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1988 Review of the European Court of Justice: Price Restraints, Patent Rights, and Extraterritorial Jurisdiction

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Increasing attention is focusing on the impending unification of the European Economic Community (EEC or Community) internal market in 1992.[1] The Court of Justice of the European Communities (Court) seems poised to provide an increasingly important role as final arbiter of Community policy.[2] Some critics have suggested,

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1. The recently adopted Single European Act, *reprinted in* 25 I.L.M. 503 (1986), COUNCIL OF THE EUROPEAN COMMUNITIES, SINGLE EUROPEAN ACT (1986); *see also* New Developments, 4 Common Mkt. Rep. (CCH) ¶ 95,027 at 51,098 (citing Council Press Release (No. 8677) (1988)), affirms the Member States' commitment to greater EEC integration:

> The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992 . . .
>
> The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.

Single European Act, Title 2, Ch. 2, Sec. 2, art. 8A, *reprinted in* 25 I.L.M. 510-11.

2. *See* Weiler, *Review Essay*, 24 COMMON MKT L. REV. 555, 556 (1987). The mandate of the European Court of Justice is set out in the three "Community" treaties which together create the European Communities. Treaty Establishing a European Economic Community, 2 U.N.T.S. 294-97, 1-3 Common Mkt. Rep. (CCH) ¶¶ 100-5406, arts. 164-188 [hereinafter EEC Treaty]; Treaty Establishing the European Atomic Energy Community, 295 U.N.T.S. 259, 1 Common Mkt. Rep. (CCH) ¶ 101, arts. 136-160 [hereinafter EAEC Treaty]; Treaty Instituting the European Coal and Steel Community, 261 U.N.T.S. 140, 1 Common Mkt. Rep. (CCH) ¶ 101, arts. 31-45 [hereinafter ECSC Treaty]. Although each treaty provides for its own judiciary, a convention signed contemporaneously with the Treaty of Rome provided common jurisdiction in a "single Court of Justice." Convention on Certain Institutions Common to the European Communities, 3 Common Mkt. Rep. (CCH) ¶ 5100, at 4232-4233, arts. 3-4.

Article 173 of the EEC Treaty defines the Court's power of review. It states, in pertinent part:

> The Court of Justice shall review the legality of acts of the Council and the Commission other than recommendations or opinions. It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of power.
>
> Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the

however, that the Court has already gone beyond its original mandate.[3] One commentator has even gone so far as to describe the Court's "activism" as "revolting judicial behavior."[4] Whichever view ultimately prevails, it remains essential to consider the implications of today's Court decisions as the Community prepares for greater economic and social integration in the next decade.

This article examines three areas of recent Court action which constitute significant developments for international legal practitioners.[5] An introductory section first examines the impact of the creation of the Court of First Instance. The article then addresses developments in Court jurisprudence in the areas of restrictive pricing practices, patent rights, and the extraterritorial application of EEC competition provisions.

I. Introduction

Since its inception, the Court has defined Community policy in conjunction with the three other administrative bodies of the EEC—the Assembly,[6] the Council,[7] and the Commission.[8] Given the limited

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form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

EEC Treaty, art. 173, 3 Common Mkt. Rep. (CCH) at 3833. For a recent discussion of the future role of the Court in light of the Single European Act, *see* Glaesner, *The Single European Act: Attempt at an Appraisal*, 10 Fordham Int'l L. J. 446, 470 (1986-1987).

3. *See, e.g.*, H. Rasmussen, On Law and Policy in the European Court of Justice (1986); Weiler, *The Community System: The Dual Character of Supranationalism*, Yearbook of European Law 267 (1981).

4. H. Rasmussen, *supra* note 3, at 508.

5. For a similar review of recent developments emanating from the Council and Commission, *see* Recent Development, 1987 Review of the European Economic Community Council and Commission: Securities Regulation, Franchising Agreements, and Knowhow Licensing, 1 Transnat'l Law. 281 (1988).

6. The Assembly, or—as it has come to be known—the European Parliament, has only in recent years begun to play a more influential role in EEC policymaking. Its original mandate limited it primarily to consultative functions and the supervision of Commission legislation. *See* EEC Treaty, arts. 138-44, 3 Common Mkt. Rep. (CCH) ¶¶ 4305-36 at 3416-48 (establishing the powers of the Assembly). The Assembly has since acquired some of the characteristics of a legislative body, having been empowered with the direct election of delegates from Member States. *See* Act Concerning the Election of the Representatives of the Assembly by Direct Universal Suffrage, Council Decision (No. 76/787) (1976), 3 Common Mkt. Rep. (CCH) ¶ 4308 at 3420-24. The Assembly has also assumed an increasingly authoritative role in Community budget oversight. *See* EEC Treaty, art. 203, 3 Common Mkt. Rep. (CCH) ¶ 5021 at 3413 (budget procedure).

7. The role of the Council, as specified in Article 145 of the EEC Treaty, 3 Common Mkt. Rep. (CCH) ¶ 4401 at 3503, is to ensure coordination of the general economic policies of the Member States and to make decisions of Community policy and law. *Id.* The Council is comprised of a ministerial representative from each of the Member States, normally either the foreign minister or the minister responsible for the specific issue being addressed. EEC Treaty, art. 146, 3 Common

legislative role of the Assembly, however, European policy pronouncements emanate largely from the Council, the Commission, and the Court. The Court's role in making policy is twofold.[9] On one hand, the Court reviews interpretations and application of the EEC Treaty by the other Community institutions.[10] On the other hand, the Court interprets and applies Treaty provisions in areas where other Community institutions have not acted.[11]

The role of the Court was significantly altered in 1988 with the establishment of the Court of First Instance.[12] Owing to the heavy burden of technically complex complaints, many requiring decisions not only on questions of law but also on questions of fact, and a full docket of EEC civil servant disputes, the Court had requested the creation of a lower court of original jurisdiction.[13] In October 1988, the Council adopted a decision creating the Court of First

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Mkt. Rep. (CCH) ¶¶ 4405-6 at 3507-9. While most Council acts require a unanimous or qualified majority vote, the Single European Act introduced the validity of simple majority voting in certain areas such as directives and regulations to establish the freedom of movement of workers. *See* EEC Treaty, art. 148, 3 Common Mkt. Rep. (CCH) ¶¶ 4415-6 at 3510-14.

8. The Commission functions broadly to ensure that provisions of the Treaty are carried out by other EEC institutions and Member States. *See* EEC Treaty, art. 155, 3 Common Mkt. Rep. (CCH) ¶ 4471-2 at 3603-6. In carrying out its mandate, the Commission is empowered to bring suit in the Court of Justice for alleged violations of Treaty obligations by Member States. *See* EEC Treaty, art. 169, 3 Common Mkt. Rep. (CCH) ¶ 4616 at 3819. The 17 Commission members are appointed by Member States, but are challenged to exercise their duties independently of Member State allegiances. *See* EEC Treaty, arts. 157-60, 3 Common Mkt. Rep. (CCH) ¶¶ 4476-96 at 3610-19.

9. The jurisdiction of the Court is broadly defined to encompass four levels of review: (1) complaints lodged against a Member State by either the Commission or another Member State based on Community law, EEC Treaty, arts. 169-171, 3 Common Mkt. Rep. (CCH) ¶¶ 4616-31 at 3819-31; (2) review and potential nullification of Council or Commission decisions or regulations when challenged by another Community institution, Member State, individual or legal person, EEC Treaty, art. 173, 3 Common Mkt. Rep. (CCH) ¶¶ 4635-36 at 3833-44; (3) preliminary rulings on aspects of Community law solicited by national courts, EEC Treaty, art. 177, 3 Common Mkt. Rep. (CCH) ¶¶ 4655-56 at 3835-66; and (4) administrative actions brought by Community staff members for review of employment policies, EEC Treaty, art. 179, 3 Common Mkt. Rep. (CCH) ¶¶ 4665-66 at 3868-69.

10. *Id.*

11. *Id.*

12. *Court of First Instance is Established*, 282 EUROPE 43 (1988).

The jurisdiction of the newly formed court will include:

> — disputes between the Communities and their civil servants;
> — actions brought against the Communities by natural or legal persons concerning the implementation of the competition rules applicable to enterprises; and
> — actions brought against the Commission by an enterprise or association of enterprises relating to matters covered by the ECSC Treaty (such as levies, production, prices, restrictive agreements, etc.).

New Developments, 4 Common Mkt. Rep. (CCH) ¶ 95,027 at 51,099 (Jan. 1989).

The Court of First Instance may also take over original jurisdiction from the Court in cases concerning dumping and subsidies, if, after a review of the court's first two years of activity, the Council acts on such a proposal before it. *Id.*

13. Glaesner, *supra* note 2, at 470.

Instance.[14] While the Court will lose its original jurisdiction in some areas, the appellate process ensures review of cases appealed from the Court of First Instance.[15] Thus, while several of the cases discussed below would not now come before the Court (at least initially), the reasoning and precedential value of the decisions remain unchanged.

II. Restrictive Pricing Practices

A. *Introduction to EEC Competition Principles Affecting Pricing Practices*

The maintenance of free competition is a central tenet of the Community goal of establishing a common European market.[16] Restrictive pricing practices are, therefore, singled out for attack because

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14. *See* Europe, *supra* note 12, at 43; New Developments, 4 Common Mkt. Rep. (CCH) ¶ 95,027 at 51,098. For recent reviews of the Single European Act, *see* Glaesner, *supra* note 2, at 470; Schermers, *The European Court of First Instance*, 25 Common Mkt. L. Rev. 541 (1988). The legal basis for the Council's decision was incorporated in the Single European Act, Council of the European Communities (1986). Articles 4, 11 and 26 of the Act amended the relevant sections of the EEC originating treaties (Article 32d ECSC Treaty, 261 U.N.T.S 165-66; Article 168A EEC Treaty, 3 Common Mkt. Rep. (CCH) ¶ 4613 at 3818; and Article 140A EAEC Treaty, 295 U.N.T.S. 99):

> 1. At the request of the Court of Justice and after consulting the Commission and the European Parliament, the Council may, acting unanimously, attach to the Court of Justice a court with jurisdiction to hear and determine at first instance, subject to a right of appeal to the Court of Justice on points of law only and in accordance with the conditions laid down by the Statute, certain classes of action or proceeding brought by natural or legal persons. That court shall not be competent to hear and determine actions brought by Member States or by Community institutions or questions referred for a preliminary ruling under Article [41 ECSC Treaty, 261 U.N.T.S. 171; 177 EEC Treaty, 3 Common Mkt. Rep. (CCH) ¶ 4655 at 3853; 150 EAEC Treaty, 295 U.N.T.S. 102].
> 2. The Council, following the procedure laid down in paragraph 1, shall determine the composition of that court and adopt the necessary adjustments and additional provisions to the Statute of the Court of Justice. Unless the Council decides otherwise, the provisions of this Treaty relating to the Court of Justice, in particular the provisions of the Protocol on the Statute of the Court of Justice, shall apply to that court.
> 3. The members of that court shall be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to judicial office; they shall be appointed by common accord of the Governments of the Member States for a term of six years. The membership shall be partially renewed every three years. Retiring members shall be eligible for reappointment.
> 4. That court shall establish its rules of procedure in agreement with the Court of Justice. Those rules shall require the unanimous approval of the Council.

Single European Act, arts. 4, 11, 26, *reprinted in* 25 I.L.M. 508, 510, 516.

15. New Developments, 4 Common Mkt. Rep. (CCH) ¶ 95,027 at 51,099. "Any party which has been unsuccessful, in whole or in part, in its submissions may bring an appeal limited to points of law before the Court of Justice against decisions of the Court of First Instance." *Id.*

16. *See generally* EEC Treaty, arts. 1-8, 3 Common Mkt. Rep. (CCH) ¶ 121 at 161-63.

of the central role prices play in maintaining competition.[17]

Regulation of restrictive pricing practices, as with Community competition policy in general, falls largely upon Articles 85 and 86 of the EEC Treaty. Article 85(1) prohibits those activities which affect trade between Member States and which either prevent, restrict, or distort competition within the Community.[18] Any agreements entered into which violate these prohibitions are void under Article 85(2).[19] Article 85(3), however, provides an important exemption clause.[20] So long as a particular agreement or practice does not impose otherwise avoidable restrictions on competition and "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 benefits," it is exempted from the prohibitions of Article 85(1).[21]

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17. G. Bellamy & G. Child, Common Market Law of Competition § 4-002 at 158 (3rd ed. 1987).

