

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*.<sup>1</sup> The case concerned the compatibility of an exclusive purchasing obligation<sup>2</sup> 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<sup>3</sup> corresponds roughly to section 1 of the Sherman Act.<sup>4</sup> 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,<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> 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,<sup>8</sup> 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<sup>9</sup> 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.<sup>10</sup> Many have followed him since.<sup>11</sup>

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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,<sup>12</sup> one could gain provisional validity for them, according to the ruling of the Community Court in the *Bosch* case.<sup>13</sup> The problem of invalidity under article 85(2) became acute when, in *Brasserie de Haecht v. Wilkin II*,<sup>14</sup> 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,<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> 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*,<sup>18</sup> 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.<sup>19</sup> 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<sup>20</sup> 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."<sup>21</sup> 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.<sup>22</sup> 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.*<sup>23</sup> and used by the Community Court in *Pronuptia*,<sup>24</sup> or between vertical<sup>25</sup> 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.<sup>26</sup> The more likely outcome of a notification is a comfort letter, and it is clear that these do not confer even provisional validity.<sup>27</sup> Although comfort letters may be taken into account by national courts, they are not binding.<sup>28</sup> 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.<sup>29</sup> Recently, the Commission has been taking advantage of a doctrine that it developed in its very first formal decision. It stated in *Grosfillex*<sup>30</sup> 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).<sup>31</sup>

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*,<sup>32</sup> the Court held that an open exclusive license<sup>33</sup> 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.<sup>34</sup>

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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*,<sup>35</sup> 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.<sup>36</sup>

In *Remia and Nutricia v. Commission*,<sup>37</sup> 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*,<sup>38</sup> 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<sup>39</sup> 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.

The ancillary restraint doctrine has the great advantage that several important classes of contract are enforceable. Although the Court's judgments on different kinds of transaction are not entirely consistent, it is often possible to work out the likely response of the Court to new types of agreement. More reliable advice can be given that there is no need to notify, or to have an agreement approved by officials. The risk of investment by each party is reduced and there is no constraint on businessmen to modify their agreements further than is necessary. As lawyers persuade their clients to clean up their contracts, they actually become less anti-competitive, whereas when one alters an agreement to qualify under a group exemption, that is not necessarily the case.

## 2. THE *DELIMITIS* JUDGMENT AND ARTICLE 85(1)

In *Stergios Delimitis v. Henninger Bräu*<sup>40</sup> the Court has gone further in developing doctrines that may lead to the clearance of agreements from the prohibition of article 85(1).

A brewery, Henninger Bräu, leased a bar to Delimitis. Delimitis agreed to buy exclusively from Henninger the bar's requirements of the kinds of beer specified from time to time in Henninger's price lists. In the course of litigation in the German courts concerning the amounts due between the parties, the Community Court was asked to rule<sup>41</sup> on a complex set of questions about the compatibility of exclusive purchasing agreements for beer with article 85(1) and on the application of the group exemption for such agreements under Title II of Regulation 1984/83<sup>42</sup> to an agreement that did not quite come within its terms.

### 2.1 *The Inherency Doctrine*

As in *Pronuptia*, the Court started by pointing out the advantages of beer supply contracts to the parties. The retailer obtains economic and financial advantages, such as loans on favorable terms, the lease of premises and so on. In return he agrees that for a period he will buy specified products only from the supplier and he usually agrees not to sell competing products. This assures the supplier an

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40. Case 234/89, judgment Feb. 28, 1991, 1991 E.C.R. I 935, 5 C.M.L.R. 210 (1992), 2 C.E.C. 530 (1993).

41. Under article 177 of the EC Treaty, a national court may ask the Community Court abstract problems about the interpretation of Community law. The Community Court leaves the application of its abstract answers to the national courts.

42. 1983 O.J. (L 173) 1, as corrected in 1984 O.J. (C 101) 2.

outlet and that the retailer will concentrate its sales efforts on the distribution of the contract products. The cooperation enables the supplier to plan its sales for the duration of the contract and to organize its production and distribution efficiently.

The Court said that

[e]ven if<sup>43</sup> 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.<sup>44</sup>

The beginning of this paragraph is important. It states firmly that exclusive agreements do not have the object of restricting competition as the Commission<sup>45</sup> and, very occasionally, the Court,<sup>46</sup> have said.

In my view, this section of the judgment differs from the ancillary restraint doctrine described in section 1.3 *supra*. In *Delimitis*, the Court did not discuss whether the restraints were the minimum necessary to support investment or even assert that they were. The exclusive purchasing obligation might have been justified for a few weeks as enabling Henninger Bräu to plan its deliveries and the tenant to be assured of regular deliveries. It might have been justified for a decade or two as necessary, with other ties, to persuade the brewer to establish a brewery in the vicinity. As in *Pronuptia* the Court pointed

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43. "Even if" is, however a false translation of the word "Wenngleich" in the authentic German text. The French text on the basis of which the judges probably deliberated uses the word "si" which can mean "if" or "although." My colleague at University College London, Margot Horspool, assures me that "Wenngleich" can mean only "although." 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.

See also Paul Lasok, Comment, *Assessing the Economic Consequences of Restrictive Agreements: A Comment on the Delimitis Case*, 1991, 5 ECLR 194, 195 note 7. He suggests that "if" in the French might have one of several meanings. The Court might be saying that if there was no anti-competitive object, then it is necessary to examine the probable effects of the agreement. Or it might be indicating that the object was probably not anti-competitive, but that it was not prepared to commit itself to that view. He gives other possibilities as well.

44. See paragraph 13, 5 C.M.L.R. at 45 (1992).

45. See Helmuth R.B. Schröter and Michel Waelbroeck, *supra* note 11. Many of the relevant cases are considered there.

46. *E.g.*, Case 319/82, *Société de Vente de Ciments et Bétons de L'Est v. Kerpen and Kerpen*, 1983 E.C.R. 4173; Common Mkt. Rep. (CCH) ¶ 14,043 (1983), Case 193/83, *Windsurfing*, 1986 E.C.R. 611; 3 C.M.L.R. 489 (1986); Common Mkt. Rep. (CCH) ¶ 14,271 (1986). Judgment in *Windsurfing* was given by a chamber of only three judges and might be reversed by a full court.

to the legitimate aims of the transaction, but in this case it did not consider whether the restrictive terms, such as the obligation to buy specified beers only from Henninger Bräu and not to stock competing beers, were necessary to make some transaction viable.

