A Standard of Reason in EEC Antitrust Law: Some Comments on the Application of Parts 1 and 3 of Article 85

Ben Van Houtte
A Standard of Reason in EEC Antitrust Law: Some Comments on the Application of Parts 1 and 3 of Article 85

Ben Van Houtte*

In this article, Mr. Van Houtte outlines the basic provisions for antitrust enforcement in the European Economic Community, and comments on the current standards utilized by the European Commission in application of these laws. He advocates movement toward a more equalized balance of the theory behind the antitrust laws and adequate enforcement of those provisions. To achieve that balance, Mr. Van Houtte favors the use of a "standard of reason" in Article 85(1) cases, and increased emphasis on the public interest in analyses performed under Article 85(3).

It is not surprising that in this time of economic turmoil antitrust enforcement in the European Economic Community (EEC) has come under attack. The European Parliament recently called upon the Commission to apply competition rules "discerningly," taking into account the principle that in this period of recession competition should not be an end in itself. The Economic and Social Committee has acknowledged the "need to reconcile competition and cooperation," and has

---


1 Competition: Parliament Calls for Broader EEC Competition Policy, EUROPE AGENCIE INTERNATIONALE D'INFORMATION POUR LA PRESSE (No. 3132) (n.s.) 9, 9-10 (May 6, 1981); Competition: Moreau Report Calls for Enlargement and Deepening of EEC Competition Policy, EUROPE AGENCIE INTERNATIONALE D'INFORMATION POUR LA PRESSE (No. 3130) (n.s.) 14 (May 1, 1981); Competition: The Economic and Social Committee Calls for an EEC Competition Policy Adapted to the Present Period of Crisis and Economic Change, EUROPE AGENCIE INTERNATIONALE D'INFORMATION POUR LA PRESSE (No. 3130) (n.s.) 15 (May 1, 1981).

suggested that "persistent inflation, rising unemployment and the numer- erous effects of the energy crisis" should moderate competition pol- icy. The Parliament’s Committee on Economic and Monetary Affairs urges that competition policy "should not be treated as an objective in isolation but as one of a number of interrelated Community policies, notably in the fields of commercial and industrial policy." Moreover, it has criticized the Commission’s failure to consider competition policy in the wider context of other Community policies. In addition, it has objected to "the lack of legal certainty as to the status of notified new agreements," and has called upon the Commission to examine "ways of expediting procedures for granting exemptions" which will provide needed certainty.

This article is intended to show that recent Court of Justice decisions permit the Commission to follow these recommendations of the European Parliament. Indeed, the Commission has already followed them in the areas of selective distribution and exclusive purchasing agreements. This liberal application of Article 85(1) of the EEC Treaty, which accounts for considerations beyond competition, will make the troublesome Article 85(3) exemption procedure unnecessary in some circumstances. Finally, this article will discuss the feasibility of balancing competition policy with other policies in Article 85(3) analysis.

I. A STANDARD OF REASON IN ARTICLE 85(1)

A. Emergence of a Standard of Reason

The European Commission has long analyzed agreements which may restrict competition, in terms of the impact they have on freedom of choice, when determining whether such agreements violate Article 85(1). In *National Sulphuric Acid Association*, for example, a buying

---

3 Id. at 11-12.  
5 Id. at 35.  
6 Id. at 11, 33.  
8 This understanding of Article 85(1) and (3) constitutes an introduction of reason into the reading of these provisions which is similar to the "rule of reason" applied by United States courts in the interpretation of the Sherman Act, 15 U.S.C. § 1 (1976).  

Article 85 provides:

1. The following shall be prohibited as incompatible with the common market: all agree-
pool involving the largest United Kingdom sulphur users was held to restrict competition because its members had entered an agreement depriving them of the choice of negotiating terms and conditions with each supplier individually. In Industrieverband Solnhofener Natursteinplatten, the Commission held that price fixing among manufacturers of natural stone restricted competition because the price agreement limited the business freedom of the member manufacturers and their dealers, and thus substantially restricted the scope of choice of the ultimate customers. Similarly, freedom of choice may be illegally restricted in vertical agreements which establish an exclusive relationship between a manufacturer and a dealer. In Hennessy-Henkell, an exclusive distribution agreement between a French cognac manufacturer and a German dealer was held to restrict competition, because the agreement foreclosed other German dealers from choosing to purchase from the manufacturer, and because the dealer involved could not purchase the product from other French sources.

