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The Economic Unity Doctrine in the EEC: A Limited Exemption to Article 85 of the Treaty of Rome

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Abstract

Section I of this Note analyzes the cases in which the Commission and the Court of Justice have implied a doctrine of economic unity and argues that this economic unity exemption to the prohibitions of article 85 may indeed be a limited one. Section II sets forth the theoretical and practical difficulties that such a limited economic unity doctrine entails. Finally, section III presents an alternative analysis for determining when article 85 of the Treaty of Rome should apply to practices between related firms.

THE ECONOMIC UNITY DOCTRINE IN THE EEC: A LIMITED EXEMPTION TO ARTICLE 85 OF THE TREATY OF ROME

INTRODUCTION

Article 85 of the Treaty of Rome¹ comprises one of the basic elements of competition law in the European Communities.² Article 85 prohibits agreements between enterprises,³

1. Treaty establishing the European Economic Community (EEC or Community), Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) (official English translation), 298 U.N.T.S. 11, 47-48 (unofficial English translation) [hereinafter cited as EEC Treaty or Treaty of Rome]. The unofficial English version of article 85 reads as follows:

1. 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, 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; or

(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 contract.

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

3. Nevertheless, the provisions of paragraph 1 may be declared inapplicable in the case of:

— any agreements or classes of agreements between enterprises,

— any decisions or classes of decisions by associations of enterprises,

and

— any concerted practices or classes of concerted practices which contribute to the improvement of the production or distribution of goods or to the promotion of technical or economic progress while reserving to users an equitable share in the profit resulting therefrom, and which:

(a) neither impose on the enterprises concerned any restrictions not indispensable to the attainment of the above objectives;

(b) nor enable such enterprises to eliminate competition in respect of a substantial proportion of the goods concerned.

Id.

2. There are three legally definable, treaty-based organizations in the European Communities (Common Market). See D. LASOK & J.W. BRIDGE, AN INTRODUCTION TO THE LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES 12-25 (3d ed. 1982).

They are the European Coal and Steel Community (ECSC), the European Economic Community (EEC) and the European Atomic Energy Community (Euratom). 2 B. HAWK, *UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE* 1 (1985). The ECSC was created by the Treaty of Paris in 1951. Treaty establishing the European Coal and Steel Community, Apr. 18, 1951, 1973 Gr. Brit. T.S. No. 2 (Cmd. 5189), 261 U.N.T.S. 140 [hereinafter cited as ECSC Treaty]. The EEC was established by the Treaty of Rome in 1957. *See supra* note 1. Euratom was created in 1957. Treaty establishing the European Atomic Energy Community, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 169 [hereinafter referred to as Euratom Treaty]. The European Communities originally consisted of six member states: Belgium, France, the Federal Republic of Germany, Italy, Luxembourg, and the Netherlands. Denmark, Ireland and the United Kingdom became members on January 1, 1973. In 1981, Greece joined the European Communities. Treaty of Accession of the Hellenic Republic, May 28, 1979, 22 O.J. Eur. Comm. (No. L 291) 9 (1979); Treaty of Accession of the Kingdom of Spain and the Portuguese Republic, January 1, 1986, 28 O.J. Eur. Comm. (No. L 302) 9 (1985). Spain and Portugal became Member States of the European Communities on January 1, 1986. *See* B. HAWK, *supra*, at 1-2; Bourgeois, *EC Antidumping Enforcement—Selected Second Generation Issues*, in 1985 *FORDHAM CORP. L. INST.*, ch. 27 (B. Hawk ed.).

There are four principal institutions of the European Communities: 1) the Council of Ministers, which is the principal body empowered to enact Community law under the treaties; 2) the Court of Justice, which is the judicial arm; 3) the Commission, which is the administrative or executive body; and 4) the European Parliament. *See* B. HAWK, *supra*, at 2.

The EEC's competition rules relating to enterprises are contained in articles 85-90 of the Treaty of Rome. *See* D. LASOK & J.W. BRIDGE, *supra*, at 385-402. Article 85 is directed at agreements and concerted practices which have an anticompetitive purpose or effect. Treaty of Rome, *supra* note 1, art. 85. Article 86 prohibits a firm's abuse of its dominant position "[t]o the extent of which trade between any Member States may be affected." *Id.* art. 86. Article 87 confers broad powers on the Council to enact detailed rules regarding competition. *Id.* art. 87; *see* D. LASOK & J.W. BRIDGE, *supra*, at 385-86. Articles 88 and 89 contain temporary provisions to be in force until the Council implements article 87. Treaty of Rome, *supra* note 1, art. 88-89. Article 90 is concerned with the application of the rules of competition to enterprises of a public nature. *Id.* art. 90.

3. EEC Treaty, *supra* note 1, art. 85(1). It has been suggested that the proper translation of article 85(1) is agreements among "undertakings" rather than among "enterprises." Lazerow, *Price Discrimination and the Treaty of Rome: The Jurisdictional Elements*, 23 *FED. B. J.* 147, 148-66 (1963). The official English version and the Commerce Clearing House (CCH) translation, in fact, use the word "undertakings" rather than "enterprises." *See* 1 *COMMON MKT. REP. (CCH)* ¶ 2005. For present purposes, however, the word "undertaking" can be considered as synonymous with the word "enterprise." *See* A. DERINGER, *THE COMPETITION LAW OF THE EUROPEAN ECONOMIC COMMUNITY* 1 (1968).

Although article 85 speaks of "enterprises," the term has not been defined in the Treaty. *See* C. BELLAMY & G.D. CHILD, *COMMON MARKET LAW OF COMPETITION* 23 (2d ed. 1978). Nor is the term "enterprise" defined in the law of any of the Member States. R. GRAUPNER, *THE RULES OF COMPETITION IN THE EUROPEAN ECONOMIC COMMUNITY* 11 (1965). It is now recognized that the term "enterprise" includes both legal and natural persons engaged in activities of an economic nature. C. BELLAMY & G.D. CHILD, *supra*, at 23; *see* H. SMIT & P. HERZOG, *THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY* §§ 3-90 through 3-98 (1981 and Supp. 1984). The term is not

decisions by associations of enterprises,⁴ and all concerted practices that may affect trade between members of the European Economic Community⁵ (EEC or Common Market) and that have the purpose or effect of restraining competition in the EEC.⁶ By its very nature, an agreement or concerted practice necessitates more than one participant; each requires two or more persons or entities that are sufficiently distinct to be capable of conspiring or agreeing together. Thus, a restraint on competition achieved by a single corporation lacks the plurality of actors required for an article 85 infringement.

Neither the Commission,⁷ nor the Court of Justice,⁸ has

synonymous with the word "corporation" and is broad enough to include more than one corporation. Natural persons are included only if they are carrying on activities of an economic nature. The officers or employees of a corporation are not enterprises. See generally 1 COMMON MKT. REP. (CCH) ¶ 2011; Conclusions of Advocate General Roemer in *Government of the Republic of Italy v. Council and Commission of the European Economic Community*, [1961-1966 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8048, at 7727 (1966); A. DERINGER, *supra*, at 5-8; H. SMIT & P. HERZOG, *supra*, at § 3-93.

4. Article 85 also applies to "associations of enterprises." If an enterprise must be involved in activity in an economic sense, see *supra* note 3, it necessarily follows that an association of enterprises must also be economically active, even if only in representing the economic interests of its members. See D. WYATT & A. DASHWOOD, *THE SUBSTANTIVE LAW OF THE EEC* 258-59 (1980). It does not appear to be important that the actual members of the association themselves be enterprises or their representatives. See A. PARRY & J. DINNAGE, *PARRY & HARDY: EEC LAW* 317 (2d ed. 1981). An organization which forms part of a governmental activity may be an association of enterprises. See, e.g., *Pabst and Richarz v. Bureau National Interprofessionnel de l'Armagnac*, 19 O.J. EUR. COMM. (No. L 231) 24 (1976), 18 Common Mkt. L.R. D63. An international association whose members are comprised of smaller national associations may also be an association of enterprises. See, e.g., *C.E.M.I.M.O.*, 12 J.O. COMM. EUR. (No. L 69) 13 (1969), 8 Common Mkt. L.R. D1. "Public" enterprises engaged in economic activity are also subject to the general rules of the Treaty. See A. PARRY & J. DINNAGE, *supra*, at 317.