Nor did it accept the rule of reason as traditionally expressed in the United States. It did not balance the benefits against the lack of choice as between brands at each individual bar. The Court has no power to approve an agreement which, in its view, restricts competition.<sup>47</sup> If it considers that the agreement should be enforceable, it can only declare that the agreement does not infringe article 85(1). The unwillingness of the Court to balance pro- and anti-competitive effects has much to recommend it. There is no end to balancing.<sup>48</sup>

There is an idea derived from German law, that restrictions inherent in a legitimate transaction do not have the object of restricting competition. United States law developed a similar view. During the early years of the Sherman Act, which outlawed *any* agreement tending to restrict trade,<sup>49</sup> courts made a number of decisions that seemed to outlaw contracts of all types.<sup>50</sup> However, the Supreme Court eventually realized that such an application would be absurd, and started to interpret the Act to prohibit only those agreements which resulted in an *unreasonable* restraint of trade.<sup>51</sup> It assumes that each kind of commercial agreement is categorized. Naked cartel agreements intended to raise prices and restrict production whether by agreement on minimum prices or the allocation of markets have long been held not to be legitimate.

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47. This did not prevent the courts in the U.S. developing a rule of reason under section 1 of the Sherman Act. That Act, however, has no provision for exemptions, so there was greater pressure on the courts to be flexible.

48. There is little balancing done now in the U.S. in relation to non-price vertical agreements. Unless the supplier has considerable market power, the restraints are cleared. See BARRY HAWK, *supra* note 11, at 69. The attitude of the Justice Department may well change under the Clinton Administration. See, e.g., the speech by the Assistant Attorney General last August (1993) 65 A.T.R.R. No. 1627, p. 250, and her speech at the Fordham Corporate Law Institute on October 21, 1993, to be published in [1993] Fordham Corporate Law Institute.

49. 15 U.S.C. § 1.

50. See, e.g., *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290, 17 S.Ct. 540 (1897).

51. See *Standard Oil Co. v. United States*, 221 U.S. 1, 31 S.Ct. 502 (1911). This decision gave birth to the American "rule of reason" used when appraising the application of § 1 of the Sherman Act to an agreement.

The German Kartel law<sup>52</sup> expressly requires that the pro- and anti-competitive aspects of vertical agreements be balanced,<sup>53</sup> so the inherency doctrine has been applied only to horizontal agreements. If it is being invoked by Commission and Court of the European Community, it is being applied to vertical agreements and any German origins are not articulated. Under this doctrine, many vertical agreements may be legitimate. Franchising was so treated by the Community Court in *Pronuptia* and it seems that beer contracts have also been so treated in *Delimitis*. See too, the Commission's notice on restrictions ancillary to concentrations<sup>54</sup> where ancillary restrictions are analyzed under the merger regulation rather than article 85. There are wider aspects of the theory to be found in the Community Court's treatment of intellectual property rights, the specific subject matter of which is preserved by article 36 against the rules for free movement, although it is not clear that the case law is based on the German theory.

Unlike the ancillary restraint doctrine which was used in *Pronuptia*, it is not necessary to decide how far the restrictive provisions are required to make the transaction viable, so there is no discussion of how much protection is required in a beer contract. It might be less restrictive for the brewer to give quantity discounts, and contracts for fixed quantities over the next two weeks might enable him to plan his delivery round. On the other hand, it might be risky to build a brewery unless the investor had arranged either fixed gallonage contracts or an exclusive purchasing obligation lasting for decades. None of this is discussed in *Delimitis*. It follows that there is no need to establish a justification in the absence of foreclosure. The Commission has been attacked for years for not clearing enough agreements that do not make the market less competitive. The application of the Court's doctrine may lead to the opposite criticism. If it is confined to vertical agreements, however, I do not see much danger.

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52. ACT AGAINST RESTRAINTS OF COMPETITION (July 7, 1957), *translated in COMPETITION LAW IN WESTERN EUROPE AND THE US* (D.J. Gilstra, ed.) at GER/L/1/1 (1977).

53. Except for patent and know-how licenses which are dealt with by special provisions.

54. 1990 O.J. (C 203) 5, para. 5, which explains the Commission's view of recital 25 to the merger regulation, Council Regulation (EEC) 4064/89.

Another example may be the Commission's notice of 1962 on limited licenses which is derived from the German law. It is the patent that restricts conduct, so a license limited to part of a member state or in time etc. does not, in itself, infringe article 85. This no longer represents the Commission's view and the notice was withdrawn when the regulation exempting patent licensing agreements was adopted.

## 2.2 Foreclosure

In ruling on the factors relevant to the question of whether the agreement had anti-competitive effects, the Court went on to consider its earlier judgment in *Brasserie de Haecht I*.<sup>55</sup> On very similar facts, the Court had ruled that when deciding on the effects on competition of an obligation accepted by the operators of a small café to buy beer to be sold there exclusively from de Haecht, a national court should take into consideration the economic and legal context of the agreement and the cumulative effect of many agreements by which most cafés were alleged to have been tied to one brewer or another.

The Court's judgment in *de Haecht I* was very short, but the reasoning is made clear by Advocate General Roemer.<sup>56</sup> His language is not as precise as that in the economic literature but, in effect, he advised the Court that a newcomer would be kept out of the market for brewing and selling beer only if there were barriers to entry at the retail level and so many cafés were tied for so long that a new brewer could not find sufficient outlets nationally, or in a specific area, to enter the market or an existing brewer expand. He added that a new brewer might sell partly through supermarkets. In *Delimitis*, the Court took a similar view,<sup>57</sup> but the reasoning was more sophisticated and more authoritative in that it was expressly adopted by the full Court.

The Court concluded at paragraph 15 that the matter for concern was foreclosure: the possible exclusion of other brewers from the market. The national court should consider whether, in the context of ties of other bars, the agreement reduced the opportunities of competitors to expand or enter the market for supplying beer for consumption on the premises. The possibility of competitors from other member states should be considered as well as those in Germany.

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55. Case 23/67, 1967 E.C.R. 407, C.M.L.R. 26 (1968), Common Mkt. Rep. (CCH) ¶ 8053 (1968).

56. Advocates General are members of the Court of equal status with the judges. Each case is allocated to one. Some time after the oral argument has been completed, he delivers an opinion. His opinion performs some of the functions of a lower court in aiding the deliberations of the judges, by analyzing the issues in a neutral fashion and coming to a conclusion. The Court, however, normally proceeds to judgement without reopening oral argument or giving the parties a chance to address the Advocate General's opinion.