The main purpose of Article 85(1), as applied under the freedom of choice standard, is thus to protect the business freedom of parties and non-parties to any business agreement. The standard cannot be strictly applied, however, because all agreements restrict freedom of

ments between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature of according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of any agreement or category of agreements between undertakings; any decision or category of decisions by associations of undertakings; any concerted practice or category of concerted practices; which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

choice and would be held to violate Article 85(1). Indeed, it is the essence of agreement that parties undertake obligations to each other which restrict their freedom of choice. Even a simple sale restricts the parties' business freedom: by purchasing from one seller, the purchaser becomes unable to make the same purchase from another seller. Accordingly, the Court of Justice and the Commission have developed two limitations to the Article 85(1) freedom of choice standard.\textsuperscript{16}

First, if it is shown that in the absence of a particular restriction of competition the particular trade could not take place at all, the restriction is not contrary to Article 85(1). For example, absolute territorial protection is usually a cardinal sin in EEC competition law. But if territorial protection is the only way for a manufacturer to penetrate a market, the protection will not be held to violate Article 85(1).\textsuperscript{17} Second, both tribunals have followed the old adage "\textit{de minimis non curat praetor:}" courts should not be bothered with insignificant problems. This \textit{de minimis} rule was introduced to EEC competition law in \textit{Völk v. Vervaecke},\textsuperscript{18} where the Court held that any agreement, even one conferring absolute territorial protection, can escape the prohibition of Article 85(1) if the market power of the parties is so weak that competition will not be significantly restricted.\textsuperscript{19} In addition to the standard of freedom of choice, including the two limits noted above, there are further rules governing Commission decisions in the specific areas of selective distribution\textsuperscript{20} and exclusive purchasing agreements.\textsuperscript{21} As will be discussed below, these additional rules may be characterized as a manifestation of a rule of reason in Article 85(1) analysis.\textsuperscript{22}

\textsuperscript{16} A significant limitation on all antitrust cases brought in the EEC is rooted in the text of Article 85(1), which provides that it applies only to trade between Member States. The text of Article 85(1) is reprinted \textit{supra} at note 9. Other trade is subject only to local statutes and national enforcement. \textit{See Hugin v. Commission}, 1979 E. Comm. Ct. J. Rep. 1869, 1899, [1978-1979 Transfer Binder] \textit{COMMON MKT. REP.} (CCH) ¶ 8524, at 7459. In addition, the Court of Justice and the Commission have established two more limitations without explicit textual basis. \textit{See Opinion of Advocate General Warner}, 1978 E. Comm. Ct. J. Rep. 131, 158, [1977-1978 Transfer Binder] \textit{COMMON MKT. REP.} (CCH) ¶ 8439, at 7930.


\textsuperscript{19} \textit{Id.} at 302-03, [1967-1970 Transfer Binder] \textit{COMMON MKT. REP.} (CCH) at 8086-87.

\textsuperscript{20} \textit{See infra} notes 23-41 and accompanying text.

\textsuperscript{21} \textit{See infra} notes 42-54 and accompanying text.

\textsuperscript{22} \textit{See infra} notes 55-64 and accompanying text.
1. Selective Distribution Systems

A selective distribution system consists of a coordinated network of dealers who must meet certain conditions imposed by the manufacturer. Usually, the manufacturer sells only to those dealers who agree not to sell outside the network. In Metro v. Commission, the European Court of Justice held that Article 85(1) permits such distribution systems, provided that manufacturers select their dealers "on the basis of objective criteria of a qualitative nature relating to the technical qualifications of the reseller and his staff and the suitability of his trading premises," and provided that such criteria are not applied in a discriminatory fashion. The Metro decision, which upheld Commission practice, is surprising because selective distribution systems inherently impair business freedom of choice. Dealers who are part of a distribution network surrender to the manufacturer their freedom to determine merchandising methods independently, and dealers not part of the network are denied the choice of purchasing from that manufacturer or the participating dealers.

This deviation from the standard of business freedom is not explained by either of the two established limitations on the standard. The Court approved the selective distribution system in Metro because it did not reduce "the degree of competition necessary to ensure the observance of the basic requirements and the attainment of the objectives of the Treaty," or threaten the formation of a single market. The Court stated that this degree of competition may vary with the product and economic structure of the relevant market in question. The Court concluded that, because the relevant market in Metro consisted of high quality, technically advanced audio equipment, and because readily interchangeable products were available to consumers through other distribution channels, the selective distribution system merely comprised one of several distribution channels adapted to the peculiar characteristics of the producers and to the needs of consum-

---

23 Selective distribution systems are similar to the American concept of franchising.
25 Id. at 1904, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) at 7850.
26 Id.
27 See supra notes 16-21 and accompanying text.
29 Id.
30 Id.
31 Id.
The Court's emphasis on the availability of interchangeable products suggests that it thought the system had little impact on competition and that the decision turned on the *de minimis* rule. However, this interpretation does not account for the Court's emphasis on the technologically advanced nature of the audio products. Also, the *de minimis* rule does not explain why the legality of the selective distribution system depended on whether manufacturers chose their dealers on objective, nondiscriminatory criteria, because the *de minimis* rule applies without regard to the content of the agreement. Moreover, in later cases the Court has not emphasized the availability of interchangeable products from channels other than selective distribution. It has implied that as long as admission to a selective distribution system is subject to objective, qualitative criteria, the distribution does not violate Article 85(1), even if several such systems exist in the same market. The Court implied this without referring to the *de minimis* rule, which would not excuse the cumulative restrictive effects which several small selective distribution systems together might cause.

