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Abstract

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ADDRESS

THE ENFORCEMENT OF COMPETITION POLICY IN THE EUROPEAN COMMUNITY: A MATURE SYSTEM*

*Jonathan Faull***

INTRODUCTION

The breadth of the title of this paper was presented to me by our Chairman as a challenge and an opportunity. Of course, a Fordham paper is always a challenge, usually to be met during the summer holiday because, while the Commission certainly offers non-stop enforcement, it is no secret that August is a quiet month when we are able to get away from Brussels, to renew acquaintance with our families and, if we are honoured with an invitation, to write our Fordham papers. The advent of the Merger Regulation[1] with its tight deadlines means that August is now a bit different. We maintain a considerable staff in Brussels and elaborate communication systems in order to cope with notifications requiring analysis and decisions in August. In August 1991, we half expected a major and controversial merger to come in. It did not, but our guard never drops. The moral of the story is that Fordham contributors who do not write their papers before August are taking a risk. I know the Commission deserves nothing less. Companies and lawyers have suffered for years from statements of objections, decisions and weighty requests for information landing on desks at the end of July. I am not asking for sympathy,

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** Cabinet of Vice-President Sir Leon Brittan, Commission of the European Communities, Brussels. The author wishes to thank Luc Gyselen, Ronan Harty, Barry Hawk, Michael Reynolds, Ben Van Houtte and James Venit for their comments on an early draft of this Address. The author expresses his personal views in this Address.

1. Council Regulation No. 4064/89, O.J. L 395/1 (1989), *corrected version in* O.J. L 257/13 (1990) [hereinafter Merger Regulation] (concerning control of concentrations between undertakings).

just warning Barry Hawk about some of the effects of increased enforcement of competition policy in the Community.

The European Community's ("EC") competition law system, by which I mean its rules, procedures and mechanisms, is almost complete. Legislation and case law have filled nearly all the gaps which were still open when enforcement got under way in the 1960s. The Commission's administrative practice has created procedural devices to keep things running smoothly without any laborious and perhaps risky attempts to amend Council Regulation No. 17/62 ("Regulation No. 17").[2]

Brussels is an exciting place to be for people interested in competition law and policy. There is ample room for improvement, and I do not in any way suggest that the Commission or the EC's enforcement system as a whole has all the right answers to the relevant questions. However, I do argue that the EC's competition law enforcement system has attained a considerable degree of maturity.

The EC's competition law is built on Articles 85 and 86 of the Treaty Establishing the European Economic Community (the "Treaty")[3] and Regulation No. 17. The Commission and the Court of Justice have developed an enforcement system to give effect to the Treaty rules, and the Council has added legislative provisions to fill in gaps. The role of competition policy in the pre-1992 period has been to open national markets within the EC and ensure that competition is the principal driving force in the EC's economy. Thus competition policy has underpinned the drive towards the EC's single market. I will say a word later about post-1992 competition policy, but allow me also a brief comment about the particular characteristics of our policy that make it different from U.S. antitrust law and policy. There are many more similarities than differences, but we must understand the latter before celebrating the former.

It has become trite to point out that the EC is setting up a single domestic market against considerable odds, whereas the United States already has one. Clearly, our approach to vertical restraints largely results from our concern to open national

2. Council Regulation No. 17/62, 13 J.O. 204 (1962), O.J. Eng. Spec. Ed. 1959-62, at 87 [hereinafter Regulation No. 17].

3. *See* Treaty Establishing the European Economic Community, Mar. 25, 1957, arts. 85, 86, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 3 (1958) [hereinafter EC Treaty].

markets in the EC and make companies and consumers used to the idea that they are living and working in one single market, not twelve. But we are also concerned about *market access*, allowing smaller companies or new entrants to challenge the market positions built up under the pre-single market *ancien régime*. Thus, for example, what some see as a sentimental and economically misplaced concern for small and medium-sized companies, SMEs in Brussels jargon, or the preoccupation with fairness can be explained by reference to the EC's overriding objective of prising open national markets and breaking down ingrained habits. This is not the invisible hand; it is competition policy as can opener. In addition, the EC's general commitment to equality of treatment and abhorrence of discrimination have become constitutional principles governing specific policies, including competition.[4] Opportunities for market access and concern for the consumer's interests are therefore central to the EC's competition policy in ways that strengthen resistance to some of the ideas of the Chicago School.

Recent cases under Article 86[5] and the emerging settlement practice under the Merger Regulation[6] show how the EC's concern for market integration and entrants translates into specific policy approaches to exclusionary practices, predatory pricing, and divestiture.

Other differences between the EC's enforcement system and U.S. rules and practices are more a matter of culture than a degree of market integration. The EC is composed of twelve Member States with differences of tradition and culture in respect of economic organisation and the role of the state in law enforcement and the corporate economy. I suspect that the

4. *See generally* Koen Lenaerts, *L'Egalité de Traitement en Droit Communautaire*, 1991 C. DE D. EUR. 3.

5. *See, e.g.*, AKZO Chemie BV v. Commission, Case C-62/86 (Eur. Ct. J. July 3, 1991) (not yet reported); Radio Telefis Eireann v. Commission, Case T-69/89, [1991] E.C.R. __, [1991] 4 C.M.L.R. 586 (Ct. First Instance); British Broadcasting Corp. and BBC Enter. Ltd. v. Commission, Case T-70/89, [1991] E.C.R. __, [1991] 4 C.M.L.R. 669 (Ct. First Instance); Independent Television Publications Ltd. v. Commission, Case T-76/89, [1991] E.C.R. __, [1991] 4 C.M.L.R. 745 (Ct. First Instance).

