

reduced the pressure that would normally have been exerted upon the *per se* prohibition itself.

The 85(3) criteria provide **the statutory possibility for a tolerance of cartel agreements that goes beyond what U.S. courts would permit even under the rule of reason.** The explicit exemption provision makes the introduction of an implicit justification procedure under a rule of reason less necessary. The Sherman Act, by contrast, contains no explicit exemption.¹³¹

Still, a form of rule of reason has developed judicially. The Court of Justice has deemed that:

- To determine the application of article 85 (1), the court needs to consider if, as a reasonably foreseeable consequence of an agreement and in light of the legal and non-legal factors, the agreement might produce a noticeable effect on the trade between Member States.

An examination of the economic realities of competition is required.¹³²

Despite never delineating these extra factors by the term “rule of reason”,¹³³ the European Court of Justice has allowed them to work in the case law in three ways.¹³⁴ The example that best evinces the integrationist movement within the EU rule of reason is that of “indispensable inducement”, which states that **but for** the restriction on competition, there would be no competitors in the first place, and no competition to restrict.

¹³¹See Weatherill, *op.cit.*, p. 625; Korah, *op.cit.*, pp. 1014-5; Timberg, *op.cit.*, p. 137.

¹³²Malawer, “International Law, European Community Law and the Rule of Reason”, 8 *Journal of World Trade Law* (17) (1974), 21.

¹³³Whish and Sufrin, “Article 85 and the Rule of Reason”, 7 *Yearbook of European Law* 1 (1987), 29: It is interesting to note that the Court itself has never used the term “rule of reason” when considering Article 85(1) in its judgments, including those given since the arrival of Judge Joliet in 1985.

¹³⁴These are: the primary one, also available in the U.S., concerning indispensable inducement; an ancillary restraints doctrine; and one allowing restrictions based on objective criteria that are applied non-discriminatorily. For an excellent description of the development of all three, please refer to Wyatt & Dashwood, *op.cit.*, pp. 406-8.