further and argue that national courts should not only be allowed to enforce comfort letters but to apply Article 85 (3)?

The Court and Advocate General in *Delimitis* firmly kept the national courts from usurping the Commission's exclusive competence over Article 85 (3). However, at the same time they required national courts, in order to avoid conflicting decisions, to assess in detail whether or not the agreement might be eligible for a Commission exemption. Over time, the national courts will become well acquainted with the criteria the Commission uses in the application of Article 85 (3). Perhaps this pre-assessing of national courts is a first step in the extension of their jurisdiction to include the power to exempt under Article 85 (3).

There have been signs that, in view of its efforts to further decentralisation, the Commission has been thinking of extending the jurisdiction of national courts to include the power to exempt. Sir Leon Brittan, former Commissioner for Competition, said[^14^] that the Commission had seriously considered this option but decided against such step for the time being. The risk of divergent applications of Community law and, as a consequence, forum shopping was considered too great.

If the powers of Article 85 (3) are to be devolved eventually, it might be to national authorities rather than to courts. The German Bundeskartellamt has been the main promoter of this idea of allowing national competition authorities the power to exempt. Such power could be exercised in close


[^14^] In his speech of 7.12.92 to the Centre for European Policy Studies.
coordination with the Commission and a possibility for the Commission to object before an exemption is granted. As to national courts, it seems that this may be a long way away.

5.7. Assistance from the Commission

One more aspect of Delimitis should be discussed at this place. The Community Court stressed that, in all situations where national courts face difficulties in the application and enforcement of EC competition law, they can request a preliminary ruling under Article 177 of the Treaty¹⁰.

Alternatively, the Court suggested that the national court could stay proceedings and turn to the Commission for guidance and assistance or for factual or economical data¹¹. The Notice on cooperation with National Courts closely reflects Delimitis¹² and indicates that the Commission will use the resources at its disposal to assist the courts of the Member States at the request of the latter¹³.

The national court can either allow or require the parties to obtain the Commission's assistance or itself turn to the Commission by way of written request. Requests from parties that are not validated by a corresponding court instruction will not be acceded to as they go beyond the bounds of cooperation between the Commission and national courts.

Commission support will generally take the form of the written disclosure of information but Commission officials may also make oral statements to national courts. It may be that Commission officials may also be asked to appear in a national court to give evidence. In Weddel and Co BV v Commission¹⁴, a

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¹⁰ Para 54, p 253.
¹¹ Para 53, p 253.
¹³ Para 41 and 42 of the Notice.
case involving Community rules on agriculture, the Community Court annulled a refusal by the Commission to allow an official to appear in a national court and give evidence. Commission assistance may also involve cases where there are neither parallel proceedings nor any relevant Community Court precedents or Commission decisions to rely upon.

The information provided by the Commission can be divided into four categories. First, information of a procedural nature. This will relate to the status of a particular Commission procedure and the time required for completion. Secondly, information of a legal nature. This may concern case law of the Community Court or the Commission's own customary practice including decisions and comfort letters. Thirdly, interim opinions on the possibility of exemption of arrangements brought before the Commission. Finally, factual and economic data.

In providing all four types of information, the Commission will act on the principle of objectivity and neutrality. The Commission will give priority to individual cases that are the subject of national proceedings, even over its own procedures.

An indication by the Commission of the stage reached in the proceedings and the Commission's own view of the restrictions in issue may be obtained far more quickly by way of this cooperation procedure than by waiting for a statement of objections or an exemption decision. By approaching the Commission, a national court having to decide a case pending before the Commission could thus reduce the damage and legal uncertainty caused by delays.

An interesting illustration in respect of delays that can occur in parallel proceedings is the Dutch case Van Marwijk. This case involved two associations of mobile crane-hiring firms, FNK and SCK, which, according to Van Marwijk, imposed anti-competitive restrictions on their members (fixed prices and a hiring ban respectively). Van Marwijk brought an action in a Dutch District Court155 and issued a complaint to the

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155 Van Marwijk and others v FNK and SCK, Utrecht District Court, The Netherlands, 11.2.92, Kort Geding, 1992, 92. This case has been discussed by Braakman, The application of Articles 85 and 86 of the EC Treaty by national courts in the Member States, compiled by Braakman, publication of the Commission DG IV, July
The President of the District Court held in interlocutory proceedings that the restrictions imposed by FNK and SCK infringed Article 85 (1) and did not qualify for exemption under Article 85 (3). The President made interim orders restraining FNK and SCK from applying the restrictive provisions until the Commission had given a final decision on the complaint submitted to it by Van Marwijk.

On appeal, the Dutch Court of Appeal overturned one of the orders. It held that the extensive submissions of arguments and evidence required a more thorough inquiry going far beyond what could be done in interlocutory proceedings. It also referred to the complaint launched earlier to the Commission by Van Marwijk and to the notifications for negative clearance made shortly thereafter by FNK and SCK in respect of the same conduct. The Court of Appeal held that it was not evident and beyond any doubt that the disputed restriction had no chance of being exempted by the Commission.

The Commission subsequently sent a statement of objections on the basis of which a fresh injunction was granted. The Commission subsequently lifted the immunity from fines, condemned and fined the defendants, and the Court


156 On 13.1.92.

157 Court of Appeal Amsterdam, case 292/92, decision of 9.7.92, unreported.

158 SCK notified its rules on 15.1.92 and FNK on 6.2.92.

159 On 16.12.92, informing the parties that it intended to lift the immunity from fines.

160 On 6.7.93, the District Court reinstated the interlocutory injunction, about a year and a half after the its first judgment. An appeal against that injunction was rejected by the High Court of Amsterdam on 28.10.93.

of First Instance recently confirmed the Commission's decision143.

As a result of the delay caused by the decision of the Dutch Court of Appeal, the reprehended behaviour was allowed to continue for over a year and a half since the date of the first injunction144. Had the Commission been approached by the Court of Appeal as to its attitude in respect of the complaint145, the latter might have confirmed the first injunction and would have saved Van Marwijk considerable damage. See 8.3.2. below for an example of successful cooperation between a national court and the Commission and where assistance from the Commission proved useful.

5.7.1. Problems

Practical problems remain, however. The continental courts may be more inclined to take action than their more adversarial counterparts in England and Wales. A preliminary ruling by the European Court of Justice is clearly authoritative but that concerns only construction and not application of the law. The status of a reply given by the Commission on application is not clear and it remains to be seen to what extent such can be relied upon by the national courts, especially the English ones.

Another problem is what the evidential status of Commission assistance will be in national proceedings. Information about


143 The Court of First instance confirmed the Commission's decision be it that one of the fines was reduced owing to an error in the turnover calculation of one of the firms: SCK and FNK v Commission, joint cases T 213/95 and T 18/96, 22.10.97, not yet reported.

144 On the same day that the Court of Appeal overturned the order, SCK reinstated the prohibition on hiring. FNK, on the other hand, gave up its price arrangements.

145 By the time the case was before the Court of Appeal, the complaint and notifications were already in the Commission's possession for more than six months. The Commission issued its statement of objections just over four months later.
solutions in parallel proceedings, the state of the proceedings, and the likelihood of a formal decision, may not pose too many problems as this information must be admitted in view of due observance of the universal principle of legal certainty. Information on legal points and factual and economic data, however, may cause serious problems in view of the domestic procedural rules of evidence applicable to the case. Where the information relates to matters of fact, it may be regarded as hearsay, especially under common law rules of evidence.\(^{146}\)

Hearsay has been defined as evidence of an oral or written statement made out of court which is being adduced to prove the truth of the matter stated. It is therefore possible that a national court would not admit as evidence all information received from the Commission before whom the same rules do not apply.\(^{147}\)

If the information relates to points of law, its status will be nothing more than a Commission opinion or, even of less authority, a view of one DG IV official, neither of which may be regarded as definitive or authoritative in any legal sense.\(^{148}\)

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In Macarthy PLC v Unichem Ltd, unreported judgment of 25.11.89, a plaintiff sought to rely on specific facts found by the Monopolies and Mergers Commission in a reference under the Competition Act 1980 as evidence to support a claim under Article 85 (1). Judge Scott J ruled that the Civil Evidence Act 1968 renders reports of the Monopolies and Mergers Commission inadmissible as evidence of the truth of specific facts recited in them. The same may apply to materials produced by the Commission.

Contrast: Iberia UK Ltd v BPB Industries plc. Ch.D. of the High Court, unreported judgment of 17 April 1996. In this case, the effect of a Commission decision on proceedings in the Chancery Division of the High Court was considered at length and in compliance with the guidance provided in Delimitis, see 8.3.1. below.

\(^{147}\) Hall, Flynn and Good, p 16 of the chapter on the UK in: The application of Articles 85 and 86 of the EC Treaty by national courts in the Member States, compiled by Braakman, published by the Commission, DG IV, July 1997.

According to Lasok such requests for information are not likely
to come from English courts since "the answers supplied will
almost certainly be inadmissible unless they relate to relatively
banal matters that fall within the Commission's own knowledge".\textsuperscript{169}

Whish also wonders whether in cases where DG IV would make
available data from the file in question, these may be restricted
by rules on professional privilege and business secrecy.\textsuperscript{170}
Under Community rules, Commission information is subject to the
restrictions set out in Article 20 (1) and (2) of Regulation 17.
This does not mean that confidential information acquired by the
Commission in the administrative proceedings cannot be
transmitted to national courts, however.

In Postbank,\textsuperscript{171} the Commission had sent its statement of
objections to firms bringing an action in a national court in
order to enable them to prepare for the Commission's hearing. The
Commission expressly required that the statement should not be
used in a national court.

The Court of First Instance held that the Commission had no
power to forbid such use. It held that the Commission was under
a duty of sincere co-operation with national courts imposed by
Article 5 (2) of the Treaty and must help them to apply the
direct effect of Article 85. It held furthermore that Article 20
(1) of Regulation 17 (stating that information acquired in the
administrative procedure should only be used for the purpose of
the relevant request or investigation) should not be interpreted
as prohibiting any use by a national court of information
obtained. Moreover, there is a presumption that a national court
would guarantee the protection of confidential information.
Article 20 (2) again does not prevent its disclosure to national
courts, provided the Commission informs the party concerned and

\textsuperscript{169} ibid.

\textsuperscript{170} The Enforcement of EC Competition Law in the Domestic

\textsuperscript{171} Postbank NV v Commission, case T 353/94, 18.9.96, [1996]
and 89-96.
informs the court about the confidentiality of the relevant passages.

The effect of domestic rules on professional secrecy on information supplied by the Commission is uncertain and may vary in each Member State.

It is too early yet to assess how this cooperation between the Commission and national courts works in practice. A Commission official indicated in February 1998 that, since 1994, there have been some twelve cases where the Commission has given advice under the Notice on cooperation but these cases are extremely difficult to trace.

One example is the French Conseil de la Concurrence (which is not a national court) which asked the Commission for an opinion. It had to decide whether it had the power to take action against the conduct of French olive oil cooperatives. The latter claimed they were exempt under EC competition law on the ground that they were agricultural marketing organisations within the meaning of Regulation 26/62 and that as a consequence the Conseil lacked the power to condemn them under conflicting national law.

The Director General of DG IV sent a letter saying that cooperative could only be exempt under the Regulation if there was a common market organisation. There was none in this case and there was no effect on inter-state trade proven. The Conseil could therefore apply the French competition ordonnance to the cooperatives.

A recent comparative study on the application of Articles 85 and 86 by national courts in the Member States does not provide much information on this issue either. Nevertheless, apart from the UK and Ireland in respect of which some possible reservations are reported, most Member States seem to readily accept the idea, at least in theory, of admitting the Commission's information as evidence, see also 8.3.2. below.

It will be interesting to see how the supply of information

172 Decision of 5.4.94, Europe, August/September, p 12.

will work in practice both at Commission and at domestic level. In cases of difficulty, Article 177 references may remain the preferred option.
6. THE TRIFURCATION OF ARTICLE 85 - CONSEQUENCES FOR THE COMMISSION

6.1. Commission's backlog reduced

Over the last ten years, the Commission has reduced its backlog of pending cases. On 31 December 1990, the Commission had 2,734 cases pending*. Two years later, the figure was down to 1,562†. On 1 January 1994, it was 1231‡.

The block exemptions, short form decisions, comfort letters and steps to accelerate proceedings have indeed helped to reduce the workload. As early as in 1984, DG IV was reorganised*. Teams were set up, each specialised in a particular market. Consequently, a case handler will already be familiar with the market involved. Each case handler is now responsible for conducting his own inspections. A separate division was established with responsibility over policy and legislation and over the co-ordination of the tasks and work methods of the teams. This reorganisation helped to speed up the Commission's procedures considerably and led to its policy being applied more efficiently.

At the end of 1992, the Commission decided to speed up its vetting of notifications, starting with structural co-operative joint ventures*. The procedure of vetting notifications of other types of agreements has not been accelerated yet although the new Regulation 3385/94 on the form, content and other details of applications and notifications provides the Commission with the

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* 2,145 notifications, 345 complaints, and 244 investigations ex officio.
† 1,064 notifications, 287 complaints, and 211 investigations ex officio.
‡ 604 notifications, 332 complaints, and 116 investigations ex officio.
means to do this. Some progress may thus be expected in the near future. The 1994 Report on Competition, however, indicated that the Commission is unlikely to reduce its backlog any further and, so far, this has proved to be true. In 1995, the number of pending cases decreased slightly to 1178 but in 1996, with the accession of Austria, Finland and Sweden, the number rose again to 1263.

Despite the fact that the Commission managed to reduce a substantial part of its backlog, legal certainty has not increased and the situation has remained unsatisfactory. Today still very few exemptions are granted by the Commission. Only seventeen were issued in 1994 which was a top year. In 1995 there were three, in 1996 eleven and in 1997 two. The Commission's capacity to close cases by informal comfort letter is still limited to about 150 a year. With an increased use of private litigation, more may arrive back on the Commission's desk requiring a formal decision.

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' 709 notifications, 351 complaints, and 117 investigations ex officio.

' 670 notifications, 420 complaints, and 173 investigations ex officio.


" 26th Report on Competition Policy, 1996.


" See 5.6.2. supra.
6.2. Further reduction of workload necessary

Today, the Commission is still faced today with a backlog of more than a thousand cases which it cannot reduce further. This problem is not expected to disappear, on the contrary, it is bound to increase.

6.2.1. Expansion of territory of application of EC competition rules

The number of notifications the Commission receives continues to climb. The Europe Agreements with Eastern European countries provide for wider application of EC competition law, albeit at the moment without direct effect. This, together with the plans to admit several Eastern European Countries as well as Cyprus and Malta as full Member States in the near future may by far exceed the catching up done in the last couple of years.

Now that the Single Market has largely been achieved, and new Member States are required to adopt the acquis communautaire, the Commission increasingly confines its activities to cases of legal, economic or political significance in order ensure a further uniform development of EC competition law in a constantly changing and expanding Community.

6.2.2. Automec II - delegatory effect may backfire

The extra encouragement for delegation to national courts in the form of the Notice of the Commission\(^{14}\) and the Automec II\(^{15}\) judgment of the Community Court was therefore not surprising. Some argue that the Commission is already keeping the figures low by an unwelcoming stance to complaints, with many refusals in the

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\(^{14}\) See 1.4.3. supra.

style of Automec II\textsuperscript{6}. But whilst Automec may help to reduce the Commission's workload in that the Commission can now refuse to handle complaints that have no priority by referring them to national courts, the same judgment may backfire in that some of its consequences are bound to increase the pressure on the Commission.

First, the Commission cannot refuse to deal with complaints involving Article 85 (3), for example, those urging withdrawal of an exemption, since that is an issue involving the exclusive competence of the Commission which it has a duty to exercise\textsuperscript{7}. Where the agreement is also disputed in national courts the Commission will have to act promptly to avoid unduly delays in national litigation\textsuperscript{8}.

Secondly, in parallel proceedings before a national court, the Commission may have to process notifications requiring clearance or exemption far more quickly and by way of formal decision rather than by way of comfort letter. Delimitis dictates that proceedings have to be stayed in all cases involving notified agreements where conflict with a subsequent Commission decision might be possible. Whilst in respect of the scope of Article 85 (1) in which the Commission and national courts have concurrent jurisdiction, the Commission cannot be forced to issue a formal decision clearing or condemning the agreement, it seems that the Commission is again under a duty to process these

\textsuperscript{6} See for cases where the Commission's rejections were confirmed by the Community Court, 1.4.2. supra footnote 63.

\textsuperscript{7} Para 75 of Automec, see 5.6.2. supra.

\textsuperscript{8} See also by analogy the Notice on cooperation with national authorities of 15.10.97, [1997] O.J. C 313, p 3, at point 53 where the Commission repeated the principle that if, during national proceedings, it appears possible that the decision to be taken by the Commission may conflict with the effects of the decision of the national authorities, the latter should stay the proceedings pending the outcome of the proceedings by the Commission. The Commission, in turn: "[...] will endeavour to deal as a matter of priority with cases subject to national proceedings thus stayed".
pending cases promptly in order not to unduly delay the process.

Thirdly, as mentioned at 5.6.2. and 5.6.3. above, in cases where a comfort letter stating that the agreement merits exemption is challenged in a national court, the Commission can be forced to reopen the file and issue a formal exemption decision. Again, it has a duty to act promptly to avoid an action for failure to act.

Finally, and on a more general note, if companies can require a formal exemption for an agreement that is exemptible, far more may notify and request an actual exemption whilst enforcing the contract in a national court.

In conclusion, the delegatory effect of the Automec II judgment may prove to be limited and the Commission may have to get used to handling more cases by way of formal decision and to doing this faster than before.

6.3. Proposed solution - reduce EC control over low-priority agreements by narrowing the substantial scope of Article 85 (1)

The Commission considers in its Notice on cooperation with national courts that in many cases national courts should be a better forum than the Commission. But the Commission is not yet prepared to give up its exclusive power to apply Article 85 (3)\textsuperscript{19}. The national court is therefore certainly not a better forum for agreements that are notified or exempt from notification and that might benefit from exemption. Within the current wide interpretation of the prohibition of Article 85 (1), there are many such agreements.

\textsuperscript{19} At para 53, p 253, of Delimitis the Community Court ruled that under Article 5 of the Treaty, the Commission is bound by a duty of sincere co-operation with the judicial authorities of the Member States, who are responsible for ensuring that Community law is applied and respected in the national legal system. The Court thereby interpreted Article 5 of the Treaty broadly since this provision refers to duties of Member States only.

\textsuperscript{20} See 5.6.5. supra.
To enable national courts to enforce comfort letters, as argued at 5.6.4. above, would solve at least part of the problem in that agreements which had already been assessed by the Commission would not have to be referred back to the Commission for national courts to be able to enforce them. However, this solution does not change the fact that the Commission will still have to consider such non-significant agreements the first time around when deciding to grant the comfort letter. Moreover, this consideration will have to be done more thoroughly than is currently the practice and it should be accompanied with sound reasoning which may require more resources.

The Commission says itself in the Notice, at para 14, that it will normally deal with agreements that have no particular, economic or legal significance by way of comfort letter, in other words: it will normally tolerate agreements it considers insignificant. But why does it have to do this expressly, why can this not be done automatically without the Commission having to check those agreements?

The prevailing argument is that by retaining the need for such low-priority agreements to be notified, the Commission is able to monitor and control the general application of the competition rules. This might have been useful in the old days when and a consistent introduction and application of competition law could only be achieved by ensuring that all realistic analysis was confined to Article 85 (3). Today, however, having to scrutinise all low-priority agreements seems a high price to pay when considering the urgent need to concentrate on important issues in order to accommodate the new developments in the Community.

Rather than continue to keep assessing all agreements containing a restriction of conduct, it might be a better solution to reduce the need to notify those types of agreements containing a restriction of conduct, it might be a better solution to reduce the need to notify those types of agreements.