6. *See, e.g.*, Varta/Bosch, O.J. L 320/26 (1991); Magneti Marelli/CEAc, O.J. L 222/38 (1991), Common Mkt. Rep. (CCH) [1991] 2 CEC 2146; Alcatel/Telettra, O.J. L 122/48 (1991), [1991] 4 C.M.L.R. 778; Fiat Geotech/Ford New Holland, O.J. C 118/14 (1991), [1991] 4 C.M.L.R. 330.

relative failure so far of our efforts to encourage private enforcement of EC competition law through the courts has as much to do with European attitudes to the state and the law as with more down-to-earth issues such as contingency fees or treble damages. This means that we are right in seeking to decentralise enforcement by explaining, educating, and improving understanding and certainty, rather than embarking on the arduous task of setting up common EC procedures throughout the Member States. A major difference between EC and U.S. enforcement systems is therefore the role of private litigation and the activities of public authorities in enforcing the law and implementing competition policy.[7]

In what follows, I will review a number of policy issues and offer comments in arguing the case for the maturity of the EC's enforcement system. I will concentrate exclusively on antitrust enforcement, but it should not be forgotten that *state aids* policy is also an important part of the EC's competition policy. State aids enforcement has increased significantly in recent years, and there is now a considerable body of legislation, case law, guidelines, and administrative practice detailing the Commission's implementation of Articles 92 and 93 of the Treaty. On July 24, 1991, the Commission adopted an important new measure providing for transparency and scrutiny of Member States' financial relationships with state-owned or controlled enterprises.[8] The need for Commission regulation of subsidies in the EC's internal market is widely acknowledged, and the system of rules and procedures set up to administer EC policy in this field is now largely complete and functions well. The enforcement of state aids policy, one of the most difficult tasks given to the Commission, is carried out in a mature system of law, administration, and policy development.

I. *PROCEDURE*

Regulation No. 17 is unchanged in substance since the 1960s. Its fact-finding, inspection, and fining provisions have stood the test of time, and case law has clarified them where

7. For an interesting account of transatlantic differences, see LAURENT COHEN-TANUGI, LE DROIT SANS L'ETAT—SUR LA DÉMOCRATIE EN FRANCE ET EN AMÉRIQUE (1985).

8. Commission Communication, O.J. C 273/2 (1991).

necessary. The Regulation No. 17 system has been extended to the transport field,[9] and the whole economy, with the exception of coal, steel and agriculture that have their own special rules,[10] is now subject to the competition rules under similar procedures. The Merger Regulation repeals Regulation No. 17 and its sister transport regulations in respect of concentrations, but adopts the basic fact-finding and inspection procedures set out in Regulation No. 17.[11]

The fact that Regulation No. 17 has not been substantively amended does not mean that it is perfect. The Commission has developed a series of administrative procedures to provide for rapid, flexible responses to particular problems. Thus various forms of comfort letters, discomfort letters and settlement arrangements have emerged. In a comfort letter, DG IV writes to say that it is satisfied on the basis of the information available to it that, for example, an agreement does not fall within Article 85(1) or that it does but merits exemption under Article 85(3); DG IV does not intend to recommend that the Commission should take a formal decision and close its file in the case; the file may, however, be reopened in the event of a complaint or a material change of law or fact. In a discomfort letter, DG IV writes to say that an agreement falls within Article 85(1) and does not, in its view, merit exemption; it may therefore, in whole or in part, be null and void pursuant to Article 85(2); however, in accordance with its enforcement priorities, DG IV does not propose to recommend that the Commission take a decision in the case, and it closes the file on the same terms as for a comfort letter. A discomfort letter will frequently be used when a national court is better placed than the Commission to resolve a dispute. It has been argued that these letters leave companies in limbo, uncertain of their legal positions, and encourage renegotiation of agreements on the basis of an artifi-

9. Council Regulation No. 3975/87, O.J. L 374/1 (1987) (air transport); Council Regulation No. 4056/86, O.J. L 378/4 (1986) (maritime transport); Council Regulation No. 1017/68, J.O. L 175/1 (1968), O.J. Eng. Spec. Ed. 1968 (I), at 302 (rail, road and inland waterway transport).

10. Coal and steel have their own treaty. Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140 (1957) [hereinafter ECSC Treaty]; *see infra* section VI. For the competition regulation concerning agriculture, see Council Regulation No. 26/62, 30 J.O. 993 (1962), O.J. Eng. Spec. Ed. 1959-62, at 129.

11. Merger Regulation, *supra* note 1, art. 22, O.J. L 257/13, at 24 (1990).

cial shift in bargaining power. My experience is that companies are generally happy with a rapid response and are willing to assume the responsibility of drawing appropriate conclusions. If the Commission is nevertheless convinced by a party that a formal decision is necessary to resolve a dispute, it will issue one.