18. Article 85(1) specifically enumerates various activities which are considered "incompatible with the common market:"

> . . .all agreements 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 with 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 or according to commercial usage, have no connection with the subject of such contracts.

EEC Treaty, art. 85(1), 2 Common Mkt. Rep. (CCH) ¶ 2005 at 1531.

19. EEC Treaty, art. 85(2), 2 Common Mkt. Rep. (CCH) ¶ 2031 at 1657.

20. Article 85(3) states:

> The provisions of [Article 85(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.

EEC Treaty, art. 85(3), 2 Common Mkt. Rep. (CCH) ¶ 2051 at 1661.

21. *Id.* Several Commission Regulations have come to play a major role in defining the permissible scope of anti-competitive practices, primarily through specific group or "block" exemptions. *See, e.g.*, Commission Regulation 1983/83 on Exclusive Distribution Agreements, 26 O.J. Eur. Comm. (No. L173) 1 (1983) (officially corrected in 26 O.J. Eur. Comm. (No.

Restrictive pricing practices are practically *per se* violations of Article 85(1) given their inherently anti-competitive nature.[22] Article 85(1) states specifically that agreements or practices which "directly or indirectly fix purchase or selling prices" and which affect trade between Member States are incompatible with the competition rules of the Common Market.[23] Exemptions under Article 85(3) for restrictive pricing practices, as provided to some distribution agreements[24] for example, are thus exceptional.[25]

Article 86[26] complements Article 85 by, among other things, prohibiting enterprises from employing restrictive pricing practices in conjunction with a dominant position[27] in a particular product mar-

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L281) 24 (1983)), 2 Common Mkt. Rep. (CCH) ¶ 2730; Commission Regulation 1984/83 on Exclusive Purchasing Agreements, 26 O.J. Eur. Comm. (No. L173) 5 (1983) (officially corrected in 26 O.J. Eur. Comm. (No. L281) 24 (1983)), 2 Common Mkt. Rep. (CCH) ¶ 2733; Commission Regulation 2349/84 on Patent Licensing Agreements, 27 O.J. Eur. Comm. (No. L219) 15 (1984) (officially corrected in 27 O.J. Eur. Comm. (No. L113) 34 (1984)), 2 Common Mkt. Rep. (CCH) ¶ 2747 [hereinafter Patent Licensing Regulation]; Commission Regulation 123/85 on Motor Vehicle Distribution Agreements, 28 O.J. Eur. Comm. (L15) 16 (1985), 2 Common Mkt. Rep. § 2751; Commission Regulation 418/85 on Research & Development Agreements, 28 O.J. Eur. Comm. (No. L53) 5 (1985), 2 Common Mkt. Rep. (CCH) ¶ 2753.

22. I. Von Bael & J-F. Bellis, Competition Law of European Economic Community § 5.02[2], at 5-4 (1988); Bellamy & Child, *supra* note 17, § 4-002 at 158.

23. EEC Treaty, art 85(1)(a), 2 Common Mkt. Rep. (CCH) ¶ 2005 at 1531.

24. Distribution agreements are commonly employed by product suppliers—often those distributing sophisticated consumer goods such as electronic equipment—who wish to maintain control over the retail dealers ultimately selling their product. Demaret, *Patents, Territorial Restrictions and EEC Law*, 1986 Fordham Corporate Law Institute (B. Hawk, ed. 1987) at 149-150. For an example of a recent case regarding the scope of the Commission's motor vehicle exception to article 85(1), *see* V.A.G. France v. Etablissement Magne, 1986 E. Comm. Ct. J. Rep. ____; [1985-1986 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,390.

25. *See* Bellamy & Child, *supra* note 17, § 4-002 at 158; Von Bael & Bellis, *supra* note 22, § 5.02[2] at 5-4.

26. Article 86 states in pertinent part:

> . . .[A]ny abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.
> Such abuse may, in particular, consist in:
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
> (b) limiting production, markets or technical development to the prejudice of consumers;
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
> (d) 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. 86, 2 Common Mkt. Rep. (CCH) ¶ 2101 at 1675.

27. A dominant position has been defined as "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers." *See* United Brands v. Commission, 1978 E. Comm. Ct. J. Rep. 207, [1977-1978 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8429 at 7708.

ket.[28] For an Article 86 violation to exist, there must be an abuse of a dominant position.[29] In the context of restrictive pricing practices, an abuse may exist where an enterprise engages in discriminatory, predatory, or excessive pricing.[30]

For restrictive pricing practices to constitute violations of either Article 85 or 86, they must rise to the level of "affecting trade between member states."[31] Pricing restrictions are most blatant and most susceptible to attack by the Commission and Court when executed by companies located in different countries or by export-oriented companies in the same country.[32] The negative impact on interstate trade, as prohibited by Articles 85 and 86, is clearly evident in such cases. Where an alleged competition violation does not affect trade between Member States, the relevant competition law of the affected Member State is determinative.[33]

Restrictive pricing practices are as varied as the number of alleged pricing violations brought before the Commission and Court each year. The most blatant or "direct" forms of pricing practices include price fixing agreements,[34] resale price maintenance agreements,[35] dis-

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28. EEC Treaty, art. 86(c), 2 Common Mkt. Rep. (CCH) ¶ 2101 at 1675.

29. Temple Lang has provided a three-part definition of what constitutes an "abuse" of dominant position:

(1) "exploitative abuses" are those in which a dominant enterprise takes advantage of its market power to obtain advantages or impose burdens not otherwise available in conditions of effective competition;

(2) "anti-competitive abuses" arise where a dominant enterprise uses its power to restrict the effective competition of similar product producers; and

(3) "reprisal abuses" are attempts by a dominant enterprise to damage or seriously interfere with a competing enterprise.

Lang, *Monopolisation and the Definition of "Abuse" of a Dominant Position under Article 86 EEC Treaty*, 16 COMMON MKT. L. REV. 345, 363-364 (1979).

30. For an example of discriminatory pricing implemented in violation of Article 86 *see infra* text accompanying notes 48-50.

31. *See supra* notes 18 and 26.

32. VON BAEL & BELLIS, *supra* note 22, § 5.02[2], at 5-5. Practices held by the Commission and Court to violate Article 85 have included: (1) agreements between companies located in a single Member State which do not expressly involve import or export between Member States, but which have the effect of compartmentalizing or protecting domestic markets. *See, e.g.* Comm'n Decision, Vereeniging van Cemethandelaren (VCH), O.J. EUR. COMM. (No. L13) 34 (1971), [Jan. 1970-Dec. 1972 New Developments Transfer Binder] Common Mkt. Rep. (CCH) ¶ 9492 (on appeal VCH v. Commission, 1972 E. Comm. Ct. J. Rep. 977, [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8179; and (2) agreements executed by enterprises in non-EEC countries regarding imports into one or more Member States; *see e.g. infra* text accompanying notes 237-90 discussing A. Ahlström Oy and Others v. Commission (the "Woodpulp" cases).

33. For a recent Court decision applying this principle, *see infra* text accompanying note 152.

34. Price-fixing agreements arise where either two or more competitors or a manufacturer and distributor agree on specified retail prices to be charged for a product. Such agreements

criminatory pricing,[36] predatory pricing,[37] and excessive pricing.[38] Other less obvious or "indirect" pricing practices, though apparently having little connection to "prices" in the narrow sense of the term, often constitute artificial price restraints. Typically, these are profit margin restrictions, discounts,[39] credit terms,[40] or rebates.[41]

The Commission and Court invoke both Articles 85 and 86 in response to restrictive pricing practices. As reflected in the two examples which follow, the major distinction between the application of Articles 85 and 86 is the degree of market impact necessary to

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typically arise in "horizontal" settings, *i.e.*, between competitors at the same level of product development or distribution, as a means of maintaining artificially high industry-wide prices. In contrast, "vertical" price-fixing agreements are those entered into between traders at different product levels, *e.g.*, between a supplier and distributor, often with the aim of maintaining specified resale prices. In practice, price-fixing arrangements frequently take on both horizontal and vertical characteristics, as in the case of producers concerting amongst themselves as to prices to be imposed in turn upon distributors. VON BAEL & BELLIS, *supra* note 22, § 5.01 at 5-2.

35. Resale price maintenance agreements are typically entered into between manufacturers and distributors, whereby the former imposes a system of minimum retail price limits on the latter. *See, e.g.*, Comm'n Decision, GERO-fabriek, O.J. EUR. COMM. (No. L16) 8 (1977), [1976-1978 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 9914 at 9968-69, discussed *infra* text accompanying notes 136-38.

36. Discriminatory pricing has been defined as "applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage." United Brands v. Commission, [1977-1978 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8429 at 7666. *See generally* VON BAEL & BELLIS, *supra* note 22, § 5.01 at 5-2, § 5.03 at 5-24.

37. Predatory pricing is generally regarded as the charging of unduly low prices in the pursuit of eliminating competition. No cases of predatory pricing have been addressed by the Commission or Court. VON BAEL & BELLIS, *supra* note 22, § 5.01 at 5-3, § 5.04 at 5-39.

38. Excessive pricing has been defined as the charging of prices "which have no reasonable relation to the economic value of the product supplied." *United Brands*, [1977-1978 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8429 at 7666. While the Court in *United Brands* stated that pricing could be determined to be excessive, in part, by comparing a product's selling price with its cost of production, the Court and Commission have declined to provide specific criteria for such a determination. Moreover, the Commission has been reluctant to interfere with enterprises' internal pricing procedures, as in the examination of cost and profit structures, by establishing itself as a price control authority. VON BAEL & BELLIS, *supra* note 22, § 5.05 at 5-46, n. 9 (citing *Fifth Report on Competition Policy,* 73, in EIGHTH GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITIES (Comm'n, April 1976).

39. *See, e.g.* Comm'n Decision, Vimpoltu, O.J. EUR. COMM. (No. L200) 44 (1983), [Jan. 1982-June 1985 New Developments Transfer Binder] Common Mkt. Rep. (CCH) ¶ 10,504 (establishing maximum discount, delivery and payment terms in a horizontal agreement among Dutch tractor importers violative of Article 85(1)).

40. *Id.*

41. The issue of profit margins was central to the recent case Stichting Sigarettenindustrie v. Commission, 1985 E. Comm. Ct. J. Rep. 3831, [1985-1986 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,265 at 16-575, discussed at length *infra* text accompanying notes 56-121. For previous Court discussion on this point, *see generally* FEDETAB v. Commission, 1980 E. Comm. Ct. J. Rep. 3125, [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8687 (Belgian tobacco association allocated different profit margins to various groups of wholesalers and retailers).

support a violation.[42] Under Article 85, the restraint on competition must "appreciably" affect trade between member states.[43] Article 86, in contrast, requires the much more onerous showing of a dominant position.[44]

Resale price maintenance agreements exercised in violation of Article 85 received Commission attention in *Deutsche Philips*.[45] In that case, Philips, a German sound recording manufacturer, required that its German retailers sell its products at the prices set by Philips, regardless of whether the products were obtained in Germany or from other Member States.[46] The Commission ruled that the resale price requirement imposed upon imported goods was likely to discourage the importation of potentially less expensive products in violation of Article 85.[47]

In *Chiquita*,[48] by contrast, the Commission applied Article 86 in response to discriminatory pricing practices by the dominant banana producer, United Brands. United Brands, the Commission charged, had abused its dominant position within the banana growing industry by unjustifiably charging various distributors significantly differing prices for equivalent transactions.[49] This practice placed distributors required to pay higher prices at a competitive disadvantage; their exports to various member states could not compete with the goods of distributors enjoying lower purchase prices. This practice constituted an abuse of United Brands' dominant position.[50]

B. *New Price Restraint Developments*

The Court's recent decisions in *Stichting Sigarettenindustrie v. Commission*,[51] and *Louis Erauw-Jacquery v. La Hesbignonne Société Co-opérative*[52] provide several new insights into price restraint prac-

42. VON BAEL & BELLIS, *supra* note 22, § 4.01[2] at 4-5.
43. *Id.*
44. *Id. See supra* note 27 for a definition of a dominant position.
45. Comm'n Decision, Deutsche Philips, O.J. EUR. COMM. (No. L293) 40 (1973), [Jan. 1973-Dec. 1975 New Developments Transfer Binder] Common Mkt. Rep. (CCH) ¶ 9606.
46. *Id.*
47. *Id.* at 9359-60.
48. Comm'n Decision, Chiquita, O.J. EUR. COMM. (No. L 95) 1 (1976), [Jan. 1976-Feb. 1978 New Developments Transfer Binder] Common Mkt. Rep. (CCH) ¶ 9800.
49. *Id.* at 9788.
50. *Id.*
51. Stichting Sigarettenindustrie v. Commission, 1985 E. Comm. Ct. J. Rep. 3831, [1985-1986 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,265.
52. Louis Erauw-Jacquery v. La Hesbignonne Société Co-opérative, 1988 E. Comm. Ct. J. Rep. ____, 4 Common Mkt. L. Rep 576 (1988).

tices. In *Sigaretteninduslrie*, the Court upheld a Commission decision declaring certain direct and indirect restrictive pricing practices invalid under Article 85.[53] The decision confirmed that even in industries heavily burdened by Member State regulations, such as tobacco manufacturing in the Netherlands, sufficient competition exists to preclude restrictive pricing practices.[54] In *Louis Erauw-Jacquery*, the Court held that vertical resale price maintenance agreements can escape prohibition pursuant to Article 85 when the activities are predominantly local in impact.[55]

1. *Sigaretteninduslrie*: The Effect of Burdensome Member State Regulation on the Validity of Restrictive Pricing Practices

In *Sigaretteninduslrie*[56] the Court faced an appeal by a Netherlands cigarette manufacturing cartel and its members (applicants)[57] from a Commission ruling that the cartel's concerted pricing agreements were illegal restrictions of competition. The Dutch tobacco industry is heavily regulated on several different levels.[58] The applicants asserted that this regulation destroyed their ability to compete in particular matters covered by the agreements.[59] Thus, they argued, no actual competition[60] was possible and the agreements could not violate Article 85.[61]

The Commission responded that the extensive regulation did not destroy competition in the matters addressed in the agreements.[62]

53. *See infra* text accompanying notes 56-121.

