Vanderbilt Journal of Transnational Law

Volume 24
Issue 1 *Issue 1 - 1991*

Article 2

1991

European Community Competition Law and National Competition Laws

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European Community Competition Law and National Competition Laws: Compatibility Problems from a German Perspective

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ABSTRACT

This Article examines conflicts between the European Community (EC or Community) competition rules and the corresponding laws of the Federal Republic of Germany in three case categories. Professor Zekoll first discusses situations in which corporate practices or agreements violate EC law, but are considered legal under German law. He then analyzes frictions that may arise when both EC and German laws are violated. In both of these case categories, Community law prevails over conflicting solutions under German law. However, considerable doubt exists about the primacy of Community law with respect to the third category involving practices that violate German law, but are allowed under the Community competition rules. According to the traditional "two-barrier theory" espoused by most German courts, corporate activity must be lawful under both national and EC law in order to be allowed. Since both legal regimes are regarded as regulating different spheres of economic activity, no conflict between the systems can occur. As a result, under this approach, prohibitive German law always should take priority over permissive Community rules.

The author takes the view that tensions may arise between prohibitive national competition rules and permissive Community law, and that, as a rule, the latter should prevail. He differentiates, however, between the devices on which the EC Commission relies in its decision to permit a practice or agreement. The so-called "comfort letters" and "negative clearances" declaring an agreement not to be in violation of EC rules cannot create a conflict with national law, and thus do not preclude the

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application of national prohibitions. However, individual and group exemptions issued by the Commission to allow certain agreements merit a different treatment. These exemptions reflect policy concerns of the Community that may be thwarted if contrary national law is applied. While German courts are reluctant to attribute any independent importance to Community exemptions, the Commission, followed by a strong majority within the academic discussion, endorses the principle of the primacy of these permissive EC rules. Professor Zekoll concludes that this principle does not mandate a blanket rejection of prohibitive national rules. Instead, a case-by-case evaluation of the true scope of Community exemptions and the underlying interests reveals that the application of national restrictions to a particular practice frequently will not frustrate the Community's objectives.

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I. INTRODUCTION

A. *The Nature of the Problem*

On January 1, 1958, the Treaty Establishing the European Economic Community (Treaty of Rome or Treaty) took effect in the six original

member states.[1] The Treaty established competition rules intended to govern business behavior throughout the European Community (EC or Community).[2] Coincidentally, on the same day, the first German Act Against Restraints of Competition (GWB) entered into force. While similar principles govern both the German and the EC antitrust regimes, they differ in many fundamental respects. Subsequent amendments to the GWB have not led to any significant degree of adaptation to the Community rules, thus perpetuating the potential for conflict in situations in which both legal regimes apply.[3]

Although the Council of the European Community has the responsibility to define the relationship between national laws and Community rules,[4] it has not yet acted. There are also no current plans for a Council directive aimed at harmonizing the competition rules of member states themselves.[5] The Single European Act, which provides for the creation

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1. The six original member states were Belgium, Federal Republic of Germany, France, Italy, Luxembourg, and the Netherlands. Treaty Establishing the European Economic Community, *done* Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter Treaty of Rome].

2. These competition rules are set forth in articles 85 through 94 of the Treaty. *Id.* at 47-52.

3. The GWB has been amended five times since its inception, but these changes have not led to any substantial reconciliation with the EC rules. The most recent amendment contains only modest adjustments, such as minor limitations on the availability of exemptions for anticompetitive practices by loan associations and the insurance industry, as well as for agreements between public utilities. Community law, however, remains significantly stricter in these areas. For a discussion of the amendments to the GWB, see Pfeffer, *The Fifth Amendment of the German Act Against Restraints of Competition*, 11 EUR. COMPETITION L. REV. 95 (1990).

4. Articles 87(1) and 87(2)(e) of the Treaty of Rome, *supra* note 1, provide as follows:

> 1. Within a period of three years after the date of the entry into force of this Treaty, the Council, acting by means of a unanimous vote on a proposal of the Commission and after the Assembly has been consulted, shall lay down any appropriate regulations or directives with a view to the application of the principles set out in Articles 85 and 86 [the antitrust provisions]. . . .
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> 2. The provisions referred to in paragraph 1 shall be designed, in particular:
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> . . . . (e) to define the relation between, on the one hand, municipal law and, on the other hand, the provisions contained in this Section or adopted in application of this Article.

5. The Commission has taken the position that member states' unilateral efforts to harmonize their laws has reduced the need for such Community-wide action. *See, e.g.*, COMMISSION OF THE EUROPEAN COMMUNITIES, SEVENTEENTH REPORT ON COMPETITION POLICY pt. 1, § 1, para. 8 (1988) (noting a "growing coherence between Community rules and national competition laws"). While this observation may be accurate with respect to some member states, such as France, which has enacted competition rules by

of an internal European market, does not mandate such a directive, because EC competition law does not fall within those areas that "have as their object the establishment and functioning of the internal market."[6] The recently adopted Merger Control Regulation (Regulation), which vests the EC Commission with the exclusive authority to regulate mergers, will ease some of the tensions within this sector of competition law.[7] The Regulation, however, only pertains to mergers of Community-wide dimension.[8]

Although actual friction between the systems has been rare in the past,[9] the potential for such friction is likely to increase with the constant

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relying heavily on Community law, it is overly optimistic with regard to others. For a discussion of the newly enacted French competition law, see Roudard, *The New French Legislation on Competition*, 10 EUR. COMPETITION L. REV. 205 (1989).

6. *Single European Act*, 30 O.J. EUR. COMM. (No. L169) art. 18, at 8 (1987). By amending the provisions of the Treaty, the Act provides for the creation of the internal market by December 31, 1992, which "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 [EEC] Treaty." *Id.* art. 13. None of the provisions in Title II of the Act amending the Treaty requires harmonization of national competition rules. *Id.* arts. 6-29.

7. *Council Regulation (EEC) No. 4064/89 of December 21, 1989 on the Control of Concentrations Between Undertakings*, 32 O.J. EUR. COMM. (No. L395) 1 (1989), *corrected in* 33 O.J. EUR. COMM. (No. L73) 34 (1990) [hereinafter *Regulation*].

8. Moreover, even when the threshold requirements for applying the Merger Control Regulation are met, national competition rules may still prevail. Article 21(3) of the Regulation enables member states to prohibit mergers that have been cleared by the Commission if the prohibition serves "to protect legitimate interests other than those taken into consideration by this Regulation." *Id.* These interests include the broad areas of public security, protecting plurality in the media, and prudential rules for the financial service industries. For details on the new regulation, see Elland, *The Mergers Control Regulation (EEC) No. 4064/89*, 11 EUR. COMPETITION L. REV. 111 (1990).

9. This has been due in part to the continuous cooperation between the Commission and the national antitrust authorities. For details, see COMMISSION OF THE EUROPEAN COMMUNITIES, FOURTH REPORT ON COMPETITION POLICY pt. 1, ch. 1, § 7, para. 47 (1975) [hereinafter FOURTH REPORT ON COMPETITION]; COMMISSION OF THE EUROPEAN COMMUNITIES, SIXTH REPORT ON COMPETITION POLICY pt. 1, ch. 3, § 2, paras. 114-16 (1977) [hereinafter SIXTH REPORT ON COMPETITION]. Article 10(2) of *Regulation 17 of the Council of 6 February 1962 Implementing Articles 85 and 86 of the Treaty*, 13 J.O. COMM. EUR. 204 (1962) [hereinafter *Regulation No. 17*] provides:

> The Commission shall carry out the procedure set out in paragraph 1 [*i.e.*, transmit relevant documents pertaining to antitrust infringements and compliance procedures to the national antitrust authorities] in close and constant liaison with the competent authorities of the Member States; such authorities shall have the right to express their views upon that procedure.

Regulation 17 is the principle regulation governing the application and enforcement of the EC competition law. It provides, among other things, a comprehensive procedural

process of expansion of EC competition law. This Article evaluates the status and effect of EC competition law in relation to national law within the Community in three areas of potential conflict: first, situations in which a practice or agreement violates EC competition law, but is considered legal under German law; second, when a practice or agreement violates both German and Community law; third, when a practice or agreement violates German law, but is permitted under EC competition law.

With respect to the first two categories, tensions between national rules and Community law are resolved in accordance with the general principle that Community law prevails.[10] Considerable uncertainty exists, however, about the extent to which this priority must be observed in the third category in which an agreement violates German antitrust law, but does not give rise to a claim under EC law.

Early scholarly approaches suggested that this potential conflict could be resolved by employing the "two-barrier theory." This theory starts with the assumption that both the Community and its constituent member states each have legitimate, but differing, interests in regulating business behavior—national law is concerned with the effects of corporate behavior on the internal market, while the Community rules are intended to protect trade between the member states—and that these interests can be protected only if both legal systems are recognized as fully applicable to a particular corporate transaction. The result of such an assumption is the rule that corporate behavior must clear the "barrier" of both national and EC law before it is to be permitted by the Community. Under the two-barrier theory, therefore, prohibitive national law always is entitled to absolute priority over permissive Community law. Although discarded by many commentators, most German courts continue to espouse this approach.

As the discussion below will show, allowing national authorites to prohibit transactions that the EC Commission already has considered and approved may frustrate the economic integration that the Treaty of Rome was intended to promote. This does not mean, however, that the primacy of Community law prevents the application of prohibitive rules under national law in all circumstances. Instead, a more complex analysis, based upon a case-by-case evaluation of the effect that application of

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framework for the actions to be taken by the Commission in application of the competition rules.

10. Verband der Sachversicherer v. Commission [4] C.M.L.R. Antitrust Supp. 264 (1988); Wilhelm v. Bundeskartellamt, 1969 E. Comm. Ct. J. Rep. 1, 8 Comm. Mkt. L.R. 100 (1969).

national law may have on the goals underlying a Community decision to permit corporate practices, will reveal that national antitrust enforcement remains important in this case catgegory. Because a discussion of these questions presupposes some knowlege of the basic EC rules, the remainder of this introduction will present an outline of EC competition law and the principles governing its enforcement by the Community institutions.

B. *The Basics of EC Competition Law*

The fundamental EC competition rules are set forth in articles 85 and 86 of the Treaty of Rome. Similar to section 1 of the Sherman Act, article 85(1) prohibits all agreements that may affect trade between member states and that have as their object or effect the prevention, restriction, or distortion of competition within the Common Market.[11] Article 86 proscribes the abuse of a dominant market position[12] and, like

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11. Article 85(1) provides:

The following shall be deemed to be incompatible with the Common Market and shall hereby be prohibited: any agreements between enterprises, any decisions by associations of enterprises and any concerted practices which are likely to affect trade between the Member States and which have as their object or result the prevention, restriction or distortion of competition within the Common Market, and in particular those consisting in:

(a) the direct or indirect fixing of purchase or selling prices or of any other trading conditions;

(b) the limitation or control of production, markets, technical development, or investment;

(c) market-sharing or the sharing of sources of supply;

(d) the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage;

(e) the subjecting of the conclusion of a contract to the acceptance by a party of additional supplies which, either by their nature or according to commercial usage, have no connection with the subject of such contracts.