The development of settlement procedures, usually involving undertakings given to the Commission, is another important administrative reform. In several recent cases of considerable importance, the Commission was able to close its file once the parties had agreed to change their agreements or conduct and had given written undertakings to DG IV. The Commission should not settle cases when the interest of another party (e.g. a complainant) or the general public interest (e.g. to impose a fine or to establish a point of law or policy) requires that a formal decision be taken. Undertakings are enforced by means of a decision following the reopening of the file closed on settlement. A party in breach of an undertaking to the Commission should not expect tenderness. Although the Court of Justice has held recently in the *AKZO Chemie BV v. Commission* ("*AKZO*") case[12] that failure to comply with a decision ordering interim measures cannot be an aggravating factor in the setting of a fine in the final decision, I do not think that this would prevent the Commission from imposing a high fine in a decision condemning an infringement of Article 85 or Article 86 where it had previously closed the file on receipt of undertakings which were subsequently breached. The fining criteria of intention and gravity, both mentioned in article 15 of Regulation No. 17, would be amply met. In a final decision following a breach of an undertaking, the Commission would almost certainly make a positive order under article 3 of Regulation No. 17 in order to ensure that the party concerned did what it had previously undertaken to do.

In a less contentious context, undertakings may be given in order to secure an exemption under Article 85(3). In this case, the Commission may transform compliance with the undertaking into a condition or obligation attached to the decision pursuant to article 8 of Regulation No. 17. The Merger

12. AKZO Chemie BV v. Commission, Case C-62/86, slip op. ¶ 163 (Eur. Ct. J. July 3, 1991) (not yet reported).

Regulation refines this further: Article 8(2) provides that the Commission may attach "conditions and obligations intended to ensure that the undertakings concerned comply with the commitments[13] they have entered into *vis-à-vis* the Commission with a view to modifying the original concentration plan" to a decision authorising a merger after a second phase inquiry.[14] However, under the Merger Regulation, *only* undertakings given to the Commission may be transformed into conditions and/or obligations,[15] whereas, under Regulation No. 17, a relevant issue on which the parties have been heard may be made the subject of a condition or obligation, without any need for a prior undertaking.[16]

Undertakings have proved a very useful innovation under both Regulation No. 17 and the Merger Regulation. Several mergers already have been authorised only after substantial changes were made, including partial divestiture at a fairly late stage in the second and final phase of the procedure, and following a statement of objections.[17] The changes and divestiture, if not already completed, become conditions or obligations attached to the authorisation decision once the parties give the necessary commitments in writing. In Regulation No. 17 cases, undertakings are often an acceptable alternative to an interim measures decision, and they can also be a satisfactory way of resolving a case in which there has been an infringement of the competition rules to which the parties agree to put an end, and where there is no particular or general interest in adopting a formal decision. In Regulation No. 17 cases, but not in merger cases, there is an obvious administrative advantage for all concerned in not having to take a time-consuming decision.

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13. Merger Regulation, *supra* note 1, art. 8(2), O.J. L 257/13, at 19 (1990). The word "commitment" rather than "undertaking" is used in order to avoid confusion with "undertaking" as a term of art of EC competition law. On this and other English language difficulties in the Merger Regulation, see SIR LEON BRITTAN, COMPETITION POLICY AND MERGER CONTROL IN THE SINGLE EUROPEAN MARKET 25-26 (1991).

14. Merger Regulation, *supra* note 1, art. 8(2), O.J. L 257/13, at 19 (1990).

15. *Id.*

16. Transocean Marine Paint Ass'n v. Commission, Case 17/74, [1974] E.C.R. 1063, 1079, [1974] 2 C.M.L.R. 459, 477.

17. *See* Varta/Bosch, O.J. L 320/26 (1991); Magneti Marelli/CEAc, O.J. L 222/38 (1991), Common Mkt. Rep. (CCH) [1991] 2 CEC 2146; Alcatel/Telettra, O.J. L 122/48 (1991), [1991] 4 C.M.L.R. 778.

Just as comfort letters were the market-driven response to the Commission's inability to supply negative clearance or exemption decisions to meet the demand by notifiers of agreements, the block exemption instrument was also developed to provide mass legal security. Article 87(2)(b) provides the legal basis for Council enabling regulations which in turn form the legal basis for the Commission's detailed block exemption regulations.[18] With the sole exception of Council Regulation No. 4056/86[19] granting a block exemption to liner conferences in maritime transport, the *Commission* has granted block exemptions in accordance with the procedure just described. The exceptional *Council* block exemption for liner conferences was part of a wider package applying the competition rules at last on a sound procedural basis to the maritime transport sector and establishing EC policy generally for that sector, and followed the United Nations Convention on a Code of Conduct for Liner Conferences.[20]

The Commission believes that it is *its* job to grant block exemptions as part of its general responsibility for implementing and enforcing competition policy. We are unlikely to see other Council block exemptions, although some Member States would like to continue where they left off with liner conferences and have the Council grant the block exemption proposed by the Commission *in the form of an enabling Regulation* for consortia in maritime transport.[21] The Commission has made it clear that it will withdraw its proposal and abandon its intention of granting a block exemption in this area rather than allow the Council to interfere with its competition policy prerogatives by granting a block exemption itself.

The block exemption instrument has been invaluable in dealing with areas which were once controversial and gave rise to hundreds, sometimes thousands of notifications. The addition of the opposition procedure, whereby agreements are ex-

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18. EC Treaty, *supra* note 3, art. 87(2)(b).