54. *Id.*

55. *See infra* text accompanying notes 122-157.

56. Stichting Sigaretteninduslrie v. Commission, 1985 E. Comm. Ct. J. Rep. 3831, [1985-1986 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,265.

57. The cigarette cartel was organized under Danish law for the purpose of promoting the common interests of Danish tobacco manufacturers comprising its membership. *Sigaretteninduslrie*, [1985-1986 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,265 at 16,572. The cartel, along with six of its members (Philip Morris Holland, Theordorus Niemeyer, R. J. Reynolds Tobacco, British American Tobacco Company (Nederland), Sigarettenfabriek Ed. Laurens, and Turmac Tobacco Company) filed separate applications with the Court, pursuant to Article 173, EEC Treaty, 3 Common Mkt. Rep. (CCH) ¶ 4635 at 3833, seeking annulment of a Commission decision holding them in violation of Article 85. *Sigaretteninduslrie* at 16,572.

58. *See infra* text accompanying notes 71-86.

59. *See Sigaretteninduslrie* [1985-1986 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,265 at 16,585-86.

60. The arguments forwarded by the applicants assumed that Article 85's reference to restrictions of competition applied only to restrictions on "actual competition," i.e., such level of competition which would normally exist in the absence of burdensome government restrictions. *Id.* at 16,592.

61. *See* Stichting Sigaretteninduslrie v. Commission, 1985 E. Comm. Ct. J. Rep. 3831, [1985-1986 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,265 at 16,573-76.

62. *Id.* at 16,574.

Although the Commission conceded that the extensive regulatory scheme created practical difficulties for the cartel members, the Commission nevertheless observed that the legislative scheme allowed adequate room for competition.[63] Thus, the Commission defended its holding that the agreements infringed Article 85(1) and were not exempt under Article 85(3).[64]

One class of challenged agreements set maximum profit margins[65] for wholesalers and retailers.[66] In addition, the applicants were parties to agreements increasing retail prices and granting rebates to certain retailers.[67] The specific agreements included:

— two agreements between the applicants and, respectively, tobacco wholesalers and retailers setting maximum profit margins for those distributors;[68]

— three agreements entered into by SSI members to increase their retail prices;[69] and

— a bonus payment agreement, whereby SSI members provided annual rebates to retailers.[70]

The applicants argued that government-imposed price increase limitations and excise duties were the true cause of restricted competition in the tobacco industry.[71] Under these laws, retail prices were established before the manufacturers sold the products to distributors.[72] Further, the Dutch laws prevented manufacturers from altering their prices without prior government approval—and approval was granted

63. *Id.*

64. *Id.* at 16,572.

65. "Profit margins" refer to the percentage share of a product's retail price garnered by a manufacturer, wholesaler, and retailer. *See id.* Profit margins are particularly significant in industries such as the tobacco industry, where government regulations often impose excise duties and price restrictions. Such restrictions tend to limit the overall profit margin of a product.

66. Stichting Sigarettenindustrie v. Commission, 1985 E. Comm. Ct. J. Rep. 3831, [1985-1986 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,265 at 16,572.

67. *Id.*

68. *Id.* Dutch pricing regulations made it possible to ascertain the retail price of tobacco products at the time of production. *See infra* note 80 and accompanying text (discussion of Dutch pricing regulations).

69. *Sigarettenindustrie*, 1985 E. Comm. Ct. J. Rep. 3831, [1985-1986 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,265 at 16,572.

70. *Id.*

71. The Dutch legislature imposed a levy on tobacco products based primarily on a high ad valorem excise duty which taxed products by a percentage of the maximum sales price, rather than on a fixed-amount per unit sold. Stichting Sigaretteninustrie v. Commission, 1985 E. Comm. Ct. J. Rep. 3831, [1985-1986 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,265 at 16,573. In addition, the Dutch Excise Duty Act mandated that tobacco products be sold only when affixed with a tax stamp indicating the retail selling price. Tobacco could not be sold at a price higher or lower than that indicated on the tax stamp. *Id.*

72. *Id.*

only on the basis of manufacturing cost increases or decreases.[73] Consequently, the manufacturers argued, they were unable to establish price differences.[74] As such, they maintained, their agreements and concerted practices could not have the effect of restricting competition.[75]

The applicants first cited price increase limitations imposed by the Dutch government for the purpose of combating inflation.[76] The restrictions prohibit manufacturers from increasing their sale prices within a specified period by more than limits mandated by the government.[77] The regulations provided criteria for the calculation of price increases, account being taken for increases or reductions in manufacturing costs.[78]

The applicants next referred to Dutch excise laws[79] requiring them to purchase tax stamps from the government bearing the price at which the product will ultimately be sold.[80] The stamps must be affixed to all tobacco products prior to distribution and sale.[81] Once the tax stamp is affixed by the manufacturer, the price at which the product is sold cannot deviate from the price specified on the stamp.[82]

Exacerbating these requirements, the applicants argued, is the excise duty's so-called "compression effect."[83] The excise duty increases proportionately to increases in the price of the product.[84] The manufacturers alleged that this graduated excise duty forced them all to reduce their costs and profits to a minimum, resulting in reduced or "compressed" price competitiveness in the industry.[85] The compression effect, they argued, makes true price competition within the

73. *Id.*
74. *Id.* at 16,574.
75. *Id.* at 16,573.
76. Stichting Sigarettenindustrie v. Commission, 1985 E. Comm. Ct. J. Rep. 3831, [1985-1986 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,265 at 16,573-74.
77. *Id.* at 16,573.
78. *Id.*
79. *Id.*
80. The Dutch legislature had imposed the duties in line with a Council directive, the aim of which was to harmonize the fiscal provisions of Member States relating to the consumption of tobacco products. *Id.* at 16,583 (Advocate General Opinion). To that end, the Council directive authorized the levying of proportional or "*ad valorem*" excise duties, expressed as a percentage of the maximum retail price, and specific excise duties calculated per product unit. *Id.*
81. Stichting Sigarettenindustrie v. Commission, 1985 E. Comm. Ct. J. Rep. 3831, [1985-1986 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,265 at 16,583 (Advocate General Opinion).
82. *Id.*
83. *Id.* at 16,574-75.
84. *Id.* at 16,573.
85. *Id.* at 16,574.

industry "impossible" and, hence, their profit margin agreements could not be singled out as violative of Article 85(1).[86]

The Court responded to the applicants' submissions by addressing the argument of alleged impossible competition in two ways. The Court first examined the argument in the context of retail prices[87] and then in relation to profit margins.[88]

The Court began its discussion of retail price limitations by noting that the Dutch Prices Order[89] did not require all manufacturers to increase their product prices in tandem with the annual price increases authorized by the government.[90]
The applicants' position was that the law virtually compelled them to take advantage of price increase authorizations when granted, believing that such increases had to be taken at once or else be forfeited.[91] The Court underscored the Commission view, however, that price increase authorizations were not subject to a time limit.[92] Consequently, manufacturers were free to progressively increase their product prices over time.[93] In this manner, manufacturers could remain competitive vis-a-vis those manufacturers opting to increase prices by the full amount authorized.[94]

In addition, the Court noted that the Dutch excise law did not prevent manufacturers from freely and independently setting their retail prices.[95] The excise law requirement that tobacco prices not vary from the amount indicated on tax stamps applied only to retailers.[96] Moreover, distinguishing the situation in *Van Landewyck v. Commission*,[97] the incremental range of tax stamp amounts available to manufacturers was not limited by Dutch tax authorities.[98]

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86. Stichting Sigarettenindustrie v. Commission, 1985 E. Comm. Ct. J. Rep. 3831, [1985-1986 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,265 at 16,574-75.
87. *Id.* at 16,573-75.
88. *Id.* at 16,575-77.
89. *See supra* notes 76-78 and accompanying text (discussion of Dutch Pricing Act).
90. *Sigarettenindustrie*, 1985 E. Comm. Ct. J. Rep. 3831, [1985-1986 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,265 at 16,574.
91. Stichting Sigarettenindustrie v. Commission, 1985 E. Comm. Ct. J. Rep. 3831, [1985-1986 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,265 at 16,575.
92. *Id.*
93. *Id.* at 16,574-75.
94. *Id.*
95. *Id.* at 16,574.
96. Stichting Sigarettenindustrie v. Commission, 1985 E. Comm. Ct. J. Rep. 3831, [1985-1986 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,265 at 16,574.
97. Heintz Van Landewyck v. Commission, 1980 E. Comm. Ct. J. Rep. 3125, [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8687 at 8117. In *Van Landewyck* the Belgian tax authorities imposed strict limits on the range of excise tax band (stamp) prices. *Id.*
98. *Sigarettenindustrie*, 1985 E. Comm. Ct. J. Rep. 3831, [1985-1986 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,265 at 16,574.

Manufacturers were free to chose a competitive amount to charge for a product.[99]

Finally, the Court concurred with the Commission's rejection of the applicants' compression effect argument.[100] The Court dismissed this argument by noting that the compression effect did not force the costs of all competing manufacturers to the same level.[101] A "compressed" industry obliges each manufacturer to reduce its costs, including its profit margin, to the minimum.[102] Due to variances in competitors' production costs and profit margin requirements, however, the minimum cost of one manufacturer's product does not necessarily correspond to that of other manufacturers.[103] The incentive to fashion competitive product prices is consequently enhanced, not restricted. Through their concerted price agreements, however, the Court concluded that, "the applicants eliminated any uncertainty regarding the prices to be applied by their competitors and were thus able to escape the compression effect."[104]

The Court began its treatment of the restrictive profit margin agreements by noting that, as in the case of competition in retail prices, the applicants considered the Dutch price and excise legislation to have rendered competition impossible in establishing dealers' profit margins.[105] The applicants' view was based on the notion of a "domino effect" between the allegedly contradictory pricing and excise legislation.[106] The contradiction arises when retailers' profit margins are increased as, for example, when retailers are granted discounts or rebates which lower their purchasing prices. Under Dutch pricing legislation, however, which requires the lowering of selling prices when dealers' costs decrease, the price of products sold by retailers enjoying increased profit margins would have to be reduced.[107] Contradicting this requirement is the provision of the Dutch excise legislation, which, as noted, prohibits reducing (or increasing) tobacco product prices once tax stamps have been applied.[108] Con-

99. *Id.*
100. *Id.*
101. Stichting Sigarettenindustrie v. Commission, 1985 E. Comm. Ct. J. Rep. 3831, [1985-1986 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,265 at 16,575.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. Stichting Sigarettenindustrie v. Commission, 1985 E. Comm. Ct. J. Rep. 3831, [1985-1986 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,265 at 16,575.
107. *Id.*
108. *Id.*

sequently, the applicants argued that if they were to openly compete in providing retailers with increased profit margin incentives, the manufacturers would be party to the retailers' infringement of the Excise Duty Act.[109]

The Commission responded to the applicants' argument by asserting that the domino effect only operates in those sectors of the economy where retailers retain the authority to set selling prices. In regulated industries such as tobacco manufacturing, the domino effect is circumvented by the requirement that benefits offered to retailers, such as the discounts and rebates granted in several of the applicants' agreements, be reflected in the initial calculation of product price by manufacturers.[110] Consequently, noted the Commission, when product price increases are authorized by the government, manufacturers must calculate the percentage of the total profit margin to be offered to retailers.[111] Manufacturers are thereby encouraged to offer competitive profit margin percentages to retailers when setting product prices.[112] In this way, competition in establishing retail profit margins is made possible.[113]

The Court adopted the Commission's views and further supported them by reasoning: "By entering into agreements setting the margins of wholesalers and retailers and granting a special rebate to certain of them, the members of the SSI did collectively what they say they could not do individually."[114] That is, had the SSI members not concerted on profit margin restrictions as a group, it would have been in the self-interest of manufacturers to legitimately enter such agreements on an individual basis.

