Subsidiarity and Competition: Decentralized Enforcement of EU Competition Laws

Roger P. Alford

Follow this and additional works at: http://scholarship.law.cornell.edu/cilj

Part of the Law Commons

Recommended Citation


Available at: http://scholarship.law.cornell.edu/cilj/vol27/iss2/1
Subsidiarity and Competition: Decentralized Enforcement of EU Competition Laws

Introduction

No longer simply a pedagogical theory of power sharing between the European Union (EU)\(^1\) and its Member States, subsidiarity is now enshrined in the Maastricht Treaty as a "constitutional" mandate,\(^2\) delineating the proper division of shared powers between them. Article 3b of the Maastricht Treaty provides, in relevant part, that

\[
\text{In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the member-States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.} \quad (3)\]

The Maastricht Treaty thus establishes what may be described as an "allocation of shared powers" doctrine that requires the Union and national institutions to compete for the right to exercise their duties in instances of concurrent jurisdiction. This competition is based on governmental effectiveness but has a distinct presumption favoring the decentralized applica-
tion of Union tasks. Alternatively, as French Prime Minister Edouard Balladur inelegantly defined it, subsidiarity is "[a]nother word for minding your own business—something the European Commission should do a lot more of."

Consistent with this commitment toward decentralization, subsidiarity is now finding practical application in the enforcement of EU Treaty provisions. One noteworthy example is the enforcement of EU competition laws. In recent years, the European Court of Justice, the Court of First Instance, and the Commission of the European Communities (the Commission) all have taken positive steps to provide more flexibility in enforcing these laws through greater Member State court involvement in their enforcement. More importantly, recent events indicate that the concept of subsidiarity is increasingly becoming a fundamental objective in the enforcement of EU competition laws. As Sir Leon Brittan emphasized in his farewell speech as Commissioner for Competition in December 1992:

"The Community's competition policy has always been underpinned by the subsidiarity principle . . . . The entry into force of Article 3b [of the Maastricht Treaty] has, however, provided the Commission with the opportunity to look afresh at the institutional balance between the Community and the Member State's competition authorities to determine whether the existing system of jurisdiction allocation can be further refined, both from the substantive and procedural viewpoints."

4. Thus, subsidiarity is grounded in the belief that Member States should transfer tasks to the Union only if such tasks cannot be effectively accomplished at the national level or if the effects of such tasks extend beyond national frontiers. MARC WILKE & HELEN WALLACE, SUBSIDIARITY: APPROACHES TO POWER-SHARING IN THE EUROPEAN COMMUNITY 36 (Royal Institute of International Affairs, Discussion Paper No. 27, 1990). Put differently, Article 3b resolves questions of concurrent jurisdiction between Member States and the Union by permitting Union institutions to act only if Member States are unable sufficiently to achieve the desired Union objectives such that they will be better achieved at the Union level. See generally Joel P. Trachtman, L'Etat, Clet Nous: Sovereignty, Economic Integration and Subsidiarity, 33 HARV. INT'L L.J. 459, 469 (1992) ("If subsidiarity is viewed as establishing a rule that issues should be addressed at the level where they can be addressed most effectively, this principle establishes a competition for governmental effectiveness among levels of government."). "Concurrent competence" covers a broad range of shared Union and Member State competence in which both Union and Member States have the power to act. Under the subsidiarity doctrine, the Union would assert its authority only when it felt the need and would leave Member States free to act on all aspects on which the Union had not taken action. Toth, supra note 2, at 1088. But see Vlad Constantinesco, Who's Afraid of Subsidiarity?, 11 Y.B. EUR. L. 33, 50 (1991)

5. Still Looking for a Role, ECONOMIST, June 26, 1993, at 64.

6. Subsidiarity is recognized as a fundamental principle of Community law. Constantinesco, supra note 4, at 45.

Toward this end, the Commission adopted a Notice on Cooperation with National Courts in Applying Article 85 and 86 \(^8\) on February 13, 1993, to "provide a catalyst leading to wider implementation of the Community competition rules at the national level." \(^9\) As shall be discussed below, the Notice on Cooperation is the Commission's most explicit pronouncement to date committing the Union to the doctrine of subsidiarity in the enforcement of EU competition laws.

The purpose of this article is to examine how the European Union has applied, and potentially will apply, the principle of subsidiarity in the enforcement of EU competition laws. This article thus focuses on how the Union envisages national court participation in the application and enforcement of EU competition laws rather than how, in practice, Member State courts have exercised their concurrent jurisdiction in enforcing Articles 85 and 86. Part One provides a brief introduction to EU competition law enforcement and examines two recent decisions by the Court of Justice and the Court of First Instance clarifying the relationship between the Commission and the national courts in enforcing EU competition rules. Part Two overviews the procedures national courts should follow in enforcing competition rules as recently set forth in the Commission's 1993 Notice on Cooperation with National Courts. Part Three assesses the impact decentralization may have on the Commission's and national courts' enforcement of EU competition law. Finally, Part Four discusses the potential for enhanced national court enforcement of competition laws through national court review of pro-competitive restraints of trade.

I. Power Sharing between National Courts and the Commission

A. Introduction to EU Competition Law Enforcement

Articles 85 and 86 of the EEC Treaty set forth the basic competition rules applicable to private undertakings. \(^10\) Article 85 governs agreements, associations, and concerted practices between private undertakings, \(^11\) and

---

10. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY].
11. Article 85 provides:
1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:
   (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
   (b) limit or control production, markets, technical development, or investment;
   (c) share markets or sources of supply;
   (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
Article 86 governs abuses of a dominant market position. Article 85(1) presents a broadly-worded prohibition on agreements or practices affecting trade between Member States which have the object or effect of preventing, restricting, or distorting competition within the Common Market. Pursuant to Article 85(2), any agreements or decisions prohibited by Article 85(1) are “automatically void.” However, under Article 85(3) an agreement or practice may be exempt from the Article 85(1) prohibition and the Article 85(2) nullification if the agreement or practice, inter alia, (i) improves the production and distribution of goods or promotes technical progress; (ii) allows consumers a fair share of the resulting benefits; (iii) imposes no restrictions that are not indispensable to these objectives; and (iv) does not eliminate competition with respect to a substantial part of the products in question.

The principal legal measure establishing the procedural rights and obligations in the enforcement of Articles 85 and 86 is Regulation 17.13

---

12. Article 86 provides:
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 incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:
(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Id. art. 86. Because Article 86 is directly effective, national courts may fully apply and enforce Article 86 relating to the abuse of a dominant position. Case 127/73, BRT v. SABAM, 1974 E.C.R. 51, 62. Accordingly, this article addresses only the hurdles that national courts encounter in enforcing Article 85.
Regulation 17 confers broad enforcement powers upon the Commission to ensure the observance of the EU competition law provisions. Under Regulation 17, the Commission has a general duty to enforce the competition laws against infringements committed during private undertakings. The Commission exercises this enforcement duty by launching investigations, inspecting books, rendering judicial decisions, adopting interim measures, imposing fines and other sanctions, and bringing infringement proceedings before the Court of First Instance or the Court of Justice. Regulation 17 also gives the Commission exclusive power to grant an Article 85(3) exemption. Thus, under Regulation 17, the Commission wields real executive powers to enforce and implement the EU competition laws.

In applying Article 85(1), the Commission generally has refused to balance the pro- and anti-competitive effects of trade restrictive provisions. Rather, it has opted to cast the net of Article 85(1) very broadly, bringing the great preponderance of agreements within its ambit. As a result, a large number of agreements or practices are caught by Article 85(1), and to be valid, such agreements must be exempted under Article 85(3). This expansive reading of Article 85(1) coupled with the Commission's exclusive exemption power has resulted in an enormous backlog of applications before the Commission. As recent commentators have noted, the Commission's approach has "created an absurd discrepancy between the Commission's theoretical jurisdiction and its capacity to generate the decisions called for by its over-broad interpretation of Article 85(1)."

Indeed, the Commission recognized this dilemma when, in an
earlier draft of the Notice on Cooperation, it conceded that "it has now become clear that—because of the extraordinary number of cases—the supposition of a formal [Article 85(3)] decision in every instance does not match the reality." 21

In an effort to deal with the unmanageable workload, in recent years the Commission has attempted to overhaul the administration of the competition rules by (i) issuing informal "comfort letters" 22 indicating that an agreement is not caught by Article 85(1); (ii) adopting "block exemptions" 23 for classes of agreements that do not require individual attention; (iii) expediting the notification process through modifications in "Form A/B," 24 and (iv) reorganizing the Commission Directorate General responsible for competition enforcement, DG-IV, to provide an accelerated and more consistent decision-making process. 25 While these changes have created a more efficient process that brings greater clarity to the competition rules, they do not provide a wholly satisfactory response to

---


22. Comfort letters are informal non-binding administrative letters from the Commission indicating that the file has been closed on the notified agreement because it does not infringe Article 85(1) or Article 86, or because an agreement falling within Article 85(1) would be eligible for exemption under Article 85(3). Comfort letters provide an expedited but legally uncertain mechanism for parties to ascertain the compatibility of the notified agreements with EU competition laws. See Joined Cases 253/78 & 1-3/79, Procureur de la République v. Giry, 1980 E.C.R. 2327, 2373-74; Case 99/79, Lancôme v. Etox, 1980 E.C.R. 2511, 2532-33; Case 31/80, L’Oréal v. De Nieuwe AMCK, 1980 E.C.R. 3775, 3788-90.