19. O.J. L 378/4, at 6 (1986).

20. Apr. 6, 1974, U.N. Doc. TD/Code/11/Rev. 1 & Corr. 1 (1974). *See generally* MARK CLOUGH & FERGUS RANDOLPH, SHIPPING AND EC COMPETITION LAW (1991); Helmut W.R. Kreis, *European Community Competition Policy and International Shipping*, 13 FORDHAM INT'L L.J. 411 (1989-1990).

21. Proposal for a Council Regulation, O.J. C 167/9 (1990), *adopted*, O.J. __ (199__) (not yet published).

empted automatically if the Commission does not object within a certain deadline, has also proved helpful in some block exemptions, although the procedure is not used very much. Important issues arising under block exemptions are still being clarified by Commission decisions and case law. For example, the concept of "intermediary" in article 3(11) of Commission Regulation No. 123/85 granting a block exemption to certain categories of motor vehicle distribution and servicing agreements[22] has been hotly disputed in a case involving the French car manufacturer Peugeot.[23]

In recent years, the block exemption instrument has been very useful in accompanying the implementation of competition policy in the air transport sector. On the basis of a Council enabling regulation, the Commission has issued block exemptions for certain types of joint planning and coordination between airlines (including slot allocation), computer reservation systems, and ground handling services.[24] An innovation in the air transport sector regarding exemptions occurs in the basic procedural regulation applying the competition rules to the sector (the equivalent, *mutatis mutandis*, of Regulation No. 17), Council Regulation No. 3975/87.[25] Article 5 sets out a procedure for exemptions for agreements relating to air transport services.[26] For the time being, only international air transport between EC airports, i.e., between one Member State and another, is concerned, but the Commission has proposed that this limitation be dropped.[27] Under this special

22. Commission Regulation No. 123/85, O.J. L 15/16, at 20 (1985); *see* Commission Notice Concerning Regulation No. 123/85, O.J. C 17/4 (1985).

23. Ecosystem SA v. Peugeot SA, [1990] 4 C.M.L.R. 449 (Commission interim measures decision); Automobiles Peugeot SA and Peugeot SA v. Commission, Case T-23/90R, [1990] E.C.R. II-195, [1990] 4 C.M.L.R. 674 (Order, Ct. First Instance, May 21, 1990), *aff'd*, Case T-23/90R (Ct. First Instance, July 12, 1991) (not yet reported). An appeal has been made to the Court of Justice.

24. Commission Regulation No. 84/91, O.J. L 10/14 (1991); Commission Regulation No. 83/91, O.J. L 10/9 (1991); Commission Regulation No. 82/91, O.J. L 10/7 (1991).

25. O.J. L 374/1 (1987).

26. *Id.* at 3.

27. The Commission first proposed that the Council amend Regulation No. 3975/87 to extend its coverage to air transport between the Community and foreign countries and to domestic air transport within a Member State. Proposal for a Council Regulation, O.J. C 248/10 (1989). This followed the Court of Justice's judgment in Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH v. Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V., Case 66/86, [1989] E.C.R. 803, [1990] 4

procedure, an agreement is notified. If the Commission has all the necessary evidence and has not initiated proceedings with a view to finding a violation of Article 85 or Article 86, it must publish a summary and call for comment in the Official Journal "as soon as possible."[28] Interested third parties and Member States have thirty days from the date of publication to submit their comments.[29] Then, ninety days after the publication, if the Commission has not raised serious doubts about the applicability of Article 85(3) in a decision notified to the applicants, the agreement is deemed exempt under Article 85(3) for six years from the date of publication.[30] The Commission may, after ninety days but before the six years are up, issue a decision applying Article 85(1) of the Treaty if it finds that the conditions for an exemption under Article 85(3) are no longer met.[31] This decision may be retroactive if the parties give the Commission inaccurate information (which includes incomplete information)[32] or if they have abused the exemption or a dominant position.[33] Finally, Member States may, within forty-five days of the Commission's forwarding a copy of the application for an exemption to them, ask the Commission to raise serious doubts "on the basis of considerations relating to the competition rules of the Treaty."[34] The Commission must then do so.[35] This is another unusual interference with the Commission's responsibilities for the implementation of competition policy, but again it was the price to pay for securing at long last the application of competition law on a sound procedural basis to air transport. In general, it may be said that the block exemption instrument has been a great success—so

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C.M.L.R. 102 [hereinafter Ahmed Saeed]. Now the Commission has submitted a new proposal to the Council regarding domestic transport within a Member State (cabotage). Proposal for a Council Regulation, O.J. C 225/9 (1991). The Commission proposes an identical amendment to the Council enabling regulation for block exemptions in air transport. Proposal for a Council Regulation, O.J. C 225/10 (1991).

28. Council Regulation No. 3975/87, art. 5(2), O.J. L 374/1, at 3 (1987).

29. *Id.*

30. *Id.*

31. *Id.*

32. *See, e.g.*, Telos, O.J. L 58/19 (1982), [1982] 1 C.M.L.R. 267; *see also* J.M. Joshua, *Information in EC Competition Law Procedures*, 11 EUR. L. REV. 409 (1986).