5. See *supra* note 2.

6. Treaty of Rome, *supra* note 1, art. 85.

7. The Commission of the European Communities is the "administrative or executive arm" of the Common Market. See B. HAWK, *supra* note 2, at 2. It was created by the Treaty of Rome. See Treaty of Rome, *supra* note 1, art. 4. The Commission may investigate and terminate infringements of articles 85 and 86. Regulation 17, art. 3, 5 J.O. COMM. EUR. 204, 205-06 (1962), 1 COMMON MKT. REP. (CCH) ¶ 2401, 2421. The Commission may fine "enterprises" for violations of articles 85 and 86. *Id.* art. 15. Commission decisions may be appealed to the Court of Justice of the European Communities and the Court may cancel, reduce or increase the fine imposed by the Commission. *Id.* art. 17. The Court of Justice of the European Communities is the judicial arm of the Common Market. It originated in the ECSC Court. ECSC Treaty, *supra* note 2, art. 45 (Protocol on the Statute of the Court of Justice). The Court has two types of jurisdiction in the competition field: 1) review of deci-

ever held that officers, directors, employees or divisions within a single corporation are capable of agreeing with each other or with the corporation in contravention of article 85.⁹ However, there remains the question of the extent to which coordinated activity between a parent company and its subsidiaries or between sister subsidiary companies can be an agreement or concerted practice in violation of article 85. EEC decisions ostensibly reject the intra-enterprise conspiracy doctrine, under which agreements between affiliated companies have been found.¹⁰ Instead, the Commission and the Court of Justice espouse a doctrine of economic unity.¹¹ Under this doctrine,

sions of the Commission and 2) review of questions of Community law on reference from national courts of Member States. See EEC Treaty, *supra* note 1, arts. 169-83; B. HAWK, *supra* note 2, at 2.

8. See *supra* note 7.

9. There has been no authoritative statement to the effect that article 85(1) can never apply to coordinated activity between branch offices or divisions of the same corporation, but the reasoning in *Christiani & Nielsen*, 12 J.O. COMM. EUR. (No. L 165) 12 (1969), [1969-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9308, supports this view. See *infra* notes 28-29 and accompanying text; B. HAWK, *supra* note 2, at 74; Forcione, *Intra-Enterprise Conspiracy Under the Antitrust Regulations of the Common Market*, 25 BUS. LAW. 1419, 1432 (1970). It has been suggested that divisions or branches could enter into an agreement prohibited by article 85(1) if they were acting as independent economic entities. See H. SMIT & P. HERZOG, *supra* note 3, at § 3-98.

10. Intra-enterprise conspiracy refers to a conspiracy among separately incorporated units of a parent-subsidiary enterprise. See Note, *All in the Family: When Will Internal Discussion Be Labeled Intra-Enterprise Conspiracy?*, 14 DUQ. L. REV. 63, 64 (1975).

The intra-enterprise conspiracy doctrine has had a checkered history in United States antitrust law under section 1 of the Sherman Act, which prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade of commerce." 15 U.S.C. § 1 (1982). However, in 1984, the United States Supreme Court clarified 40 years of ambiguous case law and held that a parent company and a wholly owned subsidiary were incapable of conspiring together under section 1. See *Copperweld Corp. v. Independence Tube Corp.*, 104 S. Ct. 2731 (1984). The Court stated:

[T]he coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act. A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one . . . [Therefore], there is no justification for § 1 scrutiny.

Id. at 2742.

11. The doctrine of economic unity has arisen from a series of Commission decisions and Court of Justice judgments that have emphasized the existence of economic interdependence in exempting practices between related firms from the prohibition of article 85. See, e.g., *Centrafarm v. Sterling Drug Inc.*, 1974 E. Comm. Ct. J. Rep. 1147, 1167, [1974 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8246, at 9151-

agreements or concerted practices between a parent company and its subsidiary are exempt from the prohibitions of article 85 when the subsidiary does not determine its own market behavior.¹²

The scope of the economic unity doctrine, however, remains subject to dispute. Specifically, Commission decisions and Court of Justice judgments relating to practices between affiliated firms have failed to clarify what degree of control is necessary to meet the requirement that the subsidiary does not determine its course of action in the market.¹³ Furthermore, both the Commission and the Court of Justice have undercut the implication of a broad economic unity doctrine by suggesting that article 85 may apply to agreements or concerted activity between related firms, even when the firms are economically interdependent, if these agreements concern something other than the mere internal allocation of tasks between

58 (the Court held that article 85 did not apply to agreements between a parent and its subsidiary if "the subsidiary has no real freedom to determine its course of action on the market"); *Christiani & Nielsen*, 12 J.O. COMM. EUR. (No. L 165) 12 (1969), 1 COMMON MKT. REP. (CCH) ¶ 2412.26 (the Commission exempted practices between a parent company and its subsidiary from the prohibitions of article 85 upon a finding that the affiliated companies formed "one economic unit"). *But cf.* *Kodak*, 13 O.J. COMM. EUR. (No. L 147) 24 (special ed. 1970), [1969-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9378 (the Commission stated that a parent company and its dependent subsidiary were not capable of agreeing in violation of article 85 even though it effectively found the required agreement).

In addition to applying to the issue of finding an agreement or concerted practice between related entities for the purpose of article 85, the economic unity doctrine is also related to two other separate issues: 1) imputation of substantive liability to foreign enterprises for the conduct of local subsidiaries, and 2) jurisdiction over foreign enterprises. *See* B. HAWK, *supra* note 2, at 54.

12. *See supra* note 11 (cases cited therein). The puzzling aspect of this analysis is that neither the Commission nor the Court has stressed the absence of more than one "enterprise" within the meaning of article 85 upon the finding that a subsidiary is incapable of independent market behavior. Despite the language in these decisions that a parent and its economically independent subsidiary form an economic unit, the Commission and the Court have nevertheless referred to the parent and subsidiary as separate "enterprises" or "undertakings." In this respect, the EEC analysis of the intra-enterprise conspiracy question differs significantly from that recently used by the United States Supreme Court in *Copperweld*, 104 S. Ct. 2731 (1984), when confronted with the problem of intra-enterprise conspiracy. *See supra* note 10. The results achieved by the Commission and the Court with respect to the intra-enterprise conspiracy question, however, are strikingly similar to that of the *Copperweld* decision.

13. *See* B. HAWK, *supra* note 2, at 75; H. SMIT & P. HERZOG, *supra* note 3, at §§ 3-95 through 3-98.

the enterprises.¹⁴

Section I of this Note analyzes the cases in which the Commission and the Court of Justice have implied a doctrine of economic unity and argues that this economic unity exemption to the prohibitions of article 85 may indeed be a limited one. Section II sets forth the theoretical and practical difficulties that such a limited economic unity doctrine entails. Finally, section III presents an alternative analysis for determining when article 85 of the Treaty of Rome should apply to practices between related firms.