57. Except in relation to supermarkets.



### 2.3 *United States Law*

The United States statute most commonly applied to exclusive purchasing agreements is section 3 of the Clayton Act.<sup>58</sup> Section 3 provides, in part that

[i]t shall be unlawful . . . to make a [lease] sale or contract for sale of goods . . . on the condition, agreement or understanding that [the buyer will not deal in another supplier's goods] . . . where the effect of such a lease sale or contract . . . *may be to substantially lessen competition* or tend to create a monopoly. (emphasis added)

In *Standard Oil Co. of California (Standard Stations) v. United States*,<sup>59</sup> the Supreme Court set the standard for the application of section 3. Standard Oil had entered into contracts with over 5,900 service stations in the western United States, amounting to 16% of the retail gasoline outlets in the area.<sup>60</sup> In return for use of the Standard Oil trademark, the stations agreed not buy the gasoline of any other producer. Foreshadowing the Community Court's opinion in *Pronuptia*, the Supreme Court recognized that such agreements may have some benefits. It held, however, that the qualifying clause of section 3 is "satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected."<sup>61</sup> The Court found that when such restrictive supply contracts are the industry standard, and that when there has been no change in market share of the suppliers during the period when such contracts were used, it was reasonable to infer that the relevant market had been foreclosed to newcomers. The Court stated that short-run market stability was not a valid substitute for long term foreclosure effects. The Court did not consider whether sufficient "free" outlets remained to support a new or expanding supplier.

The Supreme Court later clarified its position in the case of *Tampa Electric Co. v. Nashville Coal Co.*<sup>62</sup> In that case, a power utility had entered into an exclusive agreement with a coal company, which required the coal company to supply all the utility's fuel needs for a five-year period. The Court in *Tampa Electric* set out a three-part test to determine whether an exclusive-dealing arrangement was illegal: "First, the line of commerce . . . involved must be determined. Second, the area of effective competition in the known line of commerce must

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58. 15 U.S.C. §§ 12-27 (1987).

59. 337 U.S. 293, 70 S.Ct. 545 (1949).

60. 337 U.S. 293 at 295.

61. *Id.* at 314.

62. 365 U.S. 320, 81 S.Ct. 623 (1961).

be charted. . . . Third, . . . the competition foreclosed by the contract must be found to constitute a *substantial share of the relevant market.*" (emphasis added)<sup>63</sup> The Court found that since in this particular case only 1% of the relevant market was affected, and, unlike *Standard Stations*, there was neither a seller with a dominant position in the market nor an industry-wide practice of relying on exclusive contracts, there was no market foreclosure.

The United States Department of Justice published guidelines in 1985, defining the criteria it uses for bringing suit against an accused violator of section 3.<sup>64</sup> Anticompetitive effects should only be found likely when all of the following three conditions are met:

1. The "nonforeclosed market" [that in which the supplier operates] is concentrated and leading firms in the market use the restraint.
2. The firms subject to the restraint control a large share of the "foreclosed market."
3. Entry into the foreclosed market is difficult.

One should remember, however, that such guidelines apply only to suits contemplated by the Justice Department; the courts have largely ignored them. The vertical guidelines were greatly criticized, not often applied, and were withdrawn by the Assistant Attorney General in August 1993.<sup>65</sup>

## 2.4 *Market Definition*

In *Delimitis*, the Court defined the relevant market as including the supply of beer for sale only in bars to the exclusion of the take-away trade.<sup>66</sup> Bars provide space where one can meet people and thus they supply more than beer; their prices are higher, and from the supply side, special installations are needed for selling beer on draft. One might add that draft beer tastes different from that sold in bottles and cans to take home, and that cans and bottles of beer are not close substitutes.

The Court admitted that there is some overlap between the markets, as a new competitor may earn a reputation in the supermarkets which would help it sell in bars. The Court referred to sales to

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63. 365 U.S. 320, *supra* note 63, at 327-29.

64. *Justice Dept., Guidelines for Vertical Restraints*, 50 Fed. Reg. 6263-03 (January 30, 1985), point 3.22.

65. See 65 ATRR 250 (1993); see also 4 Trade Reg. Rep. (CCH) ¶ 13,400 (1989).

66. Unlike Advocate General Roemer in *Brasserie de Haecht* (1).

wholesalers only at another part of its judgment after it had returned to foreclosure (paragraph 21). One might add that on the supply side, a minimum efficient scale of production may be supported by sales partly through each kind of outlet.

The Court ruled that the geographic markets are still national, as contracts for the supply of beer are mostly concluded at a national level. In defining the geographic market, it looked to the supply side without considering demand: whether social drinkers would travel far. It is submitted that this was right. Henninger Bräu would have no market power locally, if other brewers could enter easily, although those drinking in bars are unlikely to travel throughout Germany.

## 2.5 *Back to Foreclosure*

The Court returned to foreclosure at paragraph 19. It said that in deciding whether many similar<sup>67</sup> contracts tying bars to one or other of the producers affect access to the market, one should consider,

the number of outlets thus tied to national producers in relation to the number of public houses which are not so tied, the duration of the commitments entered into, the quantities of beer to which those commitments relate, and on the proportion between those quantities and the quantities sold by free distributors.<sup>68</sup>

The Court also referred at paragraph 21 to the minimum number of outlets required to make a distribution system viable, but not to the minimum quantity of beer bought that would make it worth while to build a brewery.

The Court largely repeated the view of the Advocate General in *de Haecht I*. In my view, whether a new firm can enter a market or an existing firm grow depends on whether so many bars are tied at any one time, that not enough free houses remain to take the output of a brewer or distributor of the minimum economic size.<sup>69</sup> The Court was

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67. The Court referred many times to "similar contracts." In my view it was referring to beer contracts under which a bar is tied to one or other of the brewers. Foreclosure does not depend on whether all the contracts are made on the same standard form of contract. Indeed in paragraph 19 the Court talked of ties to several national producers and they were unlikely to use identical forms of contract.

Paul Lasok comes to a similar conclusion. See *supra* note 43.

68. 5 C.M.L.R. at 246 (1992).

69. In *Delimitis*, Advocate General Van Gerven said at point 21 of his opinion that even the statistics produced by the Commission were inadequate and that in view of the difficulty of establishing the amount of beer sold through tied houses, and the duration of the ties, the cumulative effect of many ties should form no more than a

right to indicate that if the ties are short term, there cannot be much foreclosure, as enough outlets will come up for renewal at any time for a newcomer to compete for them. It is thought, however, that it is not so much the ratio between the beer sold through the free and tied trades that is relevant<sup>70</sup> as the amount a new or expanding brewer could sell through the free trade, given that such outlets probably sell several brands and not all of them will want a particular new one.

It is also surprising that the Court looked only to ties to national producers. Even if the relevant market is defined as being national, a tie to a foreign brewer would foreclose as much as a tie to a national one. What should have mattered was the amount of beer that could be sold in outlets that were not tied to anyone. This may have not been relevant in this case, however, as few bars could afford to buy only a foreign brand of beer.

In paragraph 21, the Court marked out new ground in its treatment of entry barriers.<sup>71</sup>

. . . it is necessary to examine whether there are real concrete possibilities for a new competitor to penetrate the bundle of contracts by acquiring a brewery already established on the market together with its network of sales outlets, or to circumvent the bundle of contracts by opening new public houses. For that purpose it is

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background to the case. In my view, the Court was right to focus on the cumulative effect. Most brewers and bartenders would have a good idea as to how easy it is to find outlets.