Treaty of Rome, *supra* note 1.

12. Article 86 reads:

To the extent to which trade between any Member States may be affected thereby, action by one or more enterprises to take improper advantage of a dominant position within the Common Market or within a substantial part of it shall be deemed to be incompatible with the Common Market and shall hereby be prohibited.

Such improper practices may, in particular, consist in:

(a) the direct or indirect imposition of any inequitable purchase or selling prices or of any other inequitable trading conditions;

(b) the limitation of production, markets or technical development to the prejudice of consumers;

(c) the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage; or

section 2 of the Sherman Act, has been applied to a broad range of unilateral practices, including predatory pricing[13] and refusals to supply.[14] The list of activities in article 86 that constitute abuses of a dominant market position is illustrative rather than exhaustive. For example, the scope of the article has been expanded to encompass mergers and acquisitions.[15]

As the texts of articles 85(1) and 86 indicate, only agreements or abusive practices that are capable of affecting trade between the member states are prohibited.[16] The EC Commission interprets the general prohibition of article 85(1) to apply to a broad range of restrictive agreements, ordinarily without engaging in a "rule of reason" analysis like that developed by United States courts under section 1 of the Sherman

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(d) the subjecting of the conclusion of a contract to the acceptance, by a party, of additional supplies which, either by their nature or according to commercial usage, have no connection with the subject of such contract.

Id.

13. *Commission Decision of 14 December 1985 Relating to a Proceeding Under Article 86 of the EEC Treaty (IV/30.698-ECS/AKZO)*, 28 EUR. COMM. (No. L374) 1 (1985).

14. Istituto Chemioterapico Italiano SpA v. Commission of the Eur. Communities, 1974 E. Comm. Ct. J. Rep. 223 (1974), 13 Comm. Mkt. L.R. 309 (1974).

15. Europemballage Corp. v. Commission of the Eur. Communities, 1973 E. Comm. Ct. J. Rep. 215 (1973), 12 Comm. Mkt. L.R. 199 (1973); *but see* British Am. Tobacco Co. v. Commission of the Eur. Communities, 1987 E. Comm. Ct. J. Rep. 4487, 4575-84 (1987) (The European Court of Justice also acknowledged the applicability of article 85 to mergers and acquisitions.). While the recently adopted Merger Control Regulation, *see Regulation*, *supra* note 7, establishes the principle that Community-wide mergers should be gauged by the Regulation alone, some commentators have suggested that articles 85 and 86 nevertheless may continue to apply to mergers. For details, see Fine, *EC Merger Control: An Analysis of the New Regulation*, 11 EUR. COMPETITION L. REV. 47, 50-51 (1990).

16. For article 85(1), see Miller Int'l Schallplatten GmbH v. Commission of Eur. Communities, 1978 E. Comm. Ct. J. Rep. 131, 151, 22 Comm. Mkt. L.R. 334, 353 (1978). The criterion is met for purposes of article 86 even when the abusive practice cannot have a direct effect on interstate trade within the Community. The sole requirement is that the abusive behavior impair the competitive structure within the common market. *See* United Brands Co. v. Commission of the Eur. Communities, 1978 E. Comm. Ct. J. Rep. 207, 294, 21 Comm. Mkt. L.R. 429, 497 (1978), in which the European Court of Justice held:

[I]f the occupier of a dominant position, established in the Common Market, aims at eliminating a competitor who is also established in the Common Market, it is immaterial whether this behavour [sic] relates to trade between Member States once it has been shown that such elimination will have repercussions on the patterns of competition in the Common Market.

Act.[17] Only those agreements displaying minimal anticompetitive effects on the market fall outside the scope of the prohibition.

For practical reasons, the Commission issued in 1970 a *Notice on Agreements of Minor Importance Which Do Not Fall Under Article 85(1) (Notice)*, providing informal guidance as to the market power an agreement may create without violating article 85(1).[18] According to the Commission's most recent *Notice*, agreements generally do not fall under the prohibition of article 85(1) if the market share of the products or services covered by the agreement, along with those other goods or services of the participants considered equivalent, does not amount to more than five percent of the total market affected by the agreement, and if the aggregate turnover of the participating firms does not exceed two hundred million Units of Account (ECU).[19]

This de minimis rule is less generous than it might first appear. The computation of "turnover" is not limited to the products or services included in the agreement, but rather is interpreted to include turnover in all goods or services achieved by the contracting firms.[20] Related entities also are considered "participants" in calculating the combined annual turnover.[21]

Under article 85(2), an agreement violating article 85(1) is automatically void[22] *ab initio* and without a prior decision by the Commission.[23] This rule also has far reaching consequences in the area of private law, because articles 85 and 86 are deemed to inure to the benefit of private

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17. *Cf.* Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911) (Court interpreted § 1 of the Sherman Act as prohibiting agreements that are "unreasonably restrictive of competitive conditions").

18. *Cf.* 1 J.O. COMM. EUR. (No. L64) 1 (1970). There is, of course, no such de minimis exception to the abuse of market power as proscribed by article 86.

19. *Commission Notice of 3 September 1986 on Agreements of Minor Importance Which Do Not Fall Under Article 85(1) of the Treaty Establishing the European Economic Community*, 29 O.J. EUR. COMM. (No. C231) 2 (1986), *replacing Commission Notice of 19 December 1977*, 20 O.J. EUR. COMM. (No. C313) 3 (1977). (The ECU is defined as a basket of the member states' currencies, each of which is allotted a different weight depending on the relative strength of the national currency.). *See Council Regulation (EEC) No. 3180/78 of 18 December 1978, Changing the Value of the Unit of Account Used by the European Monetary Corporation Fund*, 21 O.J. EUR. COMM. (No. L379) 1 (1978), *last amended by* Regulation (EEC) No 1971/89 of 19 June 1989, 32 O.J. EUR. COMM. (No. L189) 1 (1989). One ECU is currently worth about US $1.35.

20. 32 O.J. EUR. COMM. at 3.

21. *Id.* at 23.

22. Article 85(2) provides: "Any agreements or decisions prohibited pursuant to this Article shall be null and void."

23. *Regulation No. 17, supra* note 9, art. 1.

individuals, and must be applied directly by the courts of the member states.[24] Agreements in violation of the general prohibition are unenforceable as between the parties as well as against third parties.[25]

Three considerations modify the seemingly harsh result of this "automatic nullity" provision. First, as will be discussed below, article 85(2) does not apply when the agreement is exempted under article 85(3) from the general prohibition. Second, the European Court of Justice (Court or European Court) has made it clear that only those portions of an agreement that actually violate article 85(1) are to be considered automatically void,[26] assuming, of course, that the void elements are severable from the agreement. Finally, the European Court developed the "provisional validity" doctrine, whereby the so-called "old agreements" are shielded from the application of article 85(2) by national courts unless the Commission has refused to issue an exemption pursuant to article 85(3).[27]

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24. As early as 1963, the European Court of Justice enunciated the general principle that individuals may rely on the prohibitions of Community law. Interpreting the purpose of the Treaty, the Court said that:

> [it] is more than an agreement which merely creates mutual obligations between the contracting states.
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> . . . .
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> [T]he Community constitutes a new legal order of international law, for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.

See N.V. Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Nederlandse administratie der belastingen, 1963 E. Comm. Ct. J. Rep. 1, 12, 2 Comm. Mkt. L.R. 105, 129 (1963). While this holding conferred a right on individuals to challenge, in national courts, customs imposed by member states in violation of article 12 of the Treaty, the Court later stated that individuals also may benefit from the prohibitions of the EEC competition rules. *See* Belgische Radio en Televisie v. SV SABAM, 1974 E. Comm. Ct. J. Rep. 51, 62-63, 14 Comm. Mkt. L.R. 238, 271 (1974); *see also* Rewe-Zentralfinanz eG v. Landwirtschaftskammer für das Saarland, 1976 E. Comm. Ct. J. Rep. 1989, 1997. The direct effect of the EC competition rules in the member states may even enable private litigants to recover compensatory damages for the violation of articles 85 or 86 in national courts. For details, see Picañol, *Remedies in National Law for Breach of Articles 85 and 86 of the EEC Treaty: A Review*, 1983 LEGAL ISSUES EUR. INTEGRATION 1.

25. *See* Re 'Yoga' Fruit Juices, 8 Comm. Mkt. L.R. 123, 134-38 (1969) (rejecting the enforcement of an arbitration award for an alleged breach of an exclusive sales agreement that, itself, was void pursuant to article 85).

26. *See* Société Technique Minière v. Maschinenbau Ulm GmbHè, 1966 E. Comm. Ct. J. Rep. 235, 250, 5 Comm. Mkt. L.R. 357, 376 (1966).

27. *See* Ets. A. De Bloos, s.p.r.l. v. Société en Commandite par Actions Bouyer, 1977

Parties whose agreements fall outside the scope of the general prohibition of articles 85 and 86 may apply for a negative clearance from the Commission certifying that "on the facts in its possession, there are no grounds under Article 85(1) or Article 86 of the Treaty for action on its part in respect of an agreement, decision or practice."[28] Parties whose agreements do not qualify for a negative clearance because they are in violation of the general prohibition of article 85(1) may be eligible for an individual or group exemption under article 85(3). Under the latter provision, the Commission will uphold agreements containing anticompetitive effects if they: (1) contribute to improving the production or distribution of goods or to promoting technical or economic progress; (2) allow consumers a fair share of the resulting benefits; (3) only impose restrictions that are indispensable to the attainment of these objectives; and (4) do not afford the participating parties the opportunity to eliminate competition with respect to a substantial part of the products in question. Although commentators occasionally refer to these factors as the European "rules of reason,"[29] the rationale of article 85(3) encompasses additional policy considerations, such as those intended to remedy overcapacity and other industry-wide problems.[30]

In evaluating the propriety of granting exemptions under article 85(3), the Commission will subordinate the goal of fostering competition when industrial and social policy goals are considered more important.[31]

E. Comm. Ct. J. Rep. 2359, 21 Comm. Mkt. L.R. 511 (1978). Pursuant to article 5 of Regulation 17, "old" agreements are those that were in existence at the date on which Regulation 17 came into force, *i.e.*, March 13, 1962. *Id.* at 2359, 21 Comm. Mkt. L.R. at 528. The rationale for shielding "old" agreements from automatic nullity under article 85(2) is to protect the legitimate expectations of parties who entered into agreements which were valid when made. The same rationale applies to so-called "accession" agreements. According to article 25(1) of Regulation 17, these are "agreements, decisions and concerted practices to which article 85 of the Treaty applies by virtue of accession [of new member states]." *Regulation No. 17, supra* note 9.

28. *Regulation No. 17, supra* note 9, art. 2.

29. *See, e.g.*, U. TOEPKE, EEC COMPETITION LAW—BUSINESS ISSUES AND LEGAL PRINCIPLES IN COMMON MARKET ANTITRUST CASES 56 (1982).