In concluding, the Court noted that there remained sufficient margin competition within the industry such that manufacturers could create price differences between their competing products notwithstanding the government-imposed restrictions.[115] Manufacturers could increase their own profit margin vis-a-vis competitors by reducing or maintaining their cost levels in relation to those of their competitors.[116] In addition, the regulations did not prohibit the introduction

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109. *Id.*
110. *Id.*
111. Stichting Sigaretteninduatrie v. Commission, 1985 E. Comm. Ct. J. Rep. 3831, [1985-1986 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,265 at 16,575.
112. *Id.*
113. *Id.*
114. *Id.* at 16,575-76.
115. *Id.* at 16,575.
116. Stichting Sigaretteninduatrie v. Commission, 1985 E. Comm. Ct. J. Rep. 3831, [1985-1986 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,265 at 16,575.

of new tobacco brands at lower prices.[117] Alternatively, authorized price increases for existing products could be delayed or only partially applied.[118] The Court's arguments thus supported the conclusion that price competitiveness remained present in the industry despite the restrictive effects of Dutch pricing regulation.[119] The concerted price setting agreements and profit margin agreements entered into by the applicants, consequently, constituted violations of Community competition policy.[120]

The *Sigarettenindustrie* case is of particular significance to the restrictive pricing debate. The case presented the question whether there exists a point after which competitive forces are so stifled as to render Article 85 restrictions inapplicable. The Court answered this question firmly in the negative. Though the Court was willing to admit that the Dutch government had interfered significantly with the applicant's price discount and profit margin restraints,[121] it could not find that the interference made competition "impossible." As a result, even when an industry is heavily burdened by national government regulations as, in this case, through mandated price restrictions and excise duties, the prohibitions of Article 85 apply. The holding in *Sigarettenindustrie* should alert regulated industries that burdensome Member State regulations are not a justification for direct or indirect price restraints. Moreover, the Court's rationale provides continuing support for the proposition that price restraint practices will almost invariably violate Article 85, even when competitive conditions strictly limit economic freedom as in highly regulated sectors of Member State economies.

2. *Erauw-Jacquery*: Intrastate Resale Price Maintenance Agreements Affecting Trade Between Member States

In *Louis Erauw-Jacquery*,[122] a Belgian holder of patented plant seeds imposed minimum resale price requirements on its licensees. The case was referred to the Court by the *Tribunal de Commerce* at

117. *Id.* at 16,592 (Advocate General Opinion).
118. *Id.*
119. *Id.* at 16,574.
120. *Id.* at 16,578.
121. Stichting Sigarettenindustrie v. Commission, 1985 E. Comm. Ct. J. Rep. 3831, [1985-1986 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,265 at 16,589 (Advocate General Opinion).
122. Louis Erauw-Jacquery v. La Hesbignonne Société Co-opérative, 1988 E. Comm. Ct. J. Rep. ____, 4 Common Mkt. L. Rep 576 (1988) at 576.

Liege, Belgium, for a preliminary ruling pursuant to EEC Article 177.[123] The Belgian court determined that the price fixing restrictions limited the availability in Belgium of the patented seeds.[124] It questioned, however, whether such restrictions were incompatible with EEC Article 85(1) prohibitions on distortions of interstate trade, based on the absence of a significant effect on trade between Member States.[125]

The case involved an agreement for the propagation of cereal seeds[126] between Louis Erauw-Jacquery (breeder) and La Hesbignonne S.C. (licensee), whereby the latter was authorized to propagate[127] and sell certain cereal stock in Belgium.[128] A provision in the contract prohibited the licensee from selling below the minimum selling prices fixed by the breeder.[129] The licensee's failure to comply with the breeder's minimum resale price restrictions prompted the action first brought before the *Tribunal de Commerce.*[130]

123. *Id.* at 587. Article 177 provides:

> The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
> (a) the interpretation of [the EEC] Treaty;
> (b) the validity and interpretation of acts of the institutions of the Community;
> (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.
> Where such a question is raised before any court or tribunal of a Member state [sic], that court or tribunal may, if it considers that a decision on a question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

EEC Treaty, art. 177, 3 Common Mkt. Rep. (CCH) ¶ 4655 at 3853.

124. *Louis Erauw-Jacquery*, 4 Common Mkt. L. Rep 576 (1988) at 588.

125. *Id.*

126. The seeds at issue were "E3" varieties of "Gerbel multi-row barley." E3 seeds are used in Belgium almost exclusively by farmers producing cereals for consumption. *Id.* at 588.

127. "Propagation" refers to "the production, for purposes of commercial marketing of the reproductive or vegetable. . . material. . ." *Louis Erauw-Jacquery*, 4 Common Mkt. L. Rep 576 (1988) at 580 (*citing* Nungesser v. Commission, 1982 E. Comm. Ct. J. Rep. 2015, [1981-1983 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8805).

128. *Louis Erauw-Jacquery*, 4 Common Mkt. L. Rep 576 (1988) at 588.

129. Louis Erauw-Jacquery v. La Hesbignonne Société Co-opérative, 1988 E. Comm. Ct. J. Rep. ____, 4 Common Mkt. L. Rep 576 (1988) at 579 (Advocate General Opinion). The extent of breeder's rights has been defined as:

> . . .those rights conferred on the breeder of a new plant variety or his successor in title pursuant to which the production, for purposes of commercial marketing, of the reproductive or vegetable propagating material, as such, of the new variety and the offering for sale of marketing of such material are subject to the prior authorisation of the breeder.

Id. at 580 (citing Nungesser v. Commission, 1982 E. Comm. Ct. J. Rep. 2015, [1981-1983 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8805).

In its *Louis Erauw-Jacquery* decision, the Court has once again expressed its unwillingness to prohibit "propagating" agreements as violative of Article 85(1) unless they are deemed unnecessary to protect plant breeders' rights to select propagating licensees. *Id.* at 589.

130. *Id.* (Advocate General Opinion) at 581.

The significant issue addressed by the case is at what point vertical resale price restraints limited to one Member State appreciably effect trade between Member States.[131] Prior to the decision in *Louis Erauw-Jacquery*, vertical price restraints had been declared violations of Article 85 where trade between Member States was affected.[132] The legality of "purely national" resale price maintenance clauses, however, was unclear.[133]

The general Community position regarding purely national restrictive price maintenance systems was articulated in the First Report on Competition Policy.[134] The Report indicated that "purely national" systems of resale price maintenance do not generally come under Community law prohibiting cartels given that trade between Member States is not affected.[135] The Commission subsequently retreated from this general proposition in *GERO-fabriek*.[136]

GERO-fabriek involved a resale price maintenance arrangement imposed upon Dutch and Belgian distributors by a Dutch cutlery manufacturer.[137] In addition to finding the arrangement to violate Article 85, the Commission implied that even those resale price maintenance agreements restricted to single Member States and which exhibited no explicit horizontal features are prohibited by Article 85 if they involve a substantial market share of the product.[138]

In *Louis Erauw-Jacquery*, the licensee argued that the minimum resale price requirements imposed upon it by the breeder had the foreseeable effect of restricting trade between Member States, even when they only appeared to apply to sales in Belgium.[139] The argument can be established as follows: The breeder had concluded a substantial number of identically restrictive agreements with other Belgian propagators.[140] Each propagator, like the licensee, was restricted from selling the seed stock below certain prices or from exporting without authorization.[141] Since the dealers purchasing the

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131. *Id.* at 584.

132. *See* VON BAEL & BELLIS, *supra* note 22, § 5.02[5] at 5-22.

133. *Id.* at § 5.02[5] at 5-21.

134. *See First Report on Competition Policy*, 55, FIFTH GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITIES, (Comm'n, April 1972).

135. *Id. See* VON BAEL & BELLIS, *supra* note 22, § 5.02[5] at 5-22 n. 31.

136. *See generally* Comm'n Decision, GERO-fabriek, O.J. EUR. COMM. (No. L16) 8 (1977), [Jan. 1976-Feb. 1978 New Developments Transfer Binder] Common Mkt. Rep. (CCH) ¶ 9914.

137. *Id.* at 9914-15.

138. *Id.* at 9968.

139. *Louis Erauw-Jacquery*, 1988 E. Comm. Ct. J. Rep. ____, 4 Common Mkt. L. Rep 576 (1988) at 590.

140. *Id.* at 581 (Advocate General Opinion).

141. *Id.* at 585 (Advocate General Opinion).

grain seed from the propagators could not be similarly restricted,[142] export sales were likely to take place nonetheless.[143] However, given that the artificially-set minimum prices would have been transferred to the dealer and the prices he subsequently charged, such export sales would be uncompetitive and, hence, discouraged.[144]

The breeder maintained that the license agreement was only intended for sales in Belgium, and that it was unlikely to affect trade between Member States.[145] In his opinion to the Court, however, Advocate General Mischio cited prior EEC case law which, he argued, contradicted the breeder's contention. The Advocate General pointed to *Vereeniging van Cementhandelaren v. Commission*[146] and *Groupement des Fabricants de Papiers Peints de Belgique v. Commission*[147] for the proposition that a price-fixing agreement limited to a single Member State does not preclude the possibility that trade between Member States is affected.[148] The two cases cited by the Advocate General, however, involved horizontal agreements between producers.[149] In contrast, the agreement between the breeder and licensee in *Louis Erauw-Jacquery* was vertical in nature.

The Court nevertheless concluded that the breeder's system of identical price-fixing agreements, taken together, constituted the same type of concerted effect as horizontal price fixing agreements repeatedly held to violate EEC competition rules under the precedent cases.[150] The agreements restricting the licensee to minimum resale prices would violate Article 85(1) if trade with other Member States was "perceptibly" affected.[151]

The question of whether agreements "perceptibly" affect trade between Member States is for national courts to determine.[152] On

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142. *Id.*
143. *Id.*
144. *Louis Erauw-Jacquery*, 1988 E. Comm. Ct. J. Rep. ____, 4 Common Mkt. L. Rep 576 (1988) at 585 (Advocate General Opinion).
145. *Id.* (Judgment) at 590.
146. Vereeniging van Cementhandelaren v. Commission, 1972 E. Comm. Ct. J. Rep. 977; [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8179 (Dutch cement association setting recommended resale prices).
147. Groupement des Fabricants de Papiers Peints de Belgique v. Commission 1975 E. Comm. Ct. J. Rep. 1491, [1976 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8335 (Belgian wallpaper association set resale prices and limited rebates).
148. *Louis Erauw-Jacquery*, 1988 E. Comm. Ct. J. Rep. ____, 4 Common Mkt. L. Rep 576 (1988) at 584 (Advocate General Opinion).
149. *Id.*
150. *Id.* at 590.
151. *Id.*
152. *Id.* at 590-591.

remand, the national court was to render a decision in accordance with the "legal and economic context" of the agreement in question.[153] As specific guidance, the Court cited as influential factors the presence of a number of similar agreements, the breeder's market share for the seeds concerned and the licensee's capacity to export the seeds.[154]

The position of the Court in *Louis Erauw-Jacquery* reflects a further derogation from the once-accepted proposition that *intrastate* restrictive price maintenance agreements do not affect trade between Member States. The Court articulated this position recently in *Salonia v. Poidomani*.[155] At issue in the case was an alleged violation of Article 85 by an agreement regulating the resale of newspapers and periodicals in Italy. The *Salonia* decision held that an agreement will violate Article 85 where it is foreseeable, to a sufficient degree of probability, that the terms of the agreement will negatively impact trade between Member States.[156]

The significance of the *Louis Erauw-Jacquery* decision rests on the Court's finding that vertical price maintenance agreements, even when executed between enterprises operating solely within one Member State, will run afoul of Community competition rules when found to perceptibly affect trade between Member States.[157]

III. Community Law Governing the Exercise of Patent Rights

Regulating the exercise of patent rights in the European Community has proved particularly troublesome for the Commission and Court. The difficulty lies in the conflict between encouraging technology transfers while preventing monopolies.[158] Adding to the conflict is

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153. *Louis Erauw-Jacquery*, 1988 E. Comm. Ct. J. Rep. ____, 4 Common Mkt. L. Rep 576 (1988) at 590-591.