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21 See 5.6.4.2. supra.

22 See for a more detailed description of the reasons to retain control over the application of the competition rules 2.3.3. supra.
that have no particular, economic or legal significance\(^2\).

This could be done by introducing simpler and broader group exemptions but, although helpful, these would relieve only part of the problems, as explained below at 6.3.2.

Another, more ambitious option, would be to allow for a more flexible interpretation of the scope of the prohibition of Article 85 (1), notably the concept of "restriction of competition". This option is advocated also at 2.3.3.1. section D supra\(^4\).

This solution would enhance a decentralised application of the EC competition rules. As a result of the increased discretion to decide whether an agreement comes within the prohibition of Article 85 (1) more agreements could be enforced by national courts without involvement by the Commission.

The Commission's workload would be substantially reduced. Unlike the situation described in the Notice where such agreements are, as a matter of policy, dealt with by way of comfort letter, the agreements would not have to be notified because national courts could, upon assessment under Article 85, enforce them on the basis that they are compatible with Article 85 (1). The Commission would not have to look at these agreements at all, whereas now it may have to assess them twice: first in order to grant a comfort letter and, secondly, to issue a formal decision once the agreements become the subject of litigation.

It will be illustrated at 6.3.2. below that the Commission has explored aspects of this idea in its Green Paper on vertical restraints, by, in addition to proposals for wider block exemptions, including the concept of a narrower scope of Article 85 (1) as a possible option for vertical agreements between parties whose market shares are below a threshold. In chapter 7 below, it will be demonstrated that the Community Court has

\(^2\) See for a distinction between agreements of legal and economic significance and those not considered significant, 1.4.2. supra. See for agreements that might fall outside Article 85 (1), 5.2.2.1. and 5.2.2.2. supra and 6.3.1. below.

\(^4\) In the context of overlap between EC and domestic competition law. Compare also 2.3.3.1. section C.
already applied this concept in a less restricted, more fundamental, manner.

6.3.1. What kind of agreements should be outside Article 85 (1)

The proposed narrowing of the application of Article 85 (1) would not concern agreements which clearly fall in-, or outside the scope of Article 85 (1). Agreements that clearly fall outside Article 85 (1) generally do not contain any restriction on competition and do not require notification, regardless of whether Article 85 (1) is interpreted narrowly or not. Anti-competitive agreements such as, for example, horizontal price fixing cartels, market sharing agreements and collective boycotts may not be affected by a more narrow interpretation of Article 85 (1) either. Neither type of agreement requires notification because exemption is either not necessary or not possible. At 3.1.1.1. and 5.2.2. supra it has been argued that, although such agreements may often require economic analysis, they could in principle be dealt with by national courts under the current wide interpretation of Article 85 (1).

The agreements that would benefit from a narrowing of the scope of the prohibition of Article 85 (1) are those the Commission considers eligible for exemption. It was explained at 5.2.2. above that many essentially pro-competitive agreements are currently found to be within the scope of Article 85 (1) owing to certain restraints imposed on the parties. Under this "freedom of action approach" practised by the Commission, such agreements containing restrictions on conduct require exemption rather than clearance to be enforceable regardless of their overall pro-competitive effect.

Vertical agreements such as exclusive licenses of intellectual property rights and exclusive distribution or purchasing agreements serve to ensure innovation and efficient production, distribution or marketing. Those agreements often produce a net competitive effect. The restrictions appearing in them often are ancillary to the pro-competitive transaction that enables penetration of a market.
Some types of horizontal agreements may not be prima facie anti-competitive either such as R&D projects, specialisation agreements and production joint ventures but here the situation is more complicated and competition is more easily distorted than in the case of vertical agreements because horizontal agreements by nature are agreements between (potential) competitors at the same level of trade or production whereas vertical agreements are agreements between players in different levels of trade.

Although the Commission has issued block exemptions and Notices, many pro-competitive agreements nevertheless fall outside the relatively narrow text of such measures because they have to contain additional restrictions or concern an area which is not covered such as the exclusive distribution or purchase of services or of products not for resale but for industrial processing.

In the wide interpretation of the concept of "restriction of competition" in Article 85 (1) currently practised by the Commission, such agreements will often have to be notified. The national courts are unable to enforce the agreements since they may include restrictions on conduct which, in the current view, may be caught by Article 85 (1). A comfort letter stating that the agreement merits exemption would only serve to strengthen this view.

If national courts could, upon assessment under Article 85, consider these agreements compatible with Article 85 (1), the Commission's workload would be reduced and decentralisation would be enhanced.

6.3.2. The Commission's reaction - Green Paper on vertical restraints

The Commission is currently thinking about introducing more flexibility for vertical agreements. In January 1997, it adopted

Recital 2 in Regulation 418/65 says that pure R & D agreements rarely infringe article 85 (1). See also 5.2.2.2. supra.
a Green Paper on vertical restraints". The paper is directed at vertical agreements for distribution but the Commission welcomes comments on competition policy aspects in respect of other types of vertical restraints. It has consulted industry and Member States as to four possible ways of dealing with vertical agreements for distribution:

- to maintain the current approach (including the current provisions for beer and petrol);

- To adopt wider block exemptions, possibly including one for selective distribution and extending the block exemption for exclusive distribution of good to services;

- To adopt more focused block exemptions, for example, with a ceiling of 40% market share, especially if there are significant price differences between Member States;

- To reduce the scope of Article 85 (1), perhaps by setting a rebuttable presumption of compatibility with the competition rules if the parties' aggregate market share is under 20%. The idea underlying this option is to implement the economic analysis of vertical restraints by legal instruments setting out the economic criteria designed to determine the market conditions in which Article 85 (1) would apply. Initially, this could be done by a Notice, which could be followed up, in the light of the experience acquired, by a negative clearance Regulation. This scenario could be combined with the second or third option mentioned above in respect of block exemptions.

The drawback of the second and third option is that the general disadvantages caused by block exemptions will remain.


" Chapter VIII, para 281 - 301, p 78 - 80.
Even though under the second option, their scope may be wider, there will always be a large number of agreements for which no block exemption exists or that cannot be forced within the strait-jacket of such exemptions.

The rapidly changing economic conditions of today require new types of agreements to accommodate features such as globalisation and new technology. Legislation, by nature, will always be slower than business in accommodating changes. The result would again be notification of agreements that cannot be brought squarely within the terms of a block exemption.

According to the judgment in Delimitis, discussed at 5.5.2. supra, national courts have to interpret the block exemptions narrowly and may have to stay proceedings in cases where an agreement does not come within the four corners of one of them and is notified for individual exemption.

It is submitted that an increased emphasis on block exemptions will impoverish and stifle European competition law in the long run. Block exemptions alter the nature of the exercise of national courts from an analysis of economic circumstances to the application of legal rules. The argument may be that at least decentralisation will then be effectively and uniformly achieved but it is questionable whether this should be done at the expense of "an economic appreciation of how anti-competitive conduct operates".

Should, as a result of option II and III, such a legislative checking of individual clauses of an agreement against the provisions in a block exemption become routine, it will be much more difficult for national courts to perform an economic analysis of the effects on competition of an agreement as a whole in cases not involving a block exemption or where Article 86 is relied upon.

It is submitted that if decentralisation is to meant to be true decentralisation in the sense that the principles of Community competition policy are to be applied at domestic level, national courts should not be restricted and stifled in their

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application of the rules but, instead, encouraged, educated, and assisted in enforcing EC competition law in its entirety, as a mature forum, next to the Commission.

Finally, if block exemptions are to increase legal certainty they should not include market share thresholds and certainly not a ceiling beyond which they cease to apply as proposed in the third option. This would mean that if parties are successful and market shares rise, their agreements may at some stage be open to challenge by third parties under Article 85 (1). If the Commission wants dominant companies not to benefit from a block exemption, it should use Article 86 in cases where the agreement is anti-competitive".

6.3.2.1. The fourth option

The fourth option is therefore most interesting. The Commission proposes a rebuttable presumption of compatibility with Article 85 (1) for parties to a vertical agreement with less than, for instance, 20% market share in the contract territory. This "negative clearance presumption" would cover all vertical restraints except those relating to minimum resale prices, impediments to parallel trade or passive sales, or those contained in distribution agreements between competitors.

This presumption could be rebutted by the Commission on the basis of a market analysis which would take account of factors such as:

- market structure (e.g. oligopoly)
- barriers to entry
- the degree of integration of the Single Market, evaluated on the basis of indicators such as price differential existing between Member States and the level of market penetration in each Member State of products imported from

See also Canenbley, [1996] Fordham Corporate Law Institute, p 56 and 57.
other Member States, or

- the cumulative effect of parallel networks

Agreements which, as a result of this market analysis, were considered within Article 85 (1) could benefit from a block exemption if they fulfilled the necessary conditions, depending on whether the second or third option is chosen for block exemptions.

This option may free a substantial number of vertical agreements from the relentless application of Article 85 (1) and its adoption would be welcome. It would be helpful for national courts in that it will enable them to enforce more agreements without the need for an exemption from the Commission. Two comments should be made, however.

First, the Green Paper seems to indicate that only the Commission can rebut the presumption of compatibility by making a market analysis\(^\text{10}\). The Commission thus still\(^\text{11}\) seems to reserve the power to make a full assessment to itself. This implies that national courts should enforce agreements below the threshold automatically, without making an economic assessment.

It also raises the question what a national court should do when asked to nullify such an agreement. Should it adjourn and ask the Commission to decide whether or not to rebut the presumption? Or should it determine itself, upon substantive assessment, whether the Commission is likely to rebut the presumption and, if affirmative, stay the proceedings in order to avoid conflict? Or should it, upon a full assessment, rebut the presumption itself and determine whether the agreement falls within a block exemption before refusing to enforce the contract?

\(^{10}\) Point 296 at p 82 of the Green Paper.

\(^{11}\) First it did this by interpreting the prohibition of Article 85 (1) widely and making full market assessments mainly under Article 85 (3). Now that it proposes to narrow the scope of the prohibition, it reserves exclusive power to make such full assessments within Article 85 (1).
Adjournment to enable the Commission to decide whether the presumption is rebutted would consume Commission resources and delay litigation but may be justified as avoiding overriding a "block negative clearance" issued by the Commission.

It would, however, constitute a reduction of the jurisdiction of national courts in respect of Article 85 (1) and (2), an area in which national courts and the Commission currently hold concurrent power\(^3\) and in which national courts recently have been required to make a full analysis by the Community Court (\textit{Delimitis}, see 7.2. below).

Another question is what would be the appropriate course of action for a national court asked to assess vertical agreements involving market shares above the threshold?

The Green Paper does not require the use of an economic analysis to cases exceeding the threshold which implies that these all require exemption. The Green Paper refers explicitly to block exemptions but these may include a 40% market share ceiling. It seems, therefore that a market analysis may be confined mainly to cases exceeding the 40% threshold.

Would a national court be allowed to make the full market assessment or would it have to refer such "significant" cases to the Commission? These are all questions that will have to be addressed during the discussions on the Green Paper.

It is submitted that the fourth option should take the form of a non-binding Commission Notice rather than a Council Regulation as ultimately foreseen. This would enable the courts to make a full assessment where needed and avoid Commission involvement in insignificant agreements. Where enforcement of agreements is appropriate, national courts will follow the Notice whilst in cases where the legality of the agreement is challenged, the court will be able to make a full assessment before enforcing or condemning it. Only then will decentralised enforcement by national courts be truly achieved.

\(^3\) It may be arguable that to affect the concurrent power in respect of Articles 85 (1) and (2), would be contrary to the principle of direct effect of Articles 85 and 86 established in binding case law of the Community Court, see 1.2.2. supra.
The second comment is that, although the Green Paper praises an economic test, it states that such test should not be relied on exclusively. The Green Paper recognises\(^3\), for example, that individual clauses in an agreement cannot be considered \textit{per se} as having a negative or positive effect on competition. It also recognises that analysis should concentrate on the impact on the market rather than the form of the agreement, for example, whether entry is foreclosed by a network of agreements or whether the vertical agreement coupled with market power permits producers or distributors to practice price discrimination. The risks associated with entry into new markets or significant market expansion are also acknowledged in that the paper states that:

"consideration should be given to a more favourable treatment towards vertical restraints where this is accompanied by significant investment\(^4\)."

Nevertheless, the Commission maintains that economic theory cannot be the only factor in the design of policy and regard must be had to existing jurisprudence. Moreover, it still takes the view that absolute territorial protection, preventing parallel trade, and resale price maintenance necessarily have the object or effect of restricting competition\(^5\), irrespective of the amount of inter-brand competition in the market and whether or not a dealer is required to incur risky, sunk costs and needs protection from free riders.

Interesting is the conclusion drawn by the Commission in Chapter VI\(^6\) where it compares Community law with the laws applicable to vertical restraints in Member States and some third countries. The Chapter highlights the competition laws of the

\(^3\) Chapter II, in particular para 85, p 26 of the Green Paper.

\(^4\) Para 85, sub V. It was added that this favourable treatment should be limited in time.

\(^5\) Para 276, at p 78.

\(^6\) Paras 216 - 218, p 65.
Member States and the differences in approach in respect of vertical restraints. Such differences exist even in some of the Member States (see 2.3.1. supra) that have laws similar to Articles 85 and 86. There are three major aspects in which the systems that differ are consistent, and consistent in differing from the Community system.

First, they hold that economic analysis should be employed in the first instance to determine whether a violation is present. This is the case in France and Italy (who belong to the ten states with rules similar to Article 85 and 86) and Germany and the UK (whose systems differ from the Community system) as well as in Canada and the US.

Secondly, neither several Member States, nor the US and Canada employ a notification system for vertical agreements. The absence of such a system is also consistent with the premise that vertical agreements are a priori lawful.

Third, only a small number of cases involving vertical restraints are brought in these systems which is again consistent with the notion that these restraints are a priori lawful.

These conclusions have been expressly confirmed by the national authorities of all fifteen Member States. They all said that in most circumstances, vertical agreements were benign and that the economic analysis should be conducted under Article 85 (1)’.

The implementation by the courts of the Member States of this fourth option as proposed by the Commission in its Green Paper and in the form argued above (empowering national courts to rebut the presumption of compatibility by making a full market assessment) may therefore not come as a surprise. In fact, the Community Court has already made it possible for national courts,

7 The European Competition Forum of April 1995, organised by DG IV, co-published in 1996 by Wiley and the Office for Official Publications of the EC. The subject of the Forum was vertical restraints and it was attended by representatives of each of the Member States' national authorities. All fifteen representatives told the Commission that its position as regards the application of Article 85 (1) to vertical restraints was "in error". Ehlermann, Robert Schumann Centre Annual on European Competition Law 1996, ed. Ehlermann and Laudati, 1997, at p 106.
in certain circumstances and upon economic analysis, to consider outside Article 85 (1) agreements with restrictions on conduct (see 7.2. below).

The adoption of the fourth option would enable national courts to enforce many insignificant agreements in competitive markets. It would, at the same time, reduce the limiting effect of block exemptions and the emphasis on the legal classification of different forms of distribution. Nevertheless, it is by no means certain that the fourth option will eventually be adopted (see also 6.3.4. below). The consultation process is not at an end. The Commission is eager to receive more written comment. More tangible policy proposals can be expected in 1998. The present deadline is 2000 but should Regulation 17 require amendment, this deadline may be extended.

6.3.3. The revised Notice on agreements of minor importance

All that the Commission has done so far to reduce the scope of application of Article 85 (1) is to abolish the turnover threshold and raise the market share threshold at which Article 85 (1) starts to apply for vertical agreements and to clear agreements between small and medium sized companies in its new Notice on agreements of minor importance.

The Notice makes a distinction between horizontal and vertical agreements. The market share threshold for horizontal agreements is to remain at 5% and for vertical agreements the threshold has been raised to 10%. In cases of mixed agreements or where it is difficult to classify the agreement as either horizontal or vertical, the 5% threshold applies.

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38 Those are defined in the annex to Commission Recommendation 96/280/EC, O.J. L 107, of 30.4.96, p 4.

39 Notice on agreements of minor importance which do not fall under Article 85 (1) of the Treaty establishing the European Community, of 9.12.97, O.J. C 372/13, points 9 and 19. See also 3.1.1.2. supra.
The Notice does not apply, even if the aggregate shares are below the threshold, to:

a) horizontal agreements which have as their object to: fix prices, limit production or sales, or share markets or sources of supply, and

b) vertical agreements which have as their the object to fix resale prices or to confer territorial protection*.

In line with its recently confirmed power to set priorities, the Commission considers, however, that in the first instance it is for the authorities and courts of the Member States to take action on any agreements envisaged above under (a) and (b). It will only intervene in those cases when it considers that the interest of the Community so demands, and in particular if the agreements impair the proper functioning of the internal market*.

As in the former versions, the Notice does not apply where in a relevant market competition is restricted by the cumulative effect of parallel networks.

To establish the market share of an undertaking involves a prior judgment about the relevant market and the share of the undertaking in that market. It was illustrated at 3.1.2.2. above that this is a difficult exercise for national courts. Often, there are circumstances where one cannot be sure whether the Community Court or the Commission would take a similar view of the relevant market. The Notice repeats the long established Community definitions of the relevant product and geographic market* and also refers to the new Notice on market definition. The principles set out in this new Notice are not entirely consistent with the old definitions.

* Para 11.

*! Para 11.

** Points 14 and 15. See 3.1.1.2. supra.
6.3.3.1. The new Notice on market definition

Although the new Notice on the definition of the relevant market purports to be based on the existing practice of the Commission and the long established definitions of the relevant product and the relevant geographic market, it is oriented more towards economics by introducing an abstract price-based test.

In section II, the Notice starts by referring to the existing definitions. It refers to the need to identify effective alternative sources of supply for the customers of the undertakings concerned both in terms of products and geographic location of suppliers.

Without repudiating the current test, often described as "functional interchangeability", it proceeds by identifying "demand substitutability" as the most important type of competitive restraint capable of limiting market power. It thereby moves to the more abstract idea of demand price elasticity which is based on the US merger guidelines.

It applies the SSNIPS test: what would be the effects of a hypothetical small but significant non-transitory increase in prices on demand substitution. Under this test, the Commission will seek to determine whether a non-transitory rise in the price of the relevant product of about 5 to 10 percent would lead customers to switch to readily available substitutes in the short term. If they would, the products to which they switch are included in the relevant market and the process is repeated until there is a gap in the chain of substitution; a set of products

"Notice on the definition of the relevant market for the purposes of Community competition law, O.J. C 372/5 of 9.12.97."

"Section II, first para. See 3.1.1.2. supra."

"Korah, Article 86: Is there still a safe Harbour for Competition on the Basis of Performance? Paper delivered at IBC's 4th Annual Advanced Conference on EC Competition Law, 4 and 5 November 1997, Radisson Hotel, Brussels, p 1."

"Korah notes that the US Merger guidelines say within two years, but the length of the short term is left open in the Notice. See previous footnote, p 1 of her paper at footnote 3."
is identified for which a price rise would not induce a sufficient substitution in demand.

Substitutes on the supply side of the market are taken into account under the Notice only when they are as effective and immediate as those on the demand side*.

The Notice may be helpful for national courts in that it provides for less arbitrary considerations than the characteristics and intended use of the product, the area and the conditions of competition or trade in that area. Instead, it identifies a quantitative economic method as a key to defining the market. In doing so it assigns an important, albeit non-exclusive role the SSNIPS test. Although the Notice is more straightforward, determining market shares remains a complicated exercise and the difficulty, for judges not being economists, of having to make complex quantitative economic analysis should not be overlooked**.