30. These considerations are not relevant to the rule of reason approach under § 1 of the Sherman Act. *See* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978), in which the United States Supreme Court noted that the rule of reason serves the limited purpose of evaluating the competitive significance of the challenged conduct. Specifically, the Court noted that "[the purpose] is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry." *Id.* at 692.

31. *Commission Decision of 4 July 1984 Relating to a Proceeding Under Article 85 of the EEC Treaty (IV/30.810—Synthetic Fibres)*, 27 O.J. EUR. COMM. (No. L 207) 17 (1984), illustrates this approach: the Commission exempted a crisis cartel that had

Thus, article 85(3) vests the Commission with broad powers to enforce its own industrial policy.[32]

Except for certain categories of agreements and practices specifically defined in article 4(2) of Regulation 17,[33] parties seeking an individual exemption under article 85(3) must "notify" their agreement to the Commission. Such notification confers immunity from fines imposed for acts taking place "after notification to the Commission and before its decision in application of Article 85(3) of the Treaty, provided they fall within the limits of the activity described in the notification."[34]

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been formed by the 10 largest European manufacturers of synthetic fibre in an effort to reduce structural overcapacities in the industry. Although the participating companies held approximately 85% of the installed synthetic fibre capacity in the EC, the Commission concluded that the limited duration of the agreement (Oct. 1982-Dec. 1985), coupled with the availability of alternative products supplied by outside competitors and the presence of equivalent goods, would mitigate the anticompetitive effects. Underlying this analysis, however, was the Commission's focus on the diminution of surplus production capacity as a means of resolving the persisting crisis in the industry.

32. This policy-setting power of the Commission is unlikely to be disturbed by judicial review. Applying what comes close to an "abuse of discretion" standard of review, the European Court only infrequently has overturned the Commission's decision to grant or deny exemptions. *See, e.g.*, Etablissements Consten SARL v. Commission of the Eur. Communities, 1966 E. Comm. Ct. J. Rep. 299, 347, 5 Comm. Mkt. L.R. 418, 477 (1966) (judicial review limited to evaluating the relative weight of the facts and resulting conclusions); *see also* Remia BV. v. Commission of the Eur. Communities, 1985 E. Comm. Ct. J.R. 2545, 2578, 48 Comm. Mkt. L.R. 1, 34 (1985). Third parties may challenge the decision to grant an exemption on the basis of article 173(2) of the Treaty, which vests natural and legal persons with standing when the contested decision is of "direct and individual concern" to such parties. *See* Metro-SB-Grossmärkte GmbH & Co. KG v. Commission of the Eur. Communities, 48 Comm. Mkt. L.R. 118, 155 (1987). The jurisdiction of the Court of First Instance, which was established in 1988 by Council Decision (88/591), 31 O.J. EUR. COMM. (No. L319) 1 (1988), encompasses competition cases appealed from the Commission. It is unclear at this time whether this Court will curtail the broad discretion traditionally enjoyed by the Commission in this area. However, one of the stated reasons for the establishment of this new court is to deal with actions involving complex fact patterns. *Id.*; *see also* Kennedy, *The Essential Minimum: The Establishment of the Court of First Instance*, 14 EUR. L. REV. 7, 25 (1989). Thus, it is likely that the Commission's findings of fact, at least, will be subject to stricter scrutiny than before.

33. For example, agreements that involve specialization in product manufacturing need not be notified when the contract products do not represent more than 15% of the volume of business done in identical or equivalent products and when the total turnover of the participating parties does not exceed 200 million ECU. *See Regulation No. 17, supra* note 9, art. 4(2)(3). While the parties are not required to notify such an agreement, they may want to do so, because only notification can shield them from the imposition of fines if they misjudge the status of their agreement.

34. *Id.* art. 15(5)(a). Prior to granting an exemption (or negative clearance), the

In part to reduce the considerable backlog caused by the increasing number of notifications and applications for individual exemptions and negative clearances, the Commission created "group exemptions" that, in principle, dispense with the notification requirement for certain categories of agreements.[35] As with individual exemptions, the Commission issues group regulations for a specific period.[36] These exemptions contain typical anticompetitive restrictions that may or may not be inserted in the agreement ("white lists" and "black lists," respectively), thus enabling the parties to tailor their agreements accordingly.[37]

The far-reaching impact of group exemptions on corporate behavior should not be underestimated. These exemptions are formal decisions of the Commission and, according to article 189(2) of the Treaty, apply

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Commission must provide the parties with an opportunity to be heard under article 19(1) of Regulation 17; in addition, the Commission must, before issuing any decision giving a negative clearance or an individual exemption, publish a summary of the relevant application or notification in the Official Journal and invite all interested third parties to submit their observations within a time period of no less than one month. *Id.* art. 19(3). Pursuant to article 15(6) of Regulation 17, the Commission may withdraw immunity if it finds, after preliminary examination of the notification, that the grant of an exemption is not justified.

35. The Commission derives its authority to enact group exemptions from enabling regulations of the Council of Ministers. *See, e.g., Regulation No. 19/65 of the Council of 2 March 1965 on the Application of Article 85(3) of the Treaty to Certain Categories of Agreements and Concerted Practices*, J.O. EUR. COMM. 533/65 (1965) [hereinafter *Council Regulation No. 19/65*]. So far, the Commission has adopted group exemptions for the following categories of agreements: exclusive distribution agreements, *Regulation No. 26 1983/83*, 26 O.J. EUR. COMM. (No. L173) 1 (1983); exclusive purchase agreements, *Regulation No. 1984/83*, 26 O.J. EUR. COMM. (No. L173) 5 (1983); patent licensing agreements, *Regulation No. 2349/84*, 27 O.J. EUR. COMM. (No. L219) 15 (1984); specialization agreements, *Regulation No. 417/85*, 28 O.J. EUR. COMM. (No. L53) 1 (1985); motor vehicle distribution and servicing agreements, *Regulation No. 123/85*, 28 O.J. EUR. COMM. (No. L15) 16 (1985); research and development agreements, *Regulation No. 418/85*, 28 O.J. EUR. COMM. (No. L53) 5 (1985); franchising agreements, *Regulation No. 4087/88*, 31 O.J. EUR. COMM. (No. L359) 46 (1988); and know-how licensing agreements, *Regulation No. 556/89*, 32 O.J. EUR. COMM. (No. L61) 1 (1989).

36. *See Regulation No. 17, supra* note 9, art. 8(1); *Council Regulation 19/65, supra* note 35, art. 2(1).

37. The Commission's recent regulations regarding group exemptions include a so-called opposition procedure for "grey list" restrictions, which are neither expressly permitted nor expressly proscribed. While this procedure requires notification to the Commission, the time for processing has been reduced drastically: an agreement that has been notified to the Commission will be deemed exempted unless the Commission, upon its own initiative or upon the request of a member state, expresses its opposition within a period of six months after such notification. *See, e.g.*, article 7(1) and (5) of the group exemption for research and development agreements, *supra* note 35.

directly in the member states. Agreements that comply with the terms of a group exemption are presumed to be in line with what article 85(3) requires for individual exemptions.[38]

Another device designed to bypass the lengthy proceedings for negative clearances or individual exemptions is the administrative or "comfort" letter. If an agreement notified to the Commission does not appear to contain serious anticompetitive effects, the Commission may publish its essential contents and invite comments from interested third parties.[39] In the absence of justifiable negative reactions, the Commission will close the file by issuing a comfort letter.[40] This letter conveys to the parties involved that "[the] agreement is de minimis, falls under a block exemption regulation, [or] falls under one of the Commission's notices . . . [and therefore] poses no problem from the point of view of the competition rules."[41]

The Commission apparently differentiates between comfort letters and its ordinary settlement practice. The Commission reserves the term "settlement" for "prospective" acts; that is, when the Commission attempts to induce entities to structure agreements in accordance with favored policy goals. More than ninety percent of all formal proceedings before the Commission[42] are terminated or suspended because of the parties' willingness either to abandon or amend their agreement in accordance with legal requirements.[43] The Commission issues comfort letters, on the

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38. *See* COMMISSION OF THE EUROPEAN COMMUNITIES, FIFTEENTH REPORT ON COMPETITION POLICY pt. 1, ch. 1, para. 1(iii) (1985) [hereinafter FIFTEENTH REPORT ON COMPETITION].

39. The Commission publishes such agreements in the *Official Journal of the European Community.*

40. For details, see COMMISSION OF EUROPEAN COMMUNITIES, ELEVENTH REPORT ON COMPETITION POLICY pt. 1, ch. 1, § 4, para. 15 (1981); COMMISSION OF EUROPEAN COMMUNITIES, THIRTEENTH REPORT ON COMPETITION POLICY pt. 2, ch. 1, § 10, para. 72 (1983).

41. FIFTEENTH REPORT ON COMPETITION, *supra* note 38, pt. 1, ch. 1, para. 1(iii). In 1988, 36 cases were closed by such comfort letters. *Cf.* COMMISSION OF EUROPEAN COMMUNITIES, EIGHTEENTH REPORT ON COMPETITION POLICY, pt. 2, ch. 2, para. 45 (1988) [hereinafter EIGHTEENTH REPORT ON COMPETITION].

42. The impetus to initiate an investigation that may result in a formal proceeding can originate from the Commission's own observations, from an application for negative clearance or a notification for exemption as well as from the receipt of a formal or anonymous complaint. For details, see I. VAN BAEL & J. BELLIS, COMPETITION LAW OF THE EEC, 282-86 (1987).

43. *Id.* at 323-24. In 1988, the Commission settled 419 cases without formal decision. Two hundred of these required no action because of the enactment of the group exemption on patent licenses. *See* EIGHTEENTH REPORT ON COMPETITION, *supra* note 41, pt. 2, ch. 2, para. 45.

other hand, "retrospectively," in response to requests for exemptions or applications for negative clearances in clear-cut cases.[44]

If a formal proceeding results in a final decision holding that the parties' conduct constitutes an infringement of EC competition rules, the Commission may issue a cease and desist order,[45] or, if the offending conduct has terminated already, the Commission may declare simply that the parties' conduct amounted to an infringement of the competition rules.[46] The Commission may impose fines for violations of articles 85 and 86,[47] and further may require affirmative remedial steps, such as forcing a defendant to supply materials it previously refused to provide.[48]

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44. *See generally* Van Bael, *The Antitrust Settlement Practice of the EC Commission*, 23 COMM. MKT. L. REV. 61 (1986).

45. *Regulation No. 17, supra* note 9, art. 3(1).

46. *See, e.g., Commission Decision of 20 December 1977 Relating to a Proceeding Under Article 85 of the EEC Treaty (IV/29.151—Video Cassette Recorders)*, 21 O.J. EUR. COMM. (L47) 47 (1978).