33. Council Regulation No. 3975/87, art. 5(4), O.J. L 374/1, at 3 (1987).

34. *Id.*

35. *Id.*

much so that Member States have imitated it or plan to do so.[36]

There are dangers involved. The block exemption may be too rigid, and companies and lawyers too ready to use it as a model agreement. National courts, which have jurisdiction to interpret and apply block exemption regulations subject to Article 177's preliminary ruling procedure,[37] may spectacularly misunderstand their purpose and effect.[38] Nevertheless, the Commission has been able to clarify law and policy in many important areas by means of a block exemption, and administration and enforcement of policy have undoubtedly been much improved.

Currently, block exemptions are under preparation for certain agreements between insurance companies, where a Council enabling regulation has been adopted,[39] and for shipping consortia, where Council discussions on the terms of the enabling regulation are still taking place.[40] On December 31, 1994, the block exemption for patent licensing agreements will expire, and the Commission no doubt will engage in widespread consultations about its renewal and possible amendment. One option that certainly will be discussed is the amalgamation of the patent licensing[41] and know-how[42] licensing block exemptions, the latter of which expires on December 31, 1999.

The Commission is currently considering ways of clarifying law and policy regarding cooperative joint ventures. Draft guidelines have just been issued,[43] and consideration will also be given to amendments to various block exemption regula-

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36. For a recent example of Member State legislation, see the Competition Act, No. 24, § 4(2) (1991) (Ir.). *See also* Alec Burnside & Eugene Stuart, *Irish Competition Law: Moving Towards the European Model*, 13 EUR. COMPETITION L. REV. 38 (1992) (forthcoming).

37. *See* Delimitis v. Henninger Bräu AG, Case C-234/89, slip op. ¶ 54 (Eur. Ct. J. Feb. 28, 1991) (not yet reported).

38. *See* VAG France SA v. Etablissements Magne SA, Case 10/86, [1986] E.C.R. 4071, [1988] 4 C.M.L.R. 98.

39. Council Regulation No. 1534/91, O.J. L 143/1 (1991).

40. Proposal for a Council Regulation, O.J. C 167/9 (1990), *adopted*, O.J. __ (199__) (not yet published).

41. Commission Regulation No. 2349/84, O.J. L 219/15 (1984), *corrected by* O.J. L 113/34 (1985).

42. Commission Regulation No. 556/89, O.J. L 61/1 (1989).

43. *See* Barry E. Hawk, *Joint Ventures Under EEC Law*, 15 FORDHAM INT'L L.J. 303, 345 app. (1991-1992) (reprinting text of draft guidelines).

tions to improve coverage of joint ventures. The patent licensing,[44] research and development,[45] specialisation,[46] and know-how licensing[47] regulations could all be looked at in this regard.

It is sometimes suggested that block exemptions would be welcome in areas not currently covered. I have heard arguments in favour of block exemptions for trademark agreements, copyright licenses and software licences. If in respect of particular sectors or issues there are many similar agreements which fall within Article 85(1)[48] and are notified to the Commission for exemption under Article 85(3),[49] the Commission will certainly be willing to consider granting block exemptions even if this means seeking new *vires* from the Council, as was the case for insurance and for shipping consortia. As far as I can see, there is no convincing case for new block exemptions at the moment, but we are always ready to listen to those who would seek to persuade us of the contrary view.

A final point on procedure relates to legal professional (or attorney-client) privilege which I know is of some concern to U.S. and other non-EC lawyers who give advice on our competition law. The Court of Justice's judgment in *AM & S Europe Ltd. v. Commission* ("*AM & S*")[50] has now been applied by the Court of First Instance in *Hilti-Aktiengesellschaft v. Commission* ("*Hilti*").[51] Although the Court of First Instance did not repeat the Court of Justice's limitation of legal professional privilege under Regulation No. 17 to members of a bar or law society of a Member State of the EC, presumably because the issue did not arise in the *Hilti* case, there can be no doubt that non-EC lawyers still are not entitled to legal professional privilege under the *AM & S* rule. EC-U.S. relations on antitrust matters are now so good—I shall refer to the EC-U.S. agreement later—that I find it hard to believe that this problem will remain unresolved for very long. My personal view is that we

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44. Commission Regulation No. 2349/84, O.J. L 219/15 (1984), *corrected by* O.J. L 113/34 (1985).

45. Commission Regulation No. 418/85, O.J. L 53/5 (1985).

46. Commission Regulation No. 417/85, O.J. L 53/1 (1985).

47. Commission Regulation No. 556/89, O.J. L 61/1 (1989).

48. EC Treaty, *supra* note 3, art. 85(1).

49. *Id.* art. 85(3).

50. Case 155/79, [1982] E.C.R. 1575, [1982] 2 C.M.L.R. 264.

51. Case T-30/89, [1990] E.C.R. II-163 (Ct. First Instance).

should be able to agree to offer each other's lawyers legal professional privilege. On our side, it would be on the basis of the *AM & S* rule for all Commission competition cases, and we would expect equivalent treatment from the U.S. authorities for our lawyers. Lawyers from any jurisdiction may represent clients before the EC Commission, including at oral hearings. The offer of reciprocal legal professional privilege in competition cases should, in my view, be open to all countries. I recognise that the EC's case law and practice are very limited in this area, and I expect that over time a process of refinement will take place as it has elsewhere. The United States has developed a sophisticated approach to "sham" privilege and the like, and I would not be surprised to see the EC follow a similar course.[52] However legal professional privilege develops, my hope is that it will be extended on a reciprocal basis to non-EC lawyers so that they are subject to the same rules as their EC counterparts and, dare I say it, competitors.