I. THE SCOPE OF THE DOCTRINE OF ECONOMIC UNITY

The doctrine of economic unity has evolved from a series of Commission decisions and Court of Justice judgments that have emphasized the existence of economic unity in exempting practices between affiliated firms from the prohibitions of article 85.¹⁵ These decisions have focused on two prerequisites for an article 85 violation. The first prerequisite relates to the existence of an agreement or concerted practice between two or more enterprises.¹⁶ The second is the restriction on competition in the Common Market.¹⁷

14. See *Centrafarm*, 1974 E. Comm. Ct. J. Rep. at 1167, [1974 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8246, at 9151-57—9151-58 (the Court stated that one qualification for an article 85 exemption was that the agreements or practices between related entities must be "concerned merely with the internal allocation of tasks as between the undertakings"); COMM'N FOURTH REPORT ON COMPETITION POLICY ¶ 52 (1975) (the Commission stated that agreements between related firms may fall within the ambit of article 85 where "they have wider implications, for instance agreements which restrict the scope for non-member undertakings to penetrate a given market"); see also COMM'N SIXTH REPORT ON COMPETITION POLICY ¶ 39 (1977) (the Commission endorsed the reasoning of the Court in *Centrafarm*, 1974 E. Comm. Ct. J. Rep. 1147, [1974 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8246, stating that article 85 may apply to restrictive agreements between companies of the same group if the agreements concern something other than the mere internal allocation of tasks between the enterprises).

15. See van Rijn, *Intra-Enterprise Conspiracy and Article 85 of the EEC Treaty*, in *ESSAYS IN EUROPEAN LAW AND INTEGRATION* 123, 126 (1982).

16. See *id.* This implies that there must be a plurality of actors that have entered into a practice voluntarily. Thus, coordinated activity where only one person voluntarily consents, the other one having no choice but to go along, should not be considered "agreements" or "concerted practices" within the meaning of the article. See D. WYATT & A. DASHWOOD, *supra* note 4, at 253.

17. van Rijn, *supra* note 15, at 126. Both actual and potential competition are included under article 85, as well as competition affecting third parties to the chal-

A. Commission Decisions

The seminal decision on the economic unity doctrine is *Christiani & Nielsen*.¹⁸ In that decision the Commission focused primarily on the possible restriction on competition within the Common Market. In 1969, *Christiani & Nielsen*, a Danish parent company, asked the Commission to issue a negative clearance¹⁹ under Regulation 17²⁰ respecting a market sharing arrangement that the parent had signed with its wholly owned subsidiary in the Netherlands.²¹ In addition to containing a territorial division, the arrangement granted the parent the

lenged agreement or practice. See *Consten & Grundig v. Commission of the European Community*, 1966 C.J. Comm. E. Rec. 299, 339, [1961-1966 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8046, at 7651. In that decision, the Commission stated: "Competition may be distorted within the meaning of Article 85(1) not only by agreements which limit it as between the parties, but also by agreements which prevent or restrict the competition which might take place between one of them and third parties." *Id.*

18. 12 J.O. COMM. EUR. (No. L 165) 12 (1969), [1969-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9308.

19. Regulation 17 establishes and defines the powers of the Commission in the competition field. First Regulation Implementing Articles 85 and 86 of the Treaty, 5 J.O. COMM. EUR. 204 (1962), 1 COMMON MKT. REP. (CCH) ¶ 2401 [hereinafter referred to as Regulation 17]. Under Regulation 17, there are three ways in which alleged anticompetitive activity may come before the Commission. First, the Commission may initiate its own investigation. See Regulation 17, *supra*, art. 3. Second, the parties may notify, *id.* art. 4, the Commission of the agreement in order to get either a "negative clearance," see *id.* art. 2, or an individual exemption, *id.* arts. 4-8, from an article 85 prohibition. Third, complaints to the Commission may originate from third parties. *Id.* art. 3(2). Under article 3(2), Member States and "[n]atural or legal persons, who show a justified interest" are entitled to apply to the Commission for review of an agreement, decision or practice for a possible article 85 violation. *Id.* art. 3(2).

Under article 3 of Regulation 17, the Commission is empowered to require parties to terminate an agreement which, acting on request or ex officio, it finds to be an infringement of article 85. *Id.* art. 3.

Article 4 calls for the notification of "agreements, decisions or concerted practices referred to in Article 85, paragraph 1 . . ." *Id.* art. 4. Notification is required in order to obtain an individual exemption under article 85(3). *Id.*

Article 2 provides that an enterprise or an association of enterprises may seek a "negative clearance" from the Commission. *Id.* art. 2. "Negative clearance" denotes a certification by the Commission that, "according to the information it has obtained, there are, under Article 85, paragraph 1 . . . no grounds for it to intervene with respect to an agreement, decision or practice." *Id.* The "negative clearance is restricted to the facts in the Commission's possession at a certain time." *Id.* art. 2; see B. HAWK, *supra* note 2, at 18.

20. See *supra* note 19.

21. *Christiani & Nielsen*, 12 J.O. COMM. EUR. (No. L 165) 12, 13 (1969), [1969-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9308, at 8658.

rights to appoint the subsidiary's officers and to give directives to the subsidiary, which was obliged to carry them out.²² The parent, Christiani & Nielsen, Copenhagen, also had other subsidiaries, two of which were located in Germany and France.²³

The Commission held that the contractual relationship between the Christiani & Nielsen parent company and its subsidiary did not fall within the scope of article 85.²⁴ According to the Commission, article 85 applies only if there is competition between the enterprises concerned.²⁵ In that respect, the Commission reasoned, it was imperative to know whether the subsidiary was capable of autonomous economic activity.²⁶ The Commission found that although the parent company and the subsidiary were two distinct legal entities, the requisite competition was lacking.²⁷

The Commission based its conclusion on three specific factors. First, it focused on the fact that Christiani & Nielsen established the two wholly owned subsidiaries as separate legal entities, rather than branch offices or agencies, solely for business purposes.²⁸ Therefore, according to the Commission, "[w]hat is involved here is an element of market strategy that does not result in the conclusion that . . . a wholly owned subsidiary is an economic entity that can compete with its par-

22. *Id.* at 13, [1969-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9308, at 8658.

23. *Id.* Furthermore, many other companies existed in the Common Market which were engaged in activities similar to those of Christiani & Nielsen. *Id.*

24. *Id.* at 14, [1969-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9308, at 8659.

25. *Id.* The Commission's words are ambiguous. Read literally, this language implies that article 85(1) does not apply in any case in which the enterprises do not compete. The Commission later stated that its words are to be given a narrow interpretation applicable only to the particular facts in the *Christiani & Nielsen* decision. Commission Answer of October 14, 1969 to Written Question No. 190/69, 12 J.O. COMM. EUR. (No. C 135) I (1969).

Clearly, the literal interpretation conflicts with the well-established principle that article 85 is applicable to vertical restraints. Typically, there is no competition between suppliers and their customers. Koppensteiner, *International Enterprises Under the Antitrust Law of the European Economic Community*, 9 J. WORLD TRADE L. 287, 299 (1975); cf. van Oven, *The Intra-Enterprise Conspiracy Paradox*, in EUROPEAN COMPETITION POLICY 105, 111-12 (1973).

26. *Christiani & Nielsen*, 12 J.O. COMM. EUR. (No. L 165) at 14, [1969-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9308, at 8659.

27. *Id.*

28. *Id.*

ent.”²⁹ Second, the Commission noted that the parent company had the power to address orders to the subsidiary and to select the subsidiary’s management.³⁰ This finding led the Commission to conclude that the subsidiary was an “integral part of the economic whole of the Christiani & Nielsen group.”³¹ Finally, the Commission stressed that the parent company would be able to determine the market behavior of the subsidiary at any time because it held all the capital of the subsidiary.³² In sum, the Commission granted the negative clearance on the grounds that the market sharing agreement was merely “a division of labor within the same economic entity,” and therefore did “not have the object or effect of preventing, restricting, or distorting competition within the Common Market.”³³

The *Christiani & Nielsen* decision thus exempted the coordinated activity between parent and subsidiary on the basis that the economically interdependent corporations were not capable of anticompetitive conduct. The Commission viewed the parent and the subsidiary as separate legal entities, but it did not consider them sufficiently independent to be capable of restricting competition in the Common Market.³⁴

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. See *supra* notes 18-33 and accompanying text. The Commission based this conclusion on both economic and formal indicia of separateness. Forcione, *supra* note 9, at 1424. It was clearly influenced by the formal considerations that the subsidiary had a particular legal identity and responsibilities not shared by the parent. See *Christiani & Nielsen*, 12 J.O. COMM. EUR. (No. L 165) 12, 14 (1969), [1969-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9308, at 8659. This finding of fact led to the conclusion that the parent and subsidiary were separate enterprises within the meaning of article 85, and thereby constituted the necessary plurality of actors. However, with respect to their capability of anticompetitive conduct, the Commission weighed economic, factual criteria and held that the parent and subsidiary were not sufficiently independent to be capable of restricting competition. Forcione, *supra* note 9, 1424-26.