47. Upon finding an infringement of article 85(1) or article 86, the Commission may assess a fine pursuant to article 15 of Regulation 17, or require periodic penalty payments in accordance with article 16 of Regulation 17. Under article 15, the Commission may assess two types of fines. First, article 15(1) allows for fines ranging from 100 to 5000 ECU to be imposed on parties that supply incorrect or misleading information regarding an application for negative clearance or notification for an exemption. The same sanction may be imposed for obstructing the Commission's fact-finding efforts. Second, under article 15(2), negligent or intentional infringements of the substantive competition rules may entail significantly higher fines. These fines may fall between 1000 and 1,000,000 ECU, "or a sum in excess thereof but not exceeding 10% of the turnover of the preceding business year of each of the undertakings participating in the infringement." The European Court has interpreted "turnover" to include the sales of all products on a worldwide basis. *See* SA Musique Diffusion Française v. Commission of the Eur. Communities, 1983 E. Comm. Ct. J. Rep. 1825, 1908, 38 Comm. Mkt. L.R. 221, 336 (1983). Pursuant to article 15(2)(b), the amount of a fine depends on the gravity and duration of the infringement. In determining the gravity of the infringement, a variety of factors must be considered, such as the value of the goods involved in the infringement, the profit derived by the parties from the infringement, the threat of the particular infringement to the objectives of the Community, and the knowledge of the parties. *Id.* at 1911, 38 Comm. Mkt. L.R. at 338.

48. *See, e.g.*, Istituto Chemioterapico Italiano SpA v. Commission of the Eur. Communities, 1974 E. Comm. Ct. J. Rep. 223, 256, 13 Comm. Mkt. L.R. 309, 345 (1974); *see also Commission Decision of 14 December 1985 Relating to a Proceeding Under Article 86 of the EEC Treaty (IV/30.698-ECS/AKZO)*, 28 O.J. EUR. COMM. (No. L 374) 1, 27 (1985), in which the Commission, in addition to assessing a 10 million ECU fine, imposed the obligation on AKZO to inform its customers about the non-binding character of certain requirement contracts. Also, the Commission ordered AKZO to submit an annual report demonstrating compliance with the cease and desist order contained in the Commission's decision. *Id.*

II. The Relationship Between EC Competition Law and National Rules

A. *Infringements of EC Law Alone*

Although the German GWB contains provisions similar to those of the EC competition rules,[49] the latter require that the agreement or practice affect trade between the member states, while the GWB is designed to protect competition within the territory of the Federal Republic of Germany. Thus, the infringement of articles 85(1) or 86 does not always entail a violation of the GWB, because the proscribed agreement may not have a sufficient effect on competition inside Germany. In addition, certain practices of entire industries are exempted from the prohibitions spelled out in the German competition rules. For example, agreements of loan associations and insurance companies, as well as agreements and practices of public utilities, may qualify for exemption under sections 102 and 103 of the GWB,[50] even though these agreements would fall squarely within the scope of article 85(1).

It is well settled that conflicts created by practices which are permitted under German law, but prohibited under EC law, must be resolved in favor of the EC rules. The European Court of Justice consistently has upheld the general principle that Community law takes precedence over conflicting national laws.[51] In *Wilhelm v. Bundeskartellamt*, a leading

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49. Similar to articles 85(1) and (2), for example, § 1 of the GWB reads in pertinent part: "Agreements made for a common purpose by enterprises or associations of enterprises and decisions of associations of enterprises shall be of no effect, insofar as they are likely to influence, by restraining competition, production or market conditions with respect to trade in goods or commercial services." Translation taken from F. Beier, G. Schricker & W. Fikentscher, German Industrial Property, Copyright and Antitrust Laws 205 (2d ed. 1989) [hereinafter F. Beier].

50. The recent amendments to the GWB have limited the scope of possible exemptions under these provisions to some extent. For a discussion of the revised § 102 concerning insurance under the GWB, see Ratliff, Tupper & Curschmann, *Competition Law and Insurance: Recent Developments in the European Community*, 18 Int'l Bus. Law. 352, 356-57 (1990); *see also* Pfeffer, *supra* note 3.

51. *See, e.g.*, Costa v. ENEL, 1964 E. Comm. Ct. J. Rep. 585, 3 Comm. Mkt. L.R. 425 (1964). In Amministrazione delle Finanze dello Stato v. Simmenthal SpA, 1978 E. Comm. Ct. J. Rep. 629, 23 Comm. Mkt. L.R. 263 (1978), the Court held that

> [t]he relationship between provisions of the Treaty and directly applicable measures of the [Community] institutions on the one hand and the national law of the member-States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but—in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the member-States—also preclude the valid adoption of new national legislative measures to the

decision on the primacy of EC competition law, the Court stated that

> [t]he binding force of the Treaty and of measures taken in application of it must not differ from one state to another as a result of internal measures, lest the functioning of the Community system should be impeded and the achievement of the aims of the Treaty placed in peril. Consequently, conflicts between the rules of the Community and national rules in the matter of the law on cartels must be resolved by applying the principle that Community law takes precedence.[52]

While this decision involved practices prohibited under both Community and German law, the Court recently confirmed the supremacy of the prohibitory EC competition rules over permissive internal laws. In *Verband der Sachversicherer v. Commission*,[53] the Court upheld a decision of the Commission refusing to grant a negative clearance and an exemption pursuant to article 85(3) in favor of a German association of insurance companies.[54] The association had issued certain recommendations to its members in violation of article 85(1), claiming that the general prohibition of Community law did not apply. The association argued that section 102 of the GWB controlled, a provision that establishes the legality of agreements subject to the supervision of the German Federal Supervisory Office for the Insurance Industry. Indeed, the German Federal Cartel office already had authorized the recommendations at issue. In support of its position, the insurance association argued that the market for insurance contracts follows idiosyncratic rules, which are matters of national economic policy alone. The association contended that so long as the Council had not adopted special rules regulating the insurance market pursuant to article 87(2)(c), the general prohibition of article 85(1) had only limited application to the insurance industry.[55]

The European Court of Justice disagreed. Turning the association's argument on its head, the Court held that articles 85 and 86 apply, without qualification, to all branches of the economy, including the insurance industry, unless an economic activity specifically has been exempted from the scope of the articles by the Treaty or regulations adopted thereunder.[56] In addition, the Court noted that in the absence of

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extent to which they would be incompatible with Community provisions.
Id. at 643, 23 Comm. Mkt. L.R. at 283.

52. Wilhelm v. Bundeskartellamt, 1969 E. Comm. Ct. J. Rep. 1, 14, 3 Comm. Mkt. L.R. 100, 119 (1969).

53. 4 Comm. Mkt. L.R. Antitrust Supp. 264 (1988).

54. 28 O.J. EUR. COMM. (No. L35) 20 (1985).

55. *Id.* at 23.

56. Specifically, the Court stated that

such a general exemption, only the Commission itself, and not the German authorities, could grant or deny individual exemptions pursuant to article 85(3). In essence, then, prohibitions under the EC competition rules preempt conflicting national law, provided, of course, that the practice in question passes the jurisdictional threshold of articles 85(1) and 86 as capable of affecting interstate trade.

B. *Infringements of Both EC Law and the German Competition Rules*

The second arena for possible conflict between the EC and German competition rules arises when a violation of the Community rules on competition simultaneously constitutes an infringement of German law. Since key provisions of the German Act Against Restraints of Competition are similar to the equivalent Community rules,[57] this is not an unlikely scenario. The European Court of Justice addressed the main issues associated with these double transgressions in *Wilhelm*.[58] The case involved fines imposed by the German Federal Cartel Office (*Bundeskartellamt*) on several German dye manufacturers that had conspired among themselves, as well as with producers from other EC member states and third countries, to raise the price of aniline (a chemical dye base) by eight percent in violation of section 1 of the GWB. The German manufacturers appealed this decision. Prior to the *Bundeskartellamt* decision to assess fines, the Commission, on its own initiative, had instituted proceedings against the German manufacturers and other producers of aniline that were parties to the agreement. Thus, the questions arose whether the same facts may give rise to independent proceedings under national law when the Commission has already asserted its jurisdiction, and whether double sanctions may ensue as a result.[59]

> [i]t must also be observed that Regulation 17 lays down detailed rules for the implementation of Articles 85 and 86 EEC for all the branches of the economy to which the provisions apply with the sole exception of those branches covered by special rules laid down on the basis of Article 87 EEC, as is the case with certain sectors of the transport industry such as sea and air transport. No exception of that type, however, exists in the case of the insurance industry.

Verband der Sachversicherer, 4 Comm. Mkt. L.R. Antitrust Supp. at 295.

57. *See supra* note 49.

58. *See* Wilhelm v. Bundeskartellamt, 1969 E. Comm. Ct. J. Rep. 1, 8 Comm. Mkt. L.R. 100 (1969).

59. *Id.* at 3, 8 Comm. Mkt. L.R. at 101.

1. Dual Proceedings

The German court in charge of hearing the appeal, the Regional Appellate Court of Berlin (*Kammergericht Berlin*), referred these and related questions for a preliminary ruling, pursuant to article 177 of the Treaty of Rome, to the European Court of Justice. On the issue of dual proceedings, the Court held that national authorities, such as the German *Bundeskartellamt*, may apply national law in independent proceedings against improper practices concurrent with a Commission examination of the same practices under Community law. The Court reasoned that, unlike articles 85 and 86, national rules were not drafted to protect trade among member states, but instead were enacted to preserve competition from a national point of view.[60] The Court held that as long as the relationship between national laws and the EC competition rules has not been defined officially pursuant to article 87(2)(e),[61] national authorities are free, in principle, to pursue those who violate national competition rules.

The Court in *Wilhelm* nevertheless made it clear that this principle will be disregarded when the application of national law would prejudice the full and uniform application of Community law.[62] Although the Court failed to elaborate on how to avoid a conflict that may arise in parallel proceedings,[63] its holding did imply that national antitrust authorities uncertain as to the compatibility of their future decisions with those of the Commission either should stay their proceedings and await a decision by the Commission or consult with the Commission before adopting a national decision.[64]

While parallel proceedings such as those in *Wilhelm* are still rare,[65]

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60. *Id.* at 13, 8 Comm. Mkt. L.R. at 118.

61. *Id.* at 13-14, 8 Comm. Mkt. L.R. at 118; *see also supra* note 4 for text of article 87(2)(e).

62. The Court stated that "this parallel application of the national system can only be allowed in so far as it does not prejudice the uniform application throughout the Common Market of the Community rules on cartels and of the full effect of the measures adopted in implemention of these rules." *Id.* at 14, 8 Comm. Mkt. L.R. at 119.

63. The Court noted that:

> Where, during national proceedings, it appears possible that the decision to be taken by the Commission at the culmination of a procedure still in progress concerning the same agreement may conflict with the effects of the decision of the national authorities, it is for the latter to take the appropriate measures.

Id. at 14-15, 8 Comm. Mkt. L.R. at 119.

64. *See* FOURTH REPORT ON COMPETITION, *supra* note 9, pt. 1, ch. 1, § 7, para. 46.