This deviation from business freedom as the test under Article 85(1) has been characterized as a rule of reason. The rule of reason weighs the outsider's interest in easy access to the manufacturer's selling network, the manufacturer's interest in commercial goodwill, the dealer's interest in maintaining prices and the consumer's interest in easily available high quality products at low prices. The *Metro* court protected the outsider's interest by requiring manufacturers to use only qualitative, objective, nondiscriminatory criteria in choosing dealers, while protecting the consumer's interest by insisting on intra-brand competition: dealers must be free to sell to other dealers within the selective distribution system in order to decrease price differences between geographic markets. While the outsider's interests are best protected by free access to the network and maximum competition, the

32 Id.
33 See supra text accompanying note 9.
34 See supra text accompanying notes 18-19.
38 EUROPEAN COMMUNITIES COMMISSION, NINTH REPORT ON COMPETITION POLICY 18 (1980).
manufacturer's interests may not be well served by the presence of these factors. For example, if a product is expensive and technologically advanced, and requires service before or after sale, the manufacturer may prefer to retain control over its distribution system so that only highly qualified dealers will handle the product. The Metro decision satisfies this interest by allowing manufacturers to develop selective distribution systems which meet the stated requirements, despite the inevitable restriction of competition. It is not clear, however, how much weight the Court gives to consumer interests. The Court merely notes in passing that a specialized distribution channel is in the interest of consumers. The Court's insistence on intra-brand competition within the distribution channel is presumably intended to benefit consumers, but it is doubtful that consumers' interests are served when products can be purchased only from approved dealers, who will usually employ a more expensive selling apparatus than would be the case in an openly competitive market. A plausible argument can be made that at least some consumers would prefer a completely competitive distribution system permitting them to buy products "off the shelf" at the lowest possible prices.

Regardless of whether insistence on intra-brand competition adequately protects consumers, it is clear from the Court's approval of selective distribution systems that it gave more weight to the interests of manufacturers than to either consumers or excluded dealers. Until the Court adopted the standard of reason analysis, manufacturers could confidently establish selective distribution systems only by obtaining an exemption under Article 85(3), because it was clear that such an arrangement would necessarily restrict the freedom of choice of both consumers and excluded dealers. Only under the balancing of a new standard of reason, giving increased weight to the manufacturers' interests within the framework of Article 85(1), could selective distribution systems be upheld without resort to Article 85(3).

39 See Posner, The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision, 45 U. CHI. L. REV. 1, 6 (1977-78). Here Posner shows that a manufacturer may want to restrict competition in the distribution of its product in order to evoke the optimal level of dealer presale services, thus avoiding "free riding" dealers (those who provide no, or fewer, presale services). He argues that the free rider concept played a role in the United States Supreme Court's decision in Continental T.V. v. G.T.E. Sylvania, 433 U.S. 36 (1977). It can be argued that the free rider concept played a similar role in the European Court of Justice's decision in Metro.


41 For a discussion of arguments supporting a rule of reason in Article 85 cases, see infra notes 55-64 and accompanying text.
2. **Exclusive Purchasing Agreements**

The standard of reason has also been employed in the area of exclusive purchasing agreements. One would assume that exclusive purchasing agreements, by which a firm agrees to purchase all its requirements from a single supplier, always restrict competition improperly, because they restrict the purchaser's freedom of choice to obtain supplies from other sources. Several recent cases, however, suggest that the Commission has taken a different position. In its leading case in this area, *BP Kemi*, the Commission correctly stated that exclusive purchasing agreements necessarily foreclose other manufacturers from supplying the customer party to the agreement, but surprisingly did not conclude that Article 85(1) was violated. Instead, it stated: "Depending inter alia, on the length of the period and on the economic context, including the market shares and positions of the purchaser and seller such a purchasing obligation may constitute a restriction on competition within the meaning of Article 85(1)." The Commission reasoned that, regardless of whether competition is restricted after implementation of the agreement, the competition to conclude an exclusive purchasing agreement is not restricted because all interested suppliers are free to make offers, and the purchaser is free to choose his exclusive supplier from among them. However, the Commission implies that while short-term agreements do not violate Article 85(1) for this reason, long-term exclusive purchasing agreements may illegally restrict competition because they deprive new suppliers (and old suppliers who may have recently developed new efficiencies) of opportunities to compete for exclusive purchasing orders.