The Notice may overstate the importance of market power, especially where there is potential competition or entry barriers are low**. The final test in determining the application of Article 85 remains whether the restrictive agreement is capable of effecting patterns of trade. Circumstances such as a highly competitive market, a declining market or a concentrated market will have to be taken into account. Similarly, effects in a related market, such as the market for spare parts, or where the agreement concerns raw materials or components, the market for the finished product may also play a role. Remote substitutes should be less relevant than close ones. Finally, some markets may not have precise edges.

* See section II, under supply substitution, 1st para. This is in line with current practice. See for example, the market definition made in Delimitis, 7.2.1.3. below, where the supply side was almost completely ignored.

** See also 3.1. supra.

See the comments made at 5.6.4.1. supra and in the last paragraph of the next section (6.3.4.) in respect of too heavy reliance on market power.
6.3.4. Evaluation

The Green Paper is most interesting. It demonstrates that the Commission is rethinking its policy in respect of vertical agreements and is currently considering the possibilities and limitations of a new policy. DG IV no longer appears to accept the idea, originating from German competition law\textsuperscript{50}, that any restriction of conduct restricts competition\textsuperscript{51}.

It remains to be seen, however, what the eventual outcome will be and what the implications will be for national courts. At the end of 1997, the option most favoured by the Commission and by the business and authorities that submitted their comments, seemed a preservation of the status quo, be it more flexible by virtue of the introduction of new, wider, block exemptions for vertical agreements and possibly accompanied by guidelines for individual decisions\textsuperscript{52}. This view was reported unchanged by a Commission official in February 1998 but, with the ongoing discussions, the situation may still change.

\textsuperscript{50} See 5.4. supra.


\textsuperscript{52} See for a personal view from the Director General of DG IV, Schaub, [1996] Fordham Corporate Law Institute, p 80: "To combine a stronger emphasis on market analysis with sufficient legal security is no doubt one of our major challenges. I expect the coming public debate on the Green Paper options will shed some light on this issue. One thing, however, has to be clarified. Whilst we will be reviewing policy, and some adjustments could well be the result, we will not be going soft on vertical restraints. The aim is to find most appropriate way to deal quickly with or even to dispense with notification in the majority of harmless cases and to seriously investigate the ones where there is market power, i.e. those which may contribute to market rigidities with respect to prices, market entry or market integration". See for a view from the Head of the Division "Legal Questions and Legislation" of DG IV, Schröter: Vertical Restrictions under Article 85 EC: Towards a Moderate Reform of Current Competition Policy, Current and Future Perspectives on EC Competition Law, 14 European Monographs, ed. Gormley, 1997, p 18 ff.
As regards the higher market share threshold for vertical agreements in the new Notice on agreements of minor importance, the considerations mentioned at 3.1.2.2. above apply in respect of the non-binding effect of Notices on national courts and the Community Courts. The value of the Notice on agreements of minor importance lies mainly in the Commission's practice of following it when vetting notified agreements and in the fact that it limits the Commission's discretionary powers to intervene.

The new Notice even explicitly provides that in cases covered by it, the Commission will not institute any proceedings either upon application or its own initiative. In the same paragraph, it states that undertakings, having failed to notify an agreement falling within the scope of Article 85 (1) because they assumed, in good faith, that the agreement was covered by the Notice, will not be fined.

As a result of the higher threshold, more companies may refrain from notifying by relying on the new Notice and more agreements can be enforced by national courts for being outside Article 85 (1) but it should repeated that the neither the Community Court nor the national court is bound by it and the former does not rely on the Notice in its judgments.

Moreover, it will be demonstrated at 7.2. and 8.1.1. that, the Notice in isolation, with its heavy reliance on market shares and thus market power, is not considered by the Community Court a proper basis upon which to decide whether or not an agreement comes within Article 85 (1). In Delimitis and Langnese and Scholler, the market share of the supplier imposing exclusive purchasing restrictions on retailers was considered important in assessing the extent of the individual contribution to the cumulative foreclosure effect of the relevant market. The market share should not be assessed in isolation, however, but in conjunction with the number of outlets tied to the supplier in relation to the total number of outlets in the relevant market

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53 Point 5.
54 See 7.2. below.
55 See 8.1.1. below.
and in conjunction with the duration of the agreements^". Moreover, the turnover of the untied outlets in relation to the minimum efficient scale of production and distribution of the relevant product are relevant to determine the barriers to entry. The Commission's reliance, in its reasoning, on the Notice in determining whether an agreement had an appreciable effect on trade between Member States was condemned by the Court of First Instance in Schöller and Langnese^".

In conclusion, the steps taken so far by the Commission to reform its policy with respect to the application of Article 85 have not improved the efficiency of the enforcement of that Article at national level. Today, national courts are still severely limited by the Commission's practice to consider most agreements containing a restriction on conduct within the scope of Article 85 (1).

Whilst the results of the Green Paper will have to be awaited, it has been the Community Court, rather than the Commission, that already has taken steps to reduce some of the problems hampering a decentralised enforcement of Article 85 by reducing the scope of this provision in certain circumstances.

" Delimitis, para 25 and 26.

" See 8.1.1. below.
7. THE COMMUNITY COURT'S SOLUTIONS - REDUCTION OF THE SUBSTANTIVE
SCOPE OF ARTICLE 85 (1)

7.1. Doctrine of ancillary restraints

Like national courts, the Community Court has no power to grant
exemptions and its jurisdiction to appraise those granted or
refused by the Commission on appeal is confined "to an
examination of the relevance of the facts and of the legal
consequences which the Commission deduces therefrom".

Instead, the Court has developed two doctrines that enable
the court to uphold contracts: "ancillary restraints", discussed
at this place, and "economic context", discussed in section 7.2.
below.

On several occasions, the Community Court has interpreted
Article 85 (1) more narrowly by holding that not all clauses
restrictive of conduct are caught by Article 85 (1) under its
discipline of ancillary restraints. These decisions have had the
effect of reducing the influence of Article 85 (3). By narrowing
the scope of Article 85 (1), the Court recognised that certain
ancillary restrictions, such as non-competition clauses in cases
where goodwill is transferred, may, in specific circumstances,
be essential to make the transaction viable. Where such
indispensable restrictions do not exceed (in length, scope, or
geographical application) what is necessary for the viability of
the agreement, the Community Court ruled that they do not, in
themselves, infringe Article 85 (1) on the basis that they are
ancillary to a business transaction that it not in itself anti-

In Consten & Grundig v Commission, case 56 and 58/64,
p 347):

"The exercise of the Commission's powers necessarily
implies complex evaluations on economic matters. A judicial
review of these evaluations must take account of their
nature by confining itself to an examination of the
relevance of the facts and of the legal consequences which
the Commission deduces therefrom."

See 3.1. supra for a more detailed description of the powers and
practices of the Court of First Instance under Article 173 and
those of the Community Court under Articles 173 and 177.
competitive. There is no balancing involved between the anti- and pro-competitive elements of the agreement.

7.1.1. Case law

The first case was Société Technique Minière v Maschinenbau Ulm. The Community Court ruled that a clause giving a distributor an exclusive territory might not infringe Article 85 (1) where it was necessary to penetrate a new market. In Metro the Court held that the provisions restrictive of conduct contained in a selective distribution system may fall outside Article 85 (1) if they enable the supplier to select only firms with qualified staff and suitable premises as resellers of goods it supplies to selected dealers. Such qualitative

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\(^2\) Case 56/65, [1966] E.C.R. 235, at 250, [1966] C.M.L.R. 257 at 375. The Court appeared to make a distinction between restrictions which are prohibited per se and other, more ancillary, restrictions.

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

The competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute. In particular, it may be doubted whether there is an interference with competition if the said agreement seems really necessary for the penetration of a new area by an undertaking."


* The Court held at para 21 that selective distribution systems could fall outside Article 85 (1) provided:

"that resellers are chosen on the basis of objective criteria of a qualitative nature relating to the technical qualifications of the reseller and its staff and the suitability of its trading premises and that such conditions are laid down uniformly for all potential resellers and are not applied in a discriminatory fashion. It is true that in such systems of distribution price competition is not generally emphasised either as an exclusive or indeed as a principal factor [...] However,
restrictions do, however, infringe Article 85 (1) when, in their economic rather than their legal context, they may affect trade between Member States and have the object or effect of restricting competition®.

In *Nungesser* the Community Court held that an open exclusive licence of plant breeders rights in a new basic maize seed variety did not infringe Article 85 (1) where, on the fact of the case, it involved such risky investment that without some protection from intra brand competition the licensee might not have risked entering into the agreement. To justify the exclusivity, the Court referred to the years of research and experimentation by the licensor INRA, a research institute financed by the French Minister of Agriculture, the risks for the licensee, Nungesser, of cultivating and marketing the product in

although price competition is so important that it can never be eliminated it does not constitute the only effective form of competition or that to which absolute priority must in all circumstances be afforded". See for criticism on the distinction between qualitative and quantitative criteria, next footnote.

® See also in *L'Oréal v De Nieuwe*, [1980] E.C.R. 3775, [1981] 2 C.M.L.R. 235. The case law and Commission policy on selective distribution was criticised by Forrester during a panel discussion in 1996. He considered the distinction between qualitative and quantitative criteria extremely artificial:
"Under this rule, it is permissible to deal only with qualified dealers, but it is deemed violative of Article 85 (1) to prescribe the size of stocks or the number of dealers".

The policy should be based on the way the holder of a mark wants to promote. Quantitative restrictions may be required to protect dealers who invest in the qualitative criteria.


® The licence protected the licensee from exports into his territory by the licensor but it did not protect him from competition in his territory from customers buying from licensees in other territories. The territorial protection was thus not absolute.
Germany, and the specific nature of the product in question.

In Coditel II, the Court went further and ruled that the absolute territorial protection of an exclusive licensee of the performing rights in a film in each Member State did not, in itself, infringe Article 85 (1), provided the exclusive territories did not lead to excessive prices.

In Erauw-Jacquery, also concerned with plant breeder's rights in basic seed, the Court went further still by ruling that, because of the fragile nature of plant breeder's rights which last only as long as the variety remains distinct, uniform, stable and useful, an export ban restraining a licensee from exporting basic seeds protected by plant breeder's rights fell outside Article 85 (1) where it was necessary to protect the right of the licensor to select his licensees. In Nungesser such a clause, conferring absolute territorial protection in relation to certified seed was held to go too far even for an exemption under Article 85 (3).

It is not clear how far the precedents in Coditel II and Erauw Jacquery go, in other words, whether they are confined to rights in basic seed and performing rights in films.

In Remia and Nutricia v Commission the Court endorsed the Commission's clearance of a restrictive covenant imposed on the vendor of a business not to compete with the buyer, where it was limited in scope and time to what was strictly necessary for the performance of the transfer in question. This case involved the sale of two businesses in the Netherlands to different firms for

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8 Para 56 - 58. The judgment does not indicate what was specific about the nature of the variety - it was an agricultural product and plant breeders rights are fragile, lasting only so long as the seed remains distinct, uniform and stable, there was competition from other varieties or it was alive and must not be allowed to dry out.


the production of sauce and pickles respectively. The Community Court confirmed the Commission's decision and held that:

"It is necessary to examine what would be the state of competition if those clauses did not exist. If that were the case, and should the vendor and the purchaser remain competitors after the transfer, it is clear that the agreement for the transfer of the undertaking could not be given effect. The vendor with his particularly detailed knowledge of the transferred undertaking, would still be in a position to win back his former customers immediately after the transfer and thereby drive the undertaking out of business. Against that background, non-competition clauses incorporated in an agreement for the transfer of an undertaking in principle have the merit of ensuring that the transfer has the effect intended."\[13.

The Court emphasised that clauses which did not extend further than is necessary to permit the legitimate agreement are not in themselves caught by Article 85 (1).

Finally, in Pronuptia\[14, the Court examined a distribution franchising agreement and indicated the useful features and benefits of such a system for franchisor and franchisee. It concluded that such a system, which allows the franchisor to profit from his success, does not, in itself, interfere with competition. It held that certain ancillary restrictions such as those needed to protect the rights of the franchisor and to maintain the reputation and common identity of the franchise system, were per se legal since they were necessary to make franchise transactions viable\[15.


\[15\] In Pronuptia the Court did not conclude that the franchise agreement concerned was pro-competitive in that it increased competition, but merely that it did not in itself restrict it. The franchisor must be able to ensure that the assistance it gives to its franchisees does not benefit competitors and that it must preserve the identity and reputation of the network. The Court continued by ruling that the minimal restrictions required to make the transaction viable are outside the prohibition of Article 85 (1). Such restrictions include exclusivity, backed by a location clause restricting the franchisee from opening a second shop.
7.1.2. Evaluation

One can see the Community Court developing the meaning of restriction of competition referred to in Article 85 (1), moving towards a narrower meaning of this phrase and taking many common agreements outside Article 85 (1).

The Court assesses whether the restraints in question were the minimum necessary to support investment and enable the agreement to come about. The Court insisted that agreements containing ancillary restraints necessary to make a transaction that was not in itself anti-competitive viable are outside the scope of Article 85 (1). This is in contrast to the Commission's frequent habit of exempting rather than clearing restrictions on conduct needed for the viability of an agreement, in cases where there is no perceptible effect on competition.

The doctrine of ancillary restraints practised by the Community Court has the effect that several classes of contracts are enforceable without requiring notification and exemption. It facilitates their enforcement by national courts and for legal counsel, it makes it easier to prepare reliable advice. If an agreement can be drafted so as to include provisions restrictive of conduct only when they can be justified as reasonable and necessary, the risk of investment is reduced as the contract will be enforceable.

The doctrine of ancillary restraints enables restrictions which restrict conduct ex post to fall outside Article 85 (1) because they are a necessary requirement for the very existence of the main agreement which itself does not infringe Article 85 (1).

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17 See on ex post and ex ante appraisals, 3.1., 3.1.1.3. and 5.2.2.2. supra.
7.1.2.1. Different from a rule of reason

The fact that the Community Court handed down reasonable judgments, however, does not mean that it adopted the US-style rule of reason\(^{18}\). Often the "rule of reason" as practised under the Sherman Act 1890\(^{19}\), section 1, is used by authors\(^{20}\) as an example for a similar approach in relation to Article 85 (1). Within such approach, not every restriction on conduct that has an appreciable effect on trade between Member States would need an exemption to be enforceable. Instead, only restrictions on conduct that make the market less competitive would fall within Article 85 (1). Section 1 of the Sherman Act provides that:

"every contract, combination [...] or conspiracy in restraint of trade or commerce [...] is declared to be illegal".

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\(^{18}\) See also 7.2.1.2. below.

\(^{19}\) 15 USC para 1.


Writers that have rejected the idea of a rule of reason are: Schröter, Antitrust Analysis under Article 85 (1) and (3), [1987] Fordham Corporate Law Institute, Ch 27; Waelbroeck, [1987] Fordham Corporate Law Institute, Ch 28 and see also Ch 29 for a panel discussion.
There is no general provision for exemptions. It was left to the courts to give a useful meaning to this phrase which, if interpreted literally, would mean that every contract restricts trade and thus would be illegal. Within a decade, the courts concluded that there were some types of contracts which were plainly in restraint of trade (such as naked horizontal price fixing). Such agreements were deemed per se illegal. Other contracts such as vertical agreements conferring exclusivity, could not be treated in such a dogmatic way\(^ {21} \) and were governed by a rule of reason approach whereby the US court used to weigh the pro-and anti-competitive effects of the agreement and makes a qualitative assessment before enforcing or condemning it.

The adoption of a rule of reason in respect of Article 85 (1) would mean that Article 85 (1) would be interpreted as prohibiting only those restraints on conduct that produce a net anti-competitive effect. The rule of reason would enable national courts and the Commission to distinguish those restraints and Article 85 (3) would provide for a possible exemption where considerations other than competition warrant exemption\(^ {22} \). Article 85 (3) allows for exemption where the agreement improves production or distribution of goods or promotes technical or economic progress while allowing consumers a fair share of the resulting benefit. The exemption is thus based on increased efficiency and progress and on consumer considerations rather than on increased competition.

The US anti trust provisions, however, have no bi- or trifurcation into separate sections with corresponding divisions of jurisdictional powers attached and there is no equivalent to

\(^ {21} \) Chicago Board of Trade v US, 246 US 231 (1918). In this case, the Court made the first attempt to formulate a rule of reason test. The test contained an extensive list of the ways one might attempt to prove the probable effect of trade restraints. This test proved too complicated and was later replaced by the current rule of reason.

\(^ {22} \) Schechter, see supra footnote 20, p 13 referring to Kon and Joliet.
Article 85 (3) so a balancing act must be incorporated into the assessment at once. The Commission and the Court of Justice have generally regarded the rule of reason as embodied within Article 85 (3) over which the Commission has exclusive competence and they have not so far accepted the introduction of an American-style rule of reason in respect of the application of the prohibition of Article 85 (1).

The Community Court cannot treat an agreement as outside Article 85 (1) when, in its view, it restricts competition as that would amount to granting an exemption which it is not able to do. All the Community Court does under the doctrine of ancillary restraints is to consider whether such restraints, which are included in an agreement which itself falls outside Article 85 (1) because it does not restrict competition, would bring the agreement within the scope of Article 85 (1).

None of the judgments appeared to constitute the application of a balancing approach between the positive and negative market effects. According to the both the Commission and the Court, the assessment under this doctrine is done completely within the scope of Article 85 (1) in that a decision is made whether or not the ancillary restriction is caught by Article 85 (1). However, the dividing line between appraisals under Article 85 (1) and (3) is sometimes vague because ancillary restraints may have a potentially appreciable effect on the market by making a significant transaction viable.

See Schröter: Antitrust Analysis under Article 85 (1) and (3), [1987] Fordham Corporate Law Institute, p 664.


According to Holley, some DG IV staff members have in the past been reported willing to use the term "rule of reason" to refer to what approach the Commission may or may not take in a given area - and this was only in conversations. [1992] Fordham Corporate Law Institute, p 690. In 1996, Paulis (assistant head of the general competition policy and coordination unit of DG IV) expressed a personal view explicitly in favour of a rule of reason under Article 85 (1). Robert Schumann Centre Annual on European Competition Law 1996, ed. Ehlermann and Laudati, 1997, p 98 and 99.
7.1.3. Can national courts apply the doctrine of ancillary restraints?

Since case law of the Community Court relating to provisions having direct effect forms binding precedents for national courts, a national court will be able to apply the doctrine too and make a flexible assessment under Article 85 (1). The doctrine has therefore enhanced the possibility for national courts to enforce agreements by holding that agreements do not fall within Article 85 (1). The findings are based on careful inquiries into the economic features of the exclusive agreements.

The knowledge that their agreement is likely to be enforceable in private litigation will encourage companies to innovate and invest and will reduce the Commission's workload in that notification may not be necessary.

It is certainly hoped that national courts will use this doctrine frequently and that a national court asked to enforce a contract will follow the Court's judgments rather than the Commission's decisions where these are at variance.

It was illustrated at 5.2., 5.5.3.2. and 5.5.3.3. above that national courts are under a duty to avoid conflict with later Commission decisions. In Delimitis, The Court ruled that proceedings should be stayed where the national court finds that the contract in issue is notified or is exempted from notification and it considers in the light of the Commission rules and decision-making practice that the agreement may be the subject of an exemption decision. But, although strictly speaking there is conflict, a decision of a national court to enforce an agreement on the ground that it falls outside Article 85 (1), followed by an exemption from the Commission under Article 85 (3) will not affect the result - the enforcement of the agreement. The principle of legal certainty and the position of the parties to the agreement or third parties are not affected by this type of conflict either.

Para 52, see 5.5.3.3. above.
A similar doctrine is not necessary under Article 86 since under that Article a full analysis by national courts is required in any event to determine whether or not a certain restriction constitutes abusive exploitation of a dominant position. Since there is no provision for exemption from the prohibition, the assessment forms an integral part of the decision whether or not the Article 86 applies. Restrictions on conduct that can be objectively justified may not amount to abuse.