Forcione argues that the Commission’s analysis is inconsistent. He notes that, in dealing with the plurality of actors requirement, the Commission stressed that the agreement was terminable only if both parties consented, but ignored the fact that the subsidiary was obligated to follow the parent’s instructions. With respect to the requirement of anticompetitive conduct, however, the Commission emphasized the fact that the subsidiary was obligated to follow the instructions of the parent and ignored the terms of the contract. *Id.* at 1426. In doing so, the Commission did not

Although this decision suggests that a parent company and its subsidiary are entirely protected from the prohibitions of article 85 when the subsidiary is incapable of autonomous economic behavior, a close analysis of the Commission's reasoning reveals that the *Christiani & Nielsen* holding does not mandate such a broad economic unity doctrine. First, it is important to recognize that the Commission viewed the parent company and the subsidiary as separate enterprises constituting the plurality of actors required for an article 85 violation.³⁵ This implies that the practices between a parent company and its subsidiary are presumptively subject to the provisions of article 85. According to this analysis, the applicability of article 85 to intra-group practices turns solely upon the capacity of the corporations to engage in anticompetitive concerted activity.

Second, in assessing whether the related entities were capable of anticompetitive conduct, the Commission limited its analysis to whether the related entities were capable of restricting competition between themselves.³⁶ In taking this approach, the Commission failed to consider that article 85 is concerned not only with competition between the parties to the agreement or concerted practice, but also with competition between those parties and independent third parties.³⁷ Thus, *Christiani & Nielsen* leaves open the question of whether restriction on competition outside the corporate group would justify the application of article 85 to intra-group practices.

Christiani & Nielsen, therefore, does not support a broad doctrine of economic unity. Rather, the decision stands for the

consider the economic, factual circumstance that the subsidiary was fully dependent on the parent as equally influential in connection with both the plurality of actors requirement as well as the anticompetitive conduct requirement. *Id.*

In any case, *Christiani & Nielsen* suggests that the Commission will not consider separately constituted entities as a single enterprise even when they are economically interdependent and will assess the applicability of article 85 solely in terms of the extent to which the affiliated companies are capable of anticompetitive conduct. *See* Mestmäcker, *Competition and Concentration in the EEC*, 6 J. WORLD TRADE L. 615, 630 (1972). *But see* Forcione, *supra* note 9, at 1424. Forcione argues that the Commission did not hold that separate related entities will always be considered separate enterprises for the purposes of article 85(1). He suggests that in the absence of a seemingly arms-length agreement, the result might have been different. *Id.*

35. *See supra* notes 27-29 and accompanying text.

36. *See supra* note 25 and accompanying text.

37. *See van Oven, supra* note 25, at 111; *supra* note 17 and accompanying text.

narrow proposition that article 85 does not apply to agreements or concerted practices between a parent company and its wholly-owned and controlled subsidiary when the anticompetitive effects are internal to the corporate group and when there is ample competition in the relevant market.³⁸

In *Kodak*,³⁹ the Commission contradicted the approach it had taken one year earlier in *Christiani & Nielsen*. Rather than focusing on the restriction on competition, the Commission in *Kodak* emphasized that article 85 requires an agreement or concerted practice between two or more enterprises.⁴⁰ *Kodak* concerned a request by the European subsidiaries of the American Eastman Kodak Corporation for a negative clearance⁴¹ with respect to their sales conditions in Europe.⁴² These sales conditions had been applied on instruction by the parent company.⁴³ In its ruling, the Commission examined the relationship between the parent company and its subsidiaries as well as the relationship between the subsidiaries themselves.⁴⁴ The Commission found that the Kodak subsidiaries could not act independently because they depended exclusively and completely on the parent company.⁴⁵ In addition, the parent company had actually exercised its power over the subsidiaries by issuing precise instructions regarding the exact business terms the subsidiaries should adopt.⁴⁶ These findings led the Commission to conclude that the identical nature of the sales conditions of the Kodak subsidiaries was not the result of "an agreement or concerted practice either between the parent company and its subsidiaries or between the subsidiaries inter se."⁴⁷

38. See Forcione, *supra* note 9, at 1426.

39. 13 J.O. COMM. EUR. (No. L 147) 24 (special ed. 1970), [1969-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9378.

40. *Id.* at 25, [1969-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9378, at 8818-19; see *supra* note 16 and accompanying text.

41. See *supra* note 19.

42. *Kodak*, 13 J.O. COMM. EUR. (No. L 147) 24 (special ed. 1970), [1969-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9378. These sales conditions required that goods purchased from a subsidiary for export be paid for not at the selling subsidiary's normal price but at the price charged by Kodak's subsidiary in the country to which the goods were to be reported. *Id.*

43. *Id.* at 25, [1969-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9378, at 8818.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

Thus, in *Kodak*, in contrast to *Christiani & Nielsen*, the Commission started from the assumption that the article 85 requirement of an "agreement" or "concertation" of action requires the coordination of two wills.⁴⁸ Once it found that the subsidiaries did not enjoy economic autonomy, it concluded that such independent conduct was lacking.⁴⁹

Although this failure to find an agreement in *Kodak* implies that article 85 does not apply regardless of any restriction on competition,⁵⁰ the Commission nevertheless examined the contents of the sales conditions imposed upon the Kodak subsidiaries by the parent company to determine the impact these sales conditions would have on competition within the Common Market.⁵¹ The Commission justified an article 85 analysis of the sales conditions on the ground that they were necessarily the subject of a contract between the Kodak subsidiaries and each of their dealers.⁵² However, there is no indication that the Commission identified an agreement between the Kodak subsidiaries and their dealers, for it did not state that the contracts between the subsidiaries and their dealers contained a conclusive obligation to discriminate.⁵³ Only after Kodak modified the sales conditions did the Commission grant the negative clearance.⁵⁴ Thus, for the purposes of article 85, the Commission found the required agreement or concerted practice between the Kodak parent company and its wholly-owned subsidiaries.⁵⁵

48. See Koppensteiner, *supra* note 25, at 299. This approach is not consistent with the Commission's reasoning in *Christiani & Nielsen* when it implied that, as separate legal entities, the subsidiaries were capable of cooperating. See *supra* notes 24-33 and accompanying text.

49. See Koppensteiner, *supra* note 25, at 299.

50. See Koppensteiner, *supra* note 25, at 293; van Oven, *supra* note 25, at 114.

51. *Kodak*, 13 J.O. COMM. EUR. (No. L 147) at 25-26, [1969-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9378, at 8818.

52. *Id.*

53. See Koppensteiner, *supra* note 25, at 293. *But cf.* Mestmäcker, *supra* note 34, at 630. Mestmäcker argues that the Commission focused primarily on the contractual relationships of the subsidiary with its customers in the Common Market. See *id.*

54. *Kodak*, 13 J.O. COMM. EUR. (No. L 147) at 26, [1969-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9378, at 8818-19.

55. See B. HAWK, *supra* note 2, at 315.

B. Court of Justice Judgments

In 1971, in *Béguelin Import Co. v. S.A.G.L. Import-Export*⁵⁶ the Court of Justice first addressed the applicability of article 85 to practices between related entities. In that case, a Japanese producer of lighters had made the Belgium company Béguelin its exclusive distributor for Belgium and France.⁵⁷ Béguelin (Belgium) then assigned its rights to the exclusive concession for France to a wholly owned subsidiary, Béguelin (France).⁵⁸ The District Court of Nice asked the Court of Justice pursuant to article 177 of Treaty of Rome⁵⁹ whether the transfer of the exclusive distribution agreement constituted an infringement of article 85. The Court found that article 85 did not apply because it was impossible for the parties to compete.⁶⁰ It stated:

Article 85(1) prohibits agreements which have as their object or effect an impediment to competition. This is not the position in the case of an exclusive sales agreement when in fact the concession granted under that agreement is in part transferred from the parent company to a subsidiary which, although having separate legal personality, enjoys no

56. 1971 C.J. Comm. E. Rec. 949, 11 Common Mkt. L.R. 81.