Because long-term and short-term exclusive purchasing agreements are distinguished on the basis of their effect on competition, the Commission's holding may seem to be an application of the *de minimis* rule. Indeed, the Commission's *Seventh Report on Competition Policy* stated that Article 85(1) generally permits exclusive purchasing agreements if they do not appreciably reduce competition—an explicit appli-
cation of the *de minimis* rule.49 The *BP Kemi* case, however, is not the result of this rule alone. In what is still the present statement of the law with respect to exclusive purchasing agreements, the Commission in *BP Kemi* gave the following guidelines:

When [in a market] which already displays a weak competitive structure, one of the most important suppliers enters into long-term contracts with one of the most important purchasers, which induce the purchaser to take all his requirements or the major part of his requirements from the same supplier, there exists an appreciable disadvantage for the supplier's competitors and for purchasers, and there is thus a restriction of competition for the purposes of Article 85(1). A six-year agreement certainly goes beyond what is appropriate under EEC rules of competition to the nature of the legal and economic relationship between the parties. Certainly [the purchaser's] interest in a regular guaranteed supply is to be recognized, as is [the supplier's] interest in lasting and steady sales of its output. But these interests could be met by concluding purchasing agreements stipulating fixed quantities . . . [and] such agreements could be regularly renewed after renegotiating to adapt them to changing interests and the shifting competitive position.50

Although the Commission recognized the parties' interests in a long-term supply arrangement, it held them insufficient because it concluded that the same interests could be met by short-term sales agreements, which restrict competition less.51 Thus, the Commission did more than merely examine the impact of the agreement on the market, which is all the *de minimis* rule requires. It judged the agreement by weighing the business justifications for the agreement and the interests of the parties involved.52

This practice of weighing the interests of the parties is also found in the *Cane Sugar Supply Agreements* decision.53 The Commission held that the purchasing agreements under review did not violate Article 85(1) because the arrangements did not restrict competition "beyond the normal commercial obligations of sellers and buyers to each other contained in this type of long-term contract."54 The case is unique because of the EEC's preferential treatment of the developing nations which were involved and because the agreements at issue were not

---

49 Id. at 23.
51 It is important to note, however, that single-term sales agreements may not be a practical alternative.
52 Especially if the purchaser's market is highly concentrated, it is unlikely that a supplier would be willing to invest heavily in manufacturing facilities unless he is certain of being able to market his product.
54 Id. at 70, [1980] 2 Comm. Mkt. L.R. at 570 (emphasis added).
strictly exclusive. However, the reference to "normal commercial obligations" of sellers and buyers to each other suggests that the Commission does not apply the same freedom of choice standard to purchasing agreements that it applies to most other agreements. Instead, parties may conclude agreements which restrict business freedom without violating Article 85(1), provided the restriction is "normal."

3. Further Indications of a Rule of Reason

In areas other than selective distribution and exclusive purchasing, the recent Commission decisions contain additional isolated references to the parties' interests. In *Floral*,55 for example, the Commission reviewed a common sales agency arrangement established by French manufacturers to coordinate their exports to Germany. The Commission held that the arrangement violated Article 85(1) because "the competitive intentions of the three French manufacturers are . . . geographically confined by means of action concerted in advance without their [sic] being any real economic constraints militating in favour of this."56 If legality of the agreement turned only on whether the business freedom of the parties or third parties was restricted, there would have been no need to investigate whether any economic constraints justified the practice at issue.

In *Reuter*,57 the Commission decided that the sale of a business and an ancillary non-competition clause did not violate Article 85(1). The Commission implied that such a sales agreement is "generally recognized as legitimate,"58 a normal practice which apparently does not violate Article 85(1) even though it eliminates a competitor from the market. A reasonable non-competition clause is likewise justified under Article 85(1) since it is necessary to protect the interests of the purchaser, though it obviously restricts competition.59 In *Distillers-Victuallers*,60 the Commission addressed a resale agreement governing the sale of whiskey for tax- and duty-free consumption. The dealers ("victuallers") were forbidden to sell to customers who sell or consume products on which taxes must be paid. Even though this agreement *prima facie* restricted the victuallers' business freedom, the Commission held the agreement legal because "these are customers who would

---

59 Id.
not normally be supplied by the victualler or his customers.”

Finally, in *Krups*, the Commission examined an obligation imposed by the manufacturer on its appointed dealers to keep adequate stocks of its products. The Commission found this was not an illegally restrictive obligation when imposed on wholesalers, because “this obligation is part of their normal job of supplying the retail trade.”