An example may be price differentials in the form of discounts. In many cases, the Community Court has condemned discount systems\(^7\) operated by dominant firms because it considered these to foreclose competition by smaller competitors\(^8\). The discount systems were considered discriminatory when applied ad hoc or anti-competitive, when applied systematically. In the case of quantity rebates, however, the discounts may be objectively justified if they reflect the savings to the dominant firm of delivering a container or barge full. The rebates should be based purely on the differences in costs borne in relation to the quantities supplied, and not on the supply of all or a very large proportion of a customer's requirements. The rebates may still foreclose competitors but are justified because they encourage customers to organise their business so as to enable the supplier to adopt such cheaper

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\(^7\) These can take the form of quantity rebates or loyalty discounts. The rebates may be progressive, such as an extra 1% on total purchases during the year for every 100 tons bought or they may be connected to individual targets, in which case they are called incentive rebates. The main concern about such discounts is the foreclosure effect it has on competitors. The rebate systems may affect the interest of traders wanting to enter the market as well as competition between suppliers which, in turn, will affect the interest of consumers.

\(^8\) See for example, Continental Can, case 6/72, [1973] E.C.R. 215, where a requirement that customers should buy only from a dominant firm was condemned. See also Sugar, cases 40-48, 50, 54-56, 111, 113 & 114/73 [1975] E.C.R. 1663, para 517-528, and Vitamins, case 85/76 [1979] E.C.R. 461, para 90 where loyalty rebates were condemned. In Michelin, case 322/81, [1983] E.C.R. I 3461, para 71, incentive rebates were condemned.
methods of delivery°. In practice, the borderline between quantity rebates and other discount systems is often blurred°. It is difficult to distinguish price-cutting, which is allowed, from exclusionary rebates, which are prohibited.

7.2. Delimitis v Henniger Bräu - new doctrine in respect of the scope of Article 85 (1)

In Delimitis°, the Community Court created another source of flexibility different from the doctrine of ancillary restraints". It was demonstrated at 5.5.2. and 5.5.3 above that the judgment strongly reinforced the Commission's exclusive powers in respect of Article 85 (3) by requiring a strict interpretation of block exemptions and by requiring courts to stay proceedings in all cases where exemption might be possible or where conflicting decisions might occur. It did this, however, after having required the national court to make a full market analysis before finding that an exclusive beer purchasing agreement would fall within Article 85 (1).

° See Vitamins, previous footnote, where the Court distinguished quantity rebates that it considered outside Article 86 from loyalty rebates that were not.

" In Michelin (see footnote 28 above), for example, the Court pointed out that the rebates practices were more similar to loyalty rebates than to quantity rebates despite the fact that the rebates applied in that case were also based on the quantities sold. The firm might have relied on the Court's earlier judgment in Vitamins ruling that quantity rebates were permissible, yet a fine was nevertheless imposed.


° Korah explains that the Community Court may have developed a third principle: "the inherency doctrine", derived from German Law, which enables it to rule that restrictions inherent in a legitimate transaction do not have the object of restricting competition. The Judgment in Delimitis: A Milestone towards a Realistic Assessment of the Effects of an Agreement - or a Damp Squib?, [1992] E.I.P.R. 167 at 171.
Rather than allowing the national court some discretion in the area of Article 85 (3) by giving it the freedom to stretch the application of a block exemption to agreements that are close to complying with it, the Court enabled agreements to be assessed in a way resulting in few infringing Article 85 (1) in the first place.

7.2.1. Section A - The compatibility of beer supply agreements with Article 85 (1)

The parties to the agreement were both based in Germany, the agreement itself was insignificant, involving one small beer house in Frankfurt. The insignificance of the agreement in isolation might have resulted in its falling outside the scope of Article 85 (1). The geographical confinement of the product, the parties and market concerned point to an agreement not involving any significant import or export to and from other Member States and thus to an agreement incapable of affecting trade between Member States.

7.2.1.1. Cumulative effect

The reason why uncertainties arose about the assessment of the agreement under Article 85 (1) is because the agreement formed part of a network of similar agreements between the brewery and other tied houses. Moreover, many such networks involving other brewers existed in the German market. It was illustrated at 3.1.2.2. above that the theory of cumulative effects allows for existing networks of agreements to be taken together in order to evaluate the impact on inter-state competition. The doctrine has been applied by the Community Court to beer supply agreements in Brasserie de Haecht I\(^3\) and to other vertical agreements\(^4\).


7.2.1.2. Exclusive beer purchasing agreements do not have an anti-competitive object

The Community Court started in Delimitis by looking at the agreement in question. Rather than examining the various individual restrictions set out in the agreement and judging whether these were unnecessary strict or ancillary, it began to explain the general advantages of beer supply agreements for suppliers and purchasers.

For the supplier, there is the advantage of guaranteed outlets and of allowing him to plan his sales and organise production and distribution effectively\(^5\). The benefit for the reseller is that the agreement enables him to gain access under favourable conditions and guaranteed supplies whilst enjoying the supplier's assistance in guaranteeing product quality and customer service\(^6\).

The Community Court then expressly rejected the notion that exclusive purchasing obligations automatically meant that an agreement restricted or distorted competition\(^7\). Instead, the Court reasoned:

"Even if such agreements do not have the object of restricting competition, within the meaning of Article 85 (1), it is nevertheless necessary to ascertain whether they have the effect of preventing, restricting or distorting competition\(^8\)"

It has been argued at 4.2.2. above, that the wording "even if" should be interpreted as meaning "although".

Consequently, the Court automatically accepted that beer supply agreements do not have an anti-competitive object, despite the existence of a block exemption which implies that such agreements are caught by Article 85 (1) and require exemption to

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\(^6\) Para 12, p 245.

\(^7\) See also Whish, *Competition Law*, 3rd ed., 1993, p 209.

\(^8\) Para 13.
be enforceable^.

This implies the adoption by the Court of a new doctrine. Advocate General Roemer had already advocated this same approach as early as in 1967 in his opinion in Brasserie de Haecht I° but it was not until Delimitis that the Community Court expressly adopted it.

A. Different from the doctrine of ancillary restraints

The Court did not reason that the agreement was pro-competitive. It did not consider whether restrictive clauses such as the obligation to buy specified beers exclusively from the supplier and not to stock competing beers, were necessary to make the transaction viable as would be done under the doctrine of ancillary restraints^2. The Court also did not consider how long outlets must be tied to enable Henniger Bräu to plan its depots and deliveries or to justify investment in a brewery. All the Court did was stating the advantages for the parties to it, not for competition in the market.

Under the doctrine of ancillary restraints, the determining factor is that the competition, restricted as a result of the restraint, would not have been possible without the restriction.

In contrast, the doctrine prescribed in Delimitis requires agreements to be appraised in their economic as well as their

^3 Throughout paragraphs 10, 11, 12 and 13 the Court used the plural term beer supply agreements, rather than the beer agreement in question which means that the Court generally regards such agreements as not having the object of restricting competition.

^4 See footnote 33 supra.

^1 Contrast Lasok, Assessing the Economic Consequences of Restrictive Agreements: A Comment on the Delimitis case, [1991] 5 E.C.L.R., p 194 at 197: 
"[...] the reason why the Court considered it necessary to assess the agreement by reference to its effect, rather than its object, seems to have been that the restrictions of competition characteristic of beer supply agreements were necessary for and ancillary to an essentially pro-competitive purpose that benefitted both parties to the agreement."
legal context. It will be demonstrated in the subsequent sections that a full analysis of the market is necessary to see whether so many outlets are tied to one or other of the exclusive suppliers for so long that insufficient outlets remain or come on the market to take the supply of a competing supplier of a viable size who wishes to enter the market or expand. In other words, whether the market upstream is foreclosed and if so, whether the agreement in issue contributes significantly to that foreclosure.

B. Different from a rule of reason

The Community Court furthermore did not balance the pro-competitive aspects of the agreement against its anti-competitive features such as the lack of choice between brands in each bar under a US-style rule of reason\(^2\). The fact that a block exemption exists for beer supply agreements which exempts exclusive purchasing obligations and other restrictive clauses would indicate that such clauses are regarded, at least by the Commission, as capable of falling within Article 85 (1).

The reasoning of the Court, i.e. stating the advantages of the agreement for the parties, can be compared with recitals 13 to 17 of Regulation 1984/83 in which the Commission explains why it issued a block exemption for beer supply agreements. The wording is very similar\(^3\). However, whereas the Commission uses

\[\text{\textsuperscript{2}}\text{ See 7.1.2.1. supra. See also Korah, The Judgment in Delimitis: A Milestone towards a Realistic Assessment of the Effects of an Agreement - or a Damp Squib?’, [1992] E.I.P.R. 167 at 171.}\]

\[\text{\textsuperscript{3}}\text{ Note, however, Recital 17, in which the Commission states: ‘The advantages produced by beer supply agreements and service station agreements cannot otherwise be secured to the same extent and with the same degree of certainty; the exclusive purchasing obligation on the reseller and the non-competition clause imposed on him are essential components of such agreements and thus usually indispensable for the attainment of these advantages [...]’}. (emphasis added)\]

This seems to indicate that the restrictions imposed in beer supply agreements must take the form of ancillary rather than
these arguments to explain the applicability of Article 85 (3) to beer supply agreements, the Community Court uses them to explain that the effect of the agreement must be assessed in order to decide whether or not the agreement comes within the scope of Article 85 (1)“.

7.2.1.3. The effect of the beer supply agreement - cumulative foreclosing effect of network only one factor

In determining whether the agreement might have the effect of restricting competition, the Court also broke new grounds. Since it was concerned with a network of agreements, the Court referred to Brasserie de Haecht I” in which the Court had ruled that the effects of an agreement had to be assessed in the context in which they occur and where they might combine with other agreements to have a cumulative effect on competition“.

The Court started by focusing on the particular network of naked restraints to be eligible for exemption. The Commission then continues that the obligations and restrictions are only indispensable as long as they are confined to the sale and consumption of beers and other drinks offered by the supplier and as long as the scope and duration of the agreement are limited (para 17 and 18). The Court has made none of such considerations in respect of this first half of its assessment.


" See footnote 33 supra.

" At para 14 of the judgment in Delimitis, the Court stated that it followed from Brasserie de Haecht (mainly from Advocate General Roemer):

"that the cumulative effect of several similar agreements constitutes one factor amongst others in ascertaining whether, by way of a possible alteration of competition, trade between Member States is capable of being affected. Consequently, in the present case it is necessary to analyse the effects of a beer supply agreement, taken together with other contracts of the same type, on the opportunities of national competitors or those from other Member States, to gain access to the market for beer consumption or to increase their market share and, accordingly, the effects on the range of products offered to consumers".
beer supply agreements of which *Delimitis* was part. It indicated that, in order to determine whether the cumulative effect of the network is capable, by way of a possible alteration of competition, of affecting trade between Member States, it is necessary to consider whether it *forecloses* the market, in other words whether the network reduces the opportunities of competitors from the same or from other Member States to enter or expand the market.

The Court defined the relevant market as the national market involving the supply of beer for sale and consumption on the premises. It excluded the take-away trade such as supermarkets and liquor stores through which brewers can also establish a market share. This view was cogently criticised by Koraif.

The extent of foreclosure of a network on the relevant market was said to depend on the number of tied bars in relation to non-tied bars not part of such a network, the duration of the ties and the quantities of beer sold by the tied bars in relation to the quantities sold in non-tied bars. All similar agreements must thus be taken into account. The Court talked only about the proportion of outlets that are tied to a domestic producer. Ties with foreign breweries were ignored.

The Court then stated that the existence of a network of contracts, even if it has a considerable effect on the opportunities for gaining access to the market, is not, however,

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*7* The geographical market was considered Germany as contracts for beer are mostly concluded at national level, para 18 p 246.

*8* Para 17 and 18.


*51* Para 19.
sufficient in itself to support a finding that the relevant market is inaccessible, inasmuch as it is only one factor, amongst others, pertaining to the economic and legal context in which an agreement must be appraised\textsuperscript{2}.

A. Real and concrete possibilities for newcomers

In that connection, the Court considered it necessary first to examine whether there are real and concrete possibilities for new competitors to penetrate the network of contracts by acquiring a brewery already established on the market or to circumvent the bundle of contracts by opening new pubs\textsuperscript{3}.

B. Conditions of competition on the market

Secondly, account must be taken of the conditions under which competitive forces operate on the relevant market\textsuperscript{4}. This involves the number and size of producers, the degree of saturation of the market, customer fidelity to existing brands and trends in beer sales\textsuperscript{5}.

C. Extensive market analysis - look at all existing networks together

Since all these criteria are relevant, an extensive economic market analysis will be required. The Court concluded:

"If an examination of all similar contracts entered into on the relevant market and the other factors relevant to the economic and legal context in which the contract must be examined shows that those agreements do not have the cumulative effect of denying access to that market to new national and foreign competitors, the individual agreements comprising the bundle of agreements cannot be held to

\textsuperscript{2} Paras 14 and 20.

\textsuperscript{3} Para 21.

\textsuperscript{4} Para 22.

\textsuperscript{5} Para 22.
restrict competition within the meaning of Article 85 (1). They do not therefore fall within the prohibition laid down in that provision". (emphasis added)

Thus if all those tests reveal that the total of similar contracts does not lead to foreclosure and access to the market is easy, a national court should enforce the individual beer contract under national law without concerns about Article 85 (1). Consequently, if there is no foreclosure of the market, the presence of networks does not prevent the enforcement of an exclusive beer supply agreement which is part of such a network regardless the restrictiveness of the individual clauses, the size of the parties, its duration and the amounts of beer involved. The impact of the individual agreement needs assessment only in cases where the market is foreclosed.

7.2.1.4. The contribution of the agreement in question to foreclosure

Only where a national court finds that access is indeed difficult owing to the effect of the bundle of similar networks, will it have to go further and assess the extent to which the network of agreements entered into by the brewery in question (in this case Henninger Bräu) contribute to that difficulty. And only if this contribution is significant, will Article 85 (1) be infringed. The Court ruled:

"If [...] examination reveals that it is difficult to gain access to the relevant market, it is necessary to assess the extent to which agreements entered into by the brewery in question contribute to the cumulative effect produced in that respect by the totality of the similar contracts found on that market. Responsibility for such an effect of closing off the market must be attributed to breweries which make an appreciable contribution thereto. Beer supply agreements entered into by breweries whose contribution to the cumulative effect is insignificant do not therefore fall under the prohibition of Article 85 (1)."  

"Para 23.

"Para 24."
In determining the extent of contribution of the network in question to the cumulative effect of foreclosure caused by all the existing networks together, the Court argued along the same lines as the Commission when the latter uses foreclosure to remove the benefit of exclusive purchasing Regulation 1984/83 from an agreement:

"access of other suppliers to the different stages of distribution in a substantial part of the common market is made difficult to a significant extent".

The Court ruled that in order to assess the extent of this individual contribution to the cumulative sealing-off effect, the market position of the brewer must be taken into consideration, as well as the number of bars tied to the brewer in relation to the total number of bars in the relevant market and the duration of the agreements with the brewer.

The market position of the parties (in this case Henninger Bräu since the bar of Mr. Delimitis is insignificant) is important in determining whether the contribution to foreclosure is significant.

In respect of the duration, the Court indicated that if the duration is manifestly excessive in relation to the average duration of beer supply agreements on the relevant market, the individual contract is caught by Article 85 (1).

5 Art 14 sub b of Regulation 1984/83 reads:
"The Commission may withdraw the benefit of this Regulation [...] where access by [sic] other suppliers to the different stages of distribution in a substantial part of the common market is made difficult to a significant extent [...]."


60 See for example Spices, O.J. 1987 L 53/20 [1978] 2 C.M.L.R. 116. Here the Commission condemned and refused to exempt an exclusive purchase agreement between a manufacturer who held 39% of the market (Belgium) and the three largest chains of food stores in that market, on the basis that the market strength of the parties indicated that penetration by other spice brands was seriously impeded. Hennessy-Henkel, [1980] O.J. L 383/11, 1 C.M.L.R. 601; Billiton and Metal & Thermit Chemicals, 7th Report on Competition Policy [1977], point 131; Soda-Ash, 11th Report on Competition Policy [1981] point 73.
Korah highlighted the difficulty for national courts to apply this test of "manifestly excessive". How long is manifestly excessive? What duration would amount to a significant contribution to the foreclosing effect? The Court did not provide a threshold in Delimitis.

The final ruling of the Community Court on the first three questions raised under section A was:

"A beer supply agreement is prohibited by Article 85 (1) if two cumulative conditions are met:

The first is that, having regard to the economic and legal context of the agreement at issue, it is difficult for competitors who could enter the market or increase their market share to gain access to the national market for the distribution of beer in premises for the sale and consumption of drinks. The fact that, in that market, the agreement in issue is one of a number of similar agreements having a cumulative effect on competition constitutes only one factor amongst others in assessing whether access to that market is indeed difficult.

The second condition is that the agreement in question must make a significant contribution to the sealing-off effect brought about by the totality of those agreements in their legal and economic context. The extent of the contribution made by the individual agreement depends on the position of the contracting parties in the relevant market and on the duration of the agreement."

7.2.2. Evaluation

In respect of the object of the agreement, the Community Court did not look at the severity of individual restrictions set out

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Korah also indicated that by holding that agreements which have a manifestly longer duration than normal for that trade are anti-competitive, the Court ignores the need for innovation. For innovation, longer protection in the form of exclusivity is often needed to offset the large and risky investments involved.


All it did was stating the general advantages of such exclusive agreements before moving to the second stage of the assessment: the effect of the agreement. The conclusion is therefore that the Community Court plainly considers beer supply agreements not to have "the object of restricting competition".

In respect of the effect of the agreement, the Court used the criterion of market foreclosure. The Court provided a two stage test to ascertain whether a network of agreements infringes Article 85 (1).

The first stage concerns the market in which the agreement operates: is this market foreclosed, in other words, it is difficult for new suppliers to enter or for existing suppliers to increase their market share? For this it is necessary to make a thorough economic assessment, taking into account all the circumstances, including (but not exclusively) the existence and effect of networks of agreements.

- If the answer is no: the market is not foreclosed, then enforce.

- If the answer is yes: the market is foreclosed, then it is necessary move to stage two.

Stage two is to examine whether the agreements of the brewer in question contribute significantly to that foreclosure.

- If the contribution is not significant: enforce.

- If the contribution is significant: the agreement is caught by Article 85 (1). In the final part of the judgment, section C, discussed at 5.3. supra, the Court provided a number of considerations for national courts faced with an agreement which is caught by Article 85 (1).

Although the Community Court has insisted since the 1960s that agreements should be appraised in their legal and economic
context**, its judgment in Delimitis** is the strongest
confirmation of this proposition so far.

The doctrine established in Delimitis goes further than the
doctrine of ancillary restraints**. The Court did not pay any
attention to the actual wording and restrictiveness of each
individual clause and it did not consider whether the agreement
was pro-competitive. Instead, the Court basically ruled that
exclusive purchasing agreements restrict competition only in very
unusual circumstances**: where the market is found to be
foreclosed and the agreement in question contributes
significantly to that foreclosure. This means that vertical
restrictions in competitive markets are unlikely to infringe
Article 85 (1).

Contrary to the Commission's view that vertical exclusive
agreements require exemption, either by block exemption or
individual exemption, the Court regards them by nature as falling
outside Article 85 (1) unless they have a significant effect on
competition. The discretion in drafting contracts should be
substantially larger** than in trying to write an agreement to
come within the terms of a block exemption. The limit of this
discussion, it is assumed, is that the agreement is still one of
a common type and not excessively restrictive in comparison to
other agreements of that type since the agreement will have to
pass the first half of the Court's reasoning, namely that it does

** See, for example, La Technique Minière v Maschinenbau Ulm
249 and 250, see 3.1.2.1. supra. See also NV L'Oréal (Brussels).