70. At point 20, the Advocate General concluded that this comparison was excluded by the definition of the market, which excluded beer sold to take away. I am glad that the Court did not take the same view. Frequently the Commission defines the market only from the demand side and considers potential competition only at a second stage when assessing market power. It is vital that the possibility of new entrants be considered at some time and be not excluded by artificial definitions of the market. At several points in this judgment, the Court considered factors outside the market found relevant, such as the possibility of gaining a reputation through the take away trade.

71. G. J. Stigler defined an entry barrier as "a cost of producing (at some or every level of output) which must be borne by a firm which seeks to enter an industry but which is not borne by firms already in the industry." STIGLER, *THE ORGANIZATION OF INDUSTRY*, at 67 (1968).

This definition brings out the relativity of the concept. A new entrant has many costs, but so did the incumbent. If I have a factory adapted to a particular product, I bore the cost of making it. A new entrant might have to build a similar factory, but would be no worse off than I am once it is built. We both have to service the capital used to build it.

It might keep out many small firms who would like to enter the market. If, however, the demand is sufficient to keep only one such factory operating, many economists, although not Stigler, would say that there is a barrier to entry since an equally efficient firm would be deterred from entry by the fear of excess capacity once he had built a factory.

necessary to have regard to the legal rules and agreements on the acquisition of companies and the establishment of outlets, and to the minimum number of outlets necessary for the economic operation of a distribution system. The presence of beer wholesalers not tied to producers who are active on the market is also a factor capable of facilitating a new producer's access to that market since he can make use of those wholesalers' sales networks to distribute his own beer.<sup>72</sup>

The Court implied that new brewers have real and concrete opportunities to enter by buying up an existing brewer who owns a chain of bars or by opening new bars, unless this is prevented by law or by agreement.

The need to enter at two levels would increase the minimum capital needed by a new entrant, but if entry were profitable, many brewers could raise the capital. It is not the sort of entry barrier that would keep out an equally efficient firm or enable the incumbent to earn monopoly profits or provide worse service. Licensing laws, such as those in England which make it difficult to obtain new licenses for the sale of beer for consumption on the premises, would be recognized as entry barriers even by economists of the Chicago school. I am not clear what the Court had in mind when speaking about regulations and agreements relating to the acquisition of companies. In some countries in the common market it is almost impossible to make a successful hostile takeover bid for a firm, as most of the shares are likely to be owned by a family and the working capital be in the form of a loan, a term of which prevents the purchase of the firm without the consent of the lender.

I wonder how often it would be possible to market a new brand of beer by buying an existing brewery when there are entry barriers and few free bars. Part of the assets would be the brewery itself and its tied outlets might not be able to take both the old and the new beer in sufficient quantities. The view that new bars might be opened in the absence of regulation, however, seems likely to be of wide application, except in country districts when the minimum economic scale for a bar might be large in relation to the small number of social drinkers in the neighborhood,<sup>73</sup> or in the United Kingdom, where the licensing laws often make it impossible.

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72. 5 C.M.L.R. at 246-47 (1992).

73. In those circumstances, opening another bar would not be an attractive investment. Both the old and new bars would probably make losses, unless one changed the services it offered, for instance, by developing a fine cuisine and attracting diners from a distance.

The Court went on to mention other relevant factors. A new entrant may be able to sell through wholesalers, who may have their own networks. In paragraph 22, the Court observed that it may be more difficult to enter a saturated than a growing market. If there is substantial loyalty to a few popular brands it may be harder to enter, although the incumbent must have paid for its reputation so the loyalty may not enable the incumbents to earn monopoly profits. The Court again pointed out the relevance of the take home trade in as much as reputation may be earned in there and exploited in the bars.

The Court did not discuss the weight to be attributed to each of these factors. Some would be considered as entry barriers by most economists because they keep out equally efficient firms. The need to enter at two levels<sup>74</sup> at once would also be treated by many Europeans as an entry barrier, as it keeps out equally efficient firms, yet the Court seems to require a national court to consider entry by buying into distribution.

Common lawyers may regret the failure of the Court to spell out its theories more fully. This may be due to the abstract nature of judgments in cases that arise under article 177 of the EEC Treaty, where the Court is asked to give an abstract ruling on a question of law. This judgment does go a great deal further than most judgments of the Community Court in articulating its reasoning.

The Court concluded that if all the similar contracts do not lead to foreclosure under these tests, the beer contract with its exclusive purchasing obligation should be enforced by the national court without concerns about article 85.

If the Commission and Court were to examine real and concrete opportunities for entry in this way also under article 86,<sup>75</sup> firms with no power over price would not be found dominant. For decades, the Court has referred to far lower entry barriers such as the need for capital or technology,<sup>76</sup> although these resources had to be acquired by the existing firms, and will rarely keep out equally efficient firms or enable incumbents to exploit market power.

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74. Both the production of beer and its distribution. The Court suggested that brewers might enter the market by acquiring or establishing new bars.

75. Article 86 prohibits the abusive exploitation of a dominant position. It corresponds roughly with section 2 of the Sherman Act. Article 86 prohibits "natural monopolists" from gouging consumers, as well as reducing such competition as remains on the market. See Case 6/72, *Continental Can*, 1973 E.C.R. 215, C.M.L.R. 199 (1973), *Common Mkt. Rep. (CCH)* ¶ 8171 (1973).

76. See, e.g., Case 6/72, *Continental Can*, *supra*; and Case 85/76, *Hoffmann-la Roche v. Commission (Vitamins)*, 1979 E.C.R. 461, 3 C.M.L.R. 211 (1979), *Common Mkt. Rep. (CCH)* ¶ 8527 (1979).

## 2.6 *Contribution to Foreclosure*

The Court stated that if the national court finds that it is easy to gain access to the market, it should enforce the exclusive purchasing contract in accordance with national law without considering article 85. If it finds that access is difficult, it should go on to assess the contribution to the cumulative foreclosing effect made by the contracts entered into by the particular brewer.<sup>77</sup> Only those ties with a significant foreclosing effect infringe article 85(1). This does not depend only on the particular brewer's market share,<sup>78</sup> but also on the number of points of sale tied to it in comparison with the total number of bars in the reference market.<sup>79</sup> This does not seem quite right to me: the amount of beer sold through its tied bars rather than the number of such beers may be more relevant. One large bar may be more significant than several smaller ones. Moreover, the comparison should not be with the number of bars in the relevant market, but with the amount necessary to induce investment in a brewery.

The Court rightly added, at paragraph 26, that the duration of the ties is also important. A brewery with a relatively small market share but with ties lasting many years may contribute to the foreclosure,<sup>80</sup> but short-term ties may be legal even for a major brewer.