23. A block exemption permits an agreement falling within the provisions of Article 85(1) to be automatically exempt pursuant to Article 85(3), provided the agreement falls within the criteria set forth in the block exemption regulation. Both the Commission and the national courts may determine whether the agreement comports with the requirements of the block exemption regulation. Block exemptions expedite the process of determining an agreement's compatibility with Article 85, but limit the parties' contractual freedom by forcing agreements to be fashioned so as to comply with the so-called "white" list of acceptable contractual provisions enumerated in the block exemption. See Case 59/77, De Bloos v. Bouyer, 1977 E.C.R. 2359, 2370; Case 170/83, Hydrotherm v. Compact, 1984 E.C.R. 2999, 3013; Case 10/86, VAC France v. Magne, 1986 E.C.R. 4071, 4088-89. See, e.g., Commission Regulation 1983/83 of 22 June 1993 on the Application of Article 85(3) of the Treaty to Categories of Exclusive Distribution Agreements, 1983 O.J. (L 173) 1; Commission Regulation 1984/83 of 22 June 1983 on the Application of Article 85(3) of the Treaty to Categories of Exclusive Purchasing Agreements, 1983 O.J. (L 173) 5; Commission Regulation 4087/88 of 30 November 1988 on the Application of Article 85(3) of the Treaty to Categories of Franchise Agreements, 1988 O.J. (L 359) 46.

24. Form A/B is a special form used to apply for an Article 85(3) exemption or to seek confirmation that the agreement does not run afoul of Article 85(1) or Article 86 (so-called "negative clearance"). Form A/B, as revised, requires, inter alia, full details of the agreement, a description of the market, and information about the business, turnover, and market shares of the parties. WYATT & DASHWOOD, supra note 16, at 432-34; CHRISTOPHER BELLAMY & GRAHAM D. CHILD, COMMON MARKET LAW OF COMPETITION 487 (3d ed. 1987).

the delays created by the centralization of power and the Commission's lack of adequate resources.\textsuperscript{26} As a result, the Commission has proposed alternative solutions.

One such proposed change calls for greater national court enforcement of EU competition laws. Since the 1980s, the Commission has sought to reinforce the role national courts play in the enforcement of EU competition rules.\textsuperscript{27} As the Commission indicated in its Thirteenth Report on Competition Policy, "[t]he Commission believes it desirable that the judicial enforcement of Article [sic] 85 and 86 should also include the award of damages to injured parties, because this would render Community law more effective."\textsuperscript{28} In the Commission's view, national court enforcement would lead to fuller application and use of EU competition laws, provide an expedited and efficient means to challenge infringements, and reduce the Commission's responsibilities, permitting it to handle its caseload more effectively.\textsuperscript{29}

Despite the Commission's professed desire to encourage national courts to provide remedies to litigants seeking protection of Union rights, efforts to do so have thus far proven unsuccessful.\textsuperscript{30} Progress is difficult because national courts are currently unable fully to apply and enforce the EU competition rules prohibiting unlawful restraints of trade in the Com-

\textsuperscript{26} According to one authority, the Commission's lack of adequate resources and its requirement for a fully reasoned opinion on each Article 85(3) request for exemption results in an average delay of two to three years. \textit{Bellamy \& Child}, \textit{supra} note 24, at 135, (citing, e.g., Mitchell Cotts/Sofiltr, 1988 O.J. 1987 (41 L) 31 (2 years, 4 months); Boussois/Interpane, 1987 O.J. (50 L) 30 (2 years, 3 months)).

\textsuperscript{27} \textit{See} Commission of the European Communities, Fifteenth Report on Competition Policy ¶ 38 (1986); Commission of the European Communities, Sixteenth Report on Competition Policy ¶¶ 41-42 (1987). Since the prohibitions of Article 85 and 86 are directly effective, private parties may raise a violation of these articles before national courts within the European Union. As Articles 85(1) and 86 tend by their very nature to produce direct effects in relations between individuals, these Articles create direct rights for the individuals concerned, rights which national courts must safeguard. \textit{See} Case 127/73, BRT v. SABAM, 1974 E.C.R. 51, 62. Moreover, the Court of Justice in \textit{Van Gend en Loos} envisioned that national courts would serve as instruments to secure compliance with Union obligations, producing direct effects and creating individual rights. Case 26/62, \textit{Van Gend en Loos} v. Nederlandse Administratie der Belastingen, 1963 E.C.R. 1, 12-13 (the Community constitutes a new legal order of international law for the benefit of which states have limited sovereign rights, and subjects of which comprise not only Member States but also their nationals; it follows that, according to the spirit, general scheme, and wording of the Treaty, Article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect).


\textsuperscript{29} According to the Commission, more frequent national court application reminds private citizens that competition provisions are part of the law of each Member State, leading to fuller acceptance and use of such provisions. Decentralized application provides an expedited and efficient means to challenge infringements and provide legal security, and reinforcing the role of national courts reduces the Commission's responsibility, thus permitting the Commission to handle its caseload more rapidly and effectively. \textit{See} Fifteenth Report on Competition Policy, \textit{supra} note 27, ¶ 39.

\textsuperscript{30} \textit{See infra} notes 38-39 and accompanying text.
mon Market.\textsuperscript{31} Although national courts may ascertain whether a given agreement violates Article 85(1) and may determine whether an agreement falls within the terms of an Article 85(3) block exemption,\textsuperscript{32} they may not grant an individual exemption under Article 85(3).\textsuperscript{33} Moreover, their power to apply Article 85(1) and Article 86 is lost as soon as the Commission initiates any negative clearance, termination of infringement proceeding, or exemption procedure.\textsuperscript{34} As a result, the Commission's Article 85(3) exemption decision may effectively preclude a final national court ruling.\textsuperscript{35} That is, a negative national court decision under Article 85(1) and (2) voiding an agreement and a positive Commission decision exempting the same agreement under Article 85(3) would, as the Commission described it, amount to a material injustice.\textsuperscript{36} Accordingly, the Court of Justice has ruled that national courts may not make a finding of nullity during the period between notification and the date on which the Commission takes a decision.\textsuperscript{37} Given such difficulties, it is not surprising that the overwhelming majority of competition law proceedings are brought before the Commission, not national courts,\textsuperscript{38} and more importantly, no plaintiff has ever been awarded damages for an EU competition law infringement by a Member State court.\textsuperscript{39}

Finally, ambiguities remain as to the proper course national courts should take when faced with new pro-competitive agreements which

\begin{flushright}
\begin{itemize}
\item \textsuperscript{33} Regulation 17, supra note 13, art. 9(1), at 89; Case 31/80, L'Oreal v. De Nieuwe AMCK, 1980 E.C.R. 3775, 3792.
\item \textsuperscript{34} See Regulation 17, supra note 13, art. 2 (negative clearance), art. 3 (termination of infringements), art. 6 (exemption); WYATT & DASHWOOD, supra note 16, at 446.
\item \textsuperscript{35} See Case 48/72, Brasserie de Haecht v. Wilkin (No. 2), 1973 E.C.R. 77, 87 (national courts have discretion to suspend proceedings in order to obtain the Commission's standpoint); Case 14/68, Wilhelm v. Bundeskartellamt, 1969 E.C.R. 1, 13-15 (where, during national proceedings it appears possible that decision to be taken by Commission at culmination of procedure still in progress concerning same agreement may conflict with effects of decision of national authorities, it is for latter to take appropriate measures).
\item \textsuperscript{36} See Commission Document, supra note 21, at 2-3.
\item \textsuperscript{37} See Case 59/77, De Bloos v. Bouyer, 1977 E.C.R. 2259, 2370 (Article 85(3) exemption system is inconsistent with jurisdiction of the national courts to make a finding of nullity during the period between notification and the date on which the Commission takes a decision).
\item \textsuperscript{38} Although a majority of European lawyers appear to believe that claims in national courts are possible, relatively few have been brought. See John Temple Lang, \textit{EEC Competition Actions in Member States' Courts—Claims for Damages, Declarations and Injunctions for Breach of Community Antitrust Law}, 7 FORDHAM INT'L L.J. 389, 407 (1984).
\item \textsuperscript{39} Mark Hoskins, \textit{Garden Cottage Revisited: The Availability of Damages in the National Courts for Breaches of the EEC Competition Rules}, 15 EUR. COMP. L. REV. 257, 258 (1992) (no reported decision in which national court has actually made an award); Jacobs, supra note 14, at 1364 (although Member State courts have frequently applied EC competition laws, there has not been a single case in which a plaintiff has recovered damages).
\end{itemize}
\end{flushright}
clearly warrant an Article 85(3) exemption. Because of the likelihood that such agreements would profit from an Article 85(3) exemption, national courts are reluctant to prohibit such agreements pursuant to Article 85(1) and to annul them pursuant to Article 85(2).40