154. *Id.* at 590.

155. Salonia v. Poidomani, 1981 E. Comm. Ct. J. Rep. 1563; [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8758 at 9101.

156. Factors which the Court cited as influencing this determination included whether the market may employ channels for distribution other than those governed by the agreement and whether demand for the product is rigid in that it does not vary as a result of the agreement. *Salonia* [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8758 at 9101. The Court, however, declined to suggest the effect of the presence or absence of these factors. *Id.*

157. *Id.* at 590-591.

158. *See* Venit, *In the Wake of* Windsurfing: *Patent Licensing in the Common Market*, in United States and Common Market Antitrust Policies 517 (B. Hawk ed. 1987).

Patent licensing, whether between independent firms or within a parent-subsidiary relationship, provides a means for transferring technology from one enterprise to another. This fosters the

the overriding Community aim of eliminating artificial barriers to trade constructed along national borders.[159] Patent licensing and protection have traditionally been regulated by individual Member States,[160] often leading to a compartmentalized effect at odds with the Treaty's vision of an integrated EEC market. These nationally created rights often permit exclusion of imports.[161] Moreover, national laws sometimes discriminate between foreign and domestic individuals seeking access to national markets.[162] The Commission and Court have responded to these concerns by favoring the Treaty goal of "the free flow of goods" over individual Member State patent rules.[163] In pursuing this goal, the Court has both upheld and restricted the substantive rights of patent owners under national law.[164]

This section reviews the Court's contribution to the Community legal regime governing the exercise of patent-based rights. Particular attention is given to Court decisions concerning attempts to exclude imports based on patent rights created under national law. The final part of this section examines the impact of the most recent Court decision on Community jurisprudence in the field of patent exploitation.

A. *Overview of EEC Patent-Based Rights*

Community law governing the exercise of patent rights derives from Articles 30 and 36 of the EEC Treaty. These articles apply specifically to quantitative restrictions. The issue of quantitative

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dissemination of the fruits of technological progress in the marketplace to the benefit of consumers and businesses. *See generally* Patent Licensing Regulation, *supra* note 21 at § 2747. At the same time, this transfer brings additional resources to bear on generating further innovations to the underlying technology. On the other hand, restrictive obligations in licensing agreements, combined with the power to enjoin use of the patented technology, restrict competition in the market for the patent-based products. Thus, the patent holder's monopoly subjects the Community to decreased efficiency, technology hoarding and higher prices, all of which often accompany monopoly power. *Id.*

159. Venit, *supra* note 158, at 521. *See generally*, HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 635-636 (1982).

160. *See generally*, Jones, *Fundamental of International Licensing Agreements and Their Application in the European Community*, 7 INT'L LAW. 78 (1973).

161. For an example of this predicament, *see infra* text accompanying notes 272-282.

162. *See infra* text accompanying notes 200-236.

163. Hawk, *supra* note 159 at 636. *See, e.g.*, Windsurfing Int'l v. Commission, 1986 E. Comm. Ct. J. Rep. 611, [1985-1986 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,271 (restrictive provisions, including "no challenge" clauses, in patent licensing agreements are incompatible with Article 85(1)).

164. *See infra* text accompanying note 236.

restrictions arises in the context of patent rights when a patent holder seeks to invoke rights under national law to exclude foreign produced imports.[165] Although Articles 85[166] and 86[167] are relevant to patent infringement claims,[168] the Court has established its contribution to Community law concerning patents primarily through the interpretation of the "free movement of goods" provisions of Articles 30 and 36.[169]

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165. *See, e.g.* Centrafarm v. Sterling Drug, 1974 E. Comm. Ct. J. Rep. 1147, [1974 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8246; Pharmon v. Hoechst, 1985 E. Comm. Ct. J. Rep. 2281, [1985-1986 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,206; Merck v. Stephar and Exler, 1981 E. Comm. Ct. J. Rep. 2063, [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8707.

166. Article 85 is relevant to patent arrangements where the freedom of either the licensor or licensee is restricted to the detriment of competition. The major issue in this area concerns the permissible scope of patent licenses. The provisions of Article 85(1) may be contravened, for example, where a patent infringement action is initiated with the aim of distorting Community competition. It must be shown that the action was brought with "the object, the means or the consequence" of restricting product availability. BELLAMY & CHILD, *supra* note 17 at 346-347. *See, e.g.,* Cousten and Grundig v. Commission, 1966 E. Comm. Ct. J. Rep. 299, [1966 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8046; Sirena v. Eda, 1971 E. Comm. Ct. J. Rep. 69, [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8101.

However, provision is made under the Patent Licensing Regulation, *supra* note 21, ¶ 2747 at 1955-56, for the exemption of certain restrictive provisions found in patent licensing agreements between two contracting states when:

1. an obligation is upon the licensor not to license other enterprises, or exploit the patented product himself, within the licensed territory for the life of the patent;
2. an obligation is upon the licensee not to exploit the patented product in territories reserved for the licensor under parallel patents;
3. an obligation is upon the licensee not to either manufacture, advertise, or actively market the patented product in territories licenced to other licensees under parallel patents;
4. an obligation is upon the licensee to use only the licensor's trade mark to distinguish the licensed product, provided the licensee can still identify herself as the manufacturer.

Patent Licensing Regulation, *supra* note 21, art. 1 (1), ¶ 2747A at 1955-56.

167. A violation of Article 86 may be found where a patent holder initiates an infringement action with the aim of maintaining its "power to impede. . . effective competition over a considerable part of [its] relevant market." VON BAEL & BELLIS, *supra* note 22, § 9.03[1] at 9-17 (citing *Sirena,* [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8101). The exercise of patent rights does not in and of itself constitute an abuse of dominant position however, given that such rights inherently possess, at least initially, a certain character of monopoly. VON BAEL & BELLIS, *supra* note 22, § 9.03[1] at 9-17.

In order for a patent infringement claim to be prohibited under Article 86, it must be established that (i) the claimant enjoys a dominant position in the market of its product; (ii) the dominant position is being abused in a manner likely to adversely affect trade between member states; and, most importantly, (iii) there is a relevant connection between the property infringement claimed and the abuse of dominant position alleged. BELLAMY & CHILD, *supra* note 17 at § 7-055, 349.

168. For an analysis of the latest United States Supreme Court decision addressing the exclusion of imports under national law *see generally* Note, *K Mart Corp. v. Cartier, Inc.: Attention Gray Market Shoppers, the United States Supreme Court has Saved Your Bargain Prices,* 2 TRANSNAT'L LAW. 303 (1989).

169. *See, e.g.* Deutsche Grammophone v. Metro, 1971 E. Comm. Ct. J. Rep. 487, [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8106; Hoffmann-La Roche v. Centrafarm, 1978 E. Comm. Ct. J. Rep. 1139, [1977-1978 Transfer Binder] Common Mkt. Rep. (CCH) ¶

Restrictions on the movement of goods between Member States are strictly prohibited under the authority of EEC Treaty Article 30: "Quantitative restrictions on imports and all measures having equivalent effect shall . . . be prohibited between Member States."[170] Article 36, however, allows for prohibitions on imports or exports when "justified on grounds of public morality, public policy or public security; . . . or the protection of industrial and commercial property."[171] Regarding patent rights, the Court has consistently held that Article 36 allows exclusion of imports "only insofar as [it is] justified for the purpose of safeguarding rights which constitute the specific subject matter of that property."[172] The Court's contribution to Community law relating to patents focuses on the definition of these rights.

In the leading case of *Centrafarm v. Sterling Drug*,[173] the Court addressed the issue of parallel patent licensing[174] in the context of pharmaceutical products. The Court held that Articles 30 and 36

8466; Centrafarm v. Sterling Drug, 1974 E. Comm. Ct. J. Rep. 1147, [1974 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8246; Pharmon v. Hoechst, 1985 E. Comm. Ct. J. Rep. 2281, [1985-1986 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,206. *See generally* Hawk, *supra* note 159, at 636-37.

170. EEC Treaty, art. 30, 1 Common Mkt. Rep. (CCH) ¶ 322 at 451.

171. Article 36 provides that:

> The provisions of Articles 30 to 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

EEC Treaty, art. 36, 1 Common Mkt. Rep. (CCH) ¶ 352 at 475.

172. Allen and Hanburys v. Generics, 1988 E. Comm. Ct. J. Rep. ____, [1986-1988 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,446 at 18,169 [hereinafter Generics]. The Court has defined "specific subject matter" rights as ". . .the control by the [patent] owner . . . of the manufacture and first marketing of the protected products," Nungesser and Kurt Eisele v. Commission, 1982 E. Comm. Ct. J. Rep. 2015, [1981-1983 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8805 at 7529. *See also* Merck v. Stephar and Exler 1981 E. Comm. Ct. J. Rep. 2063. [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8707. For an expanded discussion of specific subject matter rights, *see infra* notes 181-84 and accompanying text.

173. Centrafarm v. Sterling Drug, 1974 E. Comm. Ct. J. Rep. 1147, [1974 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8246.

174. The term "parallel patent licensing" or "parallel licensing" typically refers to the granting of exclusive licenses for the marketing of the same product to two or more parties in different countries Jones, *supra* note 160, at 94-95. In *Centrafarm*, Sterling Drug held patents in both Great Britain and the Netherlands on the preparation of the pharmaceutical product trade named "Negram." The patents were licensed in the two countries by two separate subsidiaries of Sterling Drug. Centrafarm purchased the drug in Britain, where the cost was substantially lower than in the Netherlands, and imported it into the Netherlands. Sterling Drug subsequently filed a patent infringement claim against Centrafarm. *Centrafarm*, [1974 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8246 at 9151-46.

preclude a patent proprietor[175] from preventing the importation of the patented drug from another Member State when the drug was marketed in the that Member State by the proprietor or with her consent.[176] The *Centrafarm* decision relied on the principle of "exhaustion of rights"[177] as a limitation on the exercise of patent rights to protect markets.[178] Under this principle, patent proprietors enjoy protection in the development and *initial* marketing of the patented product.[179] Once the product is marketed anywhere in the Common Market by the proprietor or with her consent, the proprietor exhausts the right to prevent the free circulation of the product by others.[180]

The "exhaustion of rights" principle attempts to balance the protection of a patent holder's investment under national law with the Community aim of promoting the free flow of goods.[181] As previously mentioned, Article 36 has been interpreted to allow for derogation from the free movement of goods provisions where the invocation of patent flows from the "specific subject matter of the property."[182] This latter notion has been narrowly defined to encompass:

> . . .the guarantee that the patentee, to reward the creative effort of the inventor, has the exclusive right to use an invention with a view to manufacturing industrial products and putting them into circulation for the first time, either directly or by the grant of licenses to third parties, as well as the right to oppose infringements.[183]

In other words, territorial exclusivity is protected only insofar as it is required to safeguard the patentee's *initial* development and mar-

175. As used in this article, the term "patent proprietor" refers to the individual or entity vested with the original patent rights to a product.

176. Centrafarm v. Sterling Drug, 1974 E. Comm. Ct. J. Rep. 1147, [1974 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8246 at 9151-56.

177. The "exhaustion of rights" principle was first introduced by the Court in regard to the copyright of sound recordings. Deutsche Grammophone v. Metro, 1971 E. Comm. Ct. J. Rep. 487, [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8106 at 7193 (prohibiting a copyright owner from excluding sale of imports distributed by the owner or with the owner's consent pursuant to the owner's exclusive right under national law).

178. *Centrafarm* [1974 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8246 at 9151-55 to 9151-56.

179. *See id.*

180. BELLAMY & CHILD, *supra* note 17 at 330; *see also Centrafarm*, [1974 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8246 at 9151-55 to 9151-56.

181. *See* Centrafarm v. Sterling Drug, 1974 E. Comm. Ct. J. Rep. 1147, [1974 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8246 at 9151-55 (discussing need to reconcile the Community's ban on quantitative restrictions with the exclusive rights of industrial property owner).

182. *Id.* at 9151-55 to 9151-56.

183. *Id.*

keting investment, while protection against infringement is preserved to its full extent under national law.[184] The result is a Community-imposed limitation on patent rights created by national law.

