THE JUDGMENT IN *DELIMITIS*—A MILESTONE TOWARDS A REALISTIC ASSESSMENT OF THE EFFECTS OF AN AGREEMENT—OR A DAMP SQUIB?*

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* An earlier version of this article with fewer comparisons with antitrust law was published in 5 EUROPEAN INTELLECTUAL PROPERTY REVIEW [E.I.P.R.] 167 (1992).

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The author wishes to thank Michael Baird of Fordham Law School for efficiently helping to adapt this article for an American journal, checking citations and much else. The remaining errors are my responsibility.

1. INTRODUCTION—THE BIFURCATION OF ARTICLE 85(1) AND (3) OF THE EEC TREATY

On February 28, 1991, the Court of Justice of the European Communities [hereafter called "the Court" or "the Community Court"] delivered judgment in the case of *Stergios Delimitis v. Henninger Bräu*.[1] The case concerned the compatibility of an exclusive purchasing obligation[2] accepted by the tenant of beer house in Germany with article 85(1) of the EEC Treaty.

The Court's judgment was based on a realistic analysis of foreclosure applied to other kinds of exclusive agreement, leading to far more agreements being clearly enforceable and removing some of the risk of having to renegotiate agreements on the basis of which a commitment to invest has been made.

In addition, the Court also gave some directions as to how a national court may enforce agreements when it is not clear whether they infringe article 85(1) or, if they do, whether they will be granted a formal exemption.

This paper will contrast the approaches of the Court and the Commission of the European Communities, [hereafter called "the Commission"] to the interpretation of article 85 of the EEC Treaty. It will then analyze the judgment in *Delimitis* and speculate on its implications for EEC competition law generally.

Article 85(1) of the EEC Treaty[3] corresponds roughly to section 1 of the Sherman Act.[4] It prohibits as incompatible with the Common Market agreements between undertakings that may affect trade between member states, and which have the object or effect of restricting competition within the common market. Unlike the Sherman Act which contains no express exemptions, however, article 85(3) provides for exemptions from this prohibition, which can be granted only by the Commission of the European Communities, the administrative body established, *inter alia*, to enforce the competition rules. Article 85(2) provides that agreements that infringe the article as a whole are automatically void.

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1. Case 234/89, Stergios Delimitis v. Henninger Bräu, 1991 E.C.R. 935, 5 C.M.L.R. 210 (1992), Common Mkt. Rep. (CCH) ¶ 95,896 (1992).

2. The terminology in Europe differs from that in the United States. While the U.S. term "exclusive distribution" refers usually to exclusive purchasing arrangements, in Europe the term refers to the converse relationship, the grant of an exclusive territory to a dealer. I shall avoid the terms "exclusive dealing" and "exclusive distribution" on grounds of ambiguity.

3. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [hereinafter EC TREATY] art. 85.

4. 15 U.S.C. §§ 1-8 (1988).

Another big difference from the United States antitrust laws is that the competition rules of the EEC are intended to support the principle of the free movement of goods, services, labor and capital that are the basis of Community law. When the Sherman Act was passed, the United States was already integrated with a single currency and federal intellectual property laws. Most people understood English. The most important function of the EEC competition rules, however, is widely perceived to be the integration of the market. Consequently, one of the conditions to the application of Community law is that the conduct complained of may affect trade between member states. In the common market, there are still eleven currencies, separate and territorially limited intellectual property laws,[5] and nine official languages.

European Community law is unlike dualist systems of public international law: legal provisions that are sufficiently precise and unconditional apply automatically in the courts of member states.[6] Consequently, unless agreements have been formally exempted by the Commission, national courts asked to enforce agreements may have to consider whether they are prohibited by article 85(1). If the agreements are caught by the prohibition, the national court may have to adjourn for months or years to give the Commission a chance to consider the agreement and grant a formal exemption.

1.1 *The Broad View of Article 85(1) Adopted by the Commission*

The Commission was able to centralize competition policy by taking exclusive power in 1962 to grant exemptions under article 85(3) in article 9(1) of Regulation 17.