Given these difficulties, some clarification of the role of national courts within the Article 85 framework was essential. The Court of Justice faced these precise issues in the 1973 landmark decision of Brasserie de Haeclht (No. 2).41 In the case of what the Court called "old agreements" (entered into before Regulation 17 became effective on March 13, 1962),42 the Court reasoned that the general principle of contractual certainty requires that the national court automatically void an agreement only after the Commission has taken a decision by virtue of the Regulation.43 Thus, an old agreement which is either properly notified or non-notifiable must be treated by national courts as "provisionally valid" unless and until the Commission has made an Article 85(3) decision on the matter and refused to grant an exemption.44 However, the Court held this not to be the case with respect to "new agreements" entered into after Regulation 17 became effective. As for such new agreements, national courts must assume that, as long as the Commission has not taken an Article 85(3) decision on the matter, the agreement can only be implemented at the parties' own risk because the agreement may run afoul of Article 85(1). As the Court noted,

[w]hilst the principle of legal certainty requires that, in applying the prohibitions of Article 85, the sometimes considerable delays by the Commission in exercising its powers should be taken into account, this cannot, however, absolve the Court from the obligation of deciding on the claims of interested parties who invoke the automatic nullity.45

Hence, for such new agreements, notification to the Commission does not have suspensive effect.46

Thus, Brasserie de Haeclht (No. 2) does not resolve the conundrum facing national courts of prohibiting and nullifying pro-competitive restraints of trade. Furthermore, given the practical difficulties of the Commission rendering formal decisions,47 the prospect of suspending national court proceedings until the Commission has taken a position on the agreement

42. See Regulation 17, supra note 13.
44. Case 59/77, De Bloos v. Bouyer, 1977 E.C.R. 2359, 2370 (national courts before which proceedings are brought relating to an old agreement duly notified or exempted from notification must give such an agreement the legal effects attributed thereto under the applicable law); Case 99/79, Lancôme v. Etos, 1980 E.C.R. 2511, 2533-35 (maintenance of provisional protection, from which notified old agreements benefit, is no longer justified from the date the Commission informs parties concerned that it has decided to close their file); Wyatt & Dашwood, supra note 16, at 449.
46. Id.
47. See infra notes 97-99 and accompanying text.
is becoming increasingly untenable. Some further elucidation regarding the balance of power between the national courts and the Commission was thus necessary.

To clarify these matters, the European Court of Justice and the Court of First Instance have recently made important pronouncements concerning national court enforcement of EU competition laws. In Sergios Delimitis v. Henninger Bräu, the Court of Justice addressed the relationship between the Commission and national courts regarding the application of Articles 85 and 86, and articulated the instances in which national court enforcement is appropriate. In Automec v. Commission, the Court of First Instance upheld the Commission's refusal to investigate a complaint where an adequate remedy could be obtained in the national courts, thus underscoring the preference for national court enforcement of EU competition laws when adequate. As further developed below, these decisions promote and give content to subsidiarity in the competition law context.

B. Stergios Delimitis v. Henninger Bräu AG

Delimitis arose out of litigation in Germany concerning a tavern operator and his exclusive purchase agreement with a brewer. The tavern operator brought the action before a national court seeking recovery of sums deducted from a security deposit covering costs associated with the termination. Pursuant to an Article 177 reference, the Court of Justice held that individual exclusive purchase agreements must have a restrictive effect in and of themselves to fall within the scope of Article 85(1). More importantly for our purposes was the Court's discussion of the relationship between national courts and the Commission concerning the application of the Treaty's competition rules.

While the Court underscored the right of the Commission to grant individual exemptions under Article 85(3), it noted that Member State courts have jurisdiction to enforce Articles 85(1) and 86 and, in appropriate circumstances, may apply the block exemptions pursuant to Article 85(3). Acknowledging that the concurrent competence of the Commission and Member State courts could lead to legal uncertainty due to conflicting results in the application of Articles 85(1) and 86, the Court enumerated several factors that a national court should consider in exer-

51. Id.
52. Under Article 177, a national court may request the Court of Justice to give a preliminary ruling on the interpretation of the Treaty or the validity and interpretation of acts of Union institutions if such a preliminary ruling is necessary to enable the national court to give proper judgment in a case pending before it. EEC Treaty, art. 177.
54. Id. at I-991 to I-992.
cising its jurisdiction.\textsuperscript{55}

First, the Court drew a distinction between clearly prohibited agreements and those that may be granted an individual exemption by the Commission pursuant to Article 85(3).\textsuperscript{56} According to the Court, if the conditions for application of Article 85(1) are clearly not met, the Member State may freely rule on the application of Article 85(1), including the nullity provision of Article 85(2).\textsuperscript{57} This also applies in instances where prior notification is a precondition to an exemption and such notification was not given.

If, on the other hand, there is a possibility that the Commission would grant an exemption, the national court must act cautiously. In the case where a failure to notify is not a precondition to an Article 85(3) exemption,\textsuperscript{58} and where an agreement could benefit from such an exemption, the national court could suspend its proceedings or take provisional measures until the Commission has either granted or rejected application of an Article 85(3) exemption.\textsuperscript{59} The Court implied that if the agreement is one that could benefit from an exemption, the national court should not declare the agreement void in the absence of Commission action.\textsuperscript{60} Similarly, in complex cases under Articles 85(1) or 86, the national court can ask the Commission to make submissions on economic or legal matters or ultimately seek guidance from the Court of Justice by way of an Article 177 reference.\textsuperscript{61}

Though not explicitly presented in this fashion, \textit{Delimitis} essentially places competition cases along a continuum according to the complexity of the issues raised. Where the cases present rather pedestrian and straightforward questions, the national courts should enforce Articles 85(1) and 86 with little or no involvement by the Commission. Where the cases raise novel or complex issues, the Court envisions the role of the national courts to decrease proportionately and the Commission’s role to increase. In complex cases, submissions from the Commission to the

\textsuperscript{55} Id. at I-993.

\textsuperscript{56} Id.

\textsuperscript{57} See id. at I-993 to I-994.

\textsuperscript{58} An example is the case where an agreement does not involve imports or exports between Member States. Id. at I-993; see also Case 43/69, Bilger v. Jehle, 1970 E.C.R. 127.

\textsuperscript{59} \textit{Delimitis}, 1991 E.C.R. at I-994; Case 48/72, Brasserie de Haecht v. Wilken-Jansen (No. 2), 1973 E.C.R. 77, 87 (national court has discretion to suspend proceedings in order to obtain the Commission’s standpoint).

\textsuperscript{60} A national court may not extend the scope of the block exemption to supply agreements which do not explicitly meet conditions for exemption laid down in that regulation, nor may it declare Article 85(1) inapplicable to such agreement under Article 85(3). It may, however, declare the agreement void under Article 85(2) if it is certain that the agreement could not be the subject of an exemption decision under Article 85(3). \textit{Delimitis}, 1991 E.C.R. at I-994.

\textsuperscript{61} Id. The Commission has the obligation, pursuant to Article 5 of the Treaty, to provide effective assistance to national courts charged with enforcement of the competition rules. Id. (citing Case C-2/88, J.J. Zwartveld and Others, 1990 E.C.R. 1-3365, I-3372).

national courts are appropriate. In highly complex cases, an Article 177
reference is encouraged, thus taking the interpretation of Article 85(1)
completely out of the hands of the national courts.

Thus, in the Court's view, there is a class of highly complex cases with
which only the Commission may deal. One Commission official has
included in this category, inter alia, cases (i) where corporations have
allegedly infringed the Treaty in two or more Member States; (ii) where
the economic issues are difficult or the final remedy has far-reaching
impact requiring effective uniformity throughout the Common Market;
(iii) where governments, state enterprises, and state measures are
involved; or (iv) where mergers or joint ventures are involved, especially
when divestiture in more than one Member State is at issue.63

Delimitis suggests that national court enforcement will not serve as an
effective tool of competition law except in uncomplicated cases. In effect,
the Court's judgment minimizes previously expressed concerns of conflicting
and disuniform application of competition rules, precisely because
national courts are urged to tread with caution whenever a case involves
complex issues. Unfortunately, by narrowly defining the role of national
courts, Delimitis undercuts the effective role national courts will play in
enforcing EU competition rules. The decision ensures that third party
actions for damages before national courts will continue to be less attrac-
tive to complainants than recourse to the Commission.

On the other hand, Delimitis reinforces the role of national courts in
enforcing straightforward cases of Article 85(1) infringements. In
essence, national courts are free to apply Article 85(1) in contexts akin to
per se prohibitions under the U.S. Sherman Act such as naked price fix-
ing, market sharing, and collective boycotts. Such agreements are, to
quote the United States Supreme Court, so "plainly anticompetitive that
no elaborate study of the industry is needed to establish their illegality."64
In EU competition law, such per se prohibitions could include the five
types of agreements explicitly mentioned in Article 85(1).65 Because such
agreements are unlikely to bring any benefits either to consumers or the
economy, national courts may freely enforce Article 85(1) and the nullity
provisions of Article 85(2).66

Having considered how the Court in Delimitis effectively confined the
role of national courts to uncomplicated cases of clear Article 85(1)

63. See John Temple Lang, EEC Competition Actions in Member States' Courts—Claims
    for Damages, Declarations and Injunctions for Breach of Community Antitrust Law, 1983 FOR-
65. These include agreements that fix purchase or selling prices; limit or control
    production, markets, technical developments, or investment; share markets or sources
    of supply; apply dissimilar conditions to equivalent transactions; and those that make
    the conclusion of contracts subject to acceptance by the other parties of supplementary
    obligations that have no connection with the subject of such contracts. EEC TREATY,
    art. 85(1).
66. Valentine Korah, The Rise and Fall of Provisional Validity—The Need for a Rule of
infringements, we turn now to another decision, Automec v. Commission, which is illustrative of an uncomplicated Article 85(1) infringement proceeding, and examine the Court of First Instance’s understanding of the appropriate action of the Commission when considering whether to refer infringement actions to the national courts.