65. *Wilhelm*, 1969 E. Comm. Ct. J. Rep. 1, 8 Comm. Mkt. L.R. 100.

they do occur—and they are not always handled in accordance with the above guidelines. For example, the *Kammergericht Berlin* stated, in dictum, that proceedings before the Commission are irrelevant as long as it has not handed down its decision.[66] Similarly, the *Kammergericht Berlin* held that a case pending before the Commission did not require the German Federal Cartel Office to stay its proceedings involving the same matter because both legal systems seek to protect different interests.[67] Both assumptions are in obvious disregard of the rules announced by the Court of Justice.

2. Double Sanctions

The *Wilhelm* case also posed the related but different question of whether parallel proceedings may result in the imposition of concurrent sanctions, one assessed by the Commission and the other by the German antitrust authority.[68] Using a rationale similar to that employed in the United States criminal justice system to support the imposition of consecutive sentences by state and federal courts,[69] the European Court of Justice noted that the prohibition against double jeopardy did not apply, because such penalties emerge from different and sovereign legal systems.[70] However, based on equitable considerations, the Court rejected a strict application of this principle,[71] holding that a prior penalty must be

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66. *Gebührenfestsetzung für Meldung von Verträgen von Verwertungsgesellschaften*, 28 WIRTSCHAFT UND WETTBEWERB [WuW] 65, 66 (1978).

67. *See Untersagung vertraglicher Ausschliesslichkeitsbindungen im Kraftfahrzeug-Ersatzteilgeschäft*, 30 WuW 615, 626 (1980). Emphasizing the different objectives that are assigned to the Community rules and national antitrust law, German courts tend to deny any possibility of conflict between the two legal orders.

68. Aside from cease and desist orders, the German antitrust authority may impose fines, pursuant to § 38(4) of the GWB, which may amount to DM 1 million, or a sum in excess thereof, but not exceeding three times the amount of the surplus (*Mehrerlös*) that had been gained as a result of the unlawful conduct. Section 37(b) of the GWB provides for an alternative fine as punishment for a specific kind of illegal conduct: the antitrust authority may claim surplus that was intentionally or negligently obtained through abusive price increases after such abuse has been enjoined through a final cease and desist order pursuant to § 22(5) or § 103(6). The surplus, however, may be claimed only to the extent other fines or damages assessed against the violation do not reach that amount. *See also supra* note 47.

69. *See, e.g.*, United States v. Lanza, 260 U.S. 377 (1922).

70. Wilhelm v. Bundeskartellamt, 1969 E. Comm. Ct. J. Rep. 1, 15, 8 Comm. Mkt. L.R. 100, 111 (1969).

71. Specifically, the Court held that "[i]f . . . the possibility of two procedures being conducted separately were to lead to the imposition of consecutive sanctions, a general requirement of natural justice . . . demands that any previous punitive decision must be

factored in when assessing consecutive sanctions.

The German Federal Supreme Court followed this approach in the national proceedings in *Wilhelm*. For reasons of fairness, it struck down the fines imposed on the dye manufacturers by the German antitrust authority, because the Commission already had punished the manufacturers.[72] Thus, depending on the sequence of the decisions in parallel proceedings, either the Commission or a German court will have to take into account any previous penalty imposed for the same offense.[73]

It is doubtful whether this principle of offsetting sanctions enunciated by the European Court of Justice in *Wilhelm* applies in cases involving a second proceeding outside Community's jurisdiction. In *Boehringer Mannheim GmbH v. Commission of the European Communities*, the Court refused to reduce a one hundred eighty thousand ECU fine under Community law, even though the defendant already had been assessed an eighty thousand dollar fine in United States antitrust proceedings.[74] The Court held that the prohibition on double sanctions announced in *Wilhelm* applies only in cases involving identical acts. While the fines imposed by the Commission in *Boeringer* were based on agreements prohibited under United States law, the Court noted that the ruling in the United States proceedings could have been based on other conduct not examined by the Commission.[75] The Court also stated that it is for the defendant-applicant to prove the identity of acts to avoid or reduce an additional sanction. Since Boehringer had not met this burden, the Court did not reach the additional issue raised by the Commission, which was whether additional sanctions need not be taken into account when they

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taken into account in determining any sanction which is to be imposed." *Id.* at 8; Comm. Mkt. L.R. at 111.

72. *Decision of the Supreme Court*, NEUE JURISTISCHE WOCHENSCHRIFT 521 (1971).

73. "Double punishment" nevertheless remains a problem in parallel proceedings. For example, legal expenses, including attorney's fees of the prevailing party, ordinarily will be borne by the unsuccessful party both under national law (§§ 77 et. seq. GWB) and under the Rules of Procedure of the European Court of Justice (art. 69(2)), which are also applicable to proceedings before the Court of First Instance. THE RULES OF PROCEDURE OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES (1962).

74. 1972 E. Comm. Ct. J. Rep. 1281, 1289-90, 12 Comm. Mkt. L.R. 864, 886-88 (1973).

75. Since the conviction in the United States was the result of a plea of nolo contendere, it remained unclear which facts actually would have been material for a conviction. The court nevertheless did say that "[a]lthough the actions on which the two convictions in question are based arise out of the same set of agreements they nevertheless differ essentially as regards both their object and their geographical emphasis." *Id.* at 1289, 12 Comm. Mkt. L.R. at 887.

are imposed in non-EC member states.

While the question regarding sanctions imposed outside the EC has not been decided yet, some commentators suggest that the imposition of a fine outside the EC at least may be taken as prima facie evidence that the offense is distinct rather than identical, and therefore need not be taken into account for purposes of computing the fine to be assessed under Community law.[76] The Commission, however, recently has placed less emphasis on the "identical act" requirement than one might expect from the foregoing. In its *Cast Iron & Steel Rolls* decision,[77] the Commission took account of fines imposed by the German *Bundeskartellamt*, although these fines were based on offenses not identical (albeit closely related) to those acts giving rise to the proceedings under Community law. This decision may have been influenced, however, by the poor financial situation of the parties in the case. Indeed, the Commission cited the "grave" economic condition of the parties and "their needs in their task of recovery" as an additional mitigating factor in assessing fines.[78]

C. *Permissive Community Law Versus Prohibitive National Rules*

The third area of potential conflict between EC and German national antitrust law arises in cases in which conduct not prohibited by EC rules nevertheless is prohibited under German law. Considerable doubt exists whether EC law controls such cases. According to the traditional two-barrier theory, which was long espoused by German authors[79] and still is adhered to widely by German courts, corporate behavior must be permissible under both systems. As a result of this cumulative application, it is always the more stringent legal regime that prevails over the more lenient. Thus, prohibitory national law is vested with absolute priority over permissive Community law. The two-barrier theory is rooted in the notion that the scope of the two legal systems cannot overlap since they protect different spheres: national law is concerned with the effects of corporate behavior on the internal market, while the Community rules are intended to protect trade between member states. In essence, the two-barrier theory denies the very possibility of a conflict between national

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76. A. GLEISS & M. HIRSCH, KOMMENTAR ZUM EWG-KARTELLRECHT, annot. 75 (3d ed. 1978).

77. 26 O.J. EUR. COMM. (No. L317) 1 (1983).

78. *Id.* at 15.

79. *See* B. GOLDMAN, EUROPEAN COMMERCIAL LAW 426 (1973); Koch, *Das Verhältnis der Kartellvorschriften des EWG-Vertrags zum Gesetz gegen Wettbewerbsbeschränkungen*, 14 DER BETRIEBS-BERATER 241 (1959); Baruch, *Das Verhältnis zwischen der Kartellregelung des EWG-Vertrages und des GWB*, 13 WUW 14, 20 (1963).

and EC law.

In *Wilhelm*, the European Court of Justice recognized the fundamentally different objectives of both systems and the consequent possibility that they could be applied in parallel proceedings.[80] The Court qualified this position, however, noting that "economic phenomena and legal situations . . . may in individual cases be interdependent [and] the distinction between community and national aspects could not serve in all cases as [a] decisive criterion for the delimitation of jurisdiction."[81] Moreover, the Court held that the simultaneous application of national and EC rules will not be tolerated when it would prejudice the full and uniform application of EC competition law, a holding that clearly recognizes the potential for conflict.[82]

While this position is incompatible with the two-barrier theory, it was enunciated in a case involving the cumulative enforcement of prohibitions under both systems. The Court, however, has not yet had to rule on the applicability of the two-barrier theory to restrictive practices that benefit from an exemption under article 85(3), but face prohibition under national rules.

The balance of this article will examine whether and to what extent prohibitory national law must give way to the Commission's decision to exempt agreements from the enforcement of article 85(1). Before examining the possible solutions to this conflict, however, Community exemptions first will be distinguished from other devices upon which the Commission relies in its decision to tolerate a particular business activity or agreement.

1. The Status of Comfort Letters and Negative Clearances

As previously discussed, exemptions under article 85(3) are relevant only for restrictive agreements that violate the general prohibition of article 85(1). Article 85(3) merely declares the prohibition inapplicable to certain agreements or types of agreements. As for agreements that are not covered by the prohibitions of articles 85(1) or 86, the Commission issues comfort letters or negative clearances. It has been argued, therefore, that comfort letters issued by the Commission should not preclude national authorities from applying national competition law that may be stricter than the EC rules.[83]

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80. *See supra* notes 58-63 and accompanying text.

81. Wilhelm v. Bundeskartellamt, 1969 E. Comm. Ct. J. Rep. 1, 13, 8 Comm. Mkt. L.R. 100, 118 (1969).

82. *See supra* note 62 and accompanying text.

83. *See* I. VAN BAEL & J. BELLIS, *supra* note 42, at 319.

Case law confirms this view—at least with respect to comfort letters which indicate that the agreement does not violate article 85(1).[84] For example, the so-called "Perfume Cases"[85] involved various selective distribution networks that authorized only a limited number of retailers to sell certain brands of perfumes. Criminal proceedings in the French *Tribunal de Grande Instance* (French Tribunal) were brought against the managing directors of several perfume companies that, in violation of French law, refused to sell their products to dealers who were not parties to the exclusive distributorship agreements. The defendants relied, among other defenses, on comfort letters issued by the Commission.[86]

The Court of Justice, called upon by the French Tribunal to give a preliminary ruling on the status of these comfort letters, decided that the letters did not take precedence over national law, which prohibited the agreements in question. The Court stressed the independent application of national laws when the agreement or practice does not reach the jurisdictional threshold of article 85(1), which requires that the agreement affect trade between member states.[87] These same considerations apply to informal settlements and suspensions—compromises reached between the Commission and the parties as a result of the latter's willingness to modify illegal agreements so as to take them outside the scope of articles

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84. This result does not necessarily follow, however, if the comfort letter indicated that the agreement falls under a group exemption regulation. In that case, the result will hinge upon a determination as to whether a group exemption prevails over conflicting national competition rules. For a discussion of this issue, see *infra* text accompanying notes 120-24.