57. *Id.* at 951, 11 Common Mkt. L.R. at 83.

58. *Id.*

59. Article 177 of the EEC Treaty, *supra* note 1, empowers the Court to hear matters implicating Community law which arise in the course of litigation in national courts. Article 177 provides:

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of this Treaty;
- (b) the validity and interpretation of acts of the institutions of the Community;
- (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to render a judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter to the Court of Justice.

EEC Treaty, *supra* note 1, art. 177.

60. *See* *Béguelin Import Co. v. S.A.G.L. Import-Export*, 1971 C.J. Comm. E. Rec. 949, 958, 11 Common Mkt. L.R. 81, 95.

economic independence.⁶¹

In this judgment, the Court strongly endorsed the Commission's reasoning in *Christiani & Nielsen*.⁶² As in that case, the Court in *Béguelin* proceeded from the assumption that the economically interdependent subsidiary was an enterprise within the meaning of article 85 and therefore was capable of concluding legally valid agreements with its parent.⁶³ It then focused exclusively on the degree of competition between the participating enterprises thereby limiting its analysis to whether the entities were capable of restricting competition between themselves.⁶⁴ *Béguelin*, therefore, does not stand for the proposition that practices between a parent company and its economically interdependent subsidiary are categorically exempt from the prohibitions of article 85.⁶⁵ Rather than espousing such a broad economic unity doctrine, the judgment suggests that the Court deliberately reserved the right to apply article 85 to such a parent subsidiary relationship.⁶⁶ Otherwise, the Court need not have considered the restriction on trade since it could have confined itself to the consideration that coordinated activity or arrangements between a parent company and its controlled subsidiary are entirely protected from the finding of an agreement or concerted practice in violation of article 85.⁶⁷

In a judgment three years after *Béguelin*, the Court again focused on the article 85 prerequisite of a restriction on competition within the Common Market. In *Centrafarm v. Sterling Drug Inc.*,⁶⁸ the agreement at issue concerned the grant of an exclusive patent distributorship by a United States parent company, Sterling Drug, to its wholly owned subsidiaries in Britain and the Netherlands.⁶⁹ The subsidiaries sought to use the patent for the purposes of opposing imports of the product into

61. *Id.*

62. *See supra* notes 18-33 and accompanying text.

63. *See Mestmäcker, supra* note 34, at 630.

64. *Id.*

65. *See van Oven, supra* note 25, at 114.

66. *Id.*

67. *Id.*

68. 1974 E. Comm. Ct. J. Rep. 1147, [1974 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8246.

69. *Id.* at 1149, [1974 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8246, at 9151-46—9151-47.

the Netherlands from England by a third party, Centrafarm.⁷⁰

One of the questions submitted to the Court by the Dutch *Hoge Raad*⁷¹ was whether article 85 applied to agreements and concerted practices between the patentee and licensees, if the aim of the agreements or concerted practices was to differentiate market conditions for the patented goods in the different states.⁷² The Court held that article 85 does not apply to:

agreements or concerted practices between undertakings belonging to the same concern and having the status of parent company and subsidiary, if the undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market, and if the agreements or practices are concerned merely with the internal allocation of tasks as between the undertakings.⁷³

Thus, the Court upheld the Commission's position in *Christiani & Nielsen*⁷⁴ that article 85 does not apply to agreements between interdependent companies if they concern merely the internal allocation of tasks within the group.⁷⁵

C. *Economic Unity: A Limited Doctrine*

The holdings in *Christiani & Nielsen*, *Kodak*, *Béguelin* and *Centrafarm* highlight two important factors that the Commission and the Court of Justice consider when assessing whether affiliated firms are capable of violating article 85. The first is the existence of economic unity.⁷⁶ Although the Commission and the Court apparently consider affiliated companies as separate enterprises for the purposes of article 85,⁷⁷ a finding of

70. *Id.*

71. The *Hoge Raad* is the Supreme Court of the Netherlands. It referred this question to the Court under article 177 of the EEC Treaty. See *supra* note 59.

72. *Centrafarm*, 1974 E. Comm. Ct. J. Rep. at 1151, [1974 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8246, at 9151-47.

73. *Id.* at 1168-69, [1974 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8246, at 9151-57-58.

74. See *supra* notes 18-33 and accompanying text.

75. See van Rijn, *supra* note 15, at 128-29. The Commission in *Christiani & Nielsen* did not use this precise language but the implication is the same. See *supra* note 33 and accompanying text.

76. See van Rijn, *supra* note 15, at 129.

77. See, e.g., *Centrafarm*, 1974 E. Comm. Ct. J. Rep. 1147, [1974 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8246; *Christiani & Nielsen*, 12 J.O. COMM. EUR. (No. L 165) 12 (1969), [1969-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9308. These cases stand for the proposition that companies of the same group may see

economic unity inevitably leads to the conclusion that the affiliated companies are incapable of restricting competition between themselves.⁷⁸ Therefore, in a relationship between a parent company and its economically interdependent subsidiary article 85 is to some extent inapplicable. However, because article 85 is concerned with competition among all market participants and not only with competition between the parties to an agreement or concerted practice,⁷⁹ a second factor is relevant to the analysis. The second factor is whether the intra-group practices restrict competition between the concern companies and independent third parties.⁸⁰

Although this differentiated approach permits the application of article 85 to intra-concern practices even when economic unity exists between the affiliated firms, the Commission and the Court of Justice have nevertheless demonstrated a reluctance to subject single-firm behavior to article 85 liability. Indeed, while the intra-group arrangements or concerted activities in many cases did have external effects, the Commission and the Court of Justice still exempted the practices from the prohibitions of article 85. For instance, in *Christiani & Nielsen*,⁸¹ as a result of the market sharing arrangement, potential customers outside the Netherlands were prevented from buying from Christiani & Nielsen. Even if ample competition did exist, as the Commission noted,⁸² price differentials for the products in question may have restricted the competitive position of non-related third parties.⁸³ Therefore, it remains uncertain under what circumstances practices between related

their agreements subject to scrutiny under article 85(1) if they concern subjects other than allocation of tasks within the group. See *supra* note 65 and accompanying text. Such scrutiny can only take place if each is a separate enterprise for the purposes of article 85(1). B. HAWK, *supra* note 2, at 74. Moreover, in *Kodak*, 13 J.O. COMM. EUR. (No. L 147) 24 (special ed. 1970), [1969-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9378, the fact that the Commission abided by the strictly legal notion of enterprises, see *supra* notes 47-52 and accompanying text, and *Béguelin*, 1971 C.J. Comm. E. Rec. 949, 11 Common Mkt. L.R. 81, does not contradict this interpretation. See *supra* notes 53-62 and accompanying text.

78. See van Rijn, *supra* note 15, at 129.

79. See van Oven, *supra* note 25, at 111; van Rijn, *supra* note 15, at 129-30; *supra* note 17 and accompanying text.

80. See van Rijn, *supra* note 15, at 130; Forcione, *supra* note 9, at 1423.

81. 12 J.O. COMM. EUR. (No. L 165) 12 (1969), 1 COMMON MKT. REP. (CCH) ¶ 2412.26.

82. See *supra* note 23.

83. See Koppensteiner, *supra* note 25, at 293-94.

firms will have substantial effects outside the corporate group sufficient to trigger a finding of an agreement or concerted practice in violation of article 85.