** See also Korah, The Judgment in Delimitis: A Milestone
towards a Realistic Assessment of the Effects of an Agreement -

** See 7.1. and 7.2.1.2. under A, supra.

** Korah, EC Competition Law and Practice, 6th ed, 1997, p
305.

** This advantage applies also to agreements drafted to fall
within the doctrine of ancillary restraints, see 7.1.2. supra.
not have the object of restricting competition®®.

The Commission's Notice on agreements of minor importance and the de minimis guidelines set out therein are also affected by the judgment®®. According to the Notice, the cumulative restrictive effect of existing parallel networks takes an agreement outside the presumption that Article 85 (1) does not apply. Many networks may now fall outside Article 85 (1). Only those networks that contribute significantly to the cumulative restrictive effect will be caught by Article 85 (1)"®.

The Commission has attempted to confine the effect of the ruling in Delimitis to exclusive beer supply agreements only and has not modified the general Notice on agreements of minor importance so as to accommodate the judgment. Instead it modified the Notice Interpreting Regulation 1984/83™. However, it is submitted that this attempt has already failed because the doctrine of economic market analysis prescribed in Delimitis has already been applied to exclusive purchasing agreements in the

*® However, the Court has not provided for any guidelines in this respect since it did not consider the severity of any of the individual clauses before coming to the conclusion that "such agreements" did not have as their object the restriction of competition. The Court only considered what is normal in the second part of the judgment when contemplating the extent of the contribution to the cumulative foreclosure effect of the bundle. When there is no foreclosure or the agreement does not contribute to it, this is not relevant.®

™ See 3.1.2.2. and 6.3.3. supra.

™® The Court does not define how many similar agreements are needed to speak about a network. It uses the word "bundle" and, in Brasserie de Haecht I, "several agreements". Few networks involving large market shares may pose more risks than many involving small market shares as large networks are more likely to affect trade to an appreciable extent.

™™ Notice [1983] O.J. C 355/7, as corrected [1984] O.J. C 101/2. The modified version was published in O.J. [1992] C 121/2. The Notice which describes beer agreements that do not infringe Article 85 (1) is very limited in scope. It states that Article 85 (1) is not infringed by exclusive purchasing obligations where the market share of the brewery does not exceed 1% of the national market for beer sold for consumption on the premises and the brewery does not produce more than 200,000 hectolitres of beer each year.
ice cream sector". It is submitted that the judgment clearly applies to all types of exclusive purchasing agreements and probably to all vertical agreements.

7.2.2.1. Consequences for national courts

Crucial for national courts is to what extent the judgment can, or should be, relied upon. If the judgment has a wide application, which it is submitted it has, its potential is enormous. There does not seem to be much in the way for national courts to assess all vertical agreements under the two stage test set out in Delimitis, including exclusive distribution, licensing of intellectual property rights and all vertical agreements for which no block exemptions exist, such as those involving services.

The insistence in Delimitis on an appraisal in the legal and economic context seems to imply that before finding that a vertical agreement infringes Article 85 (1), national courts and the Commission must determine a lack of real and concrete possibilities to enter or expand.

The judgment enables businessmen to rely on the doctrine established in Delimitis resulting in few agreements being caught by Article 85 (1) rather than having to distort their agreements to come within a block exemption. It may be the case that many already rely on the doctrine and refrain from notifying their agreement to the Commission.

The workload of national courts may increase because the market analysis under Article 85 (1) required by the Court in Delimitis enables firms to ascertain the validity of their contract by enforcing it through national courts rather than by notifying it for exemption. This could substantially reduce the Commission's workload and facilitate a better decentralisation of EC competition law enforcement.

It is a disappointment that the Commission did not take up this point in its Green Paper on vertical restraints by expressly recommending or encouraging the type of market analysis under Article 85 (1) required by Delimitis.

It is submitted that the national courts should follow the Court's judgment rather than the inconsistent analysis by the Commission. Nevertheless, it should be borne in mind that the Commission may take the less liberal view. On that view, a group exemption may be necessary for exclusive purchasing agreements. However, since Automec II, it seems unlikely that the Commission will follow up a complaint or start investigations ex officio in respect of agreements that have already been enforced by a national court. Even if this were to happen, there may be the possibility of a successful appeal against a negative Commission decision provided the Community Courts continue to decide along the route of Delimitis.

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74 See also Korah, EC Competition Law and Practice, 6th ed, 1997, p 314.

75 See 6.3.2. supra. Instead, it recognises the importance of economic analysis but considers, amongst other things, that a full economic analysis of every case would be too costly and involve too many resources and that competition policy may have to resort to more simpler rules of thumb without a full economic analysis in every case. Chapter II, para 86. See footnote 80 below.

76 The fourth option of the Green Paper proposes a rebuttable presumption that there is no infringement of Article 85 (1) below the market share threshold of 20%. It does prescribe a market analysis but only when deciding whether to rebut the presumption. This seems in line with Delimitis which prescribes a full market analysis before finding that a vertical agreement infringes Article 85 (1). However, in contrast to Delimitis which requires both national courts and the Commission to perform the analysis, the Commission in the Green Paper seems intent on establishing exclusive competence to rebut the presumption and thus to perform the analysis. As discussed at 6.3.2. above, this may affect the jurisdiction of national courts to decide cases in which vertical agreements are challenged under Article 85 (1) and (2).

77 Korah, see footnote 74 supra, at p 207.

78 See 8.1.1. below.
7.2.2.2. Full market analysis required by Delimitis is complex

One drawback remains, however\(^9\). The test provided in Delimitis may be difficult for national judges to apply habitually every time a vertical agreement must be assessed under Article 85 (1). Since no truncated analysis or check list was given, everything is relevant and a complete economic analysis must be made in every case where the agreement or concerted practice is not manifestly anti-competitive. This may prove difficult in practice, not only for national courts but also for the Commission\(^{10}\).

One of the possible consequences of the complicated test laid down in Delimitis is the risk of interim measures being refused by reason of the complexity of the dispute\(^{11}\). Middelhuis en Sterk v Verenigde Bierbrouwerijen Breda-Rotterdam BV\(^2\), a case before the national court of Breda, the Netherlands,

\(^{11}\) This point was raised by Korah, Future Competition Law; Community Courts and Commission not consistently analytical in competition and intellectual property matters, Paper written for Round Table Conference, organised by Amato and Ehlermann, 16 June 1997, European University Institute Florence, last section, unrelated point. To be published by Hart publishing, Spring 1998.

\(^{10}\) The Commission has said that it does not have the resources to make a complete economic analysis in every case:

"[...], a full economic analysis of every case would be very costly and might not be justified by gain in identifying market situations and vertical restraints that were detrimental to competition. In those circumstances, competition policy may have to resort to relatively simple rules of thumb and do without a full economic analysis of every case. The costs in terms of uncertainty for enterprises and resources needed to do this analysis would not be justified by the expected economic gains of this approach."

This point was raised in the Green Paper on vertical restraints, Chapter II, para 86. See 6.3.2. supra.

\(^{11}\) See for an example of such refusal on the basis of the complexity of the case, President of the Court of Utrecht, the Netherlands, in Unigro/Heineken, Kort Geding 1985, 94.

\(^{12}\) The President of the Court of Breda, 9 December 1992, Kort Geding 1993, 106. See also before the same Court, Dommelsche Bierbrouwerij BV v Roodhaert Biljartcentrum Westermarkt BV, Kort Geding 1993, 180.
concerned also an exclusive purchasing agreement for beer. Referring to the tests developed in Delimitis, the President found that these criteria are of a very complicated nature and necessitate extensive consideration of the facts and the economic assessment to be made of them, so that for this reason alone the subject matter lends itself only to a very limited extent to the making of orders in interlocutory proceedings on the basis of Article 85 of the Treaty.

Another example is the Van Marwijk case discussed at 5.7. above, in which a Dutch Court of Appeal overturned an earlier decision of the District Court granting interim measures against conduct it considered to infringe EC competition law, on the ground that the issue required a thorough inquiry going far beyond what could be done in interlocutory proceedings.

Korah suggested that a truncated analysis should have been adopted, or a "quick look view". She added that, in the US, for many agreements only a truncated rule of reason or "quick look" is applied. These could contain rebuttable presumptions. The Community Court has not explicitly rejected the possibility of a filter so perhaps one day, a judgment will provide a framework for a truncated analysis. This may facilitate the assessment of such agreements for national courts and the Commission.

See Braakman at para 62 of his chapter on the Netherlands in: The application of Articles 85 and 86 of the EC Treaty by the national courts in the Member States, a comparative report compiled by Braakman and published by the commission DG IV, July 1997.

See footnote 79 supra. She noted that in Delimitis the central issue, for which a full market analysis was considered necessary, was the question whether the exclusive purchasing obligation foreclosed other firms entering the market or expanding. To avoid Article 85 (1), it should have been sufficient to prove one of several matters:
1) there were no entry barriers to retailing beer,
2) sufficient retail outlets were untied to enable a firm to enter the market on an efficient scale, or
3) that the ties were short term, so that a new entrant would be able to find outlets soon enough.

Ibid. See also her Chapter in Current and Future Perspectives on EC Competition Law, 14 European Monographs, ed Gormley, 1997, p 6.
Meanwhile, national courts will gain experience in performing economic analysis every time they are asked to enforce or nullify a not manifestly anti-competitive agreement under Article 85, especially if application of the doctrine in Delimitis is argued more often by litigants. In cases of difficulty, the Commission can be asked to assist the court or the court may request a preliminary ruling which may be helpful for all national courts in that it develops the doctrine further.

In Delimitis, a central issue to determine was whether the market was foreclosed and whether the agreement (network) in issue contributed significantly to that foreclosure. Presumably, once the implications of the doctrine established in the judgment become more fully known to legal counsel, the litigants may increasingly rely on the doctrine and present extensive economic facts and arguments specifically aimed at demonstrating or refuting foreclosure. If national courts are "capable to try cases of medical negligence, the design of an electric turbine, or a breach of copyright", they should also be able to try a case involving complex economic analysis. This issue is discussed further at 8.1.1. below.

It is submitted that the benefits of the doctrine outweigh the expected difficulties by far. Delimitis has greatly enhanced the ability of national courts to apply and enforce Article 85 fully and independently. The judgment facilitates decentralised enforcement of EC competition law by national courts. The increased importance of economic analysis will result in a more realistic application of Article 85. It will reduce the importance of the freedom of action approach under which formal exemption by the Commission is needed every time an agreement significantly restraining conduct requires enforcement in private litigation.

" See 5.7. supra.

" Forrester, Competition Structures for the 21st Century, [1994] Fordham Corporate Law Institute, Ch. 19, 445 at 497. He used these examples to illustrate his argument that national courts should be able to apply EC competition law in general.
8. HOW DOES THEORY RELATE TO PRACTICE - SOME COMMENTS ON THE CURRENT SITUATION

8.1. Subsequent cases in which the test of Delimitis has been applied

The doctrine established by the Court of Justice in Delimitis has since been applied by the Court of First Instance. In its decisions in the German ice cream cases, Langnese and Schöller¹, criticised by Korah², the Commission considered an exclusive purchasing obligation to foreclose competition from the particular outlet or freezer and as a result to infringe Article 85 (1).

Contrary to the ruling in Delimitis, the Commission analysed the market only under Article 85 (3)³. In deciding whether the agreements were caught by Article 85 (1) the Commission found that the effects on trade between Member States were appreciable by reference to its Notice on agreements of minor importance⁴ rather than by reference to the opportunities of a new supplier to enter the market or expand, as was required by the Community Court in Delimitis⁵.

The Commission argued⁶ that Delimitis was not relevant because the precedent applies only where the network of exclusive purchasing agreements with the particular supplier involved does

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¹ Commission decision Langnese - Iglo and Schöller [1993] O.J. L 183/1 and 19; [1993] 2 C.E.C. 2101 and 2123. These cases have been discussed in an illustrative context at 3.3. supra.


³ From point 114 onwards in its decision in Schöller, and from para 115 onwards in Langnese did the Commission perform a considerable market analysis, including entry barriers as required by the judgment in Delimitis.


⁵ See 7.2.1.3. supra, under A.

⁶ Para 105 in Langnese, para 106 in Schöller.
not have any appreciable effect. In Delimitis, however, Henniger Bräu produced 6% of the beer in Germany so its network would not have come within the Notice either, even if the ties to other brewers were ignored.

Both Decisions were upheld by the Court of First Instance® but reversed in their reasoning®. The Court analysed the foreclosure under Article 85 (1) rather than 85 (3). In Langnese®, the Court of First Instance considered the Commission's exclusive reliance on its Notice on agreements of minor importance insufficient to establish whether Article 85 applies:

"It must be borne in mind that the Notice is intended only to define those agreements which, in the Commission's view, do not have an appreciable effect on competition or trade between Member States. The Court considers that it cannot however be inferred with certainty that a network of exclusive purchasing agreements is automatically liable to prevent, restrict or distort competition appreciably merely because the ceilings laid down in it are exceeded. Moreover [...] it is entirely possible in the present case that agreements concluded between undertakings which exceed the limits indicated affect trade between Member States or competition only to an insignificant extent and consequently are not caught by Article 85 (1) of the Treaty."

Instead, the Court of First Instance applied the test established in Delimitis, disapproving the Commission's failure to use the test in its Decisions.

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The Court stressed the importance of economic analysis by holding that:

"As to whether the exclusive purchasing agreements fall within the prohibition of Article 85 (1), it is appropriate, according to the case-law, to consider whether, taken together, all the similar agreements entered into in the relevant market and the other features of the economic and legal context of the agreements at issue show that those agreements cumulatively have the effect of denying access to that market for new domestic and foreign competitors. If, on examination, that is found not to be the case, the individual agreements making up the bundle of agreements as a whole cannot undermine competition within the meaning of Article 85 (1) of the Treaty. If, on the other hand, such examination reveals that it is difficult to gain access to the market, it is necessary to assess the extent to which the contested agreements contribute to the cumulative effect produced, on the basis that only agreements which make a significant contribution to any partitioning of the market are prohibited. (Delimitis para 23 and 24)

However, as stated above (para 101), the extent of the tying-in is only one factor among others pertaining to the economic and legal context in which the network of agreements must be assessed. It is also necessary to analyse the conditions prevailing on the market and, in particular, real and specific possibilities of new competitors to penetrate the market despite the existence of a network of exclusive purchasing agreements".

The Court found that the Commission had correctly applied Article 85 (1) in the light of the particular market structure for impulse ice cream and the specific barriers to entry, market access was made very difficult for third parties.

The result of the Court's reversal of the reasoning employed by the Commission is momentous in that even in cases involving high market shares, the Court requires an analysis of the market and the impact on third parties and competition.

\[\text{Langnese had been found to hold a strong position on the relevant market. In 1991, its share was more than 45% both in the grocery trade and in the traditional trade. The contested agreements (sales outlets tied to Langnese) represented more than 15% of the relevant market. Schöller's sales in 1991 covered about 20% of the relevant market and the tied outlets represented over 10% (T 9/93, points 96 and 101).}\]
Mr. Deacon of DG IV, expressed his personal view on the judgment in Langnese:

"Although this case concerned an exclusive supply agreement, the Court's reasoning would apply generally to all vertical restrictions. To my mind, this judgment does not leave much room for the theory which equates a restriction of competition with a restriction of freedom of action. It takes the emphasis off the relationships between cooperating parties and puts it squarely on the impact of the cooperation on third parties in the market."

As far as national courts are concerned, I am aware of only one single case in which a national court applied aspects of the analysis prescribed in Delimitis. It is the judgment, rendered in 1992, by the Irish High Court in Masterfoods Ltd T/A Mars Ireland v HB Ice Cream Ltd in an ice cream dispute very similar to that in Langnese and Schöller. As part of the ice cream saga, this case was mentioned at 3.3. above to illustrate the potential for divergence in the decisions of national courts, national authorities, the Commission and the Community Court.

HB sued Mars for encouraging Irish retailers to stock Mars ice creams in freezer cabinets provided by HB. Mars relied on EC competition law in claiming that the exclusivity restriction regarding the use of the freezers infringed articles 85 and 86.

Elaborate arguments were presented by counsel, supported by extensive expert economic evidence. The Irish court made an extensive general assessment of the applicable law of Articles 85 and 86 accompanied by many references to case law of the Community Court (paras 99 - 189). It also examined the Commission's interim decision in Langnese and Schöller which had just been adopted (para 99 - 189) but noted that the trading arrangements in Germany differed from those in Ireland in that, in Germany, freezer exclusivity was combined with outlet exclusivity (para 173). Moreover, the Commission had granted

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14 IV/34-072 of 25.3.92.
interim measures against outlet exclusivity only.

The Irish court referred to Technique Minière" (para 137) by stating that the object and the effect of the agreements should be considered disjunctively.

In determining whether the agreements had the object of restricting competition, the court considered three aspects. First, that the agreements did not prohibit the sale of rival products. Secondly, that they did not constitute exclusive purchasing agreements requiring the retailers to purchase all or a substantial proportion of their requirements from HB. Thirdly, that the agreements may be terminated at two months' notice at any time by the retailers (para 216). The freezer exclusivity agreements were therefore considered to be outside the category of horizontal and vertical agreements recognised as providing for partitioning of territories or as having the object of restricting competition. They were considered different from agreements that require either block or individual exemption such as tied house agreements in the brewer industry, exclusive distributorships and selective distribution -, and franchise agreements (para 217).

Earlier in the decision (at paras 139 and 140), the court had referred to paras 10 - 13 of Delimitis" in which the Community Court had considered the advantages of an exclusive beer purchasing agreement. By analogy, the court noted that the agreement's actual object was to ensure that refrigerated space is available for the storage and display of HB's products, to enable display of advertising material at the point of sale and to facilitate quality control (para 218). According to the court this could not be regarded as an anti-competitive object.

In assessing the effect of the agreement on competition, the Irish court adopted an approach which differed from the Community Court's test in Delimitis regarding foreclosure. The Irish court acknowledged the high market share of HB (HB occupied 70% of the relevant market, tying 80% of its customers through freezer

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15 See 3.1.2.1. supra.
16 See 7.2.1.2. supra.
exclusivity, paras 221 and 233). It also recognised that the agreement was part of a network of similar agreements and again quoted Delimitis (paras 19 - 22)\(^7\) by saying that the existence of such network was only one factor amongst others to be considered (para 140). The court then, however, adopted a "rule of reason" (para 222), considering the following factors:

a) the fact that the agreement conferred significant commercial advantages on the manufacturer such as ensuring proper storage, efficient distribution, and display of advertising and promotional literature. They also confer advantages on the retailers by relieving them of capital costs and ensuring supplies of the leading brand (para 223)

b) the fact that freezer exclusivity, unlike outlet exclusivity, does not prevent the retailers from selling competing products (para 224). Even in outlets where there is only room for one cabinet, there is nothing to prevent the retailer from terminating the agreement at any stage and buy his own or another supplier's cabinet (224).

The court then concluded that the agreement did not have an anti-competitive effect.

As to foreclosure, the court stated that the question of barriers to entry was better dealt with under Article 86 since HB was dominant. The court considered that the agreement in question was of a type commonly used in the Irish ice cream industry and that of other European countries for years. In this industry, it is the general practice to include an exclusivity term (para 228) and such term could not be seen as imposing a supplementary obligation as meant under Art 85 (1) (e) or to infringe Article 85 (1) (para 229).

As regards Article 86, the court held that, on a subjective test, the exclusivity clause did not create a barrier to entry.