It proposed and the Council of Ministers adopted Regulation 17, which allows parties to agreements to notify their contracts to the Commission with a request for exemption. The Commission has usually taken several years to adopt a decision, and its backlog of notifications has built up. The process of formally granting an exemption by decision absorbs considerable resources. The Commission has, therefore, tended to write administrative letters rather than adopt formal decisions.

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5. Benelux, which consists of Belgium, the Netherlands and Luxembourg, has unified its trademark and design laws. The Council has been adopting directives for the harmonization of intellectual property for instance, trademarks, software, data bases and lending rights, but the process is far from complete.

6. Case 26/62, Van Gend & Loos v. Netherlands Inland Revenue Administration (1963) E.C.R. 1 C.M.L.R. 105 (1962), Common Mkt. Rep. (CCH) ¶ 8008 (1963).

The Commission reinforced its exclusive power to subject commercial agreements to its scrutiny in the mid-1960s by habitually treating as restrictive of competition and contrary to article 85(1) any restriction of conduct that was significant on the market.[7] The very possibility of exemption under article 85(3) encouraged wide application of the prohibition. In theory, this restrictive test should have reduced the number of cases where national courts produced judgments inconsistent with those in other member states.

In the United States there is in general no possibility of administrative exemption from section 1 of the Sherman Act and, since the *Sylvania* decision,[8] the courts have been willing to accept non-price restrictions imposed by a supplier on dealers in the same brand as long as there is a reasonable argument that the restrictions may be needed to encourage competition between different brands.

As early as 1967, René Joliet[9] criticized the Commission for finding that any significant restriction of conduct restricts competition contrary to article 85(1), even in the absence of market power or when no competition would be possible without the restriction.[10] Many have followed him since.[11]

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7. The Commission's desire to increase its exclusive power was understandable. The competition rules of the only two member states which had any were very different. The French price decree, adopted just after World War II, was intended to control the black market: to support regulation rather than competition, and was more severe when applied to vertical agreements than to horizontal. The German law, intended to defend citizens from tyranny through a self-regulating market, prohibited any significant restrictions on conduct between competitors, subject to specified exceptions and exemptions, but analyzed carefully the likely effects on the market before condemning them.

8. Continental T.V., Inc., et al. v. GTE Sylvania Inc., 433 U.S. 36, 97 S.Ct. 2549 (1977). *See also* the judgment of the Ninth Circuit on remand, Continental T.V., Inc., et al., v. GTE Sylvania Inc., 694 F.2d 1132 (9th Cir. 1982); Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 108 S.Ct. 1515 (1988) (reaffirming that a vertical restraint is not illegal *per se* unless it fixes prices or price levels).

9. Then a young teacher at the University of Liège, now a judge in the Community Court.

10. RENE JOLIET, THE RULE OF REASON IN ANTITRUST LAW: AMERICAN, GERMAN AND COMMON MARKET LAW IN COMPARATIVE PERSPECTIVE (1967).

11. In order of the author's first publication on the subject:
- René Joliet, *Trademark Licensing Agreements Under the EEC Law of Competition*, 5 NW. J. OF INT'L L & BUS. 755, 773 (1984);
- V. Korah, 1972 J.B.L. 325, at n. 15;
- V. Korah, *The Rise and Fall of Provisional Validity—The Need for a Rule of Reason in EEC Antitrust*, 3 NW. J. OF INT'L L. & BUS. 320, at 340 *et seq.* (1981);
- V. Korah, *EEC Competition Policy—Legal Form or Economic Efficiency*, 1986 CURRENT LEGAL PROBLEMS 85;
- V. KORAH, EEC COMPETITION LAW AND POLICY, chap. 14.(1990);
- V. Korah, *Joint Ventures*, 15 FORDHAM INT'L L.J. 248 (1993);

Soon after the adoption of Regulation 17 by the Council in 1962, it became clear that the Commission could not cope with the backlog of requests for exemption, but by notifying agreements,[12] one could gain provisional validity for them, according to the ruling of the Community Court in the *Bosch* case.[13] The problem of invalidity under article 85(2) became acute when, in *Brasserie de Haecht v. Wilkin II*,[14] the Court held that provisional validity did not apply to agreements made after the regulation came into force.