This paragraph does, however, raise two difficulties. The Court suggested that a duration manifestly excessive in relation to the average duration of such contracts generally concluded in the relevant market is illegal. This seems to accept the view of the Commission in *ARD*, so cogently criticized by Warwick A. Rothnie,<sup>81</sup> that a degree of exclusivity unusual in the industry is anti-competitive. Innovation may be important in retailing as well as in production and it would be unfortunate if the Court lent support to a doctrine that makes innovation more risky. Judges often say that a practice that has proved satisfactory over much use can be assumed to be good. There is some truth in this, although the converse is not true. Common transactions

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77. The whole corporate group forms the unit for calculation.

78. At point 22, the Advocate General stated that the Henninger Bräu group supplied some 6.4% of the beer produced in Germany, but its share of a regional market may have been larger.

79. At times the Court refers to the position of the brewery, at others to the position of the parties. A particular agreement between a single brewer and the operator of a single bar will rarely foreclose significantly. Unless many bars are operated by a single undertaking, it is thought that there would never be a significant contribution to foreclosure unless it is the position of the supplier that is relevant.

80. At point 22, the Advocate General said that there should be no franchise for small breweries to escape the prohibition of article 85(1).

81. See *supra* note 19.

were initiated by someone once. Moreover, when considering the foreclosing effect of an agreement, the more firms that adopt it the worse. The first agreement is unlikely to foreclose significantly.

The second difficulty is that the test is not an easy one for a national court to apply. How big and how long is excessive? It is thought that the general tenor of the judgment leads to the view that the anti-competitive effect of foreclosure depends on whether the free trade or bars tied are sufficient within a short period of time to support new entry on an efficient scale, or whether sufficient new free houses for that purpose could be established or acquired. The test of significant contribution, however, is not defined, save by reference to what is common in the industry. The Advocate General observed at point 22 that the Commission's notice on agreements of minor importance which are outside article 85(1) does not apply when there are many networks foreclosing outlets. The Commission has published a notice and press release<sup>82</sup> that will be of little use in practice, but which does apply when an individual brewer is very small, even if many bars are tied to other brewers. The press release binds no one but the Commission, although national courts are likely to take it into account.

## 2.7 *The Access Clause*

The relevance of the access clause was argued in relation to the concept of trade between member states. Henninger Bräu permitted its tenants to buy beer from other member states and it was argued that this operated to take the agreement outside article 85(1) even if the ties did foreclose<sup>83</sup> as beer from other member states might be imported. The Court observed that the tie would be attenuated more if the tenant were free to buy beers imported by wholesalers than if he were entitled only to import himself. It added that if the tenant were required to take a minimum quantity of beer from the brewer, the liberty to buy imported beer might not be significant. This, however, would be the case if the

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82. Beer Supply, Exclusive dealing. *De minimis*, 1992 O.J. (C 121) 2, IP(92) 350, May 4, 1992, 4 C.M.L.R. 546 (1992).

It follows the judgment in *Delimitis* in suggesting that the relevant markets are national and confined to sale in premises where the beer can be drunk. If the business' market share is under 1%, presumably of sales in bars, its production under 200,000 hectoliters of beer a year and the periods of the tie not more than half as much again as those permitted under Regulation 1984/83, the agreement does not infringe article 85(1). The Commission adds that agreements where the brewer's sales exceed these limits do not necessarily infringe article 85(1) and, if they do, may fall within the group exemption of Regulation 1984/83. This notice seems unnecessarily cautious in view of the far more liberal attitude of the Court in *Delimitis*.

83. The Advocate General at point 23 reminded the Court that whether 85(1) was infringed depended, in part, on the severity of the ties. The Court accepted that the "open clause" attenuated the tie.



minimum quantity were all or nearly all the beer normally sold at the bar, especially if there were sanctions for not taking the minimum required.

The Court adopted the same realistic attitude that it had earlier by ruling that an exclusive purchasing agreement that permits the buyer to obtain beer from other member states is unlikely to affect interstate trade when this liberty corresponds to a real opportunity for a national or foreign supplier to supply beer from other member states to the buyer.

### 2.8 *Need for Truncated Analysis*

The worrying feature of this part of the judgment is that everything seems to be relevant. It is very important that the Community Court should encourage national courts to adopt a truncated analysis. The Court made it clear that the agreement may be enforced if foreclosure is not significant, *or* if the particular brewer (or particular contract) does not contribute significantly to foreclosure. If national courts are to avoid intolerably complex litigation, often over small sums of money, they must go further and hold that article 85 is irrelevant if any one of a number of matters be proved:

- 1) that outlets capable of selling sufficient quantities to support a new entrant are not tied to any producer of similar products,
- 2) that sufficient ties to provide outlets to new entrants are short term,
- 3) that it is easy to establish new outlets,
- 4) that it is easy to buy chains of new outlets not already tied to one brewery or another,
- 5) that the supply industry is fragmented,
- 6) that the minimum efficient scale of a new entrant is not so large that free outlets or those tied for a short period, are not available,<sup>84</sup> or
- 7) that the contribution of the particular supplier to the foreclosure is not significant.

These factors are similar to those considered by the U.S. Supreme Court in *Tampa Electric*.<sup>85</sup>

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84. This is really an amalgam of the first two points.

85. See *supra* note 63, and accompanying text.

### 3. GROUP EXEMPTIONS TO BE CONSTRUED NARROWLY

Having required the national court to analyze the restrictive clause in a way that should result in few such agreements infringing article 85(1) and needing exemption, the Court was able to construe strictly Title II of Regulation 1984/83 granting a group exemption to exclusive purchasing agreements for beer supplied for consumption on the premises. It had been argued that agreements that very nearly came within its terms should be enforceable, but such a rule would have led to considerable uncertainty.

Advocate General Van Gerven stressed the central role of the Commission in granting exemptions under article 85(3).<sup>86</sup> He added, at point 10 of his opinion, that group exemptions derogate from article 85(1) of the Treaty; they 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 interpretation of its provisions.

There were two respects in which the agreement in question went further than permitted by Regulation 1984/83, which grants a group exemption to contracts for the exclusive purchase of beer. First, under article 6(1) of the regulation the beers or beers and other drinks to which the exclusive purchasing obligation applies must be specified in the agreement whereas Henninger Bräu left this to be specified in the price lists from time to time. The Court pointed out that the requirement that the drinks be specified was intended to prevent the brewer from changing the scope of the obligation unilaterally. It ruled that the conditions for the application of the exemption are not met when the drinks are not listed in the text of the contract itself. In view of the Court's helpful explanation of the reason for the rule, it would seem to me sufficient to incorporate a particular, existing price list by reference. This would normally have to be done in the case of oral agreements unless few drinks were specified. What was wrong in *Delimitis* was that the tenant had no control over changes to the list.