II. *JURISDICTION*

There is little to be added to the many commentaries on the *A. Ahlström Osakeyhtiö v. Commission* (*"Wood Pulp"*) judgment.[53] The implementation doctrine is now well established, and jurisdictional arguments are rarely heard any more in EC competition cases. The Merger Regulation has been applied in several cases involving parties headquartered outside the EC and jurisdiction has not been a controversial issue. Of course, there is no telling when a hard case that requires a precise distinction between "implementation" and "effects" and which sends the effects doctrine back into the legal headlines will arise.[54] Nevertheless, for the present, one can say that the jurisdictional issue in EC competition law has been settled, and that what was once one of the great unanswered questions that

52. *See* Julian Mathic Joshua, *Proof in Contested EC Competition Cases: A Comparison with the Rules of Evidence in Common Law*, 12 EUR. L. REV. 315, 340-45 (1987).

53. Joined Cases 89, 104, 114, 116-17 & 125-29/85, [1988] E.C.R. 5193, [1988] 4 C.M.L.R. 901; *see* SIR LEON BRITTAN, *Jurisdictional Issues in EC Competition Law*, *in* COMPETITION POLICY AND MERGER CONTROL IN THE SINGLE EUROPEAN MARKET, *supra* note 13, at 10-16; Walter Van Gerven, *EC Jurisdiction in Antitrust Matters: The* Wood Pulp *Judgment*, *in* 1989 FORDHAM CORP. L. INST. 451 (Barry Hawk ed., 1990).

54. *See* BRITTAN, *supra* note 13, at 12-15.

fascinated learned commentators has been taken off the agenda.

III. *RULE OF REASON?*

The Commission is sometimes urged to adopt a rule of reason in Article 85(1) analysis. It is even presented as an inexorable development that we would be foolish to resist. One is reminded of the words of the English poet George Herbert:

> Lord, with what care hast thou begirt us round!
> Parents first season us: then schoolmasters
> Deliver us to laws; they send us bound
> To rules of reason . . . .[55]

Leaving aside the pitfalls of using a term of art of U.S. law, however European its common law roots may be, as a suggested graft onto EC law, I suppose that those who believe that Article 85(1) needs a rule of reason also believe that our current system of enforcement is thoroughly inadequate and immature. Even those who see cases over the last five years or so as moving timidly towards a new approach to restraints on conduct that are not necessarily restrictions of competition within the meaning of Article 85(1) must, I suppose, want to argue against my thesis that the EC's enforcement system is reaching maturity. After all, if the law is still inchoate on such an important issue, is there not still a long way to go before the word maturity can be pronounced?

It is not my purpose here to enter into the whole debate about the "rule of reason." I accept that it is still raging, but not that it undermines my general maturity thesis. What we are seeing in the EC is the development of an ancillary restraint doctrine. While this can be traced back at least as far as the Commission's 1979 notice on sub-contracting agreements,[56] it has really come to the fore in Court of Justice case law and Commission decisions and block exemptions in recent years. It has also received legislative recognition in article 8(2) of the Merger Regulation: "The decision declaring the concentration compatible shall also cover restrictions directly related and necessary to the implementation of the concentra-

55. GEORGE HERBERT, *Sinne*, *in* A CHOICE OF GEORGE HERBERT'S VERSE (Faber and Faber 1967).

56. Commission Notice, O.J. C 1/2 (1979).

tion."[57] The Commission has issued a notice "regarding restrictions ancillary to concentrations" to explain article 8(2) and recital 25 of the Merger Regulation.[58] Meanwhile, joint venture guidelines have been issued explaining the application of the ancillary restraints doctrine with respect to cooperative joint ventures.[59] The general position is that restraints on conduct that are necessary to achieve the legitimate aims of an agreement are ancillary and fall outside Article 85(1) if the agreement does, except for those restraints which divide the Common Market along territorial lines. We have not yet reached anything like full and consistent implementation of such an approach, but it is a reasonable inference from the case law that that is the direction we have taken. In my view, this is a sign of a maturing system. Enforcement will be decentralised and, while legal certainty may suffer in the short term, companies and their advisers will soon be able to identify ancillary restraints for themselves, consulting DG IV if necessary but without having to make unnecessary notifications.

IV. *ARTICLE 86*

There has been considerable Article 86 activity in recent months. Even since Luc Gyselen's outstanding contribution to the Fordham Corporate Law Institute's proceedings two years ago,[60] several unanswered questions have been resolved. In 1989, the Court of Justice held that Article 86 is directly enforceable in national courts in the Community, notwithstanding the absence of implementing legislation under Article 87[61] (i.e. Regulation No. 17 and its counterparts).[62] This complicates one-stop shopping for mergers, but that is a separate issue. For present purposes, it suffices to note the judicial answer to a long-open question.

The interplay between Articles 85 and 86 is another ques-

57. Merger Regulation, *supra* note 1, art. 8(2), O.J. L 257/13, at 19 (1990).

58. Commission Notice, O.J. C 203/5 (1990); *see* Merger Regulation, *supra* note 1, recital 25, art. 8(2), O.J. L 257/13, at 16, 19 (1990).