Two recent decisions, *Kawasaki*⁸⁴ and *Johnson & Johnson*,⁸⁵ provide further evidence of the Commission's reluctance to find an agreement between economically interdependent firms. These decisions concerned the application of article 85 to restrictions imposed upon dealers by wholly owned British subsidiaries of Japanese and United States multinational enterprises.⁸⁶ In both cases, an affiliated German company provided assistance in enforcing the restrictions.⁸⁷ Analyzing the restrictive practices similarly, the Commission, in both instances, readily found an article 85 violation by identifying an agreement between the subsidiaries and the restrained dealers.⁸⁸ While in *Kawasaki* the fine was imposed only on the British subsidiary, in *Johnson & Johnson*, the parent company, the British subsidiary, and the German company were jointly and severally fined.⁸⁹

84. 22 O.J. EUR. COMM. (No. L 16) 9 (1979), 24 Common Mkt. L.R. 448.

85. 23 O.J. EUR. COMM. (No. L 377) 16 (1980), 31 Common Mkt. L.R. 287.

86. *Johnson & Johnson*, 23 O.J. EUR. COMM. (No. L 377) at 16-17, 31 Common Mkt. L.R. at 289-91; *Kawasaki*, 22 O.J. EUR. COMM. (No. L 16) at 9, 24 Common Mkt. L.R. at 450.

87. *Johnson & Johnson*, 23 O.J. EUR. COMM. (No. L 377) at 17, 31 Common Mkt. L.R. at 291; *Kawasaki*, 22 O.J. EUR. COMM. (No. L 16) at 9, 24 Common Mkt. L.R. at 450.

88. *Johnson & Johnson*, 23 O.J. EUR. COMM. (No. L 377) at 23, 31 Common Mkt. L.R. at 297; *Kawasaki*, 22 O.J. EUR. COMM. (No. L 16) at 14, 24 Common Mkt. L.R. at 457. In both cases, the Commission defined the agreement as the restrictive sales contract between the subsidiaries and their respective dealers, but in neither case did the Commission join the dealers in the suit. In *Kawasaki*, the Commission stated that the dealers had no interest in enforcing the ban because it was a restriction on their commercial freedom. 22 O.J. EUR. COMM. (No. L 16) at 14, 24 Common Mkt. L.R. at 457. In *Johnson & Johnson*, the Commission similarly justified its refusal to include the dealers in the suit by stating that "[t]he restrictive agreements with the [dealers] were only the vehicle for this protective policy, which was indeed contrary to the interests of those [dealers]." 23 O.J. EUR. COMM. (No. L 377) at 23, 31 Common Mkt. L.R. at 296.

89. *Johnson & Johnson*, 23 O.J. EUR. COMM. (No. L 377) at 27, 31 Common Mkt. L.R. at 304; *Kawasaki*, 22 O.J. EUR. COMM. (No. L 16) at 16, 24 Common Mkt. L.R. at 460. There is a discrepancy in these two decisions with respect to imposition of liability. The Commission's finding in *Kawasaki* that the subsidiaries and the parent company form "one economic unit" seems inconsistent with the imposition of a fine only on the subsidiary. As one economic unit, the conduct of the subsidiary should have been regarded as the conduct of the parent company for the purposes of article 85. For a discussion of the economic unity doctrine in the context of imputation of

These decisions can be seen as an indirect and informal condemnation of the group policy of maintaining and protecting national markets.⁹⁰ However, it is important to note that the Commission deliberately defined the subsidiaries as separate enterprises and identified the agreement as existing between the members of the concern group and an independent third party.⁹¹

D. *The Criteria for Economic Unity*

Assuming that the Court and the Commission have at least partially repudiated the application of article 85 to the relations between economically interdependent firms, it still remains to be seen under what circumstances a parent company and its subsidiary or sister subsidiary companies will be considered one economic unit. For instance, in *Christiani & Nielsen*,⁹² one basis for the Commission's finding of economic unity was that the parent company could have set up branch offices rather than legally independent subsidiaries.⁹³ This suggests that complete ownership of capital is an important consideration in assessing whether the related entities form one economic unit. However, in *Christiani & Nielsen*, the Commission also argued that the parent company had the power to control the subsidiary's management.⁹⁴ This argument indicates that the parent company's mere power of control over its subsidiary may justify a finding that the two are an economic entity.⁹⁵

Other cases further evidence the confusion regarding the criteria for economic unity. For instance, in *Kodak*,⁹⁶ the actual exercise of power by the parent company was the decisive fac-

substantive liability to foreign enterprises for the conduct of a local subsidiary, see B. HAWK, *supra* note 2, at 51-54; Koppensteiner, *supra* note 25, at 309-13.

90. See van Rijn, *supra* note 15, at 124.

91. See *Johnson & Johnson*, 23 O.J. EUR. COMM. (No. L 377) at 23, 31 Common Mkt. L.R. at 297; *Kawasaki*, 22 O.J. EUR. COMM. (No. L 16) at 14, 24 Common Mkt. L.R. at 457. One commentator has suggested that the *Johnson & Johnson* decision could be interpreted as finding an agreement between three wholly owned subsidiaries. See B. HAWK, *supra* note 2, at 75.

92. 12 J.O. COMM. EUR. (No. L 165) 12 (1969), [1969-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9308.

93. See *supra* notes 28-29 and accompanying text.

94. See *supra* notes 30-31 and accompanying text.

95. See Koppensteiner, *supra* note 25, at 295.

96. 13 J.O. COMM. EUR. (No. L 147) 24 (special ed. 1970), [1969-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9378.

tor in the Commission's determination that the subsidiaries were incapable of autonomous economic activity.⁹⁷ In *Centrafarm*⁹⁸ and *Béguelin*,⁹⁹ however, the Court of Justice found that the subsidiaries did not enjoy economic autonomy, presumably on the sole basis that they were wholly owned.¹⁰⁰ Therefore, these decisions do not indicate whether 100% ownership, the possibility of control or the actual exercise of power supports a finding of economic unity that may result in an article 85 exemption for the intra-group practices.

A recent case, *Flat Glass*,¹⁰¹ raises further questions about the degree of control necessary for there to exist economic unity between the companies of the same group. In that case, the Commission held that two parent companies, Saint-Gobain and BSN, and their respective subsidiaries, Glaceries de Saint-Roch and Glaverbel, violated article 85 by restricting competition in the Benelux countries.¹⁰² The restrictive practices included price fixing, market sharing and exchanges of detailed information to ensure compliance with the unlawful agreements.¹⁰³ In its ruling, the Commission failed to invoke the economic unity doctrine¹⁰⁴ and imposed fines on both the parent company and the individual subsidiaries. One of these subsidiaries was wholly owned and the other was majority-owned.¹⁰⁵ The Commission reasoned that the parent should

97. See *supra* notes 45-46 and accompanying text.

98. 1974 E. Comm. Ct. J. Rep. 1147, [1974 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8246.

99. 1971 C.J. Comm. E. Rec. 949, 11 Common Mkt. L.R. 81.

100. See *supra* text accompanying notes 58 and 69.

101. *Agreements and concerted practices in the flat-glass sector in the Benelux countries (Flat Glass)*, 27 O.J. EUR. COMM. (No. L 212) 13 (1984), [1982-1985 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 10,612.

102. *Id.* at 22, [1982-1985 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 10,612, at 11,474.

103. *Id.* at 14-18, [1982-1985 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 10,612, at 11,465.

104. Although the Commission did not explicitly invoke the economic unity doctrine, it did emphasize the degree of independence enjoyed by the subsidiaries. This approach is consistent with the economic unity doctrine.