1.2 *The Drawback of Requiring Exemption—Increasing the Risk of Transactions that may be Void*

Subject only to a *de minimis* rule,[15] any kind of exclusive agreement has almost always been found by the Commission to infringe article 85(1) and to require exemption. National courts, few of

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- M. C. Scheckter, *The Rule of Reason in European Competition Law*, 1982/2 LIEI 1;
- S. Kon, *Article 85 Paragraph 3: A Case for Application by National Courts* 19 COMMON MKT. L. REV. 541 (1982);
- J. Faull, *Joint Ventures under the EEC Competition Rules*, 5 E.C.L.R. 358, 362 (1984);
- Forrester & Norall, *The Laicization of Community Law: Self-Help and the Rule of Reason: How Competition Law Is and Could Be Applied*, 21 C.M.L.R. 11 (1984); Also published in [1983] FORDHAM CORP. L. INST., chap. 8;
- L. Gyselen, *Vertical Restraints in the Distribution Process: Strength and Weakness of the Free Rider Rationale under EEC Competition Law*, 21 C.M.L.R. 648 (1984);

A good discussion took place at Fordham. *See* Helmuth R.B. Schröter, *Antitrust Analysis under article 85(1) and (3)*, (Barry Hawk, ed.) (1987) FORDHAM CORP. L. INST., chapter 27 and Michel Waelbroeck, *Id.* at chapter 28, and the ensuing discussion in chapter 29.

- Barry Hawk, *The American (Anti-trust) Revolution: Lessons for the EEC?*, 9 E.C.L.R. 53 (1988).

12. The regulation set up a system of notification for agreements the parties wanted exempted. Notifications have to be made on Form A/B, and include the information requested on that form. Normally one uses this opportunity to get the first word, indicating the good features of the agreement and the need for any restrictions on conduct in substantial annexes.

13. Case 13/61, de Geus v. Bosch, 1962 E.C.R. 45, (1962) C.M.L.R. 1, Common Mkt. Rep. (CCH) ¶ 8003 (1962).

14. Case 48/72, Brasserie de Haecht v. Wilkin II 1973 E.C.R. 77, C.M.L.R. 287 (1973), Common Mkt. Rep. (CCH) ¶ 8170 (1973). Agreements that became subject to article 85 only on the accession of new member states and were duly notified probably also enjoy provisional validity.

See generally, V. Korah, *The Rise and Fall of Provisional Validity—The Need for a Rule of Reason in EEC Antitrust*, 3 NW. J. OF INT'L L. & BUS. 320 (1981).

15. In Case 5/68, Völk v. Vervaecke, 1969 E.C.R. 295, C.M.L.R. 273 (1969), Common Mkt. Rep. (CCH) ¶ 8074 (1969), the Court established that there is a threshold below which effects on trade between member states, and on competition do not count. It has never quantified the threshold, but the Commission has tried to do so in its notice on agreements of minor importance, 1986 O.J. (C 231) 2. This binds no one but the Commission, but is used by the Commission when analyzing agreements notified to it for exemption.

which have any experience of competition problems, may tend to follow its decisions.[16] It is far from clear that for a national court to enforce an agreement that appreciably restricts conduct does not amount to granting an exemption.[17] The possible invalidity of important clauses in licenses, distribution agreements and joint ventures has increased the risk of exploiting products in other member states.