The other problem was that article 8(2)(b) requires that the tenant be permitted to buy drinks other than beer from third parties who offer them on more favorable terms which the landlord does not meet. The Court construed this provision literally and ruled that the absence of such a clause would prevent the application of the regulation. These points are important for demonstrating (if demonstration were required) that if a contract exceeds any element of a group exemption, the

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86. Point 5 of his opinion in the case.

regulation will not apply to the agreement as a whole. It is not just the particular part of the agreement that is void, but any provision that restricts competition.

Nevertheless, the Court went on to observe that the whole contract might not be void. It is only those provisions that restrict competition that are void. The others may be enforced if they are severable.<sup>87</sup> Moreover, an agreement between only two persons and relating to only one member state may be notified without limit of time with a request for an individual exemption and may be exempted retrospectively to the period before notification.<sup>88</sup>

The Advocate General (but not the Court) went on from point 12 to consider some other restrictions in the contract that might make the regulation inapplicable.

#### 4. THE COMMISSION'S OBLIGATION TO HELP NATIONAL COURTS

At paragraph 44, the Court emphasized that the Commission is responsible for the implementation and direction of Community competition policy. Only it can grant individual and group exemptions which require complex assessments of an economic nature. Competence under articles 85(1) and 86 is, however, shared with national courts, as those provisions have direct effects in relations between citizens and directly create rights that national courts are required to protect. Group exemptions also have direct effect, but this does not entitle national courts to modify their scope.

Without any assistance from the Advocate General who did not consider this aspect of the case, the Court observed at paragraph 47 that this shared competence created the risk that national courts might give judgments in conflict with those taken or envisaged by the Commission. Such conflicts would be contrary to the general principle of legal certainty and must be avoided when national courts give judgments on matters that may be the subject of a decision by the

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87. Whether they are severable has been held to be governed by national law, Case 56/65, *La Société Technique Minière v. Maschinenbau Ulm*, 1966 E.C.R. 235, C.M.L.R. 357 (1966); Common Mkt. L. Rep. (CCH) ¶ 8047 (1966); and confirmed in *Delimitis* itself.

88. Regulation 17, articles 4(2) and 6. If the agreement was not notified before the period in issue there can be no retroactive exemption, unless the agreement be one of the kind listed in art. 4(2) of Regulation 17, which dispenses some kinds of agreement from the need for notification. Beer contracts often qualify under article 4(2) and may be exempted retrospectively even if they form part of a network of such agreements with other parties. See, e.g., Case 43/69, *Bilger v. Jehle*, 1970 ECR 127, C.M.L.R. 382 (1974).

Commission. I agree with Paul Lasok,<sup>89</sup> that the Court is referring to formal decision adopted under Regulation 17 and not to informal comfort letters.

Agreements made before Regulation 17 came into force enjoy provisional validity, so may be enforced without considering article 85(2).<sup>90</sup> There was, however, no reason to think that this agreement was old or that it was an exact reproduction of a contract type made before March 1962 and duly notified.<sup>91</sup>

In the case of new agreements, to avoid conflicting decisions the Court told the national judge to take account of various factors. If the agreement does not manifestly infringe article 85(1) and there is little risk of the Commission taking another view, the judge should proceed to decide the case under national law. Similarly, at the other extreme where the agreement is clearly contrary to article 85(1), and in the light of the group exemptions and the Commission's previous decision there is no chance of an exemption, anti-competitive provisions of the agreement should not be enforced.

The judgment probably makes it more difficult than formerly for the national court to proceed where there is doubt whether the agreement infringes article 85(1). It is only if it is clear that the agreement does not infringe article 85(1) that the national judge should proceed to judgment.

Where, however, an agreement has been notified or is exempted from notification, and may be exempted retrospectively, or where there is a chance of conflicting decisions under article 85(1) or 86, the national court may adjourn and take interlocutory measures in accordance with the terms of its national legal procedure (paragraph

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89. See LASOK *supra* note 43, at 200. The Court refers to decisions and to the Commission's competence. An informal comfort letter is not a decision, and the Commission requires no competence to send one. It has no legal effect, save to deprive an old agreement of its provisional validity as decided in the *Perfume* cases. See *supra* note 27.

90. Paragraph 57. Can one infer from this affirmation in 1991, that the Court's judgments in Case 66/86, Ahmed Saeed, 1989 E.C.R. 803, 4 C.M.L.R. 102 (1990), 2 C.E.C. 654 (1989) and Case 209-213/84, Nouvelles Frontières, 1986 E.C.R. 1425, 3 C.M.L.R. 173 (1986), Common Mkt. Rep. (CCH) ¶ 14,287 (1986), will continue to apply to agreements that are no longer subject to Regulation 17, and that concentrative joint ventures enjoy provisional validity unless and until dealt with under articles 88 or 89 of the EC Treaty? See Regulation 4064/89, 1989 O.J. (L 395) 1, 4 C.M.L.R. 286 (1990) (Merger Regulation) at art. 22.

91. This implies a stricter interpretation than in the ruling given in Case 106/79, V.B.B.B. v. Eldi, 1980 E.C.R. 1137, 3 C.M.L.R. 719 (1980), Common Mkt. Rep. (CCH) ¶ 8646 (1980). There the Court treated as old an agreement that had been liberalized since 1962, but made stricter again since it was no more restrictive than it had been when notified.

52). This power to give interlocutory relief was controversial and is important, but the Court made it clear that in granting relief a national judge should attempt to avoid conflict with the Commission's future decisions.

At paragraph 53 the Court stated that within the limits of its national rules of procedure, a national court might ask the Commission about its proceedings: the stage they have reached and the chances of a formal decision being adopted. The national court might also ask for advice where the application of articles 85(1) or 86 raises particular difficulties with a view to obtaining economic and legal data. It added that the Commission is bound, pursuant to article 5 of the EEC Treaty, by an obligation of loyal cooperation with national authorities, including their courts.<sup>92</sup>

One day, the Community Court will be asked to rule whether, when the Commission has closed its file on the grounds that an agreement merits exemption, the restrictive provisions can be enforced. Most people think that the answer is that they cannot.

The implementation of this part of the judgment in *Delimitis* is likely to give rise to great difficulties.<sup>93</sup> In England, civil courts cannot

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92. It cited Case C-2/88, *Zwartveld*, 1990 E.C.R. 1, 1 C.E.C. 107 (1992) para. 18, but the judgment in *Delimitis* goes considerably further. The ruling in *Delimitis* interprets article 5 of the EC Treaty very broadly:

1. Member States shall, in close cooperation with the institutions of the Community, coordinate their respective economic policies to the extent necessary to attain the objectives of this treaty.
2. The institutions of the Community shall take care not to prejudice the internal and external financial stability of the Member States.

5 C.M.L.R. at 253 (1992), in paragraph 53. Paragraph 2 cannot be relevant, and paragraph 1 appears to be addressed only to member states.