The cases discussed above show that the Court and the Commission have increasingly deviated from the usual test for violation of Article 85(1): whether business freedom is restricted in more than a *de minimis* way. The Commission is reluctant to strike down practices for which the parties have valid economic justifications, and which can, therefore, be deemed “normal” in the sense that any firm in the same situation would reasonably be expected to act similarly. Thus, the new rule of reason analysis inquires as to whether the parties had normal economic interests in imposing *prima facie* anticompetitive restrictions and whether these interests outweigh the burdens imposed on the restricted parties.

The tendency to apply the standard of reason analysis is firmly established in the areas of selective distribution and exclusive purchasing agreements. This rule of reason also may be applied in some other areas of antitrust law, possibly requiring major changes in the Commission’s philosophy with respect to exclusive relationships.

B. Advantages of a Standard of Reason in Article 85(1)

Council Regulation 17, which divides the task of enforcing EEC antitrust laws between the Commission and the courts of Member States, empowers only the Commission to grant an exemption pursuant to Article 85(3) for agreements which violate Article 85(1). The exemption procedure requires that the parties notify the Commission of their agreement and request an exemption. However, the Commission has

---

64 It can be argued that this development is supported by the text of Article 85(1) itself. Article 85(1) lists certain practices it deems to be illegally restrictive, one of which is making “the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.” EEC Treaty, art. 85(1)(e), supra note 9. Although there is hardly any case law pertaining to this prohibition of tying, it appears that the drafters of the EEC Treaty did not wish to prohibit “normal” business restrictions. Rather, they intended that the interests of the parties involved should be weighed.
so many notifications pending that there is a backlog of several years. Indeed, formal Commission responses to notifications are very rare, and consequently firms are denied the certainty they may need to implement their agreements.

This problem is compounded by the danger that, while a notification is pending, a national court may find the agreement illegal. If a national court is called upon to apply Article 85(1) to an agreement, it must do so even if the parties have notified the Commission and an exemption request is pending. Because national courts are not empowered to grant exemptions, and because the restriction of competition test is usually strictly applied, the national court will usually find the agreement illegal and may even award damages. It is little comfort that the Commission may eventually reverse the national court and grant an exemption.

This unbearable situation is partly remedied by the institution of the group exemption, in which the Commission grants exemption under Article 85(3) for all agreements which fulfill strict conditions it establishes concerning content of the agreement and market power of the parties. National courts are empowered to determine whether a particular agreement satisfies the conditions of the group exemption, even if the Commission was not notified of the agreement. A large number of agreements, however, are not covered by the group exemptions, either because the Commission has established no applicable group exemption or because the parties are unwilling or unable to enter

---

66 In 1981, the Commission took only 11 decisions applying Articles 85 and 86. In the same year, 185 new notifications were made. At the end of the year, 3,882 notifications were pending. EUROPEAN COMMUNITIES COMMISSION, ELEVENTH REPORT ON COMPETITION POLICY 51 (1982).


In order to avoid these contradictory holdings, some have suggested that the national court should stay its proceedings until the Commission decides whether to grant an exemption. A different opinion, however, is that the national court should stay its proceedings as to "old agreements," i.e., agreements existing before the implementation of Article 85 by Regulation 17, but should proceed as usual when considering "new agreements."

69 The Commission is aware of the problems created by its backlog, and intends to speed up its procedure. EUROPEAN COMMUNITIES COMMISSION, ELEVENTH REPORT ON COMPETITION POLICY 27 (1982).

an agreement which complies with the strict conditions the group exemptions impose.

It is with regard to agreements not covered by group exemptions that a standard of reason under Article 85(1) is most greatly needed. Without it, there remains a great risk that national courts would hold such agreements to be void and unenforceable. An application of Article 85(1) which accounts for the interests of the parties would substantially reduce the Commission’s backlog of exemption requests and the resulting uncertainty for business planners, both by making fewer agreements unlawful under Article 85(1) and by reducing the need to request exemptions.

One could object that this approach enhances the power of national courts to shape competition policy and thereby hinders uniform application of EEC antitrust law as decided by its main policy making body, the Commission. One could also object that introducing a rule of reason into Article 85(1) analysis decreases the effectiveness of the Commission’s sanction of refusing to consider an application for exemption of an agreement restricting competition of which the Commission is not notified.

Although these objections are warranted, they do not outweigh the risk firms incur that their agreements may needlessly be declared void by a national court. Even though some uncertainty in antitrust law is unavoidable, and may even be desirable, this uncertainty should be minimized. Second, there is no reason to doubt that national courts of Member States are capable of enforcing Article 85(1) effectively. Some Member States, such as Germany, already possess a tradition of enforcing national antitrust laws. Provided the general awareness and knowledge of EEC antitrust law is increased, national courts will be able to apply Article 85(1) satisfactorily. Third, uniformity of enforcement would still be guaranteed by requests for preliminary rulings on questions of law, which is how the European Court of Justice ensures that Article 85(1) is uniformly applied. Finally, it is probable that such an application of Article 85(1) will relieve the Commission of its backlog, speeding up the exemption procedure, providing more legal certainty to businesses, and thereby possibly decreasing the reluctance of many firms to notify the Commission of their agreements. Introducing a

---


standard of reason to Article 85(1) could thus provide for more, instead of less, effective antitrust enforcement.