\(^7\) See 7.2.1.3. supra.
It acknowledged the Commission's arguments in its interim decision in Schöller and Langnese that there was probably a significant number of retail outlets that had no room or was unwilling to install a second freezer. There was however nothing in the court's view that prevented that retailer from terminating his agreement with HB and replacing the freezer with a rival supplier's cabinet including the Mars products (para 233).

The court went on to say that HB's dominance will continue to present a crucial difficulty for new entrants, at least in the short term, but that does not mean that it is required to abandon its exclusivity term so common in the industry and give free access to competitors to the cabinets in which it has made a huge investment (para 235). The court recognised that new entrants would have to make substantial investment in cabinets but it did not consider recoupment unfeasible (para 237).

Finally, the court acknowledged that HB had effectively dictated the level of prices in the market for many years but did not accept that the prices had been kept at an artificially high level (para 238) nor that the interests of the Irish consumer had been seriously affected by the practices complained of (para 240). The court concluded that there was no infringement of Articles 85 and 86. Moreover, Mars' claimed right for its products to be admitted into HB's cabinet was considered to constitute a radical interference with HB's property rights such as to infringe Article 222 of the Treaty.

The judgment shows many differences with the approach prescribed in Delimitis. As regards the effect of the agreement (the issue of market foreclosure) the divergence is particularly manifest. The Irish court acknowledged that the agreement was part of a network and it also stated that the market was foreclosed (paras 235 and 237). This appears to support the view that freezer exclusivity is anti-competitive. Without making a thorough assessment of the economic arguments presented in this particular context, the court concluded that the freezer

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18 See also Robertson and Williams, footnote 2 supra, at p 20.
exclusivity did not constitute a barrier to entry\textsuperscript{®}.

Whereas in Delimitis, the Community Court used the commercial reasons for the agreement and its advantages to supplier and retailers to explain that the agreement did not have an anti-competitive object, the Irish court used these aspects in its assessment of the effect of the agreement.

The effort of the court to apply various principles of Delimitis, including less reliance on market shares in isolation, is nevertheless laudable. It is a pity that the analysis in the decision is not very clear and that the conclusions in respect of foreclosure seem contradictory.

The case is currently under appeal in the Supreme Court of Dublin\textsuperscript{2} and it will be interesting to see the outcome, especially since the Commission has adopted its final decision in Langnese and Schöller and the Court of First Instance has rendered judgment on appeal.

There may be more cases in the Community where national courts have applied (parts of) the doctrine of economic analysis prescribed in Delimitis but it can be safely concluded that these are still extremely rare. This appears to strengthen the assumption that national courts may not be able to perform the complex economic analysis required. It may also mean, however, that national courts are not aware of the doctrine and/or still rely on the Commission's habitual practice of finding agreements containing significant restrictions on conduct within the prohibition of Article 85 (1) and requiring exemption to be enforceable. The Commission still tends to reserve a market analysis for Article 85 (3) as it did in the ice cream cases.

Although it is acknowledged that a complex economic assessment, possibly ex ante, is exceedingly difficult for judges being non-economists (see chapter 3 and section 7.2.2.2. above),

\textsuperscript{®} Robertson and Williams, ibid., state in the context of the concept of barriers to entry, that:
"In this case it appeared that the court was not sufficiently sophisticated to deal with complex economic arguments".

\textsuperscript{2} Supreme Court Ref. 301/92. The case is listed for a hearing on 10.6.98. See also 3.3. supra.
it is submitted that is too early yet to draw any final conclusion as to the their ability or preparedness to apply the doctrine established in Delimitis. Until the Commission has begun to apply the doctrine, national courts should be given the benefit of the doubt. In the meantime, they should be encouraged and enlightened through further judgments of the Community Court clarifying and developing the doctrine.

At the same time, legal counsel will hopefully become more aware of the doctrine which considers many agreements containing restrictions on conduct compatible with Article 85 and enforceable in national courts. They increasingly may advise firms to rely on the doctrine and, if necessary, private litigation to assert the validity of their agreements rather than to distort it to come within a block exemption or to notify it. The capacity of national courts to make the economic analysis prescribed as well as the extent of such analysis will depend largely on the arguments and evidence presented by the counsel. The stronger and more focused the economic facts and arguments establishing or rebutting foreclosure are presented, the better a national court will be able to perform the analysis prescribed by the doctrine.

As mentioned at 6.3.2.1 above, the national authorities of most Member States tend to rely heavily on economic analysis, in particular as regards vertical agreements and all fifteen have indicated that their application of national law differs from the Commission's application of Article 85. The Commission's Green Paper on vertical restraints, quotes the Italian authority as having commented:

"[W]hat is to be considered a restriction of competition under Article 85 of the Treaty as well as under the corresponding national provisions is in no way a self-evident issue.

Under a traditional, legalistic approach one may consider Article 85 to prohibit some clauses in vertical

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22 Para 195 at p 61. See 6.3.2.1. supra.
agreements. Nevertheless, an increasingly shared view is that Article 85 (1) should be interpreted as prohibiting vertical agreements only in so far as they may have an economic impact restricting competition on the market. Notably, in many judgments the European Court of Justice has held that the restrictive nature of a vertical agreement within the meaning of Article 85 (1) can be considered only by reference to its economic and legal context. On an economic appraisal, there is ample support for the view that an examination of the potentially restrictive nature (in terms of competition) of a vertical agreement should not be confined to its formal aspects."

8.2. General comparison of different conditions in different Member States

Some general conclusions can be drawn from reports, recently written by legal specialists from each Member State, except Finland, Sweden and Austria, on the application of Article 85 and 86 by national courts. These reports represent part of a book published recently by the Commission. First, some aspects are mentioned to highlight the varying conditions in the Member States.

8.2.1. Germany

In Germany, a distinction is made between, on the one hand, disputes arising under Article 85 and 86 in which these Articles are the core provisions and, on the other hand, disputes based on other provisions but in which competition law is to be applied

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"The Application of Articles 85 and 86 of the EC Treaty by national courts in the Member States, compiled by Braakman, published by the Commission, DG IV, July 1997. The book includes an extensive introduction on EC competition law with numerous references, written by Braakman and Schröter followed by separate chapters on each Member State, except Austria, Finland and Sweden that have been written by legal specialists. Each chapter deals extensively with all aspects of the application of Article 85 and 86. Where in existence, references of decisions are given. The report does not make a comparative analysis nor contains any conclusions.

in deciding specific issues.

As regards the first category of cases, only specialist courts\textsuperscript{23} have jurisdiction to the exclusion of ordinary national courts. A civil court approached in such cases must declare itself incompetent and refer to the proper specialist court.

As regards the second type of dispute, the ordinary courts have no automatic jurisdiction either. They will have to stay proceedings in cases where the dispute cannot be decided without a substantive examination of Articles 85 or 86 and await a decision from a specialised court unless the correct application of EC competition law is so obvious that there is no room for any reasonable doubt.

Although these rules have been stretched somewhat in practice, ordinary courts do not as a rule deal with Article 85 and 86. According to the report, they tend to decide the issue under domestic competition law and avoid EC matters.

8.2.2. Belgium

According to the report\textsuperscript{24}, ordinary courts give often judgments without having available the results of detailed investigations of the case. This clearly limits their vision, especially as they hear only the parties and are not aware of any other arguments. Belgian courts do not frequently request preliminary rulings. This is partly because they often find it difficult adequately to formulate a question whose answer would enable them to resolve the dispute before them and partly because the Community Court provides answers so abstract that they are difficult to apply.

\textsuperscript{23} The Kammer für Handelssachen of the Landesgericht. On appeal: the Kartellsenat of the Oberlandesgericht. In the case of judicial review: the Kartellsenat of the Bundesgerichtshof.

\textsuperscript{24} Written by Schiltz, Linden, Grolig, Brussels.
8.2.3. Greece

According to the report⁷, Articles 85 and 86 concern an unknown territory to both citizens and Greek courts. Today, twelve years after the accession of Greece to the EC, Greek judges are reported not to have the necessary knowledge to apply the rules of Community law, nor to follow the decisions of the Community Courts. The reason for this is not "that the Greek judge has not conceived the necessity of the application of Community law, nor does he fail to apply this law owing to any prejudice or chauvinism but because he is not offered the potential to get acquainted with it"²⁸.

Nevertheless, the Greek Competition Committee, comprised of experts rather than judges, has dealt with a wide variety of cases and has adopted decisions in light of the criteria set out by the Commission and the Community Court since Greek competition law reflects Articles 85 and 86 closely in substance and structure.

8.2.4. Spain

Spanish national courts cannot apply Article 85 and 86 in the first instance since a prior administrative ruling on the substance is necessary⁹. Neither may they grant compensation for infringement of those provisions unless a decision has already been taken by the Competition Protection Tribunal or the

⁷ Written by Grammatopoulou of Zepos & Zepos Law Offices, Athens.

⁸ Speech of Bakopoulos, senior Judge of the Supreme Court of Justice at a Conference, organised by the Centre of International and European Law, held in October 1996 in Thessaloniki: The Impact of the Treaty of Maastricht to Greek Jurisdictions. Point taken gratefully from Grammatopoulou, see previous footnote.

Commission®. The direct effect of Articles 85 and 86 is thus ignored.

8.2.5. Luxembourg

There are extremely few cases in Luxembourg®. The reason is reported to be its economy being based primarily on imports of manufactured and consumer goods which has led it to be faced with very few problems concerning the application of Article 85 and 86. Another reason is Luxembourg's tiny population. There are virtually no commentaries or text-books dealing with Article 85 and 86.

8.2.6. The Netherlands

In the Netherlands®, Article 291 of the Code of Civil Procedure allows judges in interlocutory proceedings to avoid application Article 85 and 86 in cases which are considered too complex to require an immediate measure. This principle was used, for example, by the Court of Appeal to overturn an earlier judgment by a lower court in interlocutory proceedings in the Van Marwijk case discussed at 5.7. and 7.2.2.2. above. It is submitted that Commission assistance would counter the use of this option®.

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10 CAMPSA, judgment of the Spanish Supreme Court of 30 December 1993.


12 Report written by Braakman, partner of Nauta Duthilh lawyers, Rotterdam.

13 See 5.7. supra and 8.3.2 below.
8.2.7. Italy

It was illustrated at 2.3.2. and 2.3.3.1 under B above, that enforcement of domestic competition law in Italy is precluded in principle where EC competition law applies. Courts are not hindered by overlap of domestic competition law and are not reluctant to apply Articles 85 and 86. The problems regarding the application of Article 85 (3) and the possibility of simultaneous Commission involvement, discussed in chapter 5 remain, however.

8.3. The application by national courts of the general guidelines set out in Delimitis to avoid conflict in parallel proceedings.

Subject to the differences in jurisdiction, experience and conditions outlined above, in particular the jurisdictional obstacles in Spain and Germany, some common attitudes with respect to the principles outlined in Delimitis can be distinguished:

- National courts in all Member States seem to acknowledge the direct effect and supremacy of Articles 85 and 86.
- The national courts all seem prepared to apply Articles 85 and 86 in private litigation.
- All seem to have accepted the idea that damages are available.
- The national courts in all Member States seem willing to stay the proceedings in all cases prescribed by Delimitis.
- National courts seem also prepared in principle to follow the decisions of the Commission, its views set out in comfort letters and, where proceedings before the Commission are pending, the views set out in a statement of

"Written by Pavesio and De Rosa of Brosio, Cassati e Associati, Milan."
8.3.1. Confusion - effect of comfort letters and Commission decisions

Nevertheless there are still several examples of cases where confusion has reigned. See, for example, the English case Inntrepreneur Estates Ltd v Mason\(^{35}\). Faced with two letters from the Commission stating that the agreement in issue merited exemption and that the Commission would proceed with publication in accordance with Article 19 (3) of Regulation 17, Deputy Judge Barnes QC, had difficulty recognising the letters as comfort letters. He referred to the Notice on Cooperation with National Courts, para 25 (a) and stated:

"On the one side there is the consideration that comfort letters are not a formal decision. [...] On the other hand it is clear that comfort letters are intended in many ways to be equivalent to a decision. [...] It may be that what is intended by [the] guidance [of para 25 (a)] is that national courts are without further ado to treat comfort letters as being in their legal effect equivalent to a formal decision^\(^{36}\).

The Deputy Judge took the view that the letters were not comfort letters and stated that, even if they were, it would make no difference to his judgment. He consulted Bellamy and Child's "Common Market Law of Competition" and found that, in circumstances where a comfort letter had been issued stating that agreement merits exemption, the national court would strive to find a means upholding the agreement\(^{37}\).

He was however unclear as to how in such circumstances this validity might be upheld since he did not have to power to grant and exemption. He added that, in any event, there was no

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\(^{35}\) [1993] 2 C.M.L.R. 293, English High Court. This point was gratefully taken from Stevens, The Comfort Letter: Old Problems, New Developments, [1994] 2 E.C.L.R. 81, at 86.

\(^{36}\) Grounds 49, 50 and 51.

\(^{37}\) Ground 52.
agreement in Community law as to the effect of comfort letters. The Deputy Judge closed the discussion by holding that the defendants had a real prospect of succeeding in contending that part of the agreement was void under Article 85 (1). This was the case whether or not the letters were comfort letters.

See also another English case Fyffes PLC v Chiquita Brands International PLC. The parties sought interlocutory injunctions. A complaint had been lodged with the Commission and a Statement of Objections had been issued stating that the Commission intended to take a decision stating that Article 85 and 86 had been infringed.

The High Court held that although the English courts would attach great weight to a decision by the EC Commission, even if provisional, it was not bound to accept a provisional decision as conclusive of the applicability of Article 85 and 86. Accordingly, pending final decisions, the courts should take their own view as to how best to regulate the position of the parties. Indeed, the Commission and the Community Court's own assessment of the application of Article 85 and 86 might be assisted by a preliminary decision of the national courts, which through the process of discovery and cross-examination was well placed to find the facts. This would avoid any risk of conflict between the English court and the Commission or the Community Court. This approach is entirely different from that suggested by the Community Court in Delimitis.

There have been other English cases, however, where a stay was granted pending a Commission decision. See, for example, British Leyland v Wyatt Interpart, and MTV Europe v BMG Records UK Ltd and Others.

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38 Ground 54.
40 [1979] 3 CMLR 79.
In *Iberian UK Ltd. v BPB Industries plc*[^2], the effect of a Commission decision was considered fully by Laddie J. The Commission had fined the defendants earlier and its decision had been confirmed by the Court of First Instance and the Community Court[^1]. The proceedings before the Chancery Division of the High Court were brought by the plaintiff seeking damages for the harm caused by the defendant's conduct. The plaintiff sought to rely upon the decision of the Commission but the defendants maintained that the case should be proven in the manner normally applied in domestic proceedings by adducing evidence of a dominant position and abuse of that position. A preliminary trial was set up to determine the significance of the Commission's decision and the subsequent appeals[^4].

In his judgment, Laddie J cited *Delimitis* and concluded that the court should take all reasonable steps to avoid conflict with a Commission decision or judgments on appeal therefrom. He continued by stating that this principle applies not only in cases where a domestic court is dealing with a case in which the Commission has adopted a decision but also where the Commission has yet to reach a decision. The courts should not interpret the rules of procedure in a way which will give rise to inconsistent


[^4]: The preliminary issues ordered to be tried related to:

a) whether the findings of fact and the conclusions as to the interpretation and applicability of Article 86 set out in the Commission's decision, the opinion of the Advocate General and the judgments of the Community Courts were admissible in the national proceedings

b) Whether the decision, the opinion and the judgments were conclusive as to those facts and conclusions.
results in relation to competition issues".

Consequently, the findings of fact and law reached in Commission decisions and judgments on appeal therefrom were held to be admissible and conclusive "at least to the extent that an undertaking has been found guilty of an infringement by the Commission and that decision has been upheld on appeal"".

8.3.2. The principle of cooperation between national courts and the Commission

"BEMIM v Commission" is an interesting case", not only because it is an example of decentralised enforcement of EC competition law at work, but also because it concerns parallel involvement of national courts, national authorities and the Commission, as well as cooperation between the Commission and national administrations in the same case.

In this case the Community Court confirmed the Commission's decision not to pursue SACEM's charging of unfair royalties to French discotheques on the ground of lack of Community interest in a problem that was confined to France. Proceedings had already been brought in domestic courts.

The Commission had investigated the case, although the only EC competition concern involved the marginal competition between discotheques situated on either side of the border between France and Belgium. The Community Court had ruled, on a reference from

15 Whish, The Enforcement of EC Competition Law in the Domestic Courts of Member states, Current and Future Perspectives on EC Competition Law, 14 European Monographs, 1997, ed Gormley, Chapter V, p. 84.

16 Green and Robertson, Commercial Agreements and Competition Law, 1997, p 333.


18 The idea of using of this case to illustrate the issues discussed in this section has been gratefully taken from Marenco, The Uneasy Enforcement of Article 85 EEC as between Community and National Levels, [1993] Fordham Corporate Law Institute, p 622.
a French court under Article 177, that, in order to decide whether SACEM's royalties constituted abuse, a comparison with royalties charged in other Member States would be necessary. The Commission subsequently drew up a table of comparisons and a report which it sent to the French Competition Authority and to the French courts and left it to them to draw the conclusions. The French competition authority condemned the pricing policy and some French courts have already followed this decision.

The comparison between the royalties in different Member States had been a difficult exercise and was indeed easier for the Commission to draw up than it would have been for a national court. Since the case was confined mostly to a single Member State, it was logical too that the national authorities made the decision.

The case demonstrates some positive aspects of cooperation between the Commission and national courts and of enforcement of EC competition law at national level. It may be that assistance from the Commission will be requested more frequently as the benefits become better known. As mentioned at 5.7. above, an exception may be formed by the English courts as those are reported to be reluctant to seek the Commission's views. Where such views have become evident from documents, such as correspondence, the English courts may take note of them but they do not seem to have accepted that the view binds. In cases of doubt about the legal principles, courts are more likely to refer under Article 177 to the Court of Justice".

As mentioned at 5.7. above, a Commission official said in February 1998 that, during the last three years, the Commission has received some twelve requests for assistance and it has dealt with most of them speedily so as to not delay the domestic proceedings for too long.

It is submitted that, provided national courts are willing and able by virtue of their domestic laws to consult the Commission in a timely manner, the cooperation procedure may help a speedier and less haphazard enforcement at national level. For

"Green and Robertson, Commercial Agreements and Competition Law, 2nd ed. 1997 at 331 and 332."
an example of delays that could have been avoided had the Commission been consulted, see the Van Marwijk case, discussed at 5.7. above.

8.4. Evaluation

At the moment, there is still potential for chaos. Some decisions from national courts are marked by a lack of experience and a wrong or insufficient understanding of Community principles such as direct effect and supremacy of EC law established in case law of the Community Court. The possibility to enforce essentially pro-competitive agreements by interpreting the prohibition of Article 85 (1) more narrowly and by applying economic analysis is still largely unknown. Although posing serious obstacles to a widespread decentralised enforcement of EC competition law, these problems may be resolved in time.

Structural factors, however, such as differences in the organisation of jurisdiction of ordinary national courts in the different Member States as, for example, in Germany, Spain and Italy, are likely to remain. Nevertheless, there are clear indications that courts are adjusting to the idea of applying Articles 85 and 86 and that business are becoming more aware of the possibility to enforce EC competition law in private litigation.

This leaves the fundamental problems resulting from the trifurcation of Article 85, discussed at chapters 5 and 6 above. Here some comfort can be drawn from the fact that the Commission has become much more transparent in respect of its policies and priorities in recent years. More importantly, it has become more receptive to criticism and proposed change. Commissioner Van Miert, explicitly wrote in the introduction to the 1996 Competition Report that the EC competition law policy was now:

"to amend Community law as to bring it more into line with economic reality, both as regards merger control, the conditions under which Article 85 and 86 are applied, and the monitoring of state aid".
More than a year earlier he had already stated:

"as the single market becomes a reality, a shift in emphasis is taking place in the application of Article 85 (1). In the past, more attention was given to the legal vetting of contractual clauses which might have restricted the freedom of trade and consequently impeded the development of a single market. This was a reason for the great importance attached to vertical restrictions. But as time goes on, a more and more structural approach is emerging [...] in handling individual cases we must be careful that the competitive structure of the markets does not suffer®°.