C. Automec Srl. v. E.C. Commission

In Automec, an Italian motor car distributor, Automec Srl. (Automec), entered into an agreement with BMW Italia, Spa (BMW Italia) for the distribution of BMW cars in the city and province of Treviso, Italy. When BMW Italia failed to renew its distribution agreement with Automec, Automec sued in an Italian court to obtain an order requiring the continuation of the contractual relationship. The Tribunale di Milano rejected the application and Automec appealed to the Corte d’Appello. While the appeal was pending, Automec, on January 25, 1988, made an application to the Commission requesting that it order BMW Italia to discontinue its infringement of Article 85 and appoint Automec as a distributor. After an informal exchange of views on the matter, the Commission, on February 28, 1990, formally rejected Automec’s application. The Commission informed Automec, inter alia, that (i) the Commission lacked the power to issue an injunction compelling BMW to supply its products to Automec; (ii) the Italian court had the same power as the Commission to apply Article 85, particularly the declaration of nullity provision under Article 85(2); (iii) the national courts had the additional power to order BMW to pay damages in the event of an infringement; and (iv) in light of the discretionary power of the Commission to accord different degrees of priority to matters referred to it, the Commission concluded that there was not a sufficient Community interest to justify a more detailed investigation of the matter.\(^6\)

On appeal, the Court of First Instance upheld the Commission’s decision, holding that the Commission is not obligated to launch an investigation or take a decision concerning the substance of a complaint. Of particular importance for our purposes was the Court’s discussion of the right of the Commission to accord different degrees of priority to the complaints it receives in order to further the Union’s interests. The Court of First Instance noted that

unlike the civil courts, whose task is to safeguard the subjective rights of private persons in their mutual relations, an administrative authority must act in the public interest. Consequently, it is legitimate for the Commission to refer to the Community interest in order to determine the degree of priority to be accorded to the different matters before it.\(^6\)

Accordingly, given the extensive supervisory and regulatory authority assigned to the Commission in the field of competition, the allocation by the Commission of different degrees of priority to the competition matters


\(^6\) Id. at 479.
referred to it was found to be compatible with its obligations under Union law.

In assessing the Union interest, the Commission must take into account all of the particular legal and factual aspects of the complaint. The Court reasoned that the Commission must examine (i) the importance of the alleged infringement for the functioning of the Common Market, (ii) the probability of being able to establish the existence of an infringement, and (iii) the extent of investigative measures necessary to fulfill successfully its task of securing compliance with the EU’s competition laws. The question, then, was whether the Commission was correct in concluding that there was not a sufficient Union interest in pursuing the matter, given that Automec had already referred the dispute to the Italian courts, and given that it could likewise submit to those courts the question of the compatibility of that termination with Article 85(1). The Court concluded that the Commission was correct in refusing to launch such an investigation.

The Court noted that, in the instant case, the Commission did not refuse to launch an investigation merely because a national court had concurrent jurisdiction. Rather, Automec had already referred an associated dispute concerning BMW Italia’s distribution system to the Italian courts. In determining whether national court remedies would be adequate, the Court examined the extent of protection afforded by national courts in safeguarding the rights provided in Article 85(1). As previously discussed in Delimitis, the Court emphasized that Articles 85(1) and 86 have direct effect in the national courts such that individuals may rely on the rights provided therein in actions before the national court. In ensuring these rights, the national court must examine whether there has been an Article 85(1) infringement, and if so, whether that infringement enjoys an Article 85(3) block exemption pursuant to, for example, Regulation 123/85 pertaining to motor vehicle distribution and servicing agreements.

If the national court has some doubt as to the validity of the action under Article 85(1) or the application of the Article 85(3) block exemption to the instant facts, the Court underscored the national court’s prerogative to make an Article 177 reference to the Court of Justice. On the other hand, if the national court determines there to be an infringement of Article 85(1) falling outside the Article 85(3) block exemption, it does not have the power to order an end to the infringement or impose fines on the responsible party. It does, however, have the power to declare the action void pursuant to Article 85(2), and the Court considered this remedy sufficient. As the Court stated:

[T]he Treaty postulates that national law gives the court power to preserve the rights of enterprises which are victims of anti-competitive practices. In the present case the applicant has produced nothing to indicate that Italian

---

69. Id.
law provides no legal remedy which would enable the Italian court to safeguard its rights in a satisfactory manner.\textsuperscript{71}

Thus, under the circumstances of the case, the Court ruled that judicial economy and administrative justice "militate in favour of examination of the matter by the [national] court already dealing with the associated questions."\textsuperscript{72}

It should be underscored that the Court in \textit{Automec} held that the national court remedies were adequate. In this respect, however, the facts of \textit{Automec} are somewhat uncommon. First, Automec had already brought suit in national court for a violation of the distribution agreement such that there was no concern that Automec's claim would be time barred under a Member State's statute of limitations. Second, the nature of Automec's complaint was problematic: Automec sought a decision from the Commission finding that BMW Italia had violated Article 85(1) and an order requiring BMW Italia to continue its contractual relations with Automec. While the Commission did not have the power to grant the requested action, the national court did have such power and, significantly, could order BMW Italia to pay damages if it violated the terms of the distribution agreement. Finally, in proceeding before the national court, the court could, in addition to considering whether there was an Article 85(1) infringement, also apply Article 85(3) because a block exemption applied to motor vehicle distribution and servicing agreements.\textsuperscript{73} The frequent complaint that national court remedies are inadequate because they cannot grant individual exemptions pursuant to Article 85(3) therefore did not arise.

\textit{Automec} makes explicit what was implicit in \textit{Delimitis}: the Commission and the national courts will increasingly share enforcement responsibilities, and national courts can serve as an effective tool for enforcing competition laws in uncomplicated cases. It also confirms that, in contrast to its previous monopolistic approach to competition law enforcement, the Commission will now only act when it is assured that its involvement will further significant Union policies. Thus, \textit{Automec} is significant because it represents one of the first times the Commission has deferred to national court enforcement on the grounds that such enforcement was sufficient to protect the complainant's and the Union's interest.

\textit{Automec} is perhaps most significant for its four-fold test articulating the criteria for determining when and whether the Commission should launch an investigation. This test requires the Commission to (i) confirm that there is a sufficient Union interest, (ii) determine whether there is some probability of successfully finding an infringement, (iii) give due consideration to the effort required to establish the existence of Article 85(1) infringement, and (iv) verify the existence of adequate national

\textsuperscript{71} \textit{Automec}, 5 C.M.L.R. at 481.

\textsuperscript{72} \textit{Id.} at 480.

\textsuperscript{73} Commission Regulation 123/85 of 12 December 1984 Concerning Motor Vehicle Distribution and Servicing Agreements, 1985 O.J. (L 15) 16.
court remedies.\textsuperscript{74} This formulation, though imprecise, marks the first articulation by the Court of when the Commission should defer to the national courts in enforcing competition laws.\textsuperscript{75}

The significance of the \textit{Automec} criteria is all the more evident given that the Commission has indicated that it will utilize this approach in processing all future EU competition infringement complaints. As Sir Leon Brittan stated:

> In the \textit{Automec v. Commission} judgment, the Court of First Instance has confirmed that the Commission may, where redress is available at the national level, reject a complaint on grounds of lack of Community interest. I propose therefore that this judgment be used as the basis of the Commission's policy with regard to complaints. Where there is no important Community interest at stake, either in economic terms or in relation to important questions of legal precedent, and redress is available at [the] national level because appropriate legal instruments exist to undertake the necessary fact-finding and order any necessary remedies, the complainant will be referred to the Member State in question.\textsuperscript{76}

The announcement of this new approach in the Commission's enforcement thus represents a ringing endorsement of subsidiarity in EU competition law policy.

In sum, \textit{Automec} is notable because it requires the Commission to apply the principles of subsidiarity in competition enforcement, it defines the circumstances under which the Commission will defer to national courts in the enforcement of EU competition laws, and it is representative of an uncomplicated case that could easily be resolved by a national court without assistance from the Commission. It also emphasizes that when complaints raise few questions of significant interest to the Union, the Commission will increasingly refer the matter to the national courts for resolution. Such a development marks a welcome change toward greater power sharing between the Commission and the national courts in the enforcement of EU competition laws.