II. A STANDARD OF REASON IN ARTICLE 85(3)

Article 85(3) provides for exemption from Article 85(1) liability of an agreement which:

(a) "contributes to improving the production or distribution of goods or to promoting technical or economic progress;"

(b) allows "consumers a fair share of the resulting benefit;"

(c) does not "impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; and"

(d) does not "afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."\(^{73}\)

Because condition (a) is positive, stating a goal to be achieved, while the other three conditions are negative, stating effects to be avoided,\(^{74}\) condition (a) is of particular importance. Consequently, it is essential to consider the meaning of the requirement that the agreement must contribute "to improving the production or distribution of goods or to promoting technical or economic progress." The determination of which arguments are relevant to Article 85(3) exemption depends on how the Commission interprets this requirement.

In most cases in which exemptions have been granted, the Commission concluded that condition (a) was met because either production or distribution was improved.\(^{75}\) Specialization and other forms of cooperation between competitors often improve production\(^ {76}\) by lowering production costs, increasing quality and facilitating development of new products. Vertical agreements often lead to improvements in distribution,\(^ {77}\) such as lower distribution costs and increased availability of products. The common feature of these production and distribution

---


\(^{74}\) Although the second condition is phrased in a positive way, apparently requiring active consumer participation in the benefits which result from the restrictive agreement, it is applied in a negative manner: the Commission usually considers it to be satisfied when competition has not been eliminated, because the pressure of competition is presumed to lead the parties to the agreement to pass on at least part of the benefits to consumers. *See, e.g.*, National Sulphuric Acid Ass'n, 23 O.J. EUR. COMM. (No. L 260) 24, 30 (1980), [1980] 3 Comm. Mkt. L.R. 429, 440.

\(^{75}\) *See, e.g.*, Re Campari, 21 O.J. EUR. COMM. (No. L 70) 69 (1978); Re the Jaz-Peter Agreement, 21 O.J. EUR. COMM. (No. L 61) 17 (1978), [1976-1978 Transfer Binder New Developments] COMMON MKT. REP. (CCH) ¶ 10,013.


\(^{77}\) *Re Campari, 21 O.J. EUR. COMM. (No. L 70) 69 (1978).*
improvements is that they benefit mainly the users of the product to which the exempted agreement pertains, because distribution and production are activities which are undertaken to satisfy the customers' demand.

In a few cases, the Commission has granted an exemption on the ground that technical or economic progress is promoted. Technical progress often results from joint research and development, and from license agreements which facilitate the development and marketing of technologically advanced products. The Commission has only rarely found, however, that an agreement promotes economic progress, and when it has, the Commission also found other benefits, such as improvement of production or technical progress.

Thus, both technical and economic progress are, in the Commission's view, closely related to the purpose of the agreement and the consumers of the product involved. Apparently, the Commission has decided that "technical or economic progress" refers only to benefits accruing to users of the products. The only arguments to which the Commission is receptive are those that emphasize the benefits to customers of the parties to a restrictive agreement.

Parties to an agreement restricting competition may wish to argue that their agreement benefits the economy as a whole, if not users of their products. Members of a crisis cartel, for example, might claim that an agreement gradually to decrease industry production according to a predetermined plan is necessary to maintain maximum employment. The members of another industry may need to agree unanimously to install pollution control or energy saving devices in order to prevent a dissenter from gaining a cost advantage and underpricing participating firms. Finally, an industry could try to justify an agreement among its members to reduce production on the grounds that re-

---

80 The second condition, providing for consumer participation in the resulting benefit, has been incorporated into the first.
81 In certain industries, for example, steel or man-made fibers, there is a lasting surplus production capacity of major proportions. In order to recoup at least part of the very high fixed costs and to keep their plants running, producers in such industries tend to sell at a loss. The purpose of a crisis cartel is to solve this problem by an industry-wide cut-back of production, which would result in a profitable price level. The alternative for this joint approach is that producers who do not have the financing capacity to sustain these losses will go bankrupt, resulting in unemployment.
82 See, e.g., EUROPEAN COMMUNITIES COMMISSION, EIGHTH REPORT ON COMPETITION POLICY 49-50 (1979).
duction is necessary to facilitate imports from developing nations.\(^3\)
These kinds of agreements harm rather than benefit the customers of
the parties involved because each agreement imposes an additional cost
on manufacturers which would probably be passed on to consumers.
In each of those agreements, however, the Community gains higher
employment, reduced pollution, saved energy or greater imports.
These public interest arguments, which support exemption of restric-
tions of competition under Article 85(3) on the grounds that the Com-

munity would benefit, even if certain consumers would not, may
influence the Commission's decision whether to investigate an agree-
ment or to publish the investigative findings, but the reported cases
clearly indicate that the Commission is disinclined to consider public
interest arguments in deciding whether to grant an exemption.