85. *Procureur de la Rêpublique v. Giry and Guerlian S.A.*, 1980 E. Comm. Ct. J. Rep. 2327, 31 Comm. Mkt. L.R. 99 (1981).

86. The Commission stated in these letters that:

> [I]n view of the small share in the market in perfumery, beauty products and toiletries held by your company in each of the countries of the Common Market . . . there is no longer any need, on the basis of the facts known to it, for it to take action in respect of the above-mentioned agreements under the provisions of Article 85(1) of the Treaty of Rome. The file on this case may therefore be closed.

Id. at 2340-41.

87. The Court held that:

> The fact that a practice has been held by the Commission not to fall within the ambit of the prohibition contained [in] article 85(1) and (2), the scope of which is limited to agreements capable of affecting trade between Member States, in no way prevents that practice from being considered by the national authorities from the point of view of the restrictive effects which it may produce nationally.

Id. at 2375, 31 Comm. Mkt. L.R. at 136. However, comfort letters are not without any legal value. The Court suggested that national courts examining the compatibility of practices or agreements with article 85 take into account the opinion transmitted in such letters. *Id.* at 2374, 31 Comm. Mkt. L.R. at 135.

85(1) and 86.[88]

Negative clearances granted pursuant to article 2 of Regulation 17 involve slightly different considerations in that they constitute formal decisions of the Commission. Nevertheless, because negative clearances are like comfort letters in that they involve a declaration that the activity does not violate Community rules,[89] they also imply that no conflict exists between EC and national law and that the latter may be applied.

2. Individual and Group Exemptions

a. The View of the Commission

The status of agreements that are prohibited under national law and also would be forbidden by the EC rules but for group or individual exemptions granted under article 85(3) is much less clear. This is an important problem because the Commission recently has granted several new group exemptions covering broad areas of economic activity, thereby increasing the potential for serious conflicts with national law.

While the relationship between such permissive EC law and prohibitory national competition rules has been discussed widely, it is by no means certain whether the principle established by the Court in *Wilhelm*, that EC law must prevail over conflicting national law, applies likewise in this case. Again, the decision in *Wilhelm* provides the starting point for the analysis. The Court, after delineating the system of prohibitions and exemptions established by article 85, held that

> while the Treaty's primary object is to eliminate by this means the obstacles to the free movement of goods within the common market and to confirm and safeguard the unity of that market, it also permits the Community authorities to carry out certain positive, though indirect, action with a view to promoting a harmonious development of economic activities within the whole Community in accordance with Article 2 of the Treaty.[90]

The strong majority opinion argues that this sentence refers to Com-

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88. *See supra* notes 42-43 and accompanying text.

89. *See supra* note 28 and accompanying text.

90. Wilhelm v. Bundeskartellamt, 1969 E. Comm. Ct. J. Rep. 1, 14, 8 Comm. Mkt. L.R. 100, 119 (1969). Article 2 reads:

> It shall be the aim of the Community, by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.

Treaty of Rome, *supra* note 1, art. 2.

munity exemptions,[91] which require that the agreement or practice display certain positive characteristics beneficial to consumers, and that the Court intended that such individual exemptions granted under EC law would prevail over prohibitive national law. It is not immediately clear, however, whether all exemptions, group exemptions included, foreclose the application of prohibitive national competition law. According to the *Wilhelm* Court, national law is inapplicable only when it would impede the uniform application of Community rules,[92] and it is uncertain whether and to what extent the application of national law to an exemption under the EC rules would constitute such an impediment.

The Commission has interpreted the *Wilhelm* decision as favoring the principle of primacy of Community exemptions.[93] The Commission, however, has not delineated the precise parameters of this principle, but has indicated that national prohibitions must yield to permissive Community law when the application of the former would affect the substance (*Kernbestand*) of an exemption.[94]

The practical consequences of this formula are not immediately evident, as the *GKN/Sachs* merger decision illustrates.[95] In that case, GKN, a British holding company, controlled a group of approximately two hundred firms primarily involved in mechanical engineering of automotive component parts, structural steel engineering, and the manufacture and distribution of iron and steel products. Sachs, a German holding company, controlled ten firms, the most important of which produced, among other things, car component parts. The Commission found that as far as the market for components was concerned, the proposed merger would not amount to an abuse of a dominant position in

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91. *See, e.g.*, D. BAROUNOS, D. HALL & J. JAMES, EEC ANTI-TRUST LAW, 142 (1975); *but see* Markert, *Some Legal and Administrative Problems of the Co-Existence of Community and National Competition Law in the EEC*, 11 COMMON MKT. L. REV. 92, 97 (1974), stating that this formula makes reference to other measures under the Treaty, such as directives under article 102 to member states to harmonize national laws. Given the context in which the Court spoke about positive, though indirect measures, *i.e.*, the dynamics of competition policy under article 85, it is difficult to agree with this position.

92. *See supra* note 62 and accompanying text.

93. *See* FOURTH REPORT ON COMPETITION, *supra* note 9, pt. 1, ch. 1, sec. 7, para. 45; *see also* EIGHTEENTH REPORT ON COMPETITION, *supra* note 41, at 15 (The Commission equates group exemptions with "positive although indirect action.").

94. *See* BUNTE & SAUTER, EG-GRUPPENFREISTELLUNGSVERORDNUNGEN, 193 (1988), quoting a Working Paper of the Commission of Oct. 10, 1984 (IV/003/R/101).

95. *See* SIXTH REPORT ON COMPETITION, *supra* note 9, pt. 1, ch. 4, § 7, paras. 181-82.

violation of article 86.[96] Following an analysis of the merger's effect on the steel market, the Commission authorized the merger based on article 66(2) of the Treaty Establishing the European Coal and Steel Community (ECSC Treaty).[97] Under the GWB, the ECSC Treaty preempts the application of German competition law.[98] Nevertheless, the German Federal Cartel Office prohibited the merger pursuant to section 24 of the GWB on the ground that it would strengthen the dominant position of Sachs in the German market for certain component parts.[99] Thus, the two proceedings led to diametrically opposing outcomes.

Despite the apparent contradiction, the Commission explicitly endorsed the German ruling, stating that it would not create a conflict with Community law.[100] This conclusion appears unassailable with respect to the market for component parts. Thus, a conflict exists only if both legal systems apply to an offense. Since the Commission already had found that the agreement regarding component parts did not implicate article 86, no conflict was created by the application of prohibitive national law to the agreement.[101]

However, given the preemptive effect the GWB accords the ECSC Treaty, it is difficult to deny that a conflict exists between the Commission's authorization of the merger pursuant to article 66 of the ECSC Treaty and the German prohibition. The Commission reconciled its position with the principle of primacy of Community law by indicating that the authorization based on article 66 pertained to only a minor aspect of the merger, its effect on the steel market. Since the merger primarily would have affected the market for component parts, and since this main effect did not fall under the prohibition of article 86, the Cartel Office was free to prohibit the merger under internal law.[102]

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96. *Id.*

97. Article 66(2) of the ECSC Treaty provides, among other things, for the authorization of transactions that will not enable the parties to evade the rules of competition instituted under the ECSC Treaty by "establishing an artificially privileged position involving a substantial advantage in access to supplies or markets." Treaty Establishing the European Coal and Steel Community, *done* Apr. 18, 1951, 261 U.N.T.S. 140.

98. Section 103(3) of the GWB provides: "This Act shall not apply: . . . 3. insofar as the Treaty Establishing the European Coal and Steel Community of 18 April 1951 contains special provisions."

99. The German Federal Supreme Court confirmed the decision of the Cartel Office. *Untersagung eines Markterweiterungszusammenschlusses*, 28 WuW 375, 376 (1978).

100. SIXTH REPORT ON COMPETITION, *supra*, note 9, pt. 1, ch. 3, § 1, paras. 110-13.

101. *See supra* notes 83-89 and accompanying text for a discussion of the status of negative clearances and comfort letters.

102. Mergers with a community-wide impact no longer will be susceptible to such

In summary, both the European Court of Justice and the EC Commission recognize the potential for conflict between Community exemptions and prohibitory national laws. This recognition implies a rejection of the traditional two-barrier theory. Although many details remain uncertain, the Commission takes the view that exemptions enjoy, in principle, priority over conflicting national rules. When permissive Community law concerns only negligible facets of the agreement or practice, as in *Sachs*, a national interest in prohibiting the anticompetitive conduct based on local law may prevail.

b. The Approach of German Courts to Community Exemptions

Most German courts do not appear to acknowledge the supremacy of Community competition law. Instead, several decisions imply that an exempted agreement or practice may stand only if it also is in accord with the German competition rules. For instance, the *Decision of the German Federal Supreme Court of July 1, 1976*[103] illustrates the reluctance to resolve such priority conflicts according to the principles espoused in *Wilhelm*.

In that case, the defendant (a BMW dealer) and the plaintiff car manufacturer (BMW) had entered into a standard agreement that, as part of a selective distribution system operated by BMW in Germany, imposed certain restrictive obligations on the defendant, including a partial prohibition on dealing in competing products. Without the consent of BMW, the defendant nevertheless reached an agreement with Peugeot to sell Peugeot's vehicles as well. As a consequence, BMW terminated the contract with the defendant and appointed a competitor of the defendant as the area's exclusive BMW dealer. That competitor, without BMW's objection, had been a dealer for both BMW and Peugeot until Peugeot terminated the previous agreement and entered into the new one with the defendant that gave rise to the suit. BMW sought to enjoin the defendant from holding itself out as a BMW dealership.

The lower courts held for the plaintiff, and the Federal Supreme

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parallel application of Community law and national competition law. According to the recently adopted Merger Control Regulation, it would be within the exclusive jurisdiction of the Commission to consider the propriety of such mergers. However, the criterion of "Community dimension" defined in article 1(2) of the Regulation is not met easily, and it is doubtful whether the GKN/Sachs merger would have reached the turnover thresholds delineated in this article. *See generally supra* notes 7-8 and accompanying text.

103. *Verweigerung einer Zweitvertretung gegenüber Vertragshändler*, 27 WuW 335 (1976).

Court reversed and remanded the case. The Court found that the termination of the distribution agreement may have constituted an unjustifiedly unequal treatment of the defendant vis-à-vis the competitor,[104] thus violating section 26(2) of the GWB.[105]

Prior to the Federal Supreme Court's judgment, the Commission had applied article 85(3) to the standard form contract between BMW and its dealers, thereby exempting such agreements from the general prohibition contained in article 85(1).[106] After balancing the anticompetitive effects of the selective distribution system with the benefits, the Commission concluded that the latter clearly outweighed the former. The Commission found that the clause prohibiting dealers from dealing in competing products without the consent of BMW would strengthen the overall competition between BMW and other car manufacturers.[107]

The exemption granted by the Commission was the result of a detailed examination of the distribution system, and certainly qualified as a "positive though indirect action" taking precedence over conflicting national law as envisioned by the European Court in *Wilhelm*.[108] The German Federal Supreme Court nevertheless maintained that the Commission's decision could not prevent application of section 26(2) of the GWB. According to the Court, the Commission's decision only rendered inapplicable the prohibitions of article 85(1), which in turn could not preempt section 26(2) of the GWB.[109] Although the court accurately restated the relation between articles 85(1) and 85(3), it begged the ques-

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104. The court did not issue a final decision, holding that it was necessary for the lower court to review additional evidence. *Id.* at 338.