The risk was aggravated when, in cases like *Davidson Rubber*,[18] the Commission started to grant an exemption only after the parties had changed some of the provisions. The Commission may also attach conditions or obligations to an exemption. If it does, the balance of the bargain may be altered.[19] Moreover, the party that has

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16. English courts have tended to follow the Commission's notices when giving interlocutory relief, but few of the cases have come back for final judgment, so they are not usually reported. Two that have been are Holleran v. Thwaites, 2 C.M.L.R. 917 (1989), and Cutsforth v. Mansfield 1 C.M.L.R. 1 (1986).

17. In Case 47/76, De Norre v. Concordia, 1977 E.C.R. 65, Common Mkt. Rep. (CCH) ¶ 8386 (1977), the Commission argued that a national court should be permitted to enforce an agreement when according to the practice of the Commission it was likely to be exempted, but the Court did not deal with the matter.

18. 1972 J.O. (L 143) 31, C.M.L.R. D52 (1972), Common Mkt. Rep. (CCH) ¶ 9512 (1972). The Commission granted an exemption for an exclusive license to manufacture within a territory, only after persuading the parties to terminate the export bans that protected the sales territories of the licensees and the restriction on challenging the validity of the patents.

19. For instance, see ARD 1989 O.J. (L 284) 36, appeal pending, cases T-157-168/89, main arguments set out at 1990 O.J. (C 14) 9 and 1990 O.J. (C 23) 10, Comment, Warwick A. Rothnie, *Commission Re-runs Same Old Bill (Film Purchases by German Television Stations)* 2 E.I.P.R. 72 (1990). A German television station had agreed with MGM and United Artists to scrutinize a large library of old films and had paid US $80 million for an almost sole and exclusive license to transmit any of them it wished over a period of years. After ARD had paid the fee and also invested resources scrutinizing the library and dubbing or subtitling many of the films, the Commission decided that the duration and extent of the exclusive license were greater than was usual in the industry. The Commission was prepared to exempt the exclusive license for West Germany only if MGM and United Artists were permitted to license third parties to transmit those films that ARD did not select and even those which it did during specified periods, called "windows." It even required ARD to provide the print copies and to pay part of the cost of dubbing or sub-titling the films that it had not already adapted. When the Commission intervened, the copyright holders, MGM and United Artists were not prepared to renegotiate the contract so that the terms could be modified to redress the commercial balance of the agreement when it had been modified to meet the Commission's requirements for an exemption. The Commission avoided this problem by accepting an undertaking from ARD that it would not rely on its contractual rights except to the extent that they were exempted.

German viewers benefitted from the chance to see more American films, and the popular ones more often. MGM and United Artists gained a lucrative opportunity to grant further licenses. Yet they have appealed the Commission's decision to grant an exemption, arguing that the agreement was so anti-competitive that it should not have been exempted at all. The immediate loser was ARD, which had paid and worked for long term exclusive rights. It is not clear that the cost would have been worth while had ARD known in advance that its rights would be reduced so substantially. Alternatively, it might have negotiated a smaller payment for more limited rights. The Commission's

gained bargaining power, possibly through the investment of the other party, may be able to renegotiate the whole agreement. Fear that this may happen adds to the commercial risk parties undertake. Not all firms are opportunistic in this sort of situation. Many value their reputation for upright trading. Others depend on long lasting relationships. When, however, things are going badly, a firm that has gained bargaining power at the expense of the party that has incurred "sunk" costs[20] might be impelled to renegotiate harshly or refuse to renegotiate when it received a windfall, as the case may be. The possibility of having to renegotiate the deal after relative bargaining power has shifted is very worrying indeed, both for a dealer who may have invested in building up the brand's reputation but finds he is no longer needed, and for a supplier who may suffer disruption for months while he searches for another dealer after the failure of the first to perform a contract. The risk and disincentive to investment in joint R & D may be even more serious.

Instead of using broad economic reasoning, the Commission has responded to the problems caused by the wide scope it gives to the prohibition of article 85(1) by granting group exemptions. Most of the group exemptions exempt exclusive obligations in a narrowly defined kind of agreement. There is usually a "white list" of other provisions that do not prevent the application of the regulation to the agreement and a "black list" of provisions that do prevent its application.