The best example of the Commission's aversion to including pub-
lic interest concerns in its analysis is found in FEDETAB.\(^4\) The case
concerned a trade association consisting of almost all of the Belgian
and Luxembourgian tobacco manufacturers. The association operated
an extensive distribution system, which fixed profit margins, standard
terms of payment and end-of-year rebates. The association’s defense
was that regulation of distribution was necessary to ensure the survival
of specialized tobacco wholesalers and retailers. The Commission re-
jected this argument, however, with little consideration:

Granting [specialized wholesalers and retailers] more favourable condi-
tions “in order to insures their survival” . . . can only be interpreted as an
attempt artificially to keep businesses on the market when the ultimate
buyer is not convinced that they are so essential and the normal forces of
competition would have put them out of business.\(^5\)

The Commission thus relegated survival of these specialized
wholesalers and retailers to the forces of competition, and ultimately to
consumers, instead of to the protective regulations of the association.
The Commission was apparently unwilling to consider that survival of
a large group of retailers could serve the public interest even if compe-
tition is reduced. It did not weigh advantages to the public interest
against disadvantages to consumers such as higher prices. One must,
therefore, conclude that the Commission’s refusal to examine the pub-
lic interest defense in detail suggests that it narrowly interprets condi-
tion (a), looking only for benefits to consumers and not to wholesalers,
retailers or their employees.

\(^3\) See Mok, *Kartelbeleid nu en in de toekomst, Nieuwe Ontwikkelingen in het Europees Kartelrecht* 1 (1976).


\(^5\) Id. at 43.
The association's appeal of the Commission's decision in *FEDETAB* to the Court of Justice was based partly on the Commission's refusal to grant an exemption.\(^8\) The association revived its public interest defense that the purpose of the distribution system was to maintain a dense distribution network of 80,000 retailers able to supply consumers in even the remotest places with a wide range of tobacco brands. They argued that elimination of the system would have serious social consequences, including increased bankruptcy of small retailers and unemployment.\(^7\) The Court affirmed the Commission,\(^8\) and rejected the public interest defense. The Court acknowledged that the distribution system was responsible for the very large number of small outlets, each carrying a wide range of brands, but it doubted whether such benefits would sufficiently compensate for the stringent restrictions imposed "on competition in respect of sales terms allowed the trade."\(^9\) Accordingly, the Court concluded that the distribution system probably did not "contribute... to improving the distribution of cigarettes within the meaning of Article 85(3)."\(^9\)

The Court's treatment of the public interest defense was unsatisfactory for two reasons. First, it did not squarely address the association's claim that elimination of the FEDETAB distribution system would endanger the survival of the small retailers, and lead to bankruptcies and unemployment. Second, although the Court stated that the distribution system probably did not contribute to improving the distribution of cigarettes, it failed to discuss whether the system satisfied condition (a) by fostering economic progress.

Although the Court disparaged the public interest defense and rested its holding on other grounds, the Court did not hold, as the Commission did, that the defense is invalid. That the Court may later accept the defense in an appropriate case is consistent with *Metro*, where the Court stated:

> [T]he establishment of supply forecasts for a reasonable period constitutes a stabilizing factor with regard to the provision of employment which, since it improves the general conditions of production, especially when the market conditions are unfavourable, comes within the framework of

---

87 *See id.* at 3278, 3 Comm. Mkt. L.R. at 246.
88 The Court disposed of the case on the grounds that condition (d) was not fulfilled. The Court pointed out that FEDETAB member firms produce or import roughly 95% of the cigarettes sold in Belgium and thus were in a position to eliminate competition in respect to a substantial part of the tobacco market. *Id.* at 3279-80, 3 Comm. Mkt. L.R. at 247-48.
90 *Id.*
the objectives to which reference may be had pursuant to Article 85(3).91

Factors other than the social considerations of avoiding bankruptcies and unemployment may be within the scope of an expanded first condition of exemption. The Court in the Metro case indicated that exemption is appropriate for agreements intended to improve the general conditions of production. This may mean that the "improvement of production" requirement of condition (a) is satisfied if the agreement improves production in the economy generally, even if it does not improve production of the goods involved in the agreement. In addition, there is a strong argument that the "technical or economic progress" requirement may be satisfied by any agreement which generates any kind of progress relevant to the EEC. "Progress" must be defined by referring to Article 2 of the Treaty, which states that the goals of the EEC are "to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it."92 The goals are sufficiently comprehensive to allow the Court to consider social, environmental and developmental policy in determining whether an agreement promotes technical or economic progress.93