So far, however, the Commission has not shown a change in its current practice. Its decisions in Langnese and Schöller and in other cases concerning exclusive distribution agreements for prestigious perfumes®¹ all demonstrate a continuation of the formalistic freedom of action approach which requires agreements containing a restriction of conduct to be exempted rather than cleared. No analysis of the market was attempted before finding that the agreements infringed Article 85 (1). Moreover, the developments involving the Green Paper, discussed at 6.3.2. above, seem to indicate that the Commission may not in the foreseeable future reverse its current practice fundamentally.

Nevertheless, the judgments of the Community Courts in Delimitis and the ice cream cases should provide a sufficient and authoritative basis for enhancing decentralised enforcement of EC competition law by national courts. If the Commission is truly in favour of sharing the application of Articles 85 and 86 with national courts, it should embrace the doctrine, follow the precedents of the Community Court and encourage national courts to do the same.

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9. EVALUATION, CONCLUSION AND RECOMMENDATIONS

9.1. Evaluation of decentralised enforcement by national courts

Today, despite active encouragement by the Commission, there is still little enforcement of EC competition law at national level. Although a major drive behind the current urge for decentralisation is simply the Commission's incapacity to handle its workload and to reduce its backlog of pending cases, a widespread decentralised enforcement is clearly merited on other, more fundamental, grounds.

A Community-wide network of enforcers would increase compliance with Articles 85 and 86 which, in turn, will enhance the competitiveness of the European industry and facilitate a more streamlined development of EC competition policy in line with the Community's economic changes and the challenges that lie ahead. The scenario envisaged is as follows.

Increased enforcement at national level would enable the Commission to focus on the areas in which it has exclusive competencies such as the control of State aid, State measures, and large mergers. In respect of Articles 85 (1) and 86, where it does not have exclusive competence, it could determine its priorities by evaluating the Community interest. This would leave it to concentrate on important cases which have a major economic or legal impact, thereby enabling it to develop and steer EC competition policy into the new millennium. In respect of the latter task, the national courts would play a complementary role: once a problem has been eliminated by the Commission, subsequent questions of contractual performance or of damages can dealt with by the national courts.

As a result of Automec II, the Commission may refuse to

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1 Although increased reliance on Articles 85 and 86 in national courts has led to more settlements.

intervene in respect of competition problems that have no Community interest. These would include cases whose main thrust lies in the territory of a single Member State: the "national cases". Unlike cross-border cases, these cases are not complicated by obstacles of private international law such as the costs and delays involved in obtaining evidence, issuing orders, and enforcing the judgment in other Member States.

It is in respect of these cases having no Community interest that national courts (and national authorities) could play a central role and truly form an alternative forum for the enforcement of EC competition law. According to the Commission, they may be even better placed to deal with the matter. Where it is important to clarify the law, the Commission might decide to intervene in one case to provide a precedent for national courts (and authorities).

Such a development, together with the fact that the Commission lacks certain powers that national courts possess make a decentralised enforcement of EC competition law increasingly desirable and necessary. The advantages seem to outweigh the risk of divergent or inaccurate applications which, in any event, can be controlled to some extent through Article 177 references and individual decisions by the Commission. Arguments against decentralisation through national courts seem to have lost their relevance since, a result of Automec II, it has become unavoidable.

For a decentralised enforcement to work efficiently, national courts will have to be able to enforce competition law fully, without restrictions or stumbling blocks. There are major obstacles, however, originating both at national level and at EC level. It is submitted that these problems constitute the main reason today why national courts are still not widely enforcing EC competition law. Moreover, unless steps are taken, these obstacles are bound to increase the Commission's workload further and prevent national courts from taking on the ambitious role envisaged for them in the scenario described above.
9.2. Differences in domestic procedural laws of the Member States

The full enforcement of EC competition law by national courts necessarily requires heavy reliance on domestic procedural rules as those govern the proceedings and the consequences of an infringement. These rules vary considerably in each Member State and this may lead to different levels of protection and enforcement in different Member States thereby hampering a uniform level of enforcement throughout the Community.

9.2.1. Proposed solution

It is submitted that there is a need for specific Regulations or Directives under article 87 (2) (e) Article 100 or 100 A of the Treaty to harmonise the most important substantive procedural rules of the Member States relating to time limits, discovery, evidence, severance and remedies in EC competition law cases. The various compliance Directives adopted in the field of public procurement could form an exemplary precedent. Common procedural rules for pleading claims of damages and its quantification are particularly desirable. The current uncertainty may be the main reason why cases where damages have been awarded are still extremely rare.

9.3. Overlap with domestic competition law - possibility of conflict

Domestic competition laws are, with the exception of Italy, not normally limited in scope of application to cases with a purely national character. EC competition law, in turn, is not confined to pure cross-border cases. The juridical condition "may affect trade between Member States" as included in Articles 85 and 86 determines the scope of application of Community competition law.

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This condition has been interpreted widely enabling the Commission, by means of the vague "deflection of trade" and "structural" tests, to assert jurisdiction in almost any case it wishes and the Community Courts have rarely interfered with the Commission's discretion in this issue*. As a result, the boundaries between the different fields of application of Community competition law and national competition laws are blurred.

Simultaneous application of Article 85 or 86 and domestic competition law is, in principle, compatible with the rationale of EC law. With the exception of Italy, application of domestic law is not precluded in cases where EC competition law applies.

Conflicts that may arise as a result of the simultaneous application of the two sets of rules must be resolved by applying the principle that Community law takes precedence.

Consequently, overlap between the two systems is nearly always possible. The result is an extensive double control system or, in cases involving more than one Member State, multiple control system which is increasing with the adoption of advanced competition laws in all Member States. This increases the risk of conflict and hampers the decentralisation process, in particular, where an agreement or conduct is subject to an EC authorization and a domestic prohibition.

9.3.1. Effect of EC authorizations

The Community Court has not yet explicitly addressed this issue yet, but the current position seems to preclude national courts from applying prohibitions of domestic competition law to agreements that benefit from an individual exemption^ or a block exemption Regulation®. In fact, national courts may have to set

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® Most recently expressed in the opinion of Advocate General Tesauro in Bayerische Motorenwerke AG v ALD Auto-Leasing D GmbH, case 70/93 [1995] E.C.L.R. I 3459, and Bundeskartellamt v...
aside the prohibiting provisions of national law and enforce an agreement by virtue of the principle of supremacy of EC law.

It is submitted that, should this position be confirmed, the consequences of comfort letters that close the file by stating that the agreement merits exemption are ultimately the same since, in the majority of cases, the recipients of such letters can insist on the Commission replacing such comfort letters by a formal exemption decision.

Automec II implies that parties are entitled to insist on the Commission reopening the file and adopting a formal decision involving Article 85 (3) in respect of which the Commission enjoys exclusive competence.

Additionally, the Commission has indicated on several occasions that it considers it is bound by the views expressed in its comfort letters unless the circumstances have changed to a major extent or it had based its comfort letter on wrong information.

The judgment in Automec was confined to the application of EC competition law only, but it is submitted that the same principle should apply in cases where an agreement is challenged under domestic competition law. If formal exemptions from Article 85 (1) amount to exemptions from domestic prohibitions, it would be unfair to distinguish between parties that benefit from such an exemption and those that would have received one had the Commission not closed its file.

Should the Community Court confirm the above positions, the consequences are momentous both for national courts and the Commission.

First, when the overriding effect of individual exemptions and block exemptions over the domestic competition laws of the Member States becomes better known, it may lead to companies increasingly notifying for individual exemptions. This would result in an increased workload for the Commission which, ironically, it attempts so hard to avoid by encouraging

Volkswagen AG and VAG Leasing GmbH, case C 266/93, of 22.11.94, [1996] 4 C.M.L.R. 505 delivered on 8.6.95, paras 38 - 41 and 51 respectively.
decentralised enforcement of EC competition law by national courts.

Secondly, the importance of block exemptions may increase as those may have a similar protective effect against domestic competition law as exemptions. More firms will try even harder to fit within their strait-jacket provisions.

It is submitted that this is an unfortunate development as it may impoverish and stifle the development of EC competition law as well as its decentralised application by national courts. Moreover, it may again lead to an increase in notifications since many agreements, especially new ones involving new products, services or technologies, may not lend themselves to be forced within the legistic provisions of one of the block exemptions.

National courts will have to interpret block exemptions narrowly as ruled in *Delimitis*. A single clause that goes beyond its scope may remove the benefit of the block exemption in its entirety. Again this would induce firms to notify, thereby increasing the Commission's workload, hampering decentralisation, and frustrating national courts. The exemptions for vertical agreements contemplated in the Green Paper may not be drafted in the same manner but that does not diminish the more general drawbacks of reliance on block exemptions.

Block exemptions alter the nature of the exercise of national courts from an economic analysis to the application of legal rules. It might be argued that at least decentralisation will then be effectively and uniformly achieved but it is questionable whether this should be done at the expense of "an economic appreciation of how anti-competitive conduct operates".

Should such a legistic checking of individual clauses of an agreement against the provisions in a block exemption become routine, it will be much more difficult for national courts to perform an economic analysis of the effects of an agreement as

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a whole, as advocated below at 9.4.3.2. under C, in cases not involving a block exemption or where Article 86 is relied upon.

The economic analysis involved in applying EC competition law is bound to be difficult for most national judges since few are familiar with economic thinking. It is submitted, however, that genuine decentralisation, in the sense that the principles of Community competition policy are to be applied at domestic level, implies that national courts should not be restricted and stifled in their application of the rules but instead, encouraged, educated, and assisted to enforce EC competition law in its entirety, as a mature forum, next to, and in close cooperation with, the Commission.

This leads to the substantive application of Articles 85 and 86 by national courts which is evaluated in the subsequent sections but first some conclusions should be drawn on potential for conflict between domestic and EC competition law.

9.3.2. Proposed solutions

Having assessed the potential for dual application of domestic and EC competition law and the consequences of EC authorizations for national courts and the Commission, the conclusion must be that the current situation is far from satisfactory. Three factors, preferably applied in combination, could alleviate the problems outlined above.

9.3.2.1. The soft harmonisation process

First, there is the soft harmonisation process of the domestic competition laws of the Member States towards laws similar to Articles 85 and 86. Provided this process will continue also as regards the interpretation and application of the national provisions, the possibility of conflict with EC competition law may be reduced.

The problems involving the overlapping of the two systems still remain, however. Undertakings may still be tried twice or more, depending on how many Member States are involved, owing to
the multiple shop approach in all situations except where there are EC authorizations based on Article 85 (3).

Moreover, the risk of conflict will not be eliminated. Owing to differences in philosophy between the two systems and "antitrust law being a shifting mixture of legal principles and economic and government socio-political value judgments" global, the outcome may be different at EC level and at domestic level despite the substantive similarity of the rules. This bring us to the second factor.

9.3.2.2. Narrowing the scope of domestic competition law

Secondly, now that the soft harmonisation process has affected nearly all Member States, it may be appropriate to reconsider the double barrier theory resulting from the overlap between EC competition law and domestic competition law. This could be done by narrowing the scope of the domestic competition laws to cases of a truly national character having no appreciable effect on trade between Member States.

The Italian Competition Act 1990 expressly includes reciprocal exclusivity by stating that its provisions shall in principle apply only to cases which do not fall within the scope of corresponding EC rules. When determining whether a practice falls within the scope of EC law, the only element to be verified is whether it may produce an effect on trade between Member States. The Act thus effectively makes room for EC competition law in cases where overlap used to exist. The Act also avoids the risk of inconsistent enforcement of domestic and EC competition law, thanks to substantive provisions that are modelled on EC competition law and require interpretation in accordance with it.

The advantages of this approach are clear. It reduces the possibility of overlap and conflict between the two sets of rules as well as the uncertainty involving a two-stop shop approach.

Pavesio and De Rosa, The application of Article 85 and 86 of the EC Treaty by national courts in the Member States, a comparative report compiled by Braakman, published by the Commission DG IV, July 1997, Italian section, introduction.
One drawback is, however, that it involves a heavy reliance on the concept of "trade between Member States". It will therefore work efficiently only if the Commission and the Community Court would clearly determine at which point they consider the application of Articles 85 and 86 to stop and that of domestic law to begin. This point should be defined more clearly by means of a clarification of the "deflection of trade" and "structural" tests currently applied to determine whether trade between Member States is, or may be, affected. The new Notice on agreements of minor importance may help to some extent to determine the line below EC competition law will not be applied by the Commission, see 9.3.4.2. under A, below.

Another drawback of the Italian option is that it requires the Member States to give up a substantial part of their domestic competition law in favour of EC competition law, an area in which the Commission enjoys concurrent competencies and a monopoly in respect of Article 85 (3) which, as demonstrated at 9.4.1. below, may determine the outcome of private litigation in parallel proceedings decisively. This may be difficult for Member States to accept unless they get something in return.

This could be done by introducing a system of exclusive competencies which would confine the Commission's competence to cross-border actions and that of national courts (and national authorities) to national cases falling within the scope of EC competition law. This would be in line with the scenario of a decentralised enforcement outlined above.

It is submitted, however, that such a division of competencies could only be realised if the exemption monopoly of the Commission is changed by enabling national courts to apply Article 85 (3) to cases in which they should provide a one-stop-shop. Such exemptions would, however, only apply within the territory of a single Member State. Moreover, the Commission is not likely to give up its exemption monopoly and we are therefore left with only one option which, it is submitted, should be

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employed regardless of whether or not the scope of application
domestic law would be reduced along the lines of the Italian
scenario: a narrowing of the current wide interpretation of the
scope of EC competition law. This option, in the form qualified
below, constitutes the third and final factor.

9.3.2.3. Narrowing the substantive scope of Article 85 (1)

Third, overlap could be reduced by narrowing the scope of EC
competition law. It is submitted, however, that a reduction of
the scope of all the conditions of application of EC competition
law would be too far-reaching and contrary to the principles of
a common market and a widespread decentralised enforcement of EC
competition law. Although it would reduce the amount of overlap
with domestic competition law, it would do so by reducing the
application of EC competition law, by national courts and the
Commission. It would enlarge the field occupied by domestic law
with its multiple controls and differing treatments of the same
situation under different laws.

The idea of a narrower scope of EC competition law should
therefore be qualified by focusing on the specific problems, i.e.
those hampering a decentralised application of EC competition law
and those posing a risk of conflict between EC and domestic
competition law, notably between EC authorizations and domestic
prohibitions. These problems relate to Article 85 and not Article
86.

A distinction should be made between the jurisdictional
scope of Articles 85 (1) and 86, involving the concept of "trade
between Member States" on the one hand, and the substantive scope
of Article 85 (1), involving the condition of "restriction of
competition" on the other.

Whilst the wide jurisdictional scope of Article 85 (1) and
Article 85 involving the broad concept of "intra-Community trade"

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11 EC authorizations are not possible under Article 86 and
the decentralised application of Article 86 poses no
jurisdictional problems for national courts. They have the power
to apply the Article fully.
should be maintained but clarified, the substantive scope of Article 85 (1), the concept of "restriction of competition" urgently requires narrowing. Once an agreement is considered to fall within the jurisdictional sphere of application, there should be more room for analysis in deciding whether or not the prohibition of Article 85 (1) actually applies. This option is explained in detail at 9.4.3.2. below.

As more agreements are treated as not infringing Article 85 (1) there would be fewer EC authorizations and, instead, more "positive clearances" involving an assessment of the agreement under Article 85 followed by a finding of compatibility. This would reduce the risk of conflict and the drawbacks of EC exemptions, including the need for the Commission to formalise comfort letters stating that the agreement merits exemption and the need for business to distort an agreement to come within a block exemption.

This option would permit the Commission and the Member States' national courts and authorities to share more efficiently the responsibility for enforcing EC competition law in the Community, especially if combined with a reduction in the scope of domestic competition law in the form of the Italian model or by granting "positive clearances" the same overriding effect as individual or block exemptions. Such combinations are unlikely to occur, however, as they require substantial changes in domestic and EC legislation respectively.

The adoption of a narrower interpretation of the substantive scope of Article 85 (1) in isolation, however, is a realistic possibility and would alleviate many of the problems described in this chapter. It would not require any changes in legislation nor affect the Commission's exemption monopoly. It would reduce the Commission's workload in that fewer exemptions would be

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14 Waelbroeck, see footnote 12 supra.
needed. It would enhance the discretion of national courts to
deal with cases under Article 85 (1) more fully and reduce the
risk of parallel proceedings involving the Commission which
causes the problems discussed in the next section.

9.4. The substantive application of Article 85 by national courts

The current practice of the Commission is to treat most
agreements containing a restriction on conduct as caught by
Article 85 (1) and requiring exemption to be enforceable. The
granting of exemptions under Article 85 (3) is an area in which
the Commission enjoys exclusive competence with the result that
there is very little scope for enforcement at national level.

The Commission is blocked by its own notification system:
it lacks the capacity to adopt decisions in all individual cases
notified to it.

The result is that both the Commission and national courts
are prevented from taking the steps necessary to achieve a wider,
decentralised enforcement of EC competition law. If this is added
to a lack of consensus and consistency in the Commission and the
Community Courts on the substance and application of the rules,
it is understandable that enforcement at national level is still
rare today. 

9.4.1. The Commission's exclusive power of exemption

National courts can enforce agreements that require exemption
only if they benefit from an individual or block exemption. Where
the agreement is notified or exempt from notification, the court
is stuck: cannot enforce the agreement on the basis that Article
85 (3) would apply since this is an area reserved for the
Commission; can, but should not bluntly apply Article 85 (1) and
(2) as this may conflict with a subsequent Commission exemption

Paulis, personal views expressed in panel discussion on
decentralisation of enforcement of EC Competition law, Robert
Schuman Centre Annual on European Competition Law 1996, ed
Ehlermann and Laudati, 1997, p 98.
having retroactive effect.

Although interpreted narrowly, agreements exempt from notification may include many of the "national cases", the very cases for which the national courts should be the preferred forum. In respect of those agreements, the parties can seek an exemption with retroactive effect from the date of its existence without having to notify first.

Consequently, the possibility of an exemption for the future always exists, even in cases that are not notified or exempt from notification, because the parties may decide to notify during the domestic proceedings or even after a judgment has become res judicata.

The question for national courts of how conflict with a future Commission decision should be avoided was addressed by the Community Court in Delimitis. The Community Court held that the national court must adjourn in all cases where a conflicting Commission decision is possible.

In the current position, a national court will also have to stay proceedings when faced with a comfort letter stating that the agreement merits exemption regardless of whether or not the court takes the same view as stated in the letter and despite the fact that such letters are considered not binding.

The national judge cannot disagree with the letter by bluntly enforcing the prohibition of Article 85 (1) and apply Article 85 (2) as this would bring the parties in possession of such a comfort letter in a worse position than parties who have notified their anti-competitive agreement but have not received a comfort letter or Commission decision yet. Moreover, Delimitis prescribes that a national court is only allowed to proceed if the agreement may on no account be the subject of an exemption decision under Article 85 (3)". It was submitted at 9.3.1. above that the chances of forcing the Commission to reopen its file and issuing a formal exemption decision are real for parties in possession of such comfort letters.

The national judge cannot enforce the agreement on the basis that it is clearly exemptible either as, under the current position, this concerns the area of Article 85 (3) in which the
Commission enjoys exclusive competence. It is submitted that the result is a purely formalistic stay (see below, 9.4.3.1.).