Unfortunately, many agreements cannot be brought within the scope of group exemptions. Each applies only to a narrow class of contracts, such as "the supply of goods for resale."[21] Often a

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decision must make other television stations wary of agreeing to perform a similar service in adapting large libraries of foreign films for Europe. The lesson is, moreover, of wide application to other sectors of the economy. Firms will be advised that innovatory contracts may have to be modified after costs have been sunk. Even worse, it will not always be possible unilaterally to modify the agreement to satisfy the Commission, in which case further performance may not be enforceable at all.

20. Sunk costs are those that have no other use, so if they do not lead to profits for the purpose they are incurred they are thrown away. Distributors may well invest in a particular brand, and if other dealers take a free ride on that investment, the expenditure may not be recouped. This makes the initial investment more risky.

21. *See* Commission Regulations 1983/83 and 1984/83 which exempt agreements for exclusive distribution and purchasing. When it proposed to the Council a regulation enabling the Commission to exempt such agreements by category, it was concerned about those relating to goods, some 30,000 of which had been notified to it. The same arguments apply to contracts to distribute services, but they cannot qualify under the *vires* of Council Regulation 19/65.

Similarly, the group exemption for patent licensing does not apply unless the know-how is ancillary to the patented technology, Boussois/Interpane, 1987 O.J. (L 50) 30, 4 C.M.L.R. 124 (1988), Common Mkt. Rep. (CCH) ¶ 10,859, at 19 & 20 (1988). So the Commission had to adopt a separate regulation for know-how agreements. That, in its turn, does not apply if the trademark is "crucial" and not ancillary, although usually

transaction is not viable without ancillary restraints of a kind that are blacklisted. The earlier regulations apply only if there are no restrictions of competition that are not expressly exempted, although the opposition procedure in some of the group exemptions made after 1984 occasionally helps.[22] Since agreements that come within a group exemption will not be notified to the Commission, it tends to be very cautious, and will not exempt by category any kind of agreement with which it is not familiar. The group exemptions tend to operate as straitjackets, encouraging parties to adapt their contracts to fit them. This discourages an important element of competition relating to the terms and conditions of contracts.

The Commission has still not developed its policy in relation to many sorts of agreement for which no group exemption is available. Few software licenses have been notified, and even the simplest questions cannot be answered with authority, such as whether an agreement with a distributor who may alter the software should be treated as analogous to a technology license or to a distribution agreement. This inability to develop detailed rules for separate categories of agreement and the unwillingness of the Commission to base its policy on the broad economic concepts used in the United States, such as the distinction between naked and ancillary restraints developed by Judge Taft in *United States v. Addyston Pipe and Steel Co.*[23] and used by the Community Court in *Pronuptia*,[24] or between vertical[25] and horizontal restraints, creates great difficulty for businessmen who would like to negotiate enforceable contracts. Moreover, the Commission frequently perceives an agreement *ex post*, after sunk costs have been incurred, in which case the need to induce investment makes no sense. So it is hardly surprising that the Commission often ignores the free rider argument.

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both are complementary, Moosehead/Whitbread 1990 O.J. (L 100) 32, 4 C.M.L.R. 391 (1991), 1 C.E.C. ¶ 2127, at 16 (1991).

22. In the group exemption for patent licenses granted by Regulation 2349/84 and in several later group exemptions, the Commission attempted to make it easier to use the group exemptions by providing that if an exclusive patent licensing agreement contained a provision that restricted competition but was not exempted nor blacklisted, the parties might notify the agreement, and if the Commission did not oppose the exemption within 6 months, the agreement would be exempt under the regulation. There are some doubts about the *vires* for this procedure, though it is likely to be upheld by the Community Court. In practice few agreements notified under the procedure have qualified, and less than two dozen have been exempted under it.