The Court subsequently expanded the exhaustion principle to include cases involving products imported from Member States where patents are not available. In *Merck v. Stephar*[185] a Dutch patent proprietor (Merck) sought to enjoin the importation of the hypertension drug "Moduretic" into the Netherlands from Italy, though Merck had previously marketed the drug in Italy. Since Italian patent law did not allow for the patenting of pharmaceutical products when Merck first introduced Moduretic into the market,[186] Merck was unable to obtain an Italian patent for Moduretic.[187] The drug importing firm Stephar subsequently imported the drug into the Netherlands from Italy, selling it at prices lower than those charged by Merck.

In support of an infringement claim, Merck attempted to distinguish the earlier *Centrafarm* case, which had premised the exhaustion of rights on the patentee having already enjoyed the fruits of initial marketing.[188] Merck and those supporting the claim[189] argued that the inability to obtain a patent in Italy had prevented Merck from "enjoy[ing] a monopoly in first placing the product on the market."[190]

The Court rejected this contention. Although the Court reasoned that protecting the "specific purpose of the product" would normally allow the patentee to enjoy the rewards of an initial marketing monopoly, such protection did not guarantee that a reward on investment would follow in all circumstances.[191] As such, it was up

184. *Id.*

185. Merck v. Stephar and Exler, 1981 E. Comm. Ct. J. Rep. 2063. [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8707.

186. *Merck*, [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8707 at 8454-55. The provision of Italian law was declared unconstitutional by the Italian Constitutional Court on March 20, 1978. Consequently, it is has since become possible to obtain patents for drugs in Italy. *Id.*

187. Even though the Italian decree concerning non-patentability of pharmaceutical products was held unconstitutional (*see supra* note 186) prior to Merck's claim, Merck was still unable to obtain a patent for the drug in Italy given that the product "no longer fulfilled the legal condition of novelty." *Merck*, [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8707 at 8446.

188. *Id.* at 8455.

189. The governments of France and the United Kingdom submitted arguments in support of Merck's position. *Id.* at 8450-51.

190. Merck v. Stephar and Exler, 1981 E. Comm. Ct. J. Rep. 2063. [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8707 at 8455.

191. *Id.*

to the proprietor of the patent to determine the profitability of marketing the product, including potential dangers of distributing in Member States where patents were not available.[192] The decision in *Merck* further constricted the protection available to a patentee from competing imports. In so doing, the Court, as in *Centrafarm*, limited the patent holders' substantive rights existing under national law.

Articles 30 and 36 were once again invoked by the Court in the *Pharmon v. Hoechst*[193] decision, this time regarding the importation of patented goods produced under a compulsory license.[194] The importer (Pharmon) purchased a consignment of goods from the holder of a compulsory licence for distribution of the goods in the Netherlands.[195] The U.K. Patents Act provided for the compulsory licensing of foodstuffs, medicines, and surgical instruments to ensure their availability to the public at lowest possible prices.[196] The Court held that the owner (Hoechst) of parallel drug patents in the Netherlands and United Kingdom could invoke Dutch law to prevent the importation of the drug into the Netherlands by Pharmon.[197]

The Court found that Hoechst could not have consented to the marketing of its product by Pharmon, since Hoechst was not a signatory to the license.[198] Using the reasoning of *Merck*, the Court concluded that Hoechst would be denied the "reward of his creative effort" if he were not allowed to prevent marketing by the third party under a compulsory license to which he had not consented.[199]

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192. *Id.* at 8455.

193. Pharmon v. Hoechst, 1985 E. Comm. Ct. J. Rep. 2281, [1985-1986 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,206.

194. Compulsory licenses are licenses granted to third parties by a national government to produce and market a patented product in cases where the original patent holder has enjoyed rights to the product for some time (usually a minimum of three years) and where the third party is unable to obtain a license from the patent holder under reasonable terms. The grounds for granting a compulsory license may include:
— the patented product not being marketed in the country to the greatest extent reasonably possible;
— the demand for the product not being met; and
— the proprietor of a patented product refuses to grant a license to third parties on reasonable grounds.
U.K. Patents Act 1977, Sect. 48, § PA77-048, *reprinted in* T. White, J. Jeffs, R. Jacob, & W. Cornish, Encyclopedia of United Kingdom and European Patent Law 2044-2045 (1977, supp. 1983).

195. *Pharmon* [1985-1986 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,206 at 16,254.

196. *Id.*

197. *Id.* at 16,257.

198. Pharmon v. Hoechst, 1985 E. Comm. Ct. J. Rep. 2281, [1985-1986 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,206 at 16,256-16,257.

199. *Id.* at 16,257. The Court ruled, moreover, that:
. . .it makes no difference whether a prohibition on exportation is attached to the

Thus, departing from the practice of limiting rights under national legislation established in *Merck* and *Centrafarm*, the Court allowed the patent owner to fully exploit its patent-based rights under national law.

B. *Patents and Licenses of Right*

The recent case of *Allen and Hanburys v. Generics*[200] is the latest development of significance in Community patent case law. The case introduces the issue of "licenses of right" to the patent-based rights case law of *Centrafarm*, *Merck* and *Pharmon*. In *Generics*, Allen and Hanburys (Hanburys), a United Kingdom pharmaceutical company, holding a U.K. patent on the drug "Salbutamol,"[201] sought to enjoin Generics, a distributor of generic drugs in the U.K., from importing the drug from Italy.[202] Hanburys was one of several subsidiaries of Glaxo Holding PLC, whose member companies together owned parallel patents[203] for Salbutamol in several Member States in which it was marketed.[204] At the time of its development, however, the drug was not capable of being patented in Italy, again due to the unavailability of such pharmaceutical patents under Italian law.[205]

The U.K. patent rights held by Hanburys, and under which it claimed infringement, arose under a patent endorsed "license of right."[206] Under the "license of right" provisions of U.K. patent law, patents having a remaining term of five years or more are endorsed "licenses of right" for the last four years of their term.[207]

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compulsory license, whether that license fixes royalties payable to the patentee or whether the patentee has accepted or refused such royalties.

Id.

200. Allen and Hanburys v. Generics, 1988 E. Comm. Ct. J. Rep. ——, [1986-1988 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,446 at 18,169.

201. The drug, trade named "Ventolin," is used in the treatment of asthma. *Id.* at 18,159.

202. *Id.* at 18,159.

203. For a definition of parallel patents, *see supra* note 174.

204. Allen and Hanburys v. Generics, 1988 E. Comm. Ct. J. Rep. ——, [1986-1988 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,446 at 18,159.

205. For an explanation of the inability to obtain certain patents in Italy, *see supra* notes 186-88 and accompanying text.

206. *Generics*, [1986-1988 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,446 at 18,159.

207. *Id.* at 18,158 (citing United Kingdom Patents Act 1977). The "licenses of right" provision was enacted into British law in 1978 as a consequence of new patent rules ratified in the Convention for the European Patent for the Common Market (Community Patent Convention (CPC)), 19 O.J. Eur. Comm. (No. L17) 1 (1976), 3 Common Mkt. Rep. (CCH) ¶¶ 5795-5824D at 4717-4722. Under the terms of the Convention, the duration of European patents was set at twenty years. CPC, Art. 51, 3 Common Mkt. Rep. (CCH) ¶ 5806B at 4717-

The "license of right" provision allows any person to market patented products when such marketing would otherwise violate the original patentee's patent rights.[208]

An important clause in the license of right provisions distinguishes between license applicants who produce the patented product in the U.K and those who intend to import the product from other Member States.[209] Whereas the domestic producer is assured a license if he accepts the terms fixed by the Comptroller, the importer may be enjoined from importing the product even if he accepts the license terms.[210] Consequently, the proprietor of an endorsed patent is entitled to challenge the granting of a license to a third party who intends to import the product, but cannot oppose a license for someone manufacturing and marketing the product in the same Member State.[211]

Generics had negotiated with Hanburys for a license to import Salbutamol from Italy to the U.K. After failing to reach an agreement, Generics applied directly to the Comptroller of Patents to settle terms of a license under the "licenses of right" provisions of the Patents Act.[212] Before the Comptroller acted on the application, however, Generics informed Hanburys of its intent to import the drug.[213] Hanburys considered this conduct a threat of patent infringement and instituted an action for an injunction which ultimately reached the House of Lords.[214]

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19 (citing Convention on the Grant of European Patents (European Patent Convention), Art. 63, 3 Common Mkt. Rep. (CCH) ¶ 5567 at 4637). British patents previously had been issued for a term of sixteen years. *Generics*, [1986-1988 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,446 at 18,158.

208. The granting of a license of right, though not transferring any proprietary interests in the patented product, simply "makes lawful an action that would otherwise be contrary to the patentee's rights." U.K. Patents Act 1977, Section 46(3), *reprinted in Generics*, [1986-1988 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,446 at 18,159. Upon the entering of such license rights, "any person shall. . . be entitled as of right to a license under the patent on such terms as may be settled by agreement or, in default of agreement, by the. . . [Comptroller General of Patents]. . . ." *Generics* at 18,159.

209. Allen and Hanburys v. Generics, 1988 E. Comm. Ct. J. Rep. ____, [1986-1988 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,446 at 18,159.

210. *Id.*

211. *Id.* at 18,167-168.

212. *Id.* at 18,159.

213. *Id.*

214. Allen and Hanburys v. Generics, 1988 E. Comm. Ct. J. Rep. ____, [1986-1988 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,446 at 18,159. The case was subsequently referred to the Court for a preliminary ruling pursuant to EEC Article 177, 3 Common Mkt. Rep. (CCH) ¶ 4655 at 3853. *Id.* at 18,159-18,160.

The major question referred to the Court by the House of Lords[215] was whether the unequal treatment between domestic producers and importers under the provisions of licenses of right ran contrary to the free movement of goods provisions of Articles 30 and 36 of the EEC Treaty.[216] In addressing the issue, the Court recalled its findings in *Merck,*[217] in which the Court had held that derogations from Article 30 prohibitions could only be justified insofar as necessary to safeguard those rights which constitute the specific subject matter of the property.[218] The Court acknowledged that unlike the proprietor of an ordinary patent, the proprietor of a patent endorsed "license of right" cannot enjoin the granting of a license to an applicant seeking to manufacture and market the patented product in the licensed territory.[219] Despite this restriction, however, the Court stated that Article 36 allows the patent proprietor a fair return on her product.[220] This return includes the recovery of product development costs and the fruits of initial marketing.[221] This right, however, cannot exceed the Article 36 limitation to rights protecting the specific subject matter of the property.[222] If the test for determining the "subject matter" rights protected under endorsed patents is the "fair return" principle, concluded the Court, then the same test applied to domestic licensees of right should also apply to alleged infringements by importing licensees.[223]

The Court reasoned that the importation of the drug by Generics could only be prohibited if necessary to ensure the patent holder the same rights against the importer as he would enjoy against a local producer of the drug.[224] In the absence of such a showing, "an injunction issued against an importer-infringer . . . would constitute arbitrary discrimination prohibited by Article 36 of the Treaty and could not be justified on the grounds of the protection of industrial and commercial property."[225]

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215. The action was referred to the Court for a preliminary ruling pursuant to Article 177. *See supra* note 123.

216. *Generics*, [1986-1988 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,446 at 18,168.

217. Merck v. Stephar and Exler, 1981 E. Comm. Ct. J. Rep. 2063, [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8707. *See also* notes 185-92 and accompanying text.

218. *Generics*, [1986-1988 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,446 at 18,169.

219. Allen and Hanburys v. Generics, 1988 E. Comm. Ct. J. Rep. ____, [1986-1988 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,446 at 18,169.

220. *Id.* at 18,169.

221. *Id.* at 18,169-18,170.

222. *See supra* notes 174-99 and accompanying text.

223. *Generics*, [1986-1988 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,446 at 18,169.

224. Allen and Hanburys v. Generics, 1988 E. Comm. Ct. J. Rep. ____, [1986-1988 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,446 at 18,169.

225. *Id.* at 18,170.