Nevertheless, while \textit{Automec} confirms the Union's commitment to the decentralized enforcement of EU competition laws, its focus was limited to the Commission's authority to defer enforcement action to the national courts. The decision did not, however, provide any guidelines for national courts to follow when seized with an EU competition law infringement action. Thus, \textit{Automec} does not resolve the uncertainties and ambiguities

\textsuperscript{74} Automec, 5 C.M.L.R. at 479-81.

\textsuperscript{75} In a significant development, on September 7, 1993 a French court sought clarification through an Article 177 reference from the European Court of Justice as to whether the Commission, when invoking the principle of subsidiarity to refer EU competition law complaints to national courts, has the sole prerogative to define what is in the "[Union] interest" in any given case. Case C-378/93, La Pyramide Sarl, 1993 O.J. (C 243). The Court's ruling in \textit{La Pyramide Sarl} will hopefully clarify whether the Commission has the exclusive right to determine whether a complaint should be handled at the national or the Union level.

\textsuperscript{76} Brittan Speech, \textit{supra} note 7, at 3.
regarding how national courts should proceed when seized of an action alleging infringement of Articles 85 and 86.

Automet's articulation of when, and on what basis, an infringement action should be referred to national courts foreshadowed a day when the Union would provide intelligible guidelines for national courts to follow when seized with an EU competition infringement action. That day came only a few months later with the publication of the Commission's Notice on Cooperation with National Courts in Applying Articles 85 and 86.\(^7\)

II. National Court Procedures in Enforcing Competition Laws: The Notice on Cooperation with National Courts in Applying Articles 85 and 86

On February 13, 1993 the Commission published its Notice on Cooperation with National Courts in Applying Articles 85 and 86.\(^8\) The Notice summarizes the respective powers of the Union and the national courts in enforcing EU competition laws. Significantly, it removes all doubt that the Commission is committed to the decentralized application of EU competition laws in fidelity to the principle of subsidiarity. As Commissioner Brittan stated:

\[\text{[T]he Commission is seeking to further encourage the enforcement of Articles 85(1) and 86 by National Courts. [Accordingly, b]efore the end of this year I shall propose to the Commission the adoption of a Notice that will clarify the rights and obligations of National Courts in Articles 85 and 86 cases. This Notice will explain that the Commission . . . intends to play a pro-active role in encouraging and assisting National Courts in applying Community law. . . . This Notice, combined with our policy of dealing with complaints only where they raise issues that cannot adequately be addressed in National Courts, should provide a catalyst leading to wider implementation of the Community competition rules at the national level.}\(^9\)

The Notice, in many respects, is the crystallization of the Union's commitment to apply the principle of subsidiarity in enforcing competition laws. Whereas Delimitis and Automet attempted to clarify the nature of cooperation between the national courts and the Commission given their concurrent power to enforce EU competition laws, the Notice provides both the purposes and the procedures to be followed by national courts in enforcing EU competition rules. This synthesis of a coherent policy and effective procedures enhances the impact that the Notice will have on the future of national court competition enforcement.

A. Rationale for Decentralized Application of Competition Laws

According to the Commission's Notice, there are two underlying policies for the decentralized application of competition laws. First, the Commission is "obliged, in general, to take all organizational measures necessary
for the performance of its task and, in particular, to establish priorities. Complaints that do not "serve the Community's general interest" should, the Commission maintains, be handled by national courts. Since the administrative resources of the Union are necessarily limited and cannot be used to deal with all cases brought to its attention, the Commission will concentrate on notifications, complaints and "own-initiative proceedings" that have particular political, economic, or legal significance for the Union. In determining whether complaints are of a sufficient significance for the Commission's investigation, however, the Commission will also examine whether plaintiffs have adequate protection of their rights before national courts.

The Commission's second rationale for encouraging the decentralized application of EU competition rules is the national court's objective to protect the rights of private parties and the procedural benefits that private parties enjoy before national courts that they do not enjoy at the Union level. In the Commission's view, it is the national courts, not the Commission, that must safeguard the subjective rights of private individuals in their relations with one another and ensure that the competition rules are respected in protecting those rights. In defending these subjective rights of individuals, the Commission underscored the fact that actions brought before national courts have significant advantages for complainants compared to complaints lodged before the Commission. These advantages include the national courts' ability (i) to award damages for injury resulting from a violation of EU competition laws; (ii) to expeditiously adopt interim measures and otherwise order illegal activities to cease; (iii) to hear concurrent claims brought under EU competition laws and national competition laws; and (iv) to award legal costs under the laws of certain Member States.

B. National Court Procedures in Enforcing EU Competition Laws

Having explained why it is in the Union's interest to encourage national court enforcement of competition laws, the Notice continues with its most significant section outlining the procedures that national courts should follow in enforcing the competition rules. In brief outline, the Commission's Notice provides guidelines for national courts to follow when making a determination as to the applicability of Article 85(1) or the likelihood of an Article 85(3) exemption.

According to the Commission's Notice, the first question that national courts must answer is whether the particular action at issue

81. Id.
82. Id.
83. "The Commission considers that there is not normally a sufficient Community interest in examining a case when the plaintiff is able to secure adequate protection of his rights before the national courts." Id. at 7.
84. Id. at 6.
85. Id. at 8.
infringes the prohibitions laid down in Article 85(1) or Article 86. The most obvious means to determine whether an infringement has taken place is to inquire whether the activity has already been the subject of a decision or opinion by the Commission. A formal ruling by the Commission is authoritative for the national courts. When, however, the Commission's decision is a non-binding opinion, such as a comfort letter, the Commission's decision constitutes only a factor for the national courts to consider in examining whether an infringement has occurred.

If the Commission has not ruled on the particular activity, the national courts should seek guidance from the case law of the Court of Justice, the decisions of the Commission, and the general notices issued by the Commission. The Notice envisages that national courts will decide whether the conduct is compatible with Article 85(1) and Article 86 on the basis of these opinions and decisions. Thus, it is assumed that in the majority of cases the national courts will be able to determine whether an Article 85(1) or 86 infringement has occurred simply by applying the facts of the particular case to the laws set forth in the case law of the Court of Justice and the Commission.

If the national court determines that the "conditions for applying Article 85(1) or Article 86 are not met," the courts should "pursue their proceedings on the basis of such a finding, even if the agreement, decision or concerted practice at issue has been notified to the Commission." Thus, if the agreement does not infringe Article 85(1) or Article 86, the national court may treat the agreement as valid. By contrast, if the national court finds that the conditions for applying Articles 85(1) and Article 86 are met, the national courts must "rule that the conduct at issue infringes Community competition law and take the appropriate measures, including those relating to the consequences that attach to infringement of a statutory prohibition under the civil law applicable."

Thus, if Article 85(1) is infringed, absent an Article 85(3) exemption, the Notice requires that national courts declare the agreement automatically void pursuant to Article 85(2) and apply the relevant national civil penalties to the infringement. Before doing so, however, the national court must first determine whether the infringement enjoys an individual or block exemption pursuant to Article 85(3). Where the Commission has either formally, through an individual Article 85(3) exemption, or informally, through a comfort letter, rendered a decision the national court

---

86. Id.
89. Notice on Cooperation, supra note 8, at 8.
90. Id. at 8-9.
91. Id. at 9.
must respect this decision and find that conduct compatible with EU competition law. By contrast, if the agreement falls within a block exemption, the conduct is "automatically exempt" and the national court must apply the exemption to the activity.\textsuperscript{92}

If there has been no Commission decision on the matter and no applicable block exemption, however, the national courts must tread with caution. Before finding an Article 85(1) infringement, the court must consider the possibility of the Commission granting an Article 85(3) individual exemption to an agreement that has been duly notified.\textsuperscript{93} If the court can determine from the existing case law of the Court of Justice and the Commission that an exemption cannot be granted, the court can take the appropriate action in response to an Article 85(1) infringement and apply the relevant Union and national penalties. Where the court determines that an exemption is possible, however, it must suspend its proceedings and adopt whatever interim measures are necessary while awaiting the Commission's decision.\textsuperscript{94} Cases that have been suspended in this fashion will be given priority by the Commission to avoid undue delay.\textsuperscript{95} If a suspension is necessary to determine the applicability of an exemption, the Notice indicates that the court can expect the cooperation from the Commission in resolving specific issues. Such assistance may include information regarding procedural matters, customary practices of the Commission, substantive points of law, and non-binding interim opinions on the likelihood of an exemption.\textsuperscript{96}

Finally, where national courts face particularly complex questions concerning the application of Articles 85 and 86, they may, rather than suspending proceedings to procure assistance from the Commission, refer cases to the Court of Justice pursuant to Article 177 for a formal ruling on the matter. This requires the suspension of proceedings before the national court and a lengthy delay pending the Court of Justice's decision.