59. *See* Hawk, *supra* note 43, app.

60. Luc Gyselen, *Abuse of Monopoly Power within the Meaning of Article 86 of the EEC Treaty: Recent Developments*, *in* 1989 FORDHAM CORP. L. INST. 597 (Barry Hawk ed., 1990).

61. EC Treaty, *supra* note 3, art. 87.

62. Ahmed Saeed, Case 66/86, [1989] E.C.R. 803, [1990] 4 C.M.L.R. 102.

tion that has delighted cognoscenti for years. Luc Gyselen has pointed out that the direct enforcement of Article 86 by a national judge may well involve an implicit finding under Article 85(3).[63] This does not alarm me: indeed, enforcement of Article 85 by national judges would be severely handicapped if they could not take a realistic view of the possible application of Article 85(3) to an agreement. After all, article 9(1) of Regulation No. 17, the source of the Commission's monopoly power to apply Article 85(3), says only that "[s]ubject to review of its decision by the Court of Justice [and, one must add, where appropriate by the Court of First Instance], the Commission shall have sole power to declare Article 85(1) inapplicable pursuant to Article 85(3) of the Treaty."[64] Courts can consider the likely application of Article 85(3) without actually going so far as to declare Article 85(1) inapplicable. Of course, a judge may stay the proceedings pending a Commission decision, make a reference under Article 177, or contact the Commission to seek its views. This last possibility has been recognised by the Court of Justice in the *Delimitis v. Henninger Bräu AG* case,[65] subject to national rules of procedure and Article 214 of the EC Treaty.[66] In fact, the Commission has on occasion assisted national judges by giving its assessment of the law and facts in cases involving the Community competition rules. The Court's judgment will encourage the Commission to pursue its efforts to decentralise enforcement by involving national judges more in the process of applying Articles 85 and 86. The Commission will certainly be willing to act as *amicus curiae* in any way that it and the national court concerned judge appropriate.[67]

But I have digressed some way from Article 86. The Court of First Instance has held that the grant of an exemption under Article 85(3) does not preclude the application of Article 86.[68] This was not a great surprise and another hitherto

63. Gyselen, *supra* note 60, at 642-43.

64. Council Regulation No. 17/62, *supra* note 2, art. 9(1), O.J. Eng. Spec. Ed. 1959-62, at 89.

65. Case C-234/89, slip op. ¶ 53 (Eur. Ct. J. Feb. 28, 1991) (not yet reported).

66. EC Treaty, *supra* note 3, arts. 177, 214.

67. For an admittedly unusual British case, see Hasselblad (GB) Ltd. v. Orbinson, 1985 Q.B. 475, [1985] 2 W.L.R. 1 (C.A.).

68. Tetra Pak Rausing SA v. Commission, Case T-51/89, [1990] E.C.R. __, [1991] 4 C.M.L.R. 334 (Ct. First Instance).

unanswered question has been resolved.

A major substantive question troubling competition lawyers and enforcers for years has been the analysis of predatory pricing. In its decision of December 14, 1985,[69] the Commission fined AKZO, a Dutch chemical company, 10 million ECU for pricing and other commercial conduct designed to drive a competitor from the market. Some of AKZO's prices to its competitor's customers were unreasonably low and discriminatory *vis-à-vis* AKZO's other customers. The Commission avoided the emotive term "predatory" and observed that Article 86 did "not prescribe any cost-based legal rule to define the precise stage at which price-cutting by a dominant firm may become abusive."[70] The Court of Justice ruled on AKZO's appeal on July 3, 1991,[71] upholding the Commission's decision in all but a few minor respects.[72] The Court's dicta on abusive pricing prohibited by Article 86 could not be clearer. There is a cost-based rule. In fact, there are two:

1. Prices below average variable costs (i.e. those which vary in accordance with the volume of production) by which an undertaking seeks to eliminate a competitor must be deemed abusive.
2. Prices below average total costs (i.e. fixed and variable costs), but above average variable costs must be deemed abusive when they are set as part of a plan designed to eliminate a competitor.[73]

There will be a lot of debate and no doubt a lot of case law on the meaning and application of these tests. The role of intent and the amount of evidence needed will be important issues. It is not my purpose here to debate abusive or predatory pricing, but there can be no doubt that the Court of Justice has answered an important and controversial question. As if this were not enough in a rather heady judgment, the Court also held that a 50 percent market share is per se dominant in the

69. ECS/AKZO, O.J. L 374/1 (1985), [1985-1988 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 10,748.

70. *Id.* at 19, ¶ 75, [1985-1988 Transfer Binder] Common Mkt. Rep. (CCH) at 11,733-24.