In Case 44/84, *Hurd v. Jones*, 1986 E.C.R. 29, para. 38, however, the Court cited its earlier judgment in Case 230/81, *Luxembourg v. European Parliament*, 1983 E.C.R. 255, and stated that article 5 is the expression of the more general rule imposing on Member States and the Community Institutions mutual duties of genuine cooperation and assistance.

In *Delimitis*, the Court expressly mentioned article 214 of the Treaty which forbids the institutions and officials to disclose information covered by a duty of professional secrecy, so the Commission is still required to respect the business secrets of the parties. See also Case 53/85, *AKZO v. Commission*, 1986 E.C.R. 1965, 3 C.M.L.R. 231 (1987), *Common Mkt. Rep. (CCH)* ¶ 14318 (1987).

93. See *Jeremy Lever, Q.C., U.K. Economic Regulation: Use and Abuse of the Law*, 2 E.C.L.R. 55, 56 (1992), where he points out that in *Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd.*, (1968) A.C. 269, Lords Reid and Morris drew on some of the statistics they quoted from the Report of the Monopolies Commission on the supply of Petrol, 1965 and Lord Hodson referred expressly to its conclusion that solus agreements should be limited to five years.

admit as evidence even the reports of the Monopolies and Mergers Commission as this has been treated as "hearsay" in an unreported case. Courts may hesitate to ask for the kind of evidence not normally admissible. Paragraph 53 is expressly made subject to the limits of the applicable national procedure. The Commission's answers may well be based on evidence that a court could not admit, such as hearsay or statements not checked by the possibility of cross examination.

The parties are unlikely to remain inactive while the Commission is considering its answers. Both are likely to lobby the Commission in different ways. Political influence may be brought to bear. The Commission is not a judicial body, but a political administration. Courts may be reluctant to initiate such a process.

National courts may decide to adjourn to ask the Commission simple factual questions such as whether the Commission has opened proceedings on an agreement and whether it contemplates adopting a formal decision. A court might prolong the adjournment if both answers are "yes." Where, however, the Commission contemplates proceeding informally, there is no risk of conflicting decisions binding the parties, and it is thought that a national court would be ill advised to adjourn. There will be difficult decisions when the Commission has not decided whether to proceed formally. Where it has decided to do so, but is likely to take several years, the national court may have to adjourn and, if conflicting decisions are to be avoided, the interim relief available may be very limited.

#### 4.1 *The Commission's Guidelines*

In an attempt to fulfil these obligations, the Commission has explained its views.<sup>94</sup> Much of the notice repeats what was said in the judgment in *Delimitis*. It does, however go a little further in relation to comfort letters, which it seems to wish were binding.

The national court is required to respect the exemption decisions taken by the Commission. Consequently, it must treat the agreement . . . at issue as compatible with Community law and fully recognize

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Lever adds that since those judgments, the Civil Evidence Act 1968, unnoticed and by a side wind, rendered reports of the Monopolies and Mergers Commission inadmissible as evidence of the truth of specific facts set out in them. Scott J. so ruled in *Macarthy v. Unichem*, unreported judgment, 24 Nov. 1989.

See also LASOK, *supra* note 43.

94. Notice on cooperation between national courts and the Commission in applying articles 85 and 86, 1993 O.J. (C 39) 6.

its civil law effects.<sup>95</sup> 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 these letters as factual elements.<sup>96</sup>

Can the second half of this paragraph be reconciled with the *Perfume* cases?<sup>97</sup> In *Guerlain*, at paragraph 12, the Court stated that comfort letters that had not been published either under article 19(3) or 21(1) of Regulation 17 were not decisions, and were not exemptions. At paragraph 13 it concluded that

Whilst it does not bind the national courts, the opinion transmitted in such letters nevertheless constitutes a factor which the national courts may take into account in examining whether the agreements or conduct in question are in accordance with the provisions of article 85.<sup>98</sup>

In *Lancôme*, the Court went on to decide that agreements made before Regulation 17 came into force lost their provisional validity once a comfort letter was sent.

'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.'<sup>99</sup>

In those cases, the comfort letter was of a clearing type, so if it were of the same mind as the Commission, the national court could treat the agreement as outside article 85(1). Were the letter to say, however,

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95. These statements are clearly correct and uncontroversial.

96. Notice on cooperation between national courts and the Commission in applying articles 85 and 86, 1993 O.J. (C 39) 6.

97. See *supra* note 27.

98. 1980 E.C.R. 2327, 2 CMLR 99 (1981) Common Mkt. Rep. (CCH) ¶ 8712 (1981).

99. Case 99/79, *Lancôme v. Etos*, 1980 E.C.R. 2511, 2 CMLR 264 (1981).

that the agreement was "exemptible," it is not clear how the national judge could enforce the agreement. It clearly could adjourn to enable the Commission to grant the formal exemption, but when it has closed a file, the Commission is unlikely to want to devote its scarce resources to that.<sup>100</sup> The end of the passage quoted from *Lancôme* suggests that the national court is required to hold that the clauses restrictive of competition are void.

In *Automec II*,<sup>101</sup> the Court refused to quash a decision by the Commission, where it had stated that it was dismissing a complaint on the ground that it had other priorities and that the national court before which proceedings were pending could grant more effective remedies. There is, however, a hint in paragraph 75 of that judgment, that the Commission may be required 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.

I infer that in the converse case, where the Commission has exclusive power to grant an exemption, it is required to proceed to a formal decision if one of the parties takes steps to require it to do so under article 175 of the EEC Treaty. John Temple Lang, a Director in DG IV, speaking in his personal capacity, stated at the Fordham Corporate Law Institute on October 22, 1993, that the Commission will proceed to a formal decision when so requested by parties notifying an agreement with a request for exemption. This procedure would, however, not be fast.<sup>102</sup>

Currently, the Commission is reducing the backlog of files by some 500 per year, but only by writing comfort letters. Few formal

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100. At the beginning of the notice, the Commission points out that it has to act in the public interest [para. 4], rather than enforce the rights of private individuals. At paragraph 13, it states that the Court in Case T-24/90, *Automec II*, 5 C.M.L.R. 431 (1992), para 77, stated that the Commission must establish priorities.