\section*{III. The Impact of Recent Developments: The Application of Subsidiarity to EU Competition Law Enforcement}

\textit{Delimitis}, \textit{Automec}, and the Notice on Cooperation confirm that the longstanding presumption that the Commission must examine all agreements to ensure their compatibility with EU competition laws is increasingly becoming a rule in search of a rationale. The Commission currently finds it impossible in practice to deal on an individual basis with more than a

\begin{itemize}
  \item \textsuperscript{92} See supra note 23.
  \item \textsuperscript{93} In determining the likelihood that the Commission would grant such an exemption, the national court must first ascertain whether the Commission has been notified of the agreement. Absent such notification, there is no possibility of an Article 85(3) individual exemption, and therefore the national court may, pursuant to Article 85(2), declare the agreement void because it infringes Article 85(1). See Notice on Cooperation, supra note 8, at 9.
  \item \textsuperscript{94} Id.
  \item \textsuperscript{95} Id. at 10.
  \item \textsuperscript{96} Id.
\end{itemize}
fraction of the Article 85(3) exemption requests it receives. The notification process has come to be used less as a mechanism for approving individual cases and more as a law-making tool, with the Commission typically ruling only on notifications that are of strategic importance in clarifying or developing the law. In the past, the Commission has attempted to exercise a theoretically all-embracing but practically unworkable surveillance over an immense number of individual transactions, rather than taking a more strategic approach of formulating policy and concentrating its efforts on carefully selected agreements where intervention is necessary and effective or of far-reaching impact.

While the Commission has attempted to overhaul the administration of the competition rules by issuing individual comfort letters and adopting block exemption regulations, the Commission admits that these changes have been only modestly successful. The practical consequence of the current procedural approach to Article 85(1) is that the great majority of agreements that potentially or actually have an adverse impact on market unity must be notified to the Commission or be excluded from the possibility of future exemption. While such centralization may have been justifiable in the course of the evolution of the Common Market, so as to establish the Commission's central role in assessing restrictive agreements and applying Article 85(1), such an approach is no longer warranted at the current stage of development of EU competition law. Instead, the role of the Commission should be less universal and more specialized, with a focus on formulating policy, prosecuting strategic cases of a general interest, and drafting notices and regulations.

The recent decisions in Delimitis and Automec, as well as the Commission's Notice on Cooperation, confirm the EU's commitment to both strategic enforcement by the Commission and broader and more effective enforcement by national courts. The renewed commitment to the decentralized application of competition laws ensures that national courts will increasingly have a significant role in the enforcement of Articles 85 and 86. Moreover, such trends are wholly consistent with the EU's general commitment to the principle of subsidiarity as embodied in Article 3b of the Maastricht Treaty. As the Commission's Notice on Cooperation emphasizes, there are distinct procedural and substantive advantages for litigants who bring infringement actions before national courts. These include monetary and injunctive relief, the ability to bring parallel claims based on EU and national competitive legislation, and, in some instances, the recoupment of litigation costs. Thus, from the perspective of the complainant, national court enforcement is a promising alternative, and such incentives likely will result in an increase in the number of such claims.

However, this renewed commitment to subsidiarity masks a hidden danger. Article 3b of the Maastricht Treaty states:

97. See Watt & Dashwood, supra note 16, at 367.
98. Forrester & Norall, supra note 18, at 13-14, 17.
99. See id. at 38.
In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the member-States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.\(^{100}\)

Applied to competition law enforcement, the Union must uphold the concept of decentralized enforcement of EU competition laws to the extent national courts can "sufficiently achieve the objectives" of Articles 85 and 86. In short, for subsidiarity to develop and thrive, national court enforcement of EU competition laws must be efficient, effective, and adequate as an enforcement mechanism.

Of particular concern in this context is the risk of (i) contradictory rulings between the Commission and the national courts, (ii) ineffective relief in actions brought before national courts, and (iii) the legal uncertainty created by a national court Article 85(2) declaration of nullity pending the Commission’s Article 85(3) exemption decision. The first of these issues appears to have been the Commission’s primary concern in drafting the Notice on Cooperation. The Notice expressly mentions this issue as one of the primary evils concurrent jurisdiction creates. Indeed, it appears that the Commission promulgated the Notice in large part to avoid such a result. As the Commission noted:

\[\text{T}\]he direct effect of Article 85(1) and Article 86 gives national courts sufficient powers to comply with their obligation to hand down judgment. Nevertheless, when exercising these powers they must take account of the Commission’s powers in order to avoid decisions which could conflict with those taken or envisaged by the Commission in applying Article 85(1) and Article 86, and also Article 85(3). In its case-law the Court of Justice has developed a number of principles which make it possible for such contradictory decisions to be avoided.\(^{101}\)

The Commission then sets forth, in great detail, the procedures that national courts should follow in enforcing EU competition laws to avoid such an eventuality. One may surmise that the Notice will largely alleviate the concern of contradictory rulings between the national courts and the Commission, provided the national courts follow the suggestions of the Notice and consult the Commission during the litigation to confirm that the Commission has not, or will not, render a contrary result. Nevertheless, there may be instances where a national court considers a matter so clear that it need not consult the Commission but the Commission subsequently reviews the matter and reaches a contrary result. Thus, the recent decisions in Delimitis and Automec, along with the Notice on Cooperation, will encourage national court enforcement of EU competition laws while minimizing the risk of contradictory rulings arising from such concurrent jurisdiction.

The second issue concerning effective relief before the national court relates to the general concern that the Commission should not refer a

---

100. **Maastricht Treaty**, art. 3b.
matter to national courts unless it can be assured that the national court, in fact, has jurisdiction over the matter and can secure effective relief for the complainant. Thus, unless the Commission can be assured that the national law provides a legal remedy which would enable the national court to safeguard the rights in a satisfactory manner, the Commission should not refer the matter to the national courts. Advocate General, now Judge, David Edward forcefully emphasized this concern in his opinion in Automec.

The availability of relief in the national courts is not a straightforward matter. The Commission cannot, in response to a genuine complaint, simply repeat a ritual formula to the effect that relief is available in the national courts. The Commission must apply its mind properly to the question whether relief would indeed be available, or whether it has a duty to exercise its own powers. The Commission must, for example, be assured that a competent national court exists to hear the complaint, that a national court is able to provide interim measures beyond its national jurisdiction, that the national court may obtain evidence in the territory of another Member State, and that other courts may properly execute judicial requests for assistance from the national court. In short, there are a number of jurisdictional and procedural obstacles, unique to the extraterritorial context, that national courts face in assessing and enforcing violations of EU competition rules. As Advocate General Edward correctly noted, the Commission should only reject complaints in favor of national court proceedings when it is reasonably assured that the national courts may effectively safeguard the parties’ interests.

Unfortunately, the Notice does not explicitly address concerns of ineffective relief before national courts. It merely states: "The Commission considers that there is not normally a sufficient Community interest in examining a case when the plaintiff is able to secure adequate protection of his rights before the national courts." The Notice does not address what, in its view, “adequate protection” means. If the principle of subsidiarity is to be properly applied in the competition context, however, the Commission must necessarily undertake a case-by-case analysis of each complaint it receives to confirm that national court remedies are, in fact, adequate. Anything short of this could result in decentralized application of competition laws that will not properly safeguard the rights of the parties and will consequently subject the subsidiarity principle to criticism for ineffective protection of the parties’ legitimate interests.

---


104. Notice on Cooperation, supra note 8, at 7.
Finally, regarding the concern for legal certainty, particularly when a national court renders an Article 85(2) declaration of nullity and the Commission subsequently grants an individual Article 85(3) exemption, the Notice does not significantly improve the current impasse. The Notice simply states:

Where the national court has ... ascertained that the agreement, decision or concerted practice at issue cannot be the subject of an individual exemption, it will take the measures necessary to comply with the requirements of Article 85(1) and (2). On the other hand, if it takes the view that [an] individual exemption is possible, the national court should suspend the proceedings while awaiting the Commission's decision.\textsuperscript{105}

Such a suggestion is nothing new and does not resolve the legal uncertainty the Article 85 framework creates. It does indicate, however, that the Commission considers the legal uncertainty resulting from delays due to national court suspension pending an Article 85(3) exemption decision to be a lesser evil than the legal uncertainty resulting from a national court Article 85(2) declaration of nullity and a subsequent Article 85(3) exemption by the Commission.

Finally, assuming the Commission will continue to cast the Article 85(1) net broadly to bring the great preponderance of agreements within its ambit, there will remain a whole category of pro-competitive restraints of trade that technically will violate Article 85(1) but that national courts will not be empowered to properly review and, where appropriate, exempt pursuant to Article 85(3). Absent a block exemption, the result is only a continuation of the interminably slow process whereby the Commission examines each complaint to determine its eligibility for a formal Article 85(3) exemption or a non-binding comfort letter. Thus, any meaningful enforcement by national courts must somehow overcome Article 85's structural hurdle. There must be either a redefinition of what constitutes an Article 85(1) infringement such that the EU adopts a so-called rule of reason approach to Article 85(1),\textsuperscript{106} or the national courts must in some

\textsuperscript{105.} Id. at 9.