105. 27 O.J. EUR. COMM. (No. L 212) at 13-14, [1982-1985 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 10,612, at 11,466-467. Through its Belgian holding company, BSN wholly owned Glaverbel and another subsidiary until May 1981. In May 1981, BSN sold 80% of the two companies' equity to a Japanese group, Asahi Glass. At the time of the decision, Asahi owned 78% of Glaverbel. Saint Roch was majority-owned during the relevant period by Saint-Gobain. Saint-Gobain's stake was 50.05% until 1982 when it rose to 66.5% *Id.*

be apportioned some of the responsibility because "the infringements were part of arrangements devised at group level."¹⁰⁶ With respect to subsidiaries, the Commission stated that they must also be apportioned some of the penalty "in view of the degree of independence they enjoyed and the active part they played in setting up and monitoring the agreements and practices."¹⁰⁷

While the Commission may have based the violation on a horizontal conspiracy between the parent companies, it did not carefully delineate the parties between whom the agreement or concerted practice was found. The Commission clearly identified the subsidiaries as separate enterprises and vaguely referred to the coordinated activity between all parties involved as agreements within the meaning of article 85.¹⁰⁸ Thus, the decision can conceivably be interpreted as finding the required agreement between the parent companies and their respective subsidiaries.

The Commission's reasoning supports this conclusion. Indeed, the Commission determined that, even though the parent company wholly owned one of its subsidiaries, the subsidiary had freedom in the management of its affairs sufficient to be capable of autonomous behavior.¹⁰⁹ In addition, the Commission found that, despite evidence that the parent asserted its power over the subsidiaries, control was effectively in independent hands.¹¹⁰ Although previous decisions are not entirely clear, both of these findings could support the conclusion that the intra-group practices violated article 85 because the related firms did not constitute an economic entity.

Flat Glass, therefore, suggests that the Commission will as-

106. *Flat Glass*, 27 O.J. EUR. COMM. (No. L 212) at 21, [1982-1985 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 10,612, at 11,474.

107. *Id.*

108. *Id.* at 18, [1982-1985 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 10,612, at 11,470.

109. *Id.* at 21, [1982-1985 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 10,612, at 11,474. This finding is consistent with the Commission's holding in *B.M.W. v. Commission of the European Community*, 1979 E. Comm. Ct. J. Rep. 2435, 2475-76 [1978-1979 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8548, at 7878, where it stated: "The bond of economic dependence existing between a parent company and the subsidiary does not preclude a divergence in conduct or even a divergence in interests between the two companies." *Id.*

110. 27 O.J. EUR. COMM. (No. L 212) at 21, [1982-1985 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 10,612, at 11,473-474.

sess whether economic interdependence exists between affiliated firms by focusing on the degree of leeway a subsidiary is given in managing its affairs. Ownership of capital, power of control or actual exercise of control, although contributing factors, apparently are not the decisive criteria for determining economic unity.

II. THEORETICAL AND PRACTICAL DIFFICULTIES WITH A LIMITED ECONOMIC UNITY DOCTRINE

The notion of a limited economic unity doctrine presents practical and theoretical difficulties. As a practical matter, a limited economic unity doctrine exempting only arrangements concerned "merely with the internal allocation of tasks"¹¹¹ would make almost every parent-subsidary organization illegitimate. Indeed, it is difficult to conceive of an internal decision that does not, in some sense, restrain trade outside the corporate group.¹¹² Any agreement or coordinated action with respect to such issues as pricing, market or customer allocation could result in a violation of article 85.¹¹³ This approach merely limits the finding of an agreement or concerted practice without providing clear guidelines for determining whether the concerted activity by related corporations violates article 85.

Furthermore, competition policy should not depend upon an enterprise's choice of corporate structures. An enterprise with subsidiaries controlled by the parent does not differ functionally or substantially from a single corporation with distinct divisions.¹¹⁴ Because divisions within a single corporation can-

111. *Centrafarm*, 1974 E. Comm. Ct. J. Rep. 1147, 1167, [1974 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8246, at 9151-58; cf. *Christiani & Nielsen*, 12 J.O. COMM. EUR. (No. L 165) 12 (1969), 1 COMMON MKT. REP. (CCH) ¶ 2412.26.

112. See *supra* text accompanying notes 81-83; Forcione, *supra* note 9, at 1437; Koppensteiner, *supra* note 25, at 293; Note, 'Conspiring Entities' Under Section 1 of the Sherman Act, 95 HARV. L. REV. 661, 663 (1982); Note, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act: A Suggested Standard*, 75 MICH. L. REV. 717, 733 (1977).

113. See Forcione, *supra* note 9, at 1437; Koppensteiner, *supra* note 25, at 293; Note, 'Conspiring Entities' Under Section 1 of the Sherman Act, 95 HARV. L. REV. 661, 663 (1982); Note, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act: A Suggested Standard*, 75 MICH. L. REV. 717, 727 (1977).

114. See Forcione, *supra* note 9, at 1432; Note, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act: A Suggested Standard*, 75 MICH. L. REV. 717, 733 n.95 (1977).

not agree with each other or with the corporation,¹¹⁵ the mere fact of separate incorporation should not justify the application of article 85. To find an agreement between separate corporations of the same group is to elevate form over substance.¹¹⁶

There are also legitimate business reasons why an enterprise might structure its organization in the form of a parent corporation with separately incorporated subsidiaries.¹¹⁷ For example, the use of subsidiaries can facilitate overseas operations, provide managerial incentives, maintain goodwill associated with particular units of a firm, and promote access to capital markets.¹¹⁸ Finding an agreement among affiliated firms when the parent controls the operations of the subsidiaries would discourage firms from seeking these socially beneficial advantages that can be achieved from a parent-subsidiary organization.¹¹⁹

Finally, the purpose of article 85 is to prevent distortion of competition.¹²⁰ Therefore, it can only be intended to apply to persons who are capable of independently determining their policy with respect to competition.¹²¹ If an entity has no ability to determine its own market behavior, a rule of law that prohibits it from acting in a particular manner is meaningless.¹²² Consequently, an article 85 violation should be found only if the persons or entities are sufficiently independent to carry on their own business.¹²³ Economic substance, and not legal form, should be the decisive and only criterion for determining the applicability of article 85 to intra-group practices.¹²⁴

115. See *supra* note 9 and accompanying text.

116. See Koppensteiner, *supra* note 25, at 294. Koppensteiner suggests that "from a policy point of view it makes no sense to apply Article 85 if the addressees are able to avoid the impact of the law by just changing the corporate structure of the subsidiary into a mere branch of the parent company." *Id.*

117. McQuade, *Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act*, 41 VA. L. REV. 183, 186 (1955).

118. *Id.*

119. See Note, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act: A Suggested Standard*, 75 MICH. L. REV. 717, 738 (1977).

120. See van Oven, *supra* note 25, at 117; Commission Decision of July 16, 1969, 2 COMMON MKT. REP. (CCH) ¶ 9313, at 8679; Conclusions of Avocate General Roemer in *Consten & Grundig*, 2 COMMON MKT. REP. (CCH) ¶ 8046, at 7669 (1966).

121. See van Oven, *supra* note 25, at 117; Koppensteiner, *supra* note 25, at 294.

122. *Id.*

123. *Id.*

124. See van Oven, *supra* note 25, at 117; Koppensteiner, *supra* note 25, at 297.

One commentator has suggested that article 85 should apply in certain circumstances to agreements or concerted practices between economically interdependent entities when they have the potential of directly affecting the main goal of the EEC, the integration of national markets into a common market.¹²⁵ To exempt intra-group practices from the prohibitions of article 85, however, is not tantamount to permitting large corporate enterprises to divide up the national markets among their respective subsidiaries.¹²⁶ For example, if a parent-subsidiary organization implements a policy of regional price differentiation and the price differentials between two countries are large enough, customers of the subsidiary operating in one country can import the goods into the other country.¹²⁷ Article 85 clearly prevents the parent-subsidiary organization from avoiding this eventuality by enjoining dealers from exporting the concern articles.¹²⁸ Furthermore, Community law forbids concern companies from partitioning the Common Market through the manipulation of parallel patents,¹²⁹ copyrights¹³⁰ or trademarks.¹³¹

125. See van Rijn, *supra* note 15, at 130-38. van Rijn argues that article 85(1) should be applicable to market partitioning practices that exceed the normal allocation of markets and aim to isolate markets within the EEC. He advocates the application of article 85(1) to direct or indirect export prohibitions or measures hindering parallel imports. *Id.*; see Schröter, *The Application of Article 85 of the EEC Treaty to Distribution Agreements — Principles and Recent Developments*, in 1984 FORDHAM CORP. L. INST. 375, 392 (B. Hawk ed.). Schröter interprets the general rule that article 85 may apply to agreements or concerted practices within a group if they concern something other than the internal allocation of tasks. He states that it might be a violation of article 85(1) if a parent company and its subsidiary had an exclusive distribution agreement and the parent ordered the subsidiary not to fill orders coming from other EEC member states where another subsidiary was responsible for distribution. *But see* Holley's Response in *Panel Discussion on Distribution Under EEC Law* in 1984 FORDHAM CORP. L. INST. 503, 512 (B. Hawk ed.) (expressing the view that Schröter's interpretation does not necessarily reflect present Commission enforcement policy).