101. *See id.*

102. Where a Community institution fails to perform an obligation, the person affected may send a letter requiring it to act within two months. The institution, however, is required only to state its position, and would probably reply only that it had re-opened the file with a view to taking a final decision. If, however, it did not then proceed with reasonable speed, one might again ask it to take a decision and if it did not do so within a further two months, take the Commission to the Court of First Instance. This would result in the Commission being required to pay costs, and fear of this would encourage the Commission to speed up its procedure. *Asia Motor France S.A. et al. v. Commission* (T-28/90), not yet reported, *but see* Comment by J. Shaw, [1993] E.L.R. 427, 439.



exemptions are granted.<sup>103</sup> If firms could easily require a formal exemption for an agreement that merits exemption, far more would be notified and require an actual exemption. Perhaps that pressure would force the Commission to follow the Court's precedents and apply the prohibition of article 85(1) less broadly.<sup>104</sup>

If the Commission refuses to adopt a final decision, but writes a comfort letter stating that the agreement is exemptible, would a national court be usurping the Commission's functions if it were to enforce the agreement? Enforcement in such a situation would be very helpful, sensible and reduce the risk of investing in sunk costs, but it is not clear that a national court is entitled to proceed.<sup>105</sup>

#### 5. CONCLUSION—IS THE JUDGMENT OF WIDE APPLICATION OR DOES IT RELATE ONLY TO BEER SUPPLY CONTRACTS?

The language of the Court in the first part of the judgment was broad. Although it referred to the facts of the case before the national court, the reference to "real and concrete possibilities of access" could be applied far more widely to exclusive purchasing obligations for other products. The reference to the possibility of entering a market through establishing new outlets (even if there were so many ties of long duration that a newcomer could not find enough outlets) could be applied to many other areas of competition law such as article 86.

At its narrowest, the judgment related only to a limitation in favor of the landlord of a bar on the conduct of a tenant, who would not be able to operate in the premises at all if he had not been given a lease. This, however, was not the basis of the judgment. There would hardly have been any need for the full Court to sit if this had been all. It is hoped and thought that the judgment went far further.

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103. *See supra* note 27.

104. Already in its notice on joint ventures, 1993 O.J. (C 43) 2, the Commission has shifted a little way towards clearing collaboration rather than exempting it. There were rumors that when the Commission has to make proposals at the end of the year to amend the merger regulation, it would include in the term "concentration" many collaborative joint ventures of a structural kind, and this would result in their becoming subject to a less strict test. All but one merger has been cleared, although conditions have been imposed in about half a dozen cases. The Commission has decided, however, to delay any legislation until 1996.

105. The group exemption for patent licensing will expire at the end of 1994. The Commission seems to be minded to replace it with a single regulation to cover patents or know-how or either. The question arises whether it will extend the regulation to licenses of significant technology where a trademark or software is complementary or whether it will state that such licenses infringe article 85(1) only if there be significant market power.

The first part of the judgment fairly clearly applies to any kind of exclusive purchasing agreement, whether it relates to beer, petrol, vehicles<sup>106</sup> or other products. Before finding that these infringe article 85(1), a national court or the Commission must find a lack of "real and concrete" possibilities to enter or expand.

It is hoped that the judgment may apply more widely to other exclusive rights such as the converse case of exclusive distribution.<sup>107</sup> It is important that exclusive distribution contracts should be treated as not infringing article 85(1) in the absence of market power by the brand owner, or when a market could not be penetrated without granting an exclusive territory, since there is no group exemption for the exclusive distribution of services. It is thought that such an agreement would protect dealers from competition appreciably only if there was little inter-brand competition. This is an extensive view of the judgment.

In relation to technology licensing, many agreements can now be brought within the regulation for know-how licensing. Nevertheless, there are gaps. It does not apply where the use of a trademark is crucial, rather than ancillary;<sup>108</sup> nor to software licenses.<sup>109</sup> Noncompetition clauses are blacklisted.<sup>110</sup> This may matter less if exclusive licenses and noncompetition clauses infringe article 85(1) only when competition really is restricted.<sup>111</sup>

The potential of the judgment to increase legal certainty by making contracts enforceable and to save industry from bureaucratic control over many agreements that increase competition is huge. The Commission frequently complains that it lacks adequate resources to deal with its case load,<sup>112</sup> and a more realistic application of article

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106. Three products for which there are special group exemptions in Regulation 1984/83, Titles I and II, and in Regulation 123/85.

107. The U.S. and EEC terminology is different. "Exclusive distribution" in Community law refers to an agreement whereby the supplier agrees to supply only that dealer within a territory, although the dealer may also agree to handle only that supplier's goods.

108. Whitbread/Moosehead, *supra* note 21, at paragraph 16.

109. Article 5(1)(4).

110. Although a best endeavors clause is not.

111. The group exemption for patent licensing will expire at the end of 1994. The Commission seems to be minded to let it do so and amend the know-how regulation to include pure patent licenses. The question arises whether it will extend it to licenses of significant technology where a trademark or software license is complementary or whether it will announce that such licenses infringe art. 85(1) only if there is significant market power.

112. According to the Commission's *20th Report on Competition Policy*, p. 73, (unfortunately printed where p. 111 should be), the backlog was reduced by some 500 files last year to 3287. According to the *21st Report*, point 73, p. 60, this was further reduced by some 550 to 2734. The *22nd Report of the Commission on Competition Policy* states, at point 126, that the backlog was further reduced by over 30%.

85(1) would help. Nevertheless, there is a long history with few exceptions of Commission decisions, formal and informal, treating any important restriction on conduct as anti-competitive.<sup>113</sup> A substantial change in attitude will be required of many officials if the judgment is to bear its full fruit. The Court of First Instance has treated the perfume market far more formalistically in *Société d'Hygiène Dermatologique de Vichy v. Commission*,<sup>114</sup> a case concerned with selective distribution rather than exclusive purchasing, but which referred expressly to the judgment in *Delimitis*. Nevertheless, I have always been an optimist and trust that the judgment in *Delimitis* is an important milestone along the road to a more realistic attitude being taken towards assessing the effects of all kinds of agreements on competition.

Some national courts have been unable to cope with EEC competition law and have, therefore, ignored it. The Commission welcomes the obligation to help them. Some officials would, however, have liked to be able to write comfort letters that make contracts enforceable. This would have required the Court to overrule its judgment in the *Perfume* cases.<sup>115</sup> If the Commission could bring itself to adopt more comfort letters of a clearing type, the problem could be largely overcome.

The Court has been careful not to usurp the functions of the Commission and extend the scope of a particular group exemption under article 85(3). It is thought that this makes it very unlikely that the Court will extend any of the group exemptions by analogy. The Commission may do so only by itself granting a formal exemption.

Many businessmen would prefer a formal decision under article 85(3) as this preempts challenge under national competition laws. It is possible that a comfort letter stating that the agreement merits exemption would also deter national competition authorities from intervention, so the parties may not press officials to write letters stating that article 85(1) does not apply, and that article 85(3) is irrelevant. If progress is to be made, the initiative will have to come from the Commission.

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113. See SCHRÖTER AND WAELEBROECK, *supra* note 11.

114. Case T-19/91, judgment 27 February 1992, not yet reported.

115. See *supra* note 27.

The following text is extremely faint and illegible. It appears to be a document with multiple paragraphs of text, but the content cannot be discerned due to the low contrast and blurriness of the scan. The text is organized into several distinct sections, likely separated by headings or subheadings, but these are also unreadable. The overall structure suggests a formal report or a detailed letter, but the specific details are lost.