\textsuperscript{106.} Although the Court of Justice has consistently refused to interpret Article 85(1) by balancing the pro- and anti-competitive effects of restrictive agreements under the rule of reason approach, see Peeters, supra note 17, at 541, the Court of Justice, and more recently the Commission, have considered particular pro-competitive ancillary restraints, in effect, to be inherent in, or necessary for, the realization of a pro-competitive or competitively neutral transactions. These cases, while few in number, adopt a more flexible attitude in which the Court assesses the overall competitive impact of the ancillary restraint to determine whether an agreement falls within Article 85(1), obviating the need in such instances for recourse to an Article 85(3) exemption. See Case 56/65, Société Technique Minière v. Maschinenbau Ulm, 1966 E.C.R. 235; Case 26/76, Metro v. Commission (No. 1), 1977 E.C.R. 1875, 1904; Case 258/78, Nungesser v. Commission (Maize Seed), 1982 E.C.R. 2015, 2069; Case 262/81, Coditel v. Ciné-Vog Films (Coditel II), 1982 E.C.R. 3381, 3402; Case 161/84, Pronuptia de Paris GmbH v. Schillgalis, 1986 E.C.R. 353, 384-85; Case 42/84, Remia v. Commission, 1985 E.C.R. 2545, 2571; Case 27/87, Louis ErauJ-Jacquery v. La Hesbigonne SC, 1988 E.C.R. 1919, 1938-39; Elopak/Metal Box (Odin), 1990 O.J. (L 209) 15, 19-20; Moosehead/Whitbread, 1990 O.J. (L 100) 32, 32; Venit, supra note 25, at 43. The adoption of this more flexible attitude under Article 85(1) could help mitigate the problem created by the Commis-
fashion be empowered to exempt, or otherwise treat as valid, pro-competitive restraints of trade. The alternative is simply the untenable continuation of the current system of monopolistic review by the Commission of restraints that enhance, rather than restrict, competition in the Common Market.

IV. The Future of Competition Enforcement: National Court Review of Pro-Competitive Restraints of Trade

The confluence of these trends toward decentralization raises anew an issue that has previously received inadequate attention: the enforcement by national courts of pro-competitive restraints of trade. The Commission has recognized that, in cases which clearly would receive favorable treatment under Article 85(3), the national courts currently are left with the unsavory choice of either automatic nullity under Article 85(2) or staying proceedings obliging the Commission to adopt a formal decision in each such case (which could lead to no decision at all given the extraordinary number of notified cases). Thus, the Court of Justice has recognized that “the Article 85(3) system is inconsistent with the jurisdiction on the part of national courts to make a finding of nullity during the period between notification and the date on which the Commission takes a decision.”

Similarly, in 1990 the Commission noted that the current approach to new agreements, whereby national courts suspend proceedings pending a formal decision by the Commission, is seldom a viable alternative given that the overwhelming majority of cases are settled by the Commission through informal comfort letters. Clearly, a change is necessary for national court enforcement of pro-competitive restraints of trade to be adequate and effective, and nothing the Union has done so far provides any meaningful remedy.

In an important development, however, the Commission, in its earlier drafts of the Notice, suggested an approach of “relative validity” for new agreements as a corollary to the “provisional validity” of old agreements enunciated in Brasserie de Haecht (No. 2). Under this approach, national courts may, pursuant to Article 85(2), treat notified agreements as valid between the parties to the litigation if “on the basis of the existing case law . . . there is no reasonable doubt that the notified agreement fulfills all the conditions of Art. 85(3).” Thus, if the national court finds that an agreement is clearly compatible with Article 85(1) because the agreement has no appreciable effect on competition or on trade between Member

110. Id. Annex 2 at 3. See also supra notes 41-45 and accompanying text.
111. See Commission Document, supra note 21, at 3. The Commission also emphasized, however, that this validity has authority only as between the parties not erga omnes. See id.
States, the national court should proceed with the case whether or not it has been notified. It appears that the "relative validity" approach envisages that national courts will apply the case law of the Court of Justice and the Commission in determining whether an agreement infringes Article 85(1) or is exempt under Article 85(3). Under this approach, if the court concludes that there is no reasonable doubt that a notified agreement or practice fulfills all conditions of Article 85(3), it may treat the agreement as valid between the parties to the litigation. This gives national courts what appears to be a discretionary "quasi-exemption" power, which applies between the parties as long as the Commission has not adopted a negative decision.

Recently, an even more radical approach has been suggested by the former EC Commissioner for Competition, Sir Leon Brittan. As he explained the notion:

In practice, the prohibition envisaged in Article 85(1) has in the past been enforced by National Courts very rarely indeed. The question therefore arises, whether it is now time for the Commission to propose that this [Article 85(3)] monopoly be lifted, and that National Courts, and indeed national competition authorities, be given the concurrent jurisdiction to grant Article 85(3) exemptions.

Commissioner Brittan therefore proposed that national courts examine agreements to determine whether they violate Article 85(1) and, if so, that they be allowed to consider whether such agreements enjoy an Article 85(3) exemption. What Sir Leon Brittan is entertaining is nothing short of a subsidiarity revolution in the enforcement of EU competition laws. Recognizing that such an approach could result in "significantly increased enforcement at [the] national level," the prospect of a national court Article 85(3) exemption could arrest what one Commission official called the "relative failure so far of our efforts to encourage private enforcement of EC competition law through the courts." Such an approach would remove the most significant obstacle to meaningful decentralized enforcement of competition rules, thereby concomitantly enabling the Commission to concentrate on significant and complex cases having far-reaching impacts on the Union.

These two approaches, the relative validity approach and the national court exemption proposal, follow logically from the Commission's and the Court's renewed emphasis on decentralized enforcement of EU competi-

112. See id., Annex 1 at 5.
114. Brittan Speech, supra note 7, at 4. Such a proposal would arguably be effected by amending Regulation 17 to eliminate Article 9(1)'s grant of exclusive competence to the Commission to rule on Article 85(3) exemptions. Regulation 17, supra note 13, art. 9(1); Peeters, supra note 17, at 536, 569 (solution to administrative problems resulting from Commission's exclusive Article 85(3) exemption power is lifting of Regulation 17's grant to Commission of exclusive jurisdiction over Article 85(3)).
tion rules. Indeed, the Commission has noted that it must show some flexibility in the approach of Article 85(3) if it wants decentralization to become a success.\textsuperscript{116} Just as the Court in \textit{Delimitis} has given national courts the freedom to enforce competition laws in clear instances of Article 85(1) violations, a flexible "relative validity" approach or "national court exemption" approach could similarly give national courts the freedom to exclude certain agreements from the application of Article 85(1) where such agreements raise no concerns as to their adverse competitive impact. Indeed, there is a certain illogic to the notion that national courts are encouraged to apply Article 85(1) to straightforward, uncomplicated cases of competition infringements, but they have no place whatsoever handling straightforward, uncomplicated cases involving pro-competitive restraints of trade. In both contexts the same policy concerns about decentralization are raised. As the Commission noted: (i) more frequent national court application would remind private citizens that the competition provisions are part of the law of each Member State leading to fuller acceptance and use of such provisions; (ii) decentralized application would provide an expedited and efficient means to apply the competition rules; and (iii) a reinforced role of national courts would reduce the Commission's workload, thus permitting it to more rapidly and effectively handle its own caseload.\textsuperscript{117}

Moreover, greater national court enforcement of Article 85 would benefit private parties. The Commission cannot award compensation for loss suffered as a result of an infringement of EU competition rules. By contrast, national courts can often give expedited interim measure injunctions, consider concurrent claims based on national and EU competition laws, and, in certain circumstances, award legal fees to the successful applicant.\textsuperscript{118} Thus, private parties have strong incentives to pursue EU competition law claims before national courts if they could be assured that such courts could effectively enforce EU competition rules. The proposals ensure that national court enforcement would be more meaningful and effective, thus encouraging plaintiffs to seek recourse in the national courts rather than through a complaint lodged with the Commission.

Finally, there are no overwhelming policy reasons why national courts could not handle straightforward agreements involving pro-competitive restraints of trade. With guidance of the kind offered in \textit{Delimitis} and the Notice, a national court could follow the case-law of the Commission and the Court of Justice in determining the applicability of Article 85(3).

\textsuperscript{117} See Fifteenth Report on Competition Policy, supra note 27, ¶ 39.
\textsuperscript{118} See Notice on Cooperation, supra note 8, at 7; Joined Cases 253/78 & 1-3/79, Procureur de la République v. Giry, 1980 E.C.R. 2327, 2374-75 (parallel application of national competition law permitted insofar as it does not prejudice uniform application throughout Common Market); Case 22/78, Hugin Kassaregister AB v. Commission, 1979 E.C.R. 1869, 1899 (Community law covers any agreement or any practice that is capable of constituting threat to freedom of trade between Member States; on the other hand, conduct whose effects are confined to territory of single Member State is governed by national legal order); Jacobs, supra note 14, at 1367-68.
Analogizing from *Delimitis*, a distinction could be drawn between agreements that are clearly permissible as a pro-competitive restraint, and those that may be held to infringe Article 85(1)’s prohibition on restrictive agreements. If the restraint is clearly not caught by Article 85(1) or would be exempt under Article 85(3), such that the Commission or the Court would not take a different view, the Member State court may freely rule on the inapplicability of Article 85(1) under either a relative validity approach or national court Article 85(3) exemption. On the other hand, if there is a possibility that the Commission or the Court would hold that the restriction infringes Article 85(1) and is not exempt under Article 85(3), the national court must act more cautiously. In such cases, national courts should follow the guidance suggested by the Notice and suspend proceedings pending an interim decision by the Commission. In highly controversial cases, an Article 177 reference to the Court of Justice may be necessary and would continue to be available. Such an approach ensures that national courts will not abuse their powers in ruling on questions of Article 85(1) infringements in the context of pro-competitive restraints of trade.