23. 85 F.2d 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

24. Case 161/84, 1986 E.C.R. 353, 1 C.M.L.R. 414 (1986), Common Mkt. Rep. (CCH) ¶ 14,245 (1986).

25. Those between firms at different levels of trade or production. Some EEC officials are more concerned by vertical agreements than horizontal—those between firms supplying a similar product. Vertical agreements are perceived as dividing the common market.

The problems of enforcement are aggravated because the system of notification introduced by Regulation 17 which should lead to individual exemptions has broken down. In 1988, the best year ever, only ten agreements were exempted in an area with a population of 320 (now 340) million, covering virtually all products.[26] The more likely outcome of a notification is a comfort letter, and it is clear that these do not confer even provisional validity.[27] Although comfort letters may be taken into account by national courts, they are not binding.[28] Where the letter states that the agreement does not infringe article 85(1) this is helpful, but one that states or implies that the agreement merits exemption may suggest that the agreement does infringe article 85(1), and it is not clear that enforcing the agreement does not amount to granting an exemption.[29] Recently, the Commission has been taking advantage of a doctrine that it developed in its very first formal decision. It stated in *Grosfillex*[30] that an exclusive territory granted to a dealer in Switzerland, not a common market country, did not have *appreciable* effects on trade between member states, as the double tariff barrier of those days would make it uncommercial to export goods from France to Switzerland and back to the common market again. The requirement that the effects both on competition and on trade between member states must be appreciable to infringe article 85(1) enables officials to clear rather than exempt some agreements of which they approve, but may be described as unbridled discretion. At the time when agreements are being negotiated it is often not possible to predict or to obtain guidance about the Commission's

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26. Only four exempting decisions were adopted in 1990, *Commission's 20th Report on Competition Policy*, p. 73, which has unfortunately been inserted where p. 111 should be. The following year, there were five individual exemptions, *21st Report on Competition Policy*, para. 73, at p. 60. In 1992 there were four according to the *22nd Competition Report on Competition Policy*, point 126.

27. The *Perfume* Cases, Case 253/78 & 1 - 3/79, Procureur de la République v. Giry and Guerlain and other cases, 1980 E.C.R. 2327, 2 C.M.L.R. 99 (1981), Common Mkt. Rep. (CCH) ¶ 8712 (1981).

See Mario Siragusa, *The System of Notification: Summary of the Relevant Rules*, [1986] FORDHAM CORP. L. INST., chap. 11 from 246.

28. The Commission wishes that they were, but many officials rarely write a letter stating that the agreement does not infringe article 85(1).

29. At paragraph 25 of the notice on cooperation between national courts and the Commission in applying articles 85 and 86 which the Commission adopted at the end of 1992, 1993 O.J. (C 39) 6, it states that in its view national courts may take account of comfort letters stating that the conditions for the application of article 85(1) have been met as factual elements. It is doubtful whether that permits a national court to enforce an agreement said to merit exemption.

30. Decision 64/233/EEC, 1964 O.J. (915), C.M.L.R. 237 (1964). For more recent examples see Finnpap, Finnish Paper Mills, Article 19(3), Notice, 1989 O.J. (C 45) 4, 4 C.M.L.R. 413 (1989), Common Mkt. Rep. (CCH) ¶ 95,072 (1989), press release describing the comfort letter, IP(89) 496, 4 C.M.L.R. 682 (1990); and the letter dismissing the complaint in GEC-Siemens/Plessey, 1990 O.J. (L 143) 1. It seemed the Commission would dismiss complaints or clear important agreements primarily by comfort letter.

future appraisal despite the goodwill of officials who are anxious to help.