105. Section 26(2) GWB provides in pertinent part:

> Market dominating enterprises, associations of enterprises . . . shall not unfairly hinder, directly or indirectly, another enterprise in business activities which are usually open to similar enterprises, nor in the absence of facts justifying such differentiation treat such enterprise directly or indirectly in a manner different from the treatment accorded to similar enterprises. Sentence 1 shall also apply to enterprises and associations of enterprises, insofar as small and medium-sized suppliers or purchasers of a certain type of goods or commercial services depend on them to such an extent that sufficient and reasonable possibilities of dealing with other enterprises do not exist.

106. *Decision of the Commission of December 13, 1974*, 18 J.O. EUR. COMM. (No. L29) 1 (1975).

107. *Id.* at 7.

108. *See supra* note 90 and accompanying text. While the exemption primarily concerned agreements that took effect on the German market, the widespread tying of BMW dealers had Community-wide ramifications and could have affected trade between member states.

109. *Verweigerung einer Zweitvertretung gegenüber Vertragshändler*, 27 WuW 335 (1976).

tion presented by the Commission's decision. This decision called for an independent assessment of the status and effects of a Community exemption pursuant to article 85(3) in relation to prohibitions under GWB section 26(2), rather than the interaction between the prohibitions contained in articles 85(1) and 26(2) of the GWB.

The Court's refusal to attribute any independent importance to Community exemptions demonstrates its adherence to the traditional two-barrier theory,[110] an approach shared by other German courts.[111] Indeed, in only rare instances have German courts indicated that they would be prepared to recognize the priority of Community competition law. A recent judgment of the Regional Court of Frankfurt (*Landgericht Frankfurt*) is one such instance.[112]

That case involved the question whether a car manufacturer may impose on its contract dealers the obligation not to supply vehicles to car leasing businesses outside the distribution system. The obligation violated section 26(1) of the GWB, which prohibits indirect refusals to sell.[113] Notwithstanding this prohibition, the court examined whether the exclusion of these companies would be legal under a group exemption granted by the Commission for selective distribution agreements for motor vehicles. This exemption allows the imposition of an obligation on the dealer "to supply to a reseller contract goods or corresponding goods only where the reseller is an undertaking within the distribution system."[114] Although the court eventually found that the group exemption did not ap-

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110. The lower court to which the case was remanded nevertheless ruled in favor of the plaintiff, albeit on grounds unrelated to the priority question. *Gerechtfertigte Vertragskündigung wegen Übernahme einer Zweitvertretung*, 27 WuW 718 (1977). This decision received final confirmation by the Federal Supreme Court, again, without mention of the Community exemption. *Gerechtfertigte Vertragskündigung wegen Übernahme einer Zweitvertretung*, 29 WuW 776 (1979).

111. *See, e.g.*, Decision of the Kammergericht (Appellate Court) Berlin of December 1, 1976 (Kart. 51/76) 27 WuW 265, 266 (1977), in which the Court held (in dictum) that, as a general rule, Community law and national law coexist separately and apart from each other, and that national law may even enjoy priority if a conflict arises between the two legal orders. *See also supra* notes 66-67 for the decisions of the same court.

112. *EG-Freistellung von Kfz-Vertragshändler-Bindungen gilt nicht für Leasinggesellschaften*, 39 WuW 942 (1989).

113. Section 26(1) of the GWB provides: "Enterprises or associations of enterprises shall not incite another enterprise or association of enterprises to refuse to sell or purchase with intent unfairly to harm certain enterprises." Unofficial Translation from F. BEIER, *supra* note 49, at 221.

114. *Regulation No. 123/85*, *supra* note 35, art. 3(10)(a).

ply to the facts before it,[115] its willingness to consider the Commission's actions indicates an awareness that Community law might take priority over conflicting German law. In most cases, however, German courts have tended to ignore or to misjudge the conflicts between permissive Community law and prohibitions under national law, thus confirming their adherence to the two-barrier theory.

c. The Views of Commentators

While there are considerable differences of opinion regarding the extent to which permissive Community law should prevail over contrary national competition rules, most authors appear to both acknowledge the potential for conflict and endorse a solution that is based on the primacy principle as enunciated in *Wilhelm*. The differences of opinion on the exact status of Community exemptions are triggered by the *Wilhelm* Court's rather vague formula whereby the Commission may "carry out certain positive, though indirect, action with a view to promoting a harmonious development of economic activities within the whole community in accordance with Article 2 of the Treaty."[116]

The narrowest academic interpretations of this formula state that an exemption can take precedence over conflicting national law only in exceptional cases. Proponents of this position are concerned about the "grave interference [of permissive Community law] with [the] exercise of the sovereign powers of the member states to deal with restrictive business practices that have adverse effects on their territory."[117] As a consequence, it is suggested that only when the Commission explicitly designates an exemption as a measure in support of economic policy can there exist a priority of permissive Community law over prohibitive national law.[118] While this view has the virtues of certainty and ease of application, it is too narrow in scope. Before granting an exemption under article 85(3), the Commission must evaluate whether an agreement contributes to improving the production or distribution of goods, or to promoting technical or economic progress, while allowing consumers a

115. The Court decided that the meaning of "resellers" in article 3(10)(a) of Regulation 123/85 does not encompass leasing companies, which do not transfer ownership to the ultimate consumer. *EG-Freistellung von Kfz-Vertragshändler-Bindungen gilt nicht für Leasinggesellschaften*, 39 WuW 942, 943 (1989).

116. *See supra* note 90 and accompanying text.

117. Markert, *The Dyestuff Case: A Contribution to the Relationship Between the Antitrust Laws of the European Economic Community and its Member States*, 14 ANTITRUST BULL. 869, 889 (1969).

118. *Id.*

fair share of the resulting benefits. Thus, an exemption, by definition, is a decision "in support of economic policy."[119] Not surprisingly, decisions to exempt an agreement never have been accompanied by statements indicating policy reasons in addition to those inherent in article 85(3).

Other authors take the view that individual, but not group, exemptions take precedence over prohibitory national law.[120] These commentators argue that group exemptions primarily are based on considerations of convenience and efficiency, but are not intended to promote economic integration, and thus are not the sort of action that the *Wilhelm* Court envisioned when discussing the primacy of "indirect, albeit positive" actions by the Commission over national law.

While it is true that the Commission has authorized group exemptions in an effort to alleviate its ever-increasing work load,[121] this view fails to recognize that the enactment of group exemptions also is contingent upon a specific finding that the category of agreement meets the criteria set forth in article 85(3).[122] Moreover, group exemptions are binding regulations that, pursuant to article 189(2) of the Treaty, directly apply

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119. A. GLEISS & M. HIRSCH, *supra* note 76, annot. 62.

120. *See, e.g.*, MAILÄNDER, in GEMEINSCHAFTSKOMMENTAR EWG-GRUNDZÜGE annot. 21 (3d ed. 1972).

121. Those who argue that group exemptions do not take priority over national law note that the Commission need not examine individual cases to determine whether an agreement qualifies. It also should be noted, however, that "grey list" restrictions constitute an important exception in that they are subject to the opposition procedure upon notification of the agreement. *See supra* note 37. The Commission's decision not to act against a notified agreement within six months is very similar to the affirmative decision granting an individual exemption pursuant to article 85(3). The former also calls for an individual evaluation of the agreement at issue. Arguably, then, agreements that were exempted as a result of an opposition procedure reflect a positive, though indirect action of the Commission for stronger reasons than do "white list" agreements that clearly fall within the ambit of a group exemption. Because of their greater potential for affecting trade, "grey list" agreements are neither expressly permitted nor expressly proscribed under a group exemption regulation. The Commission's tolerance of such an agreement evidences that, on balance, the benefits outweigh the anticompetitive effects of the agreement in accordance with article 85(3). *See also* Bunte, *Das Verhältnis von deutschem zu europäischem Kartellrecht*, 39 WUW 7, 18 (1989).

122. Article 85(3) expressly refers to "category of agreements," "category of decisions," and "category of concerted practices." The Commission, elaborating on the status of group exemptions confirms this view:

> When agreements fulfil the conditions for block exemption, this means that they are presumed to be in line with the conditions which Article 85(3) imposes for individual exemptions. In fact, the advantage of such regulations is that they provide enterprises with legal certainty without requiring them to notify their agreements to the Commission.

See FIFTEENTH REPORT ON COMPETITION, *supra* note 38, pt. 1, ch. 1, para. 1(iii).

in all member states. Because group exemptions are apt to influence the corporate behavior of a great number of parties throughout the Community,[123] they are more important in fostering integrated economic development in the Community than are individual exemptions.[124] Therefore, it makes little sense to argue that individual exemptions take precedence over national law, while group exemptions do not.

A third group of authors recognizes that all exemptions, whether based on individual decisions or group regulations, generally must be deemed positive, though indirect actions of the Commission, and conclude that no agreement covered by an exemption can be prohibited by national law.[125] This conclusion, though inviting, is not compelling under the principle that *Wilhelm* enunciated. While the *Wilhelm* Court authorized the Commission to carry out certain "positive acts," it did not preempt the application of national law altogether, but only when it would "prejudice the uniform application throughout the Common Market of the Community rules on cartels and of the full effects of the measures adopted in implementation of those rules."[126] Application of national prohibitive law, however, does not in every case imperil "the uniform application" of Community rules.

d. The Scope of Exemptions as a Gauge for the Primacy of Community Law

The "uniform application" standard enunciated by the *Wilhelm* Court suggests that the extent to which permissive Community law takes precedence can be ascertained only by examining the actual scope of the exemption. A closer look at the group exemption for patent license agreements[127] illustrates the point. The list of exempted agreements contained in article 2 of that regulation is not limited to restrictive agreements that

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123. The substantial number of settlements without a formal decision are due in large part to the parties' willingness to modify their agreements to conform with a group exemption. *See supra* note 43 and accompanying text.

124. The substantial economic impact also is reflected both in the prerequisites for enacting a group exemption and the mandatory monitoring process during its limited duration. As to the former, for example, the conditions under which the Commission exercises its powers to enact regulations must be the result of a "close and constant liaison with the competent authorities of the Member States." *See* the preamble to the enabling *Council Regulation No. 19/65*, *supra* note 35, which vests the Commission with the power to enact group exemptions. As to the latter, the Commission may revoke or amend a regulation taking account of changed economic circumstances. *Id.* art. 2(2).

125. *See, e.g.*, A. GLEISS & M. HIRSCH, *supra* note 76, annot. 61-67.

126. *See supra* note 62 and accompanying text.