Unfortunately, despite the strong policies supporting a move in the direction of relative validity or the more promising national court exemption approach, neither option appears to be imminently on the horizon. The relative validity approach, while in the earliest drafts of the Notice, was omitted from the published draft of the Notice and the final Notice on Cooperation. One need not speculate as to the reason for its omission, but it suggests that the Commission rejected this option for the time being. As for the national court Article 85(3) exemption, Sir Leon Brittan has confirmed that while the Commission is considering this option, it believes that “the time is not yet right to take this step.” This is because of concern that the Commission’s establishment over the past thirty years of uniform enforcement of EU competition laws would be undermined because of disparate domestic legislation and enforcement mechanisms in the Member States. Such differential application of Union laws would, Brittan fears, result in forum shopping leading to the “fragmentation of the common market and distortions of capital flows.”

Sir Leon Brittan’s concern for disuniformity and forum shopping as the basis for rejecting or postponing a national court exemption approach is misplaced. While it is certainly true that Member States do not have equally effective or sophisticated competition enforcement regimes, there is no reason to fear that adopting a national court exemption approach would, in any novel way, result in the “differential application” of Union laws or forum shopping. This is because forum shopping and disuniformity are inherent in the decentralized application of competition enforcement.

---

122. *Id.* at 4.
laws, with or without a national court exemption power. It is well known that the procedures entitling injured parties to seek remedies before national courts vary from one Member State to another;\(^{123}\) the rights conferred by Union law are exercised before national courts in accordance with the procedures and conditions laid down by national rules.\(^{124}\) Thus, for example, in certain Member States the availability of damages may depend upon whether the relevant national law protects private or public interests.\(^{125}\) Further, forum shopping is implicitly tolerated under the Brussels Convention in that a plaintiff alleging an EU competition infringement arguably may sue in the jurisdiction where the defendant is domiciled, the jurisdiction where the illegal conduct occurred, or the jurisdiction where the resulting injury occurred.\(^{126}\) Moreover, pursuant to Article 26, the decisions of the courts of one signatory state must be recog-

---

\(^{123}\) Jacobs, supra note 14, at 1365-66 (citing LA COMMISSION DE LA CEE, COLLECTION; ETUDES SERIE CONCURRENCE No. 1, LA REPARATION DES CONSEQUENCES DOMMAGEABLES D'UNE VIOLATION DES ARTICLES 85 ET 86 DU TRAITE INSTITUANT LA CEE (1966) (1966 Commission study on rights of plaintiff to recover damages for breach of EU competition laws in each Member State)).


\(^{125}\) See Garden Cottage Foods v. Milk Marketing Board, 1 App. Cas. 130, 144 (1984); Bourgoin S.A. v. Ministry of Agriculture Fishers and Food, 3 W.L.R. 1027, 1034 (1985); Answer to Written Question No. 519/72, 1973 O.J. (C 67) 55.

\(^{126}\) Convention on Jurisdiction and the Enforcement of Civil and Commercial Judgments, Sept. 27, 1968, reprinted in BULL. EUR. COMM., Supp. 2/69 at 17, arts. 2, 5 [hereinafter Brussels Convention]; Case 21/76, Handelswekerij G.J. Bier B.V. v. Mines de Potasse d'Alsace S.A., 1976 E.C.R. 1735, 1745-47 (Article 5 of Brussels Convention makes provision in a number of cases for special jurisdiction, which plaintiff may opt to choose; plaintiff suing in tort, delict, or quasi-delict has option to commence proceedings either at place where damage occurred or place of event giving rise to it); ALAN DASHWOOD ET AL., A GUIDE TO THE CIVIL JURISDICTION AND JUDGMENTS CONVENTION 21-24 (1987) (under Articles 2 and 5(1), claims in matters relating to contract may be brought before either courts of jurisdiction where obligation in question is to be performed or courts of jurisdiction where defendant is domiciled; under Articles 2 and 5(5), tortious claims may be brought before courts of jurisdiction where damage occurred, jurisdiction where event giving rise to damage occurred, or jurisdiction where defendant is domiciled; under Articles 2 and 5(5), disputes arising out of activities of branch, agency, or other establishment of parent body may be brought before courts in jurisdiction of subsidiarity body or before courts of jurisdiction of parent body). But see Case T-24/90, Automec Srl. v. E.C. Commission, 5 C.M.L.R. 431, 458-59 (1992) (Advocate General Edward) (Brussels and Lugano Conventions may apply, but it is not clear how private actions to enforce direct rights under Articles 85 and 86 are to be treated under those Conventions; enforcement of final judgments within the Union should not prove too difficult, provided Brussels Convention applies).
nized in the courts of other signatories to the Convention. Thus, even absent a national court Article 85(3) exemption power, forum shopping among national courts and between national courts and the Commission already exists when plaintiffs sue to enforce Article 85(1) and Article 86.

As for concerns for the differential application of EU competition laws, this is no more an issue for Article 85(3) than for Article 85(1) and Article 86. As the Court of Justice emphasized:

The 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.

Consequently, as recognized by the Court of Justice, disuniformity is inherent in the Union's decentralized competition regime, in which Articles 85(1) and 86 create direct rights which national courts must safeguard. Indeed, disuniformity is an issue in applying all laws in a "federal" system. Provided there is an established doctrine of primacy of Union law and an effective system of judicial review, however, disuniformity can be minimized through the oversight of the judicial organs. Such judicial review exists through recourse to the Commission, the Court of First Instance, and the Court of Justice. Moreover, the European Union has frequently considered creating a more advanced system of judicial review to supervise national court judgments and reduce the attractiveness of forum shopping, and the newly created Court of First Instance is a concrete manifestation of this effort.

In sum, if disuniformity and forum shopping are truly the overriding concerns of the Commission, then the very concept of decentralized application of EU competition laws would not be a fundamental goal of the Union. Of course, such concerns are peripheral and the primary objective is the effective enforcement of EU competition laws by the Commission and the national courts alike. Effective national court enforcement of Article 85 requires the ability of national courts to review pro-competitive restraints of trade either under a relative validity approach or a national court Article 85(3) exemption approach.

Thus, despite Commissioner Brittan's protestations against forum shopping and differential application, there is no overriding reason for the Union to refrain from correcting the most glaring impediment to

---

129. See id. See also Case 127/73, BRT v. SABAM, 1974 E.C.R. 51, 62.
131. See Venit, supra note 25, at 41.
effective national court enforcement of EU competition laws. Indeed, in commenting upon the current reluctance to grant national courts an Article 85(3) exemption power, even he concedes that "it is only a matter of time before a sufficient consensus develops throughout the Union which would enable this view to change. If the speed at which convergence on this issue has been progressing over the last few years continues apace, this will not be unduly long." Thus, national court enforcement of pro-competitive restraints to trade is inevitable, although regrettably not imminent.

Conclusion

Subsidiarity has become "a critical epithet in the debate about the future of Europe." No longer simply a theoretical corrective to uncontrolled federalism, subsidiarity is now enshrined in the Maastricht Treaty as a constitutional mandate delineating the proper allocation of shared powers. Coupled with this is the Article 5 requirement that Member States, including the courts of Member States, "take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty . . . ." Thus, national courts, as well as the EU institutions, are now charged with the obligation to enforce Treaty provisions, including Articles 85 and 86, with the principle of subsidiarity foremost in mind.

The Commission has acknowledged that, due to sheer volume, private parties may no longer reasonably expect a formal Article 85(3) decision exempting their agreements. Furthermore, the procedural reforms the Commission has made will only reduce, not resolve, the problems created by lack of adequate resources and its monopolistic review under Article 85(3). The consequence of the current impasse is legal uncertainty and the concomitant harm to private undertakings competing in the Common Market. For the EU competition rules to be competently and efficiently enforced, the Commission can no longer effectively be the sole arbiter of Article 85 infringements.

Delimitis, Automec, and the Notice on Cooperation suggest that the power to enforce competition law as applied to private undertakings may gradually give way to more vigorous enforcement by national courts. In particular, these trends signal the Commission's willingness to leave to national courts the enforcement of uncomplicated cases of manifest infringement of Article 85(1), clear protection under an Article 85(3) block exemption, and eventually, obvious instances of pro-competitive restraints of trade. Such an approach frees the Commission to focus its efforts on addressing the more complicated and significant issues of com-

---

132. Brittan Speech, supra note 7, at 5.
133. Trachtman, supra note 4, at 468.
134. EEC Treaty, art. 5. See also Constantinesco, supra note 4, at 41 (Article 5, without expressly proclaiming subsidiarity, seems to have been inspired by the notion; one may think here we have the first, although admittedly indirect, adoption of subsidiarity by primary Union law).
135. See supra note 21 and accompanying text.
petition enforcement in the private and public sectors. Moreover, these trends are supported by cogent policy arguments: effective enforcement of the competition rules by the most efficient and appropriate means possible, in fidelity to the principle of subsidiarity. Thus, the application of the subsidiarity principle to EU competition enforcement is no longer merely a theoretical possibility, it is increasingly becoming a practical necessity.