9.4.2. Drawbacks of a stay of domestic proceedings in parallel proceedings

Having to stay proceedings in cases where the Commission might exempt and, indeed, in all cases where a conflicting decision is possible does not particularly encourage national courts. It deprives them of their power and independence to apply EC competition law, whilst at the same time, it reinstates the Commission's dominance in enforcing EC competition law. It hampers a swift and effective decentralised enforcement of EC law. The need to adjourn makes litigation slower and more hazardous for the plaintiff. For the Commission, it increases its workload and the pressure to deal with notified cases fast and, in the cases of exemptible agreements, by way of decision. This is contrary to its current practice.

Parallel proceedings are still rare and it has been argued that the problems discussed in respect of agreements meriting exemption and benefitting from comfort letters to that effect are academic and should not be so much stressed.

As submitted at 9.3.1. above, however, notification has become more rewarding than ever as a result of the one-stop-shop protection against stricter domestic competition law of individual exemptions and, possibly, comfort letters stating that the agreement merits exemption.

The delay it causes in the domestic proceedings and the fact that it may determine the substantive outcome decisively, may also make notification attractive in some cases.

Notification may no longer have the deterring effect on firms of risking the prompting of an investigation, perhaps of a wider or different scope. This risk has become very small as a result of the Commission's priority policy, especially in respect of "national cases". The Commission itself has said that it will deal with those by way of comfort letter. Firms may feel more encouraged to notify than ever before and the number of
parallel proceedings may therefore increase at the same rate as the number of private proceedings.

9.4.3. Proposed solutions

9.4.3.1. Courts should be able to enforce comfort letters stating that the agreement merits exemption

It is submitted that national courts should be able to enforce agreements benefitting from comfort letters stating that the agreement merits exemption. National courts, should stay proceedings and refrain from enforcing agreements benefitting from comfort letters only in cases where they disagree with their contents, consider the circumstances to have changed, or where problems relating to third parties arise.

This would save the Commission from having to reopen the case as a result of Automec II and having to waste its resources by looking at the agreements twice, unless circumstances had changed to a major extent (see 9.3.1. above).

It may be argued that the modifications needed to enable national courts to enforce comfort letters would require too many resources because comfort letters will have to be made more carefully, at high level, accompanied by sound reasoning and they will have to be published. It is submitted, however, that this argument cannot be used any longer since the Commission has declared itself bound by the views expressed in its comfort letters. The modifications referred to above are therefore needed in any event because the Commission is not allowed to consider the issue more carefully a second time around and, on that basis, to change its mind.

This solution does not change the fact, however, that the Commission will still have to consider such non-significant agreements the first time around when deciding to grant the comfort letter.

Another, perhaps better, way to enforce agreements that merit exemption would be bluntly to disregard any comfort letter to that effect and to enforce the agreement on the basis that it
falls outside Article 85 (1). This brings us back to the central issue, already proposed at 9.3.2.3. above: the need for a more flexible and narrow interpretation of the substantive scope of Article 85 (1).

9.4.3.2. A narrower interpretation of the substantive scope of Article 85 (1)

Rather than continue to monitor all agreements restraining conduct significantly, a better solution for the Commission would be to reduce the need to notify those types of agreements that have no particular economic or legal significance. The Commission says itself in the Notice on cooperation with national courts that it will normally deal with those agreements by way of comfort letter, in other words: it will normally tolerate such agreements. Narrowing Article 85 (1) would reduce the need to notify agreements and for the Commission to prepare comfort letters.

It is submitted that such interpretation of Article 85 (1) should not lead to an automatic exclusion from its scope of all cases not having a Community interest or all cases that are, on balance, pro-competitive as under a US-style rule of reason.

Instead, it would involve a new policy under Article 85 (1) involving more discretion for national courts in deciding whether or not Article 85 (1) applies on the basis of a thorough economic analysis. There would be a shift from the "freedom of action" approach to the "economic effects" approach. In other words, it would require a consideration of the real impact of the agreement as a whole on the market rather than a legistic focusing on restrictive clauses. Inter-brand competition and efficiencies created by vertical restraints would be emphasised more. Intra-brand competition would become important only in case of insufficient inter-brand competition at production and/or retail level. The emphasis on market shares would be reduced in case of insignificant market players.

This option would have the largest impact on vertical agreements as a result of the shift from the effects of the
restrictive clauses as between the parties to its effect on the market i.e. third parties. Many more agreements could be considered to fall outside the scope of the prohibition.

It is submitted that the implementation of this new approach might not cause major problems at national level because the Member States are already familiar with it. During the European Competition Forum of April 1995, the national authorities of all Member States have advocated a more economic approach and told the Commission that its current position as regards "the application of Article 85 (1) to vertical restraints was in error".

The argument against a narrowing of the scope of Article 85 (1), has long been that national courts would then have to make the complex evaluations under Article 85 (1) currently done by the Commission under Article 85 (3) which would lead to inconsistent or inaccurate decisions. It will be illustrated in the next section that binding case law of the Community Court already prescribes a full analysis whenever an agreement is not manifestly anti-competitive or falls outside a block exemption.

National courts will have to get used to making or assessing sophisticated economic analysis in any event, not only under Article 85 (1), but also in parallel proceedings when they apply Article 85 (3) negatively to assess whether the agreement may be exempted by the Commission and, finally, when applying Article 86.

9.4.3.3. The options proposed by the Commission

The Commission has accepted that it is necessary to reduce the need to notify. It is exploring various options and this has resulted so far in a new Notice on agreements of minor importance and a Green Paper on vertical restraints.

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A. The Notice on agreements of minor importance

The Notice\textsuperscript{17} represents a first small step of the Commission to reduce the need to notify by abolishing the turnover thresholds and, in respect of vertical agreements, by raising in the market share ceiling below which it considers Article 85 (1) not to apply from 5 to 10\%. This Notice is useful for national courts in that it clarifies and narrows the substantive scope of Article 85 (1) to a limited extent by stating where the Commission considers the prohibition of Article 85 (1) not to apply and by expressly limiting the Commission's discretionary powers to intervene to cases exceeding the thresholds.

A drawback of the Notice, however, is that, although it excludes agreements between small and medium sized undertakings, it still catches insignificant agreements between small companies and large market players. Many such agreements are bound to fall outside Article 85 (1) as well.

Another drawback is the non-binding effect on the Community Courts which have not endorsed the quantitative approach of the Notice in their judgments. More importantly, the Community Courts consider the Notice in isolation, with its heavy reliance on market shares and thus market power, no proper basis upon which to decide in isolation whether or not an agreement comes within Article 85 (1). When having to make such a decision whether or not Article 85 (1) applies, national courts are still severely hampered by the Commission's current "freedom of action" approach.

B. Block exemptions

A second option to reduce the need to notify is the introduction of simpler and broader group exemptions. This has been proposed in the Commission's Green Paper as an option for vertical agreements. Although helpful in the short run, it is submitted that increased reliance on block exemptions would relieve only

\textsuperscript{17} O.J. [1997] C 372/13.
part of the problems since it still implies a heavy reliance on Article 85 (3) and involves the major drawbacks mentioned at 9.3.1. above.

Additionally, if block exemptions are to increase legal certainty they should not include a market share ceiling (in this case 40%) beyond which they cease to apply as proposed in the Green Paper. If the Commission wants dominant companies not to benefit from a block exemption, it should use Article 86 in cases where the agreement is anti-competitive.

C. A narrower interpretation of Article 85 (1)

The final option in the Commission's Green Paper resembles the option proposed at 9.3.2.3. and 9.4.3.2. above in several respects. It proposes a rebuttable presumption of compatibility with Article 85 (1) for parties to vertical agreements with less than, for instance, 20% market share in the contract territory. This "negative clearance presumption" would cover all vertical restraints except those relating to minimum resales prices, impediments to parallel trade or passive sales, or those contained in distribution agreements between competitors. The presumption of compatibility could be rebutted by the Commission on the basis of a full market analysis. The idea underlying this option is to implement the economic analysis of vertical restraints by legal instruments setting out the economic criteria designed to determine the market conditions in which Article 85 (1) would apply.

Although welcome, a drawback of this option is that it still relies heavily on market share thresholds. It reduces the importance of economic analysis for cases below the 20% threshold to only those cases where the presumption of negative clearance is attacked or can obviously be rebutted. In other cases national courts will tend to enforce agreements automatically without any economic analysis. Moreover, by attributing the power to rebut the presumption to itself, the Commission seems to deny the national courts the possibility of making an economic analysis even in those cases where the presumption is challenged in
private litigation by claiming an infringement of Articles 85 (1).

The option also does not require the use of an economic analysis to cases exceeding the threshold which implies that these all require exemption. The Green Paper refers explicitly to block exemptions but these may include a 40% market share ceiling. It seems, therefore that a market analysis may confined mainly to cases exceeding the 40% threshold.

Should the fourth option be adopted, it is submitted it should take the form of a non-binding Commission Notice rather than a Council Regulation as ultimately foreseen in the Green Paper. Where enforcement of agreements is appropriate, national courts could follow the Notice whilst in cases where the legality of the agreement is challenged, the court will be able to make a full assessment before enforcing or condemning it, thereby avoiding Commission involvement in insignificant agreements.

Although the Green Paper praises an economic test and recognises that analysis should concentrate on the impact on the market rather than the clauses of the agreement, the Commission nevertheless maintains that economic theory cannot be the only factor in the design of policy and regard must be had to existing jurisprudence. Moreover, it still takes the view that absolute territorial protection, preventing parallel trade, and resale price maintenance necessarily have the object or effect of restricting competition, irrespective of the amount of inter-brand competition in the market and whether or not a dealer is required to incur risky, sunk costs and needs protection from free riders.

The positive side is that it demonstrates that the Commission is rethinking its formalistic "freedom of action" approach. Although it is submitted that the best solution would be to bluntly replace the "freedom of action" approach with the "economic effects approach" without any market share threshold or negative clearance presumption, the implementation of this final option of the Commission's Green Paper would nevertheless be a welcome step.
It remains to be seen, however, whether this policy change will ever be implemented by the Commission. The result of the Green Paper will have to be awaited but the option currently most favoured seems a preservation of the status quo, be it more flexible by virtue of the introduction of new, wider, block exemptions for vertical agreements.

The conclusion must be that, although in the last few years the Commission has become receptive to change and some officials are even publicly in favour of changing the scope of Article 85 (1), the current methodology in enforcing the rules has remained virtually unchanged. The Commission has maintained a wide interpretation of Article 85 (1) combined with a regulatory approach of laying down the types of agreements and detailed clauses that would, or would not, be permitted. So far, no significant steps have been taken to remedy the problems hampering an efficient decentralised enforcement of EC competition law by reducing the scope of Article 85 (1) and it may well refrain taking any in the future.

It is therefore more important to focus on the Community Courts, rather than the Commission to resolve the main problems hampering a decentralised enforcement of Article 85.

9.4.3.4. The option provided by the Community Court

The Court of Justice, like national courts unable to grant exemptions, has already started the process of a more flexible application of Article 85 (1) by emphasising economic analysis. The Court has begun to develop the meaning of "restriction of competition" referred to in Article 85 (1), moving towards a narrower meaning of this phrase on the basis of a full market analysis thereby taking many common agreements outside Article 85 (1).

In doing this, the Court in Delimitis developed the doctrine of "full market analysis". Under this doctrine, it is not necessary to consider the individual restrictive clauses in the agreement. Instead, it requires agreements to be appraised in their economic as well as their legal context to see whether they
would have the effect of restricting competition. A full analysis of the market is necessary to see whether the market is foreclosed and if so, whether the agreement in issue contributes significantly to that foreclosure.

As mentioned at 9.3.1 above, the judgment in Delimitis strongly reinforced the Commission's exclusive powers in respect of Article 85 (3) by requiring a strict interpretation of block exemptions and by requiring courts to stay proceedings in all cases where exemption might be possible or where conflicting decisions might occur. At the same time, the Court enabled agreements to be assessed in a way resulting in few infringing Article 85 (1) and requiring exemption in the first place.

Since case law of the Community Court forms binding precedents for national courts, a national court can apply this doctrine too and make a flexible assessment, heavily based on economics, under Article 85 (1). It is submitted that national courts should rely on these doctrines, rather than on the often inconsistent analysis by the Commission, when asked to enforce a contract it considers not anti-competitive and hold that it falls outside Article 85 (1) rather than that it is exemptible.

The Commission may still take the less liberal view in which a group exemption may be necessary for several types of vertical agreements but, considering the issues raised in Automec II, it seems unlikely for the Commission to follow up a complaint or start investigations ex officio in respect of agreements that have already been enforced by a national court on the basis of Community Court case law but that in the Commission's view require exemption under Article 85 (3) to be enforceable. It would be a waste of resources because, in both views, the result would be the same: the enforcement of the agreement, either on the basis that it does not infringe Article 85 (1) or on the basis of an individual exemption. In the event of a negative Commission decision, there may be the possibility of a successful appeal provided the Community Courts continue to decide along the route of Delimitis.
The enhanced discretion of national courts could substantially reduce the Commission’s workload and facilitate a better decentralisation of EC competition law enforcement. Finally, the doctrine prevents firms from having to distort their agreements to come within a block exemption. It may be the case that many already rely on the doctrine and refrain from notifying their agreement to the Commission.

One drawback remains. The full market analysis required by Delimitis may prove difficult for national courts, being non-economists. The extent of the exercise may also be a bit of overkill in respect of "national" or "insignificant" agreements. A further judgment from the Community Court providing a rule of thumb, checklist, or truncated analysis would reduce this problem as well as the presentation by legal counsel of thoroughly compiled economic data and tightly written arguments rebutting or establishing market foreclosure along the guidelines established in Delimitis.

9.5. Other difficulties for national courts and proposed solutions

The complexity of EC competition law, its economic nature, the need to consider not only the dispute between the parties but the effects on the economy as a whole and on trade between Member States, the need to assess not only actual but also potential or hypothetical issues such as potential competition or an assessment of the situation in the absence of the infringing conduct (for example to quantify damages suffered) all pose serious stumbling blocks for ordinary national courts.

It is therefore regularly suggested that national authorities and specialised courts are more suitable to realise decentralised enforcement of competition law. But ordinary national courts play a vital role in protecting the rights of individuals harmed by infringements and they are the sole authority that can provide damages for losses suffered. Although the legal substance of their decision will be decisively influenced, they are not paralysed by the Commission starting
proceedings they way national authorities are. Moreover, national courts are bound to apply Article 85 and 86 whilst national authorities are not. The powers of national courts are so different from those of national authorities and the Commission that they certainly deserve to play an equal part in the enforcement of EC competition law, with assistance from and in close cooperation with the other two.

The problems described above could be alleviated in time by education, assistance, and experience. Competition law and its related economics certainly deserve a more prominent place in the law studies of the Member States' Universities. Today, however, there already is a growing number of practising lawyers and judges familiar with EC competition law. This development will continue with the rules being increasingly applied in domestic litigation. In the meantime, the Commission seems willing to provide assistance to national judges upon their request.

9.5.1. Database

A relatively simple measure that would counter the risk of differing or inaccurate interpretations by national judges and enable the Commission to identify and remedy areas in which the divergence is greatest, is to set up a database in which all decisions of all national courts in the Member States are compiled. The database, including translation services, would enable national courts to compare economic assessments made and decisions taken by other courts on similar issues when deciding a particular case. It could also help them in making a decision whether or not to make a reference for a preliminary ruling. This could facilitate a consistency-oriented approach by the judges themselves, not in respect of those areas where they are restricted by parallel proceedings before the Commission, but in respect of those areas in which they enjoy discretion.
9.5.2. EC-wide (Intranet) conferences for national judges

An additional option would be the organisation of annual conferences for national judges, preferably along the lines of the Annual European Competition Fora organised by DG IV, the annual proceedings of the Fordham Corporate Law Institute, or the Robert Schuman Centre Annuals. These conferences should be hosted by Commission officials and specialists and aimed at promoting and developing the Notice on cooperation with national courts, furthering cooperating with the Commission, and at comparing experiences and identifying problems encountered during the preceding year.

The difficulties in organising such conferences are immense, however. An alternative would be an "Internet conference", enabling the participants to submit their contributions and comments by e-mail. The text of the contributions and ensuing dialogue could be published afterwards. An Intranet set up by DG IV specifically for national courts would be a good vehicle for this purpose. An added benefit of an Intranet is that it would provide a means for a continuous dialogue and exchange of information between national courts and the Commission.

9.6. Conclusion and recommendations

This paper is an attempt to compile and assess the various problems national courts may face when asked to apply Articles 85 and 86. More generally, it discusses the intrinsic problems in respect of Article 85 that currently hamper widespread, efficient, independent, and decentralised enforcement. It also suggests a sensible use of the Commission's resources.

Although several problems are bound to remain, such as the differences between jurisdiction of ordinary courts in different Member States owing to the existence of specialised courts or the

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\textsuperscript{18} Goyder, suggested, in 1994, a one-off conference for judges to take place before 1996, discussing issues of the substantive application of Article 85 that hamper the efficient enforcement of EC competition law by national courts, panel discussion, [1994] Fordham Corporate Law Institute, p 594.
role of national authorities, and new problems will doubtless evolve once domestic enforcement becomes more widespread, the overall conclusion must be that the advantages of a wide and decentralised enforcement by national courts outweigh the drawbacks especially if some of the most pressing problems are addressed.

Years ago, Lord Denning spoke of EC law as an incoming tide. Perhaps the future challenges of EC competition law could be described in a maritime manner too:

Increased domestic enforcement could play an important role in the future shaping of EC competition law. It would enable the Commission to resume its position on the bridge of the ship, steering it through the rocky river of domestic enforcement, onto the deep waters of the ocean of economic change, through the challenging storms of globalisation and innovative technologies, and into the unknown territory looming at the horizon: the huge expansion Eastward, a territory which, it is submitted, may be riddled by hurricanes and tidal waves. It is hoped that by that time, the Commission will have strengthened the ship, thrown out excess ballast and secured the remaining load.

Bulmer v Bollinger [1974] Ch 401, Court of Appeal: "The treaty [of Rome] does not touch any of the matters which concern solely the mainland of England and the people in it. But when we come to matters with a European element the treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back".
My recommendations for a more efficient enforcement of EC competition law by national courts are:

First, the creation of a database containing all decisions made by national courts in the Community.

Second, the organising of annual conferences for national judges from the Member States, possibly via an Intranet.

Third, the adoption, in due course, of harmonising procedural rules governing the application and enforcement of EC competition law by national courts, especially as regards remedies.

Fourth, a clear division between the application of domestic and EC competition law to eliminate overlap, conflict and double or multiple controls. This could be realised by a combined introduction of three options; the first option is submitted purely for discussion whilst the second and third are strongly recommended:

a) a reduction of the scope of domestic competition law, either upward by confining its application to cases not covered by EC competition law, or downward by attributing a binding effect to the Commission's "positive clearances",

b) a clarification of the jurisdictional scope of Article 85 (1) through a more consistent interpretation of the condition of intra-Community trade, and

c) a narrower interpretation of the concept of "object or effect of restricting competition" which equals the sixth recommendation set out below.

Fifth, a confirmation by the Community Court of the power of national courts to enforce comfort letters stating that the agreement merits exemption, unless circumstances have changed to a major extent or the letter had been based on false information.
Sixth, a narrower interpretation of the substantive scope of Article 85 (1). This narrowing would not constitute a relaxation of the rules by automatically excluding large numbers of agreements from its scope. Instead, it would imply a new policy of assessment under Article 85 (1) in which, by means of a full market assessment as prescribed in Delimitis, the emphasis would shift from a formalistic focusing on restrictive clauses to an assessment of the impact on the market of the agreement as a whole.

Finally, guidelines should be issued by the Commission or in further case law of the Community Court to simplify the test set out in Delimitis.
<table>
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