127. *See Regulation No. 2349/84*, *supra* note 35.

violate article 85(1); for the sake of legal certainty, the Commission also exempted agreements that normally do not fall within the ambit of article 85(1). Like negative clearances,[128] the prohibition of these latter types of agreements under national law cannot create a conflict with Community law, because article 85(1) does not apply. Thus, while the group regulation on patent license agreements amounts, as a whole, to a "positive, though indirect action" that should not be subject to national prohibitive law, not every agreement exempted thereunder enjoys that status.

Furthermore, abusive practices committed under the guise of an exemption also may be prohibited under national law. While it is within the exclusive jurisdiction of the Commission to grant and to revoke individual exemptions under article 85(3),[129] national courts are entitled to gauge a particular practice in light of an existing exemption and to apply national law against that practice when it clearly is out of line with what the Commission intended to exempt from the prohibition of article 85(1).[130] The application of national laws, then, certainly is not apt to impair the uniform application of Community law or the measures taken or to be taken to implement it.[131]

Irrespective of the substantive scope of an exemption, there cannot be a conflict with national laws when the agreement is outside the time limits prescribed by the exemption. Thus, corporate behavior that falls outside the temporal scope of the exemption also is susceptible to national sanctions. It stands to reason that an agreement which has not been duly notified under Regulation 17 to the Commission may subject the parties to fines under national laws,[132] even though it either clearly would have qualified for an individual exemption or actually was later exempted from the prohibition contained in article 85(1). A decision pursuant to article 85(3) ordinarily cannot take effect earlier than the date of notification.[133]

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128. *See supra* note 89 and accompanying text.

129. *See Regulation No. 17, supra* note 9, arts. 9(1), 8(3).

130. Bunte, *supra* note 121; *see also* Steindorf, *Europäisches Kartellrecht und Staatenpraxis*, 142 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT 525, 548 (1978).

131. *See supra* notes 58-63 and accompanying text.

132. Note that a national court also could declare the agreement null and void under Community law, should the agreement violate the general prohibition of article 85(1). *See supra* note 24 and accompanying text for a discussion of the direct effects and applicability of Community law in the member states.

133. *See Regulation No. 17, supra* note 9, art. 6(1) ("Whenever the Commission takes a decision pursuant to article 85(3) of the Treaty, it shall specify therein the date

It is less clear, however, whether the period after notification, but before the Commission's decision to grant or deny an exemption under article 85(3), should merit similar treatment. An affirmative answer would enable courts and antitrust authorities of the member states to impose sanctions under internal laws against agreements that are immune from Community fines.[134] The application of national law against an agreement while Commission action is pending could thwart the retroactive effect of any exemption that may ultimately be granted, as exemptions usually relate back to the date of notification.[135] The question thus becomes whether a national court must suspend its proceedings and await a decision by the Commission to avoid such possible conflicts with Community law.

At first glance, this solution appears appropriate in light of the *Wilhelm* decision. The Court in *Wilhelm* hinted at the duty of national courts to suspend proceedings if a conflict concerning the same agreement were to arise.[136] This case, however, involved parallel formal proceedings, one instituted by the German Federal Cartel Office, the other by the Commission. The Court intimated that suspension might be appropriate when, "during national proceedings, it appears possible that the decision to be taken by the Commission at the culmination of a procedure still in progress . . . may conflict with the . . . decision of the national authorities."[137] The mere notification of an agreement, however, is not tantamount to initiating a "procedure" as required under *Wilhelm*.[138] The Commission may not act upon a notification for years, and there is no imminent possibility of conflict of the sort envisioned by the Court in *Wilhelm*. Requiring national courts to suspend their proceedings upon notification not only would exceed what is required under *Wilhelm*, but also would ignore a major aim of the Court in rendering the decision: to vindicate the genuinely independent status of national law. If national courts were required to suspend their proceedings upon notification of an agreement, the application of national law could be

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from which the decision shall take effect. Such date shall not be earlier than the date of notification.").

134. *Id.* art. 15(5)(a). For details, see *supra* note 34 and accompanying text.

135. *Cf. Regulation No. 17, supra* note 9, art. 6.

136. Wilhelm v. Bundeskartellamt, 1969 E. Comm. Ct. J. Rep. 1, 14-15, 8 Comm. Mkt. L.R. 100, 119 (1969).

137. *Id.*, 8 Comm. Mkt. L.R. at 119.

138. *See* SA Brasserie de Haecht v. Wilkin-Janssen, 1973 E. Comm. Ct. J. Rep. 77, 88, in which the Court stated, albeit in a different context, that the Commission's acknowledgment of receipt of a notification for obtaining an exemption under article 85(3) cannot be considered an official act, initiating a procedure.

eliminated virtually at the whim of the parties to the agreement.

Accordingly, it seems appropriate for national courts to suspend proceedings because of a notification to the Commission only when the Commission expresses its intent to issue an exemption.[139] This expression of intent occurs when the Commission publishes a summary of the relevant notification and invites all interested parties to submit their observations within a certain time limit.[140]

Of course, should the Commission eventually issue an exemption that is incompatible with a decision of the national authorities rendered prior thereto, the latter may have the duty to solve the conflict by vacating the decision and reopening the case.[141] However, such corrective action should have only prospective effect. For example, fines would not have to be repaid to undertakings if these fines were assessed by the national antitrust authority for violations of national laws occurring before the Commission's action. At the time, no conflict existed; nor can it be said that there was any positive, though indirect, action on the part of the Commission with respect to the activity for which the national authority had assessed a penalty during the period prior to the Commission's official action.

National law also, in certain cases, may impose shorter time periods on the duration of restrictive agreements than provided for in an exemption granted by the Commission. This priority of stricter national law is illustrated in Regulation 1984/83, a group exemption for various categories of exclusive purchasing agreements.[142] While Regulation 1984/83 provides that one type of exclusive purchasing obligation, requiring gas station operators to purchase their petroleum products from a single supplier, may have a maximum duration of ten years,[143] the Commission has made it clear that it intends to set merely an upper limit. The Commission noted that laws in the member states proscribing a shorter duration "are not contrary to the objectives of this Regulation."[144]

Given that the Commission stated explicitly that Regulation 1984/83 did not preempt national laws on the duration of agreements, one may

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139. *See* Markert, *supra* note 91, at 98.

140. *Regulation No. 17, supra* note 9, art. 19(3).

141. *See* FOURTH REPORT ON COMPETITION, *supra* note 9, pt. 1, ch. 1, § 7, para. 46, in which the Commission states: "The legal obligation for national authorities to respect the primacy of Community law also applies, however, where an earlier decision of the national authorities subsequently turns out to be incompatible with Articles 85 or 86."

142. *Regulation No. 1984/83, supra* note 35.

143. *Id.* art. 12(1)(c).

144. *See id.* recital (No. 19).

argue that other limitations in exemptions that are unaccompanied by such qualifying language imply, *argumentum e contrario*, that national laws indeed are preempted in this respect. This argument may have merit with respect to ceilings on the duration of other types of exclusive purchasing agreements that are addressed in Regulation 1984/83.

Outside the area of time limitations on agreements, there is little guidance about whether regulation (short of prohibition) by national authorities is permissible with respect to agreements for which an exemption already has been granted. Here, the above argument is less persuasive in that, for example, an exempted agreement must satisfy the formal requirements imposed by national law.[145] It follows that no priority conflicts exist when the actual operation of an exempted agreement is contingent upon the compliance with certain national requirements, such as the mandate that certain mergers and acquisitions be notified to the state antitrust authority.[146] On the other hand, the imposition of such requirements must not affect the exemption so as to render it entirely inoperative in light of its intended scope.

This rule in particular illustrates that national courts will not always be in a position to judge with certainty whether and to what extent national laws or regulations may be applied without rendering the exemption entirely inoperative. Such doubts about the compatibility of internal law with the ultimate objective of creating equal conditions for competition throughout the Common Market can be resolved by referring the matter to the European Court of Justice, which then will determine the true scope of the exemption in a preliminary ruling pursuant to article

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145. The Commission explicitly has recognized and acknowledged this regulatory function of national law. In a recital (No. 29) to Regulation 123/85, the group exemption regarding selective distribution agreements for motor vehicles, the Commission noted that "[The exemption] is without prejudice to laws and administrative measures of the Member States by which the latter, having regard to particular circumstances, prohibit or declare unenforceable particular restrictive obligations contained in an agreement exempted under this Regulation; the foregoing cannot, however, affect the primacy of Community law." *Regulation 123/85, supra* note 35, at 19, para. 29.

146. *See* A. GLEISS & M. HIRSCH, *supra* note 76, annot. 63; *see also* Markert, *supra* note 91, at 96. On notification requirements for mergers and acquisitions, see §§ 23 and 24a of the GWB; the pertinent provisions of these lengthy and complex regulations are reprinted in F. BEIER, *supra* note 49, at 213 *et. seq.* Mergers that fall under the newly adopted Merger Control Regulation 4064/89, *supra* note 7, need not be notified to the national authorities; the Commission's jurisdiction over such mergers is exclusive. Article 21(2) of the Regulation provides: "No Member State shall apply its national legislation on competition to any concentration that has a Community dimension." *Regulation, supra* note 7, art. 21(2).

177 of the Treaty.[147] Of course, a referral presupposes that national courts are willing to acknowledge that internal competition rules are capable of conflicting with Community law. Thus, to the extent German courts continue to adhere to the traditional two-barrier theory, such referrals to the European Court of Justice are unlikely.

III. CONCLUSION

The primacy of EC competition law is a universally acknowledged principle. Few dispute its actual operation when Community law prohibits a particular corporate practice. This is the case, regardless of whether German law permits or prohibits the same practice. In the former instance, German law must give way unqualifiedly. In the latter, the application of German law is appropriate only in as much as it does not frustrate the uniform application of the Community rules. Thus, national authorities must avoid parallel proceedings that result in conflicting outcomes or in additional fines for the same corporate practice.

The operation of the primacy principle is less clear in cases involving the application of Community exemptions to practices that violate German competition law. The two-barrier theory, traditionally advanced to justify the absolute priority of national prohibitions, is based upon the fallacious premise that conflicts between the systems cannot arise. As the discussion in this Article shows, both individual and group exemptions under Community law do create the potential for conflict with national law, a conflict that must be resolved in accordance with the general principle of Community law primacy.

Nevertheless, this broad principle is not as sweeping as it appears, because close analysis of the true scope of Community exemptions often shows that they do not cover the implementation of a particular agreement. When this is the case, application of national law will not work against the Community law's objectives. Even when an agreement falls within the scope of an exemption, the national rules may operate to prohibit or restrict its operation upon a showing that the Community has no real interest in barring national authorities from applying their own law. Thus, the recognition that permissive Community competition law should, in principle, take precedence over prohibitive national law, does not dispose of the need for analyzing on a case-by-case basis the effect that application of national prohibitions may have on the public policy goals embodied in the Community exemptions.

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147. *Cf.* Steindorf, *supra* note 130, at 549. The jurisdiction of the newly created Court of First Instance does not encompass such preliminary rulings.