Two arguments were forwarded by Hanburys in support of its claim for injunctive relief. The first maintained that injunctions prohibiting imports can be justified on the basis of the difficulty in ascertaining the quantity and quality of products produced in other Member States.[226] This situation, Hanburys argued, made the calculation of royalties much more difficult than for domestically produced goods.[227] The Court quickly dismissed this argument, however, noting that it might well be just as difficult to make royalty determinations for domestic products.[228] Moreover, such determinations must be set out in the original licensing agreement whether for domestic producers or importers.[229]

The second major argument pressed by Hanburys concerned the need for quality control of imported pharmaceutical products in the interests of public health.[230] Here too, the Court rejected Hanburys' contention, stating that the protection of a patentee's exclusive rights cannot be masked behind unrelated concerns over public health.[231] Though not specifically citing its prior case law, the Court's dismissal of the public health argument falls in line with its earlier decision in *Centrafarm*.[232] In that case, the Court established that the owner of a pharmaceutical patent cannot avoid the prohibitions of Articles 30 and 36 for the purpose of protecting the public from the distribution of potentially defective drugs.[233] The Court in *Centrafarm* did acknowledge that protecting the public from such defects is a "legitimate concern" and capable of being addressed under the exception of Article 36 concerning the protection of health and life of humans and animals.[234] The Court noted, however, that such protective measures are limited to those adopted in the field of health control and, as in *Generics*, ruled the public health argument invalid.[235]

The *Generics* decision, in sum, provides a further restriction by the Court on the permissible scope of patent-based rights, particularly those which discriminate against importers. Prior to *Generics*, the

226. *Id.* at 18,169.
227. *Id.*
228. *Id.*
229. Allen and Hanburys v. Generics, 1988 E. Comm. Ct. J. Rep. ____, [1986-1988 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,446 at 18,169.
230. *Id.*
231. *Id. See supra* note 171 and accompanying text (public health provision of Article 36).
232. *See* Centrafarm v. Sterling Drug, 1974 E. Comm. Ct. J. Rep. 1147, [1974 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8246 at 9151-57.
233. *Id.*
234. *Id.*
235. *Id.*

Court restricted in some cases and upheld in others various provisions of national law permitting exclusion of imports based on nationally-erected patent rights. Based on the principle of exhaustion of rights, the Court protects the patent proprietor's substantive right to a monopoly in the initial distribution of patented products. Court jurisprudence, however, prevents exclusion of imports purchased abroad and redistributed by third parties in the patentee's or licensee's protected territory.[236] The *Centrafarm* decision precludes patent proprietors from enjoining third parties who purchase the patented products from licensees abroad from importing such products. In *Merck*, the Court reaffirmed the invalidity of national laws precluding such parallel imports.

The *Generics* decision adds to Community law regarding national laws creating hybrid substantive patent rights, such as compulsory licenses and licenses of right. Under *Pharmon*, the patent holder or its licensees may invoke national law to preserve national rights protecting the initial distribution in protected territories against imports by third parties holding involuntary licenses. Now, following the precedent established in *Merck*, the Court has chosen to further restrict the scope of national patent-based rights. Under *Generics*, national laws may not unjustifiably discriminate against third party importers with regard to hybrid patent rights such as licenses of right. Though regulating the scope of patent rights will undoubtedly continue to prove difficult for the Court, it seems evident from the progression of its cases to date that the overriding aim of eliminating the artificial barriers to Community trade will weigh heavily in its deliberations.

IV. Extraterritorial Application of EEC Competition Regulations

Articles 85 and 86, which prohibit restraints of competition taking place "within the common market" and affecting trade "between Member States,"[237] seem limited geographically by their language to those states within the Community itself. Jurisdiction over anti-competitive practices has not, however, been restricted to transactions

236. *See generally* Note, *K Mart Corp. v. Cartier, Inc.: Attention Gray Market Shoppers, the United States Supreme Court has Saved Your Bargain Prices*, 2 Transnat'l Law. 303 (1989).

237. *See supra* notes 18-30 and accompanying text (discussing the provisions of Articles 85 and 86).

which strictly involve EEC member states. In several significant cases, the Court imposed liability for various competition infringements on enterprises located in non-EEC countries.[238] However, the exercise of jurisdiction over transactions involving foreign-based enterprises by EEC institutions has proved theoretically troubling for the Court, as it has for other countries.[239]

The issue of the scope of EEC extraterritorial jurisdiction was originally presented in the landmark "Dyestuffs" cases.[240] In these cases, the Commission asserted jurisdiction over nine European manufacturers of dyestuff,[241] including four non-Member State companies,[242] alleging concerted pricing-fixing[243] in violation of Article 85.[244] The Commission maintained that jurisdiction was valid on the basis of the anti-competitive "effects" within the Common Market as a result of the foreign enterprises' price-fixing scheme.[245] The "effects doctrine" embodies the right of a nation to extend its jurisdiction

238. *See, e.g.* Europemballage and Continental Can v. Commission, 1973 E. Comm. Ct. J. Rep. 215, [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8171 (applying Articles 85 and 86 to non-EEC defendants); Istituto Chemioterapico Italiano & Commercial Solvents v. Commission, 1974 E. Comm. Ct. J. Rep. 223, [1974 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8209 (Article 86 applies to commercial and industrial activities supplying the Member States); Imperial Chemical Industries Ltd. v. Commission, 1972 E. Comm. Ct. J. Rep. 619, [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8161 (imputing liability on foreign parent through EEC subsidiary) [hereinafter *Dyestuffs*].

239. For the Court's discussion of the various international law theories of extraterritorial jurisdiction *see infra* notes 269-90 and accompanying text. For an analysis of current issues in extraterritorial jurisdiction *see* Comment, *Extraterritorial Application of Securities Regulations: Territorialism in the Wake of the October 1987 Market Crash*, 1 TRANSNAT'L LAW. 307 (1988).

240. *Dyestuffs*, [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8161; J.R. Geigy v. Commission, 1972 E. Comm. Ct. J. Rep. 787, [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8164; Sandoz v. Commission, 1972 E. Comm. Ct. J. Rep. 845, [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8165.

241. Dyestuff refers to all products relating to aniline dyes and pigments. *See Dyestuffs*, [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8161 at 8032-33 (Opinion of Advocate General).

242. Imperial Chemical Industries was registered in the United Kingdom (which, at the time of the decision, was not a member of the EEC). Ciba, Geigy and Sandoz were based in Switzerland. *Dyestuffs*, [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8161 at 8049 (Advocate General Opinion).

243. For a definition and discussion of price fixing, *see supra* note 34 and accompanying text.

244. For a discussion concerning the particular pricing infringements of the Dyestuffs companies, *see infra* note 260. Imperial Chemical Industries Ltd. v. Commission, 1972 E. Comm. Ct. J. Rep. 619, [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8161 at 8003-04; *Geigy*, [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8164 at 8111-13; *Sandoz*, [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8165 at 8146-48.

245. Imperial Chemical Industries Ltd. v. Commission, 1972 E. Comm. Ct. J. Rep. 619, [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8161 at 8007; *Geigy*, [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8164 at 8114-15; *Sandoz*, [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8165 at 8150.

to acts arising outside its territory which impact conditions within its territory.[246]

Arguing for one of the foreign companies in their appeal before the Court, Professor Jennings refuted the effects doctrine as an invalid infringement of public international law.[247] He contended that EEC jurisdiction over competition infringements should be confined to traditional "territorial" limits,[248] and should not extend to non-Member State enterprises only for their *conduct* within the EEC.[249] Advocate General Mayras, on the other hand, proposed a "modified" effects test.[250] Under this view, jurisdiction over foreign restrictive conduct is valid only when its effects are "direct and immediate," "reasonably foreseeable" and "substantial."[251]

In upholding the Commission decision, however, the Court relied on its own, narrower basis of jurisdiction.[252] Its theory was premised primarily on an "economic unity" concept of jurisdiction, which imposed liability by imputing the prohibited actions of foreign enterprises to the EEC-based subsidiaries executing them.[253] The rationale of the *Dyestuffs* decision was limited in its applicability because the presence of EEC-based subsidiaries obviated the need to develop a jurisdictional doctrine reaching beyond traditional territorial theory. The Court, thus, was not required to elaborate on the permissible scope of jurisdiction over non-EEC entities whose extraneous actions

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246. *See, e.g.*, Restatement (Third) of the Foreign Relations Law of the United States §§ 402, 403 (1987) and comments thereto. Hawk defines the "effects doctrine" as "the most extreme articulation of extraterritorial application. . . under which a state applies its laws to conduct by non-nationals occurring entirely outside its territory but which has some effect within the prescribing state." Hawk, *supra* note 159 at 21.

247. *Dyestuffs*, [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8161 at 8005. "Public international law governs the relation between sovereign states and may perhaps be regarded as the common law of mankind in an early stage of development (footnote omitted)." P.M. North, Private International Law 13 (9th ed. 1974).

248. The "territorial" principle of jurisdiction is rooted in the notion that a state is conferred sovereign dominion over persons and goods situated within the physical territory of the state. *See* Hingorani, Modern International Law 15-19 (1984); Restatement (Third) of Foreign Relations Law of the United States, Subchapter A, Introductory Note, at 235, and § 402, at 237-38 (1987).

249. Imperial Chemical Industries Ltd. v. Commission, 1972 E. Comm. Ct. J. Rep. 619, [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8161 at 8006.

250. *Id.* at 8053-58 (Advocate General Opinion).

251. *Id.*

252. *Id.* at 8031.

253. The economic unity doctrine (or "unity of group" theory) comprises three ideas: extraterritorial jurisdiction over foreign enterprises, imputation of substantive liability to foreign enterprises for conduct of local subsidiaries, and location of concerted action between related enterprises for purposes of EEC and U.S. anti-trust rules. Hawk, *supra* note 159, at 457; *See also* Von Bael & Bellis, *supra* note 22, § 1.03 at 1-7 (discussing the unity of group theory in the EEC).

produced effects within the Community, but which were not linked to EEC-based agents.

The jurisdictional debate of *Dyestuffs* provides the backdrop to the Court's recent judgment in the "Woodpulp" cases.[254] The cases center around a Commission challenge to the concerted price-fixing practices of numerous woodpulp[255] producers located in Scandinavia, North America, Spain and Portugal.[256] The Court upheld the Commission decision finding EEC jurisdiction over enterprises operating outside the Community which affected competition within the EEC.[257]

The Commission recognized the novelty of the *Woodpulp* cases for EEC competition jurisdiction at the outset of its decision.[258] It noted that the joined cases represented the first instance of alleged competition violations by enterprises all having their headquarters outside the Community.[259] The producers and their trade associations were found to have restricted price competition and hindered trade between Member States of the EEC by:

— concerting to fix prices announced and charged in the EEC for the sale of woodpulp to customers located in that market;

— exchanging information among themselves on prices to be charged on a regional and international level; and

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254. Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85: (A. Ahlström, Joutseno-Pulp, and Others (Case 89/85); Bowater Incorporated (Case 104/85); The Pulp, Paper and Paperboard Export Association (Case 114/85); St. Anne-Nackawic Pulp and Paper Company Limited (Case 116/85); International Pulp Sales Company (Case 117/85); Westar Timber Limited (Case 125/85); Welwood of Canada Limited (Case 126/85); MacMillan Bloedel Limited (Case 127/85); Canadian Forest Products Limited (Canfor) (Case 128/85); and British Columbia Forest Products Limited (Case 129/85) v. Commission [hereinafter Woodpulp], 1988 E. Comm. Ct. J. Rep. ____, 4 C.M.L.R. 901. *See, EC Jurisdiction over Foreign Companies Upheld by Court*, Fin. Times, Sept. 28, 1988, at 1, col. 3; *Ruling Widens Reach of EC Rules on Competition*, Wall St. J., Sept. 28, 1988, at 20, col. 1.

255. Woodpulp is the primary material used in the manufacture of paper and paperboard. At issue in the present cases was the sale of "bleached sulphate woodpulp," the highest quality woodpulp, to some of the 800 paper manufacturers in the EEC. Little of the high grade pulp is produced in the EEC, accounting for the fact that the EEC is the most important market for foreign producers. *Woodpulp*, 4 C.M.L.R. 901 at 906.

256. At the time of the Commission decision in 1984, Portugal and Spain were not members of the EEC. Both nations will become Member States of the EEC in 1992. *See* Treaty Concerning the Accession to the Kingdom of Spain and the Portuguese Republic to the European Economic Community and to the European Atomic Energy Community, 28 O.J. EUR. COMM. (No. L302) 1 (1985), 3 Common Mkt. Rep. (CCH) ¶¶ 7703-7733D (1988).

257. *Woodpulp*, 4 C.M.L.R. 901 at 942.

258. Comm'n Decision, *Woodpulp*, 28 O.J. EUR. COMM. (No. L 85) 1 (1985), [Jan. 1982-June 1985 New Developments Transfer Binder] Common Mkt. Rep. (CCH) ¶ 10,654, at 11,547-10. Comm'n Press Release, No. IP (84) 468, Brussels, Dec. 20, 1984, [Jan. 1982-June 1985 New Developments Transfer Binder] Common Mkt. Rep. (CCH) ¶ 10,654, at 11,547-10.