1.3 *The Court More Frequently Finds that Clauses Restricting Conduct Do Not, in Themselves, Restrict Competition*

The Court of Justice of the European Communities has no power to grant exemptions, and little jurisdiction to appraise exemptions granted or refused in the Commission's individual decisions. As early as *Consten & Grundig v. Commission*, the Court stated that it would not lightly review the complex economic assessments made by the Commission under article 85(3).[31]

Instead, the Court has construed article 85(1) more narrowly than the Commission. It has adopted a doctrine of ancillary restraints, possibly derived from United States antitrust law. When some legitimate agreement would not be viable without certain restrictions on the conduct of the parties, the transaction does not, in itself, restrict competition within the meaning of article 85(1) and nor do the ancillary restrictions, in so far as they are reasonable and needed to make the transaction viable. For instance, in *Nungesser*,[32] the Court held that an open exclusive license[33] of plant breeders' rights did not in itself infringe article 85(1), owing to the risky investment by both parties and the fact that the license was for a new seed variety of great value. The Court held, however, that the Commission was right to find that absolute territorial protection manifestly went too far even for an exemption.[34]

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31. Cases 56 & 58/64, 1966 E.C.R. 299, 347, C.M.L.R. 418 (1966), Common Mkt. Rep. (CCH) ¶ 8046 (1966). The Court said:

> [T]he 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.

32. Case 258/78, 1982 E.C.R. 2015, 1 C.M.L.R. 278 (1983), Common Mkt. Rep. (CCH) ¶ 8805 (1983).

33. A license under which the licensor promises that neither he nor anyone deriving rights from him will exploit in the licensee's territory. It does not protect the licensee from competition by those buying from the licensor or from other licensees.

34. The territorial protection was not absolute. As argued by the government of the United Kingdom, once the French seed was sold to dealers in France the plant breeders' rights would be exhausted according to the case law of the Community Court developed under articles 30-36 of the EC Treaty. The seed could legally be sold in Germany. In fact, however, before the Community doctrine of exhaustion was clearly established in 1974, the licensee obtained an order from a German court keeping the French seed out of Germany.

The results of the decision are arbitrary. For products that are of little value compared to the cost of transporting them, considerable protection is available without

A few months later, in *Coditel II*,[35] the Court went further and ruled that even 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 prices that were too high, whatever that may mean in relation to licenses of intellectual property rights which were granted to encourage innovation by enabling the holder to raise prices above the competitive level.[36]

In *Remia and Nutricia v. Commission*,[37] the Court confirmed the clearance by the Commission of a covenant not to compete with the buyer of a business as a going concern, provided it was no wider in scope and time than was needed for the buyer to appropriate the reputation for which he had paid.

In *Pronuptia*,[38] the Court indicated the useful features of distribution franchising and concluded that "such a system, which allows the franchisor to profit from his success, does not in itself interfere with competition. In order for the system to work two conditions must be met."

The franchisor must be able to ensure the uniformity and reputation of the network and that the assistance and marketing know-how given to the franchisees be not given to competitors. Restrictions needed for these purposes do not restrict competition contrary to article 85(1). Nevertheless, once the network is widespread, the need for a location clause coupled with an exclusive territory[39] should be considered under article 85(3).

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infringing article 85(1); for those where freight is a small part of the delivered cost, much less protection is possible.

35. Case 262/81, 1982 E.C.R. 3361, 1 C.M.L.R. 49 (1983), Common Mkt. Rep. (CCH) ¶ 8865 (1983). In its more recent cases on intellectual property rights and the rules for the free movement of goods and services, the Court has recognized the need for incentives to investment.

36. A sufficient incentive to producing films is particularly difficult to assess. Most films make little profit if any, and large takings from a few successful ones have to compensate for the others if film production is to remain viable. Successful films are by-products of the flops, since producers do not know how to make only films that will prove popular.

37. Case 42/84, 1985 E.C.R. 2545, 1 C.M.L.R. 1 (1987), Common Mkt. Rep. (CCH) ¶ 14,217 (1987).

38. Case 161/84, 1986 E.C.R. 353, 1 C.M.L.R. 414 (1986), Common Mkt. Rep. (CCH) ¶ 14,245 (1986).

39. The integration of the common market has been elevated from a mechanism to an objective of the competition rules. If a franchisee may sell only from the shop located in his exclusive territory, he may not sell into the territory of the others. Each would enjoy absolute territorial protection, which the Court has rarely cleared.