126. Koppensteiner, *supra* note 25, at 300.

127. *Id.*

128. See, e.g., *Johnson & Johnson*, 23 O.J. EUR. COMM. (No. L 377) 16 (1980), 31 Common Mkt. L.R. 297; *Kawasaki*, 22 O.J. EUR. COMM. (No. L 16) 9 (1979), 24 Common Mkt. L.R. 448.

129. See, e.g., *Centrafarm*, 1974 E. Comm. Ct. J. Rep. 1147, 1167, [1974 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8246 (applying article 36).

130. See, e.g., *Deutsche Grammophon Gesellschaft GmbH v. Metro-SB-Grossmarkte GmbH*, 1971 E. Comm. Ct. J. Rep. 487, [1971-1973 Transfer Binder] COMMON MKT. REP. ¶ 8106.

131. See, e.g., *Centrafarm*, 1974 E. Comm. Ct. J. Rep. 1147, 1167, [1974 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8246; *Van Zuylen Frères v. Hag A.G.*, 1974 E.

III. *ALTERNATIVE ANALYSIS FOR DETERMINING
THE APPLICABILITY OF ARTICLE 85 TO
PRACTICES BETWEEN RELATED COMPANIES*

The applicability of article 85 to agreements or concerted activity between affiliated firms should be assessed by focusing upon the degree of managerial control the parent company exercises over its subsidiaries. Such an approach is consistent with past Commission decisions and Court of Justice judgments and furthers the policy goals of the Community without exceeding the intended scope of article 85.

If a parent company controls the day-to-day operations of its subsidiaries, an agreement should not be found on the basis of coordinated activity between them. Even though a fictional plurality exists in separate corporate entities, several controlled companies belonging to the same group act as a single company whose actions are guided by one corporate consciousness.¹³² Therefore, such companies should be viewed as a single entity, whose various parts are incapable of conspiring with one another.¹³³

A standard based on day-to-day control is consistent with the central purpose of article 85, the prohibition of concerted action among two or more independent entities.¹³⁴ Implicit in article 85 is the notion that the agreement must be among independent competitive units, that is, an agreement between two or more independent forces on concerted action or restraint.¹³⁵ If a parent company controls the daily behavior of a subsidiary, there is no justification for article 85 scrutiny because no such disparity of interests exists.

Support for a theory based on control can also be found in cases that seek to hold the parent liable for the behavior of its

Comm. Ct. J. Rep. 731, [1974 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8230. A parent-subsidiary organization's manipulation of its trademark for the purposes of achieving territorial division may also be a violation of article 86 of the Treaty of Rome as an abuse of a dominant position. See *infra* note 140; van Oven, *supra* note 25, at 116.

132. See Mestmäcker, *supra* note 34, at 632-33; Ellis, *Joint Venture Intra-Enterprise Arrangements and Horizontal Arrangements Between Independent Companies*, in PROCEEDINGS OF THE CONFERENCE ON ANTITRUST AND THE EUROPEAN COMMUNITIES 95 (1963).

133. *Id.*; cf. van Oven, *supra* note 25, at 117.

134. See van Oven, *supra* note 25, at 116-17.

135. *Id.*

subsidiary.¹³⁶ If day-to-day control exists, the Commission and the Court of Justice disregard the form of independent entities and, on the basis of the substance of the relationship, hold the parent company liable.¹³⁷ Acceptance of a control standard in this context supports its application to the finding of an agreement or concerted practice between two or more entities, for it is inconsistent to consider the parent and subsidiary as independent entities only for the purposes of creating the plurality required under article 85.¹³⁸

Furthermore, applying article 85 to a parent-subsidiary enterprise is unlikely to alleviate anticompetitive behavior in the Community. Such an application would only encourage a parent-subsidiary organization to consolidate into a single entity with divisions and forego the advantages of a parent-subsidiary structure.¹³⁹ A better method of preventing market partitioning and other practices that contravene the EEC's goal of market integration would be to apply article 86¹⁴⁰ to unilateral restrictive practices of a single firm that has a domi-

136. See, e.g., *Imperial Chem. Indus. v. Commission*, 1972 E. Comm. Ct. J. Rep. 619, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8161. The Commission, in considering the possibility of imputing the subsidiaries activities to the parent company, stated:

When a subsidiary company does not enjoy any real autonomy in the determination of its course of action on the market, the prohibitions of Article 85(1) E.E.C. may be considered inapplicable in the relations between it and its parent company, with which it then forms a single economic unit.

See also *Commercial Solvents Corp. v. Commission*, 17 O.J. COMM. EUR. (No. L 299) 51 (1974), 13 Common Mkt. L.R. 309; *Community v. Hoffman-LaRoche*, 19 O.J. COMM. EUR. (No. L 223) 27 (1976), 18 Common Mkt. L.R. D25.

137. *Id.*

138. *But cf.* B. Hawk, *supra* note 2, at 54. Hawk suggests that "[t]he policies underlying these . . . issues may not be sufficiently similar to permit a single standard." *Id.*

139. See *supra* notes 117-19 and accompanying text.

140. Treaty of Rome, 298 U.N.T.S. at 48-49 (unofficial English translation). The official English version of article 86, 1973 Gr. Brit. T.S. No. 1 (Part II) (Cmd. 5179-II) reads as follows:

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as in-

nant position in the Common Market.¹⁴¹

CONCLUSION

Under a doctrine of economic unity, the Commission and the Court of Justice have suggested that agreements and coordinated activity between a parent company and its subsidiaries or between sister subsidiary companies are exempt from the prohibitions of article 85 when the subsidiary does not determine its own market behavior. A careful analysis of the relevant Commission decisions and Court judgments, however, indicates that the economic unity exemption to the prohibitions of article 85 is a narrow one. Indeed, economic interdependence has not been the only relevant factor in assessing the applicability of article 85 to coordinated activity between related firms. In addition to economic interdependence, both the Commission and the Court have examined whether the agreements restrict competition between the concern companies and independent third parties. In so doing, the Commission and the Court have reserved the right to apply article 85 to agreements or coordinated activity between related firms if the agreements concern something other than the mere internal allocation of tasks between the enterprises.

This approach, however, provides no clear guidelines for determining the applicability of article 85 to intra-group practices and is inconsistent with the purpose of article 85, which is to prevent the distortion of competition by persons who are capable of independently determining their policy with respect

compatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

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

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to the acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Id. For an analysis of article 86, see Lang, *Some Aspects of Abuse of Dominant Positions in European Community Antitrust Law*, 3 *FORDHAM INT'L L. FORUM* 1 (1979-1980).

141. It should be noted, however, that article 86 requires market dominance as well as misuse. See EEC Treaty, *supra* note 1, art. 86.

to competition. A better approach is to assess the applicability of article 85 to intra-group practices by examining the degree of managerial control the parent exercises over its subsidiaries. If day-to-day control exists, an agreement should not be found between them because the separate entities are not sufficiently independent to be capable of conspiring with one another.

Sarah M. Ward