259. Comm'n Decision, *Woodpulp*, at 11,547-10.

— prohibiting the resale or export within the EEC of woodpulp sold to European customers.[260]

The decision declared the woodpulp producers and associations in violation of Article 85 and imposed fines.[261] The producers then appealed to the Court of Justice for annulment of the Commission decision, specifically challenging the extraterritorial application of Community jurisdiction.[262]

Once before the Court, the woodpulp producers contended that the Commission *Woodpulp* decision misinterpreted the territorial scope of Article 85.[263] Distinguishing the earlier decision in the *Dyestuffs* cases, the producers noted that the Court had extended jurisdiction over non-EEC domiciled companies only insofar as the foreign companies controlled the actions of their subsidiaries within the EEC.[264] In *Dyestuffs*, the Court had specifically refused to adopt the "effects doctrine" of extraterritorial jurisdiction.[265] Thus, in the *Dyestuffs* cases, responsibility for price manipulation was imputed to the subsidiary located within the EEC, not because price fixing effects were felt in the EEC, but because the Court considered the responsible companies "alter egos" of EEC-registered undertak-

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260. *Id.* at 11,547-24, 11,547-32. The price fixing practices were found to have affected 60% of the bleached sulphate woodpulp market in the EEC. *Id.* at 11,547-33.

> . . .the effect of the agreements and practices on prices announced and/or charged to customers and on resale of pulp within the EEC was therefore not only substantial but intended, and was the primary and direct result of the agreements and practices.

Id. at 11,547-23 to 11,547-24.

261. *Id.* at 11,547-34 to 11,548. The fines imposed ranged from 50,000 ECU to 250,000 ECU (approximately $58,000 to $290,000 at current rates of exchange), depending on the individual producer's length and the seriousness of Article 85 violation:

> In determining the fine on the individual firms to which this decision is addressed, the Commission has taken into consideration the role played by them in the concerting pricing practices and in the exchange of information, the length of time they are proved to have taken part in the infringements, their respective average shipments of bleached sulphate wood pulp to the Community in the last year of the period under review and—to a lesser extent—the individual total turnover of each.

Id. at 11,547-34.

In its Press Release accompanying the decision, the Commission stated "that this case will guarantee that the pulp market in the EEC will now function competitively and that, with this decision as an example, the risk of concertation on prices in similar markets in the EEC will be substantially lessened. *Id.* at 11,547-10.

262. *Woodpulp*, 1988 E. Comm. Ct. J. Rep. ____, 4 C.M.L.R. 901 at 939.

263. *Id.*

264. *Id.*

265. *Id. See supra* notes 252-53 and accompanying text (discussing the Court's holding in *Dyestuffs*). However, as Advocate General Darmon points out in his "Woodpulp" opinion, "Although the Court has not, in its decisions to date, formally upheld the effects doctrine with regard to the application of competition law to undertakings outside the Community, that does not imply that it rejects the doctrine." *Id.* 918-19.

ings.[266] The woodpulp companies argued that because their actions took place outside of the EEC, some of them without the involvement of subsidiaries or agents registered in the EEC, jurisdiction based on alleged Article 85 violations was without support.[267]

The producers further argued that the exertion of jurisdiction by EEC institutions would violate well-recognized principles of public international law and comity.[268] American woodpulp producers contended, for example, that applying Article 85 to them contradicted the intent of the Webb-Pomerene Act of 1918 which aimed to promote U.S. exports by exempting export associations from U.S. antitrust regulations.[269] Such a contradiction, they maintained, constituted a breach of the principle of non-interference recognized by international law.[270] Likewise, the Canadian producers considered the imposition of fines by the EEC, and the conditioning of their reduction on specified action, an infringement of Canada's sovereignty and thus a breach of the principle of international comity.[271]

The Court dismissed the argument that application of EEC law was an infringement of the principle of non-interference[272] by pointing out that no contradiction existed for American producers between EEC competition law and the Webb-Pomerene Act.[273] The Court stated that the Act merely exempts export cartels from the application

266. *See supra* notes 252-53 (discussing the Court's holding in *Dyestuffs*). The conduct of a subsidiary can be imputed to its parent company, according to the Court, where the subsidiary, although having separate legal personality, does not decide independently upon its own market behavior, but essentially follows the instructions given to it by the parent company. Imperial Chemical Industries Ltd. v. Commission, 1972 E. Comm. Ct. J. Rep. 619, [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8161 at 8031.

267. *Woodpulp*, 1988 E. Comm. Ct. J. Rep. ____, 4 C.M.L.R. at 939 (Advocate General Opinion).

268. *Id.* at 940.

269. *Id.* The Webb-Pomerene Act of 1918 exempted export associations, such as the Pulp, Paper and Paperboard Export Association (formerly named Kraft Export Association), from United States anti-trust laws. *Id.* at 906.

270. *Id.* at 940.

271. *Id.* The principle of international comity includes the notion that nations will mutually recognize and respect the sovereign prerogatives with which independent states have historically been endowed. Where one state requires that certain action be taken by nationals of another state, this principle of comity may be jeopardized. *See* RESTATEMENT, *supra* note 246, § 403, Comment (a), at 245-6.

272. The principle of noninterference recognizes situations where a person or enterprise is bound by the contradictory laws or regulations of two states having concurrent jurisdiction in the matter. These situations typically arise in the case of enterprises which are organized under the laws of one state, but do business in another state. Where conflicting laws exist between states, the principle of noninterference obliges each state to exercise its jurisdiction with moderation. *Woodpulp*, 4 C.M.L.R. at 941. *See also* RESTATEMENT, *supra* note 246, § 403(3), at 245.

273. *Woodpulp*, 1988 E. Comm. Ct. J. Rep. ____, 4 C.M.L.R. at 942.

of United States antitrust laws—it does not require that such cartels be formed.[274] Only if such a requirement were present would producers have been faced with conflicting state regulations, whereby the principle of non-interference would come into question.[275]

The Court also dismissed the breach of comity argument in summary fashion.[276] The argument, maintained the Court, presupposed the invalidity of the EEC's extraterritorial application of competition rules, in the form applied in *Woodpulp*.[277] The Court declared the comity issue moot, because the Court held the extraterritorial jurisdiction valid.[278]

The Court's concern for establishing the appropriate basis for applying extraterritorial jurisdiction is clearly evident in its judgment. Notably, in the section of the Court's report entitled "Questions asked by the Court," the Court articulated only one specific question:

> Does the Commission maintain that it has jurisdiction in these cases by reason of conduct which has taken place within the Community and, if so, what is that conduct? Or does it base its jurisdiction on the effects within the Community of conduct which took place outside the Community and, if so, what is that conduct and what are its effects?[279]

Providing the language which the Court subsequently adopted in its judgment, the Commission responded that "what is important from the point of view of jurisdiction is where the conduct of the parties which it is the object, or effect, of the agreement to influence occurred and not the place where the agreement was made."[280] Applying this test to the present case, the conduct of the woodpulp producers which violated Article 85 did take place in the EEC: the fixed prices were communicated to purchasers in the EEC and the prices were subsequently charged within the EEC.[281]

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274. *Id.*
275. *Id.* at 942-43.
276. *Id.*
277. *Id.*
278. *Woodpulp*, 1988 E. Comm. Ct. J. Rep. ____, 4 C.M.L.R. at 942-3.
279. *Id.* at 914 (Report for the Hearing).
280. *Id.* Two other considerations were emphasized by the Commission: First, "conduct" can consist of conduct initiated by principals as well as that of their subsidiaries, agents, and other controlled entities. (Such a view is clearly consistent with the Court's holding in "Dyestuffs.") Second, it is necessary to comprehensively assess the conduct of all parties to determine whether it was the intention of each that the conduct of all other parties be affected. *Id.*
281. *Woodpulp*, 1988 E. Comm. Ct. J. Rep. ____, 4 C.M.L.R. at 914 (Report to the Hearing).

In presenting what might be described as its "conduct" test, the Commission acknowledged the difficulty in distinguishing "'the effects' of 'conduct' from the conduct itself."[282] The Commission, however, defined "effects" as "the direct and perceivable consequences of certain 'conduct.'" The Commission continued, "[t]he distinction to be made is thus between 'conduct' which distorts the competitive process in the Community and 'conduct' which, though not itself distorting the competitive process within the Community, produces such consequences."[283] It is the former situation which characterizes the woodpulp producers' concerted actions, and which will now invoke the jurisdictional reach of the EEC.

In upholding the Commission's exercise of jurisdiction, the Court stated that the decisive criterion for establishing jurisdiction under an Article 85 violation was a determination of where the restrictive practices were *implemented*, not where they *originated*.[284] The Court reasoned that if a finding of jurisdiction—and thus the application of Article 85 prohibitions—centered on the place where the alleged violations were formed (as the woodpulp producers maintained), undertakings could easily evade Community restrictions simply by entering violative agreements beyond the frontiers of the EEC.[285] "It is immaterial," wrote the Court, "whether or not [non-EEC entities] had recourse to subsidiaries, agents, sub-agents, or branches within the Community in order to make their contacts with purchasers within the Community."[286] The Court concluded that application of EEC competition rules was in conformity with the widely recognized territorial basis of jurisdiction since the producers implemented their pricing scheme within the EEC.[287]

Since the Court resolved the issue of extraterritoriality in *Dyestuffs* by imputing actions of foreign-based parent companies to their EEC-based subsidiaries, the absence of such subsidiaries in the *Woodpulp* cases necessitated a greater expansion of jurisdictional doctrine. Instead of looking to the ultimate *effects* of anti-competitive conduct as its test for jurisdiction, the Court focused on the initial implementation of *conduct* which leads to such effects. The Court explained:

282. *Id.*
283. *Id.*
284. *Id.* at 941.
285. *Id.*
286. *Woodpulp*, 1988 E. Comm. Ct. J. Rep. ____, 4 C.M.L.R. at 941.
287. *Id. See supra* note 248 (discussing the principle of territoriality).

> It follows that where those producers concert on the prices to be charged to their customers in the Community and put that concertation into effect by selling at prices which are actually co-ordinated, they are taking part in concertation which has the object and effect of restricting competition within the Common Market within the meaning of Article 85 of the Treaty.[288]

Therefore, the Court reasoned, where enterprises employ anti-competitive practices in marketing their products within the Community, the Commission can exert jurisdiction as a consequence of the specific practices themselves.

In sum, the *Woodpulp* decision now subjects non-EEC based enterprises doing business within the Community to EEC competition rules if their actions affect the EEC internal market as defined by Article 85. Thus, if they have "as their object or effect the prevention, restriction or distortion of competition within the common market," as determined by the Commission and Court, violations and fines may be cited."[289] According to Advocate General Darmon, "The wording of Article 85 of the Treaty offers general support for the proposition that Community competition law is applicable, by its very essence, whenever anti-competitive effects have been produced within the territory of the Community."[290]

Considering that the Court upheld the Commission's formulation and exercise of extraterritorial jurisdiction in *Woodpulp*, the question which remains unanswered is where the Court will ultimately draw the line on the extent of EEC jurisdiction. In both the *Dyestuffs* and *Woodpulp* cases, the Court adopted the least expansive means of exercising jurisdiction over the offending parties. Consequently, these cases do not necessarily provide a definitive statement of the true extraterritorial scope of EEC law. This question of scope will undoubtedly come before the Court in the future now that the Court has extended the EEC's jurisdictional reach.

CONCLUSION

As the EEC prepares for the transition to the broader economic and social unification of 1992, developments of the past year provide important insights into the role of the Court in securing European integration. The establishment of the Court of First Instance bodes

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288. *Id.* at 941.
289. *See supra,* note 18 and accompanying text (discussing Article 85).
290. *Woodpulp,* 4 C.M.L.R. at 918 (Advocate General Opinion).

well for an increased role of Court of Justice jurisprudence. As the EEC begins to face the increasingly difficult challenge of harmonizing national economic and social policies with the broader Community mandates of 1992, the Court will undoubtedly be called upon to interpret new confrontations between national and Community law. As such, the Court will certainly benefit from the relinquishment of previously burdensome individual actions. EEC competition policy, exemplified in this article by the Court's handling of restrictive pricing practices and patent rights abuses, will continue to provide the crucial vehicle for securing integration of Community economic policy. While critics may continue to question the broad mandate of the Court, if the ambitious integration goals of the EEC are to withstand the pressures of national interests, the Court must continue to provide an active and expansive application of Community law. Some of the recent developments of the Court outlined in this article, including the notable *Woodpulp* decision, provide a significant indication of the Court's powerful role in forging greater European integration in the coming decade.

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