Even if the Commission interprets condition (a) of exemption so as to account for considerations other than increased competition and benefits to customers, agreements restricting competition will still have to satisfy conditions (b), (c) and (d) to qualify for exemption. The three other conditions impose standards which preclude exemption of agreements which would have undesirable results for competition and customers. Condition (b) requires consumer participation in the benefits resulting from the restrictive agreement. Because the cases discussed above interpret condition (a) also to require that the customer benefit, conditions (a) and (b) may seem identical. The Court, however, has stated that they are separate requirements,94 and the Commission should, therefore, separately examine whether consumers participate in benefits enumerated in condition (a). This requires a definition of

92 EEC Treaty, art. 2, supra note 9.
93 Similarly, the Opinion of the Economic and Social Committee, supra note 2, at 3, states that "These are clearly economic and social aims and it is therefore right and expedient that rules on competition should be increasingly considered in the light of the economic and social situation." (emphasis in original).
"consumers." Some writers favor a definition including all those not a party to the agreement. However, the Court and Commission have decided that "consumers" means "users of the product." Consequently, condition (b) requires that consumers receive a benefit beyond that guaranteed by condition (a) to consumers as part of the economy as a whole.

Condition (c) provides that the agreement contain only indispensable restrictions. By making overly broad restrictions unlawful, the condition provides an additional safeguard.

Condition (d) requires that competition in a substantial part of the products in question not be threatened. The criteria for meeting this condition, however, are unclear; the Commission has exempted agreements between parties possessing predominant market shares, yet refused to exempt agreements between parties with low market shares. Although a "unified theory" of condition (d) is clearly lacking, such a theory may be deduced from Geitling v. High Authority, a case brought under an equivalent provision of the European Coal and Steel Community Treaty. In that case, the Court of Justice seemed to imply that the power to eliminate competition in a substantial part of the product market means the power to affect substantially the price level in that product market. No EEC decision has adopted this principle, but none has contradicted it either, and it seems an appropriate basis for the fourth condition of exemption. This construction would assure that exempting more agreements by expanding condition (a) would not substantially increase prices in the relevant market.

Thus, a standard of reason in Article 85(3) means that, in order to benefit from an exemption, an agreement must (a) yield benefits for the economy as a whole, (b) yield benefits for the customers of the parties

---

95 In some of the other languages of the EEC Treaty, the corresponding term is "users."
96 See, e.g., Mok, supra note 83.
100 It is subject to dispute whether other means of allowing such agreements exist. One possibility would be a regulation under Article 87(2)(c), which provides for defining, if need be, in the various branches of the economy, the scope of the provisions of Article 85. EEC Treaty, art. 87(2)(c), supra note 9. Whereas some writers are of the opinion that such regulations should comply with Article 85(3), e.g., Sharpe, The Commission's Proposals on Crisis Cartels, 17 COMMON Mkt. L. Rev. 75, 82 (1980), it is submitted that this constitutes a petito principii since the applicability of Article 85(3) precisely depends on the scope of Article 85.
to the agreement, (c) not contain any restrictions beyond what is necessary to achieve these goals, and (d) pose no danger that prices will be increased in the relevant market.

III. CONCLUSION

The development of EEC antitrust law, which still continues, requires that an equilibrium be found between the need for a sound theory of the antitrust provisions and the need for sound enforcement. The present emphasis on developing theory has produced unsatisfactory enforcement, fraught with delay and uncertainty. The introduction of a standard of reason to Article 85(1), which accounts for interests of the parties to the agreement, brings EEC antitrust law nearer to the proper equilibrium. The theory is sound because the Commission ought not to interfere with restrictive practices for which the parties have valid economic reasons, which are not intended to restrict competition, and which are normal in the sense that any reasonable firm in the same situation would adopt the same restrictions. This theory of Article 85(1) would solve some of the present enforcement problems of backlogged exemption requests.

The present theory of Article 85(3) attaches some significance to the public interest, but should emphasize this interest with greater enthusiasm. The Commission should be more receptive to arguments that a restrictive agreement benefits the economy as a whole by increasing employment or environmental protection, or by meeting any of the objectives of Article 2. Consumer interests will be adequately protected by existing requirements that exempted agreements produce benefits in which consumers participate and which do not increase prices.

This suggested evolution admittedly reduces the importance of consumers’ and competitors’ interests. In the present economic circumstances, however, a more balanced theory of competition law is necessary to respond to the valid criticisms of the European Parliament.