71. AKZO Chemie BV v. Commission, Case C-62/86 (Eur. Ct. J. July 3, 1991) (not yet reported).

72. The Court reduced the fine from 10 to 7.5 million ECU. *Id.*

73. *Id.* slip op. ¶¶ 71-72.

absence of exceptional circumstances.[74] This is an important dictum for the implementation of the Merger Regulation, although clearly a more sophisticated analysis is needed before establishing a dominant position. High market shares trigger interest and further analysis, but are not sufficient for a finding that a dominant position exists. Moreover, under the Merger Regulation, a dominant position must be created or strengthened and give rise to a significant impediment to competition before it can be prohibited.[75]

Other developments in the predatory field are the Council's new regulation simplifying the Commission's competition procedures in the air transport sector where complainants apply for interim measures to stop predatory behavior,[76] and the Commission's decision of July 24, 1991 fining Tetra Pak 75 million ECU for a number of abuses of dominant position, including prices designed to eliminate a competitor.[77]

While we were still digesting *AKZO*, the Court of First Instance gave judgment a week later in the *Radio Telefis Eireann v. Commission*, *British Broadcasting Corporation and BBC Enterprises Ltd. v. Commission*, and *Independent Television Publications v. Commission* cases.[78] These cases concerned intellectual property rights and their relationship to Article 86. Can a refusal to license be an abuse of dominant position? Yes, said the Court of First Instance, in upholding the Commission's decision.[79] The essential function of copyright is to protect the moral rights in a work and to ensure a reward for creative effort. But Article 86 and its aims must be respected and may prevail over any use of national intellectual property law contrary to the principles of Community competition law. The refusal to li-

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74. *Id.* ¶ 60.

75. For a recent decision in which a dominant position (90 percent market share) was found not to have been strengthened by a merger, see Tetra Pak/Alfa Laval, O.J. L 290/35 (1991), Common Mkt. Rep. (CCH) [1991] 2 CEC 2203.

76. Council Regulation No. 1284/91, O.J. L 122/2 (1991).

77. Tetra Pak (Eur. Comm'n July 24, 1991) (not yet reported).

78. Radio Telefis Eireann v. Commission, Case T-69/89, [1991] E.C.R. __, [1991] 4 C.M.L.R. 586 (Ct. First Instance); British Broadcasting Corp. & BBC Enter. Ltd. v. Commission, Case T-70/89, [1991] E.C.R. __, [1991] 4 C.M.L.R. 669 (Ct. First Instance); Independent Television Publications Ltd. v. Commission, Case T-76/89, [1991] E.C.R. __, [1991] 4 C.M.L.R. 745 (Ct. First Instance).

79. *Radio Telefis Eireann*, [1991] E.C.R. at __, [1991] 4 C.M.L.R. at 617; *BBC*, [1991] E.C.R. at __, [1991] 4 C.M.L.R. at 693-94; *Independent Television Publications*, [1991] E.C.R. at __, [1991] 4 C.M.L.R. at 765-66.

cense in order to prevent the production and marketing of a new product for which potential consumer demand existed on an ancillary market, thereby preventing any competition and securing a monopoly, was held to violate Article 86.[80] What happened was that British and Irish TV stations held copyright in their schedules, and each published very successful weekly magazines containing their own, but not each other's or anyone else's listings. As a result, a comprehensive magazine listing all television schedules could simply not exist in the United Kingdom or Ireland. The Court of First Instance has certainly reasserted the primacy of competition law in a striking way and has breathed life into the categories of abuse identified by the Court of Justice in the *AB Volvo v. Eric Veng (UK) Ltd.*[81] and *Consorzio Italiano della componentistica di ricambio per autoveicoli and Maxicar v. Régie nationale des usines Renault* ("*Renault*")[82] cases. Lest it be felt that intellectual property is insufficiently respected in EC law, it should be remembered that it recently scored a victory with the burial of the common origin doctrine in *S.A. CNL-Sucal NV v. Hag GF AG* ("*Hag II*").[83]

Meanwhile, another important issue of interpretation of Article 86 is receiving attention: joint dominance. The Commission's *Flat Glass* decision[84] awaits judgment in the Court of First Instance. Italian flat glass manufacturers were found by the Commission to have infringed both Articles 85 and 86 by operating a cartel within a tight oligopoly.[85]

A further question arises on this topic which is of great importance. Does the concept of "dominant position as a re-

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80. *Radio Telefis Eireann*, [1991] E.C.R. at __, [1991] 4 C.M.L.R. at 619; *BBC*, [1991] E.C.R. at __, [1991] 4 C.M.L.R. at 696; *Independent Television Publications*, [1991] E.C.R. at __, [1991] 4 C.M.L.R. at 766-70.

81. Case 238/87, [1988] E.C.R. 6211, [1989] 4 C.M.L.R. 122.

82. Case 53/87, [1988] E.C.R. 6039, [1990] 4 C.M.L.R. 265.

83. Case C-10/89, [1990] E.C.R. __, [1990] 3 C.M.L.R. 571; *see* René Joliet, *Trade Mark Law and the Free Movement of Goods: The Overruling of the Judgment in* Hag I, 22 INT'L REV. INDUST. PROP. & COPYRIGHT L. (IIC) 303 (1991); George Metaxas-Marangidis, *Hag II: A New Taste from the Old Label*, 16 EUR. L. REV. 128 (1991); Peter Oliver, *Of Split TradeMarks and Common Markets*, 54 MOD. L. REV. 587 (1991); Warwick A. Rothnie, *Hag II: Putting the Common Origin Doctrine to Sleep*, 1 EUR. INTELL. PROP. REV. 24 (1991); Christopher Shelley, *Abolition of the Doctrine of Common Origin: Some Reflections on* Hag II *and its Implications*, 2 EUR. BUS. L. REV. 87 (1991); Bastiaan van der Esch, *Note de Commentaire*, 1991 C. DE D. EUR. 473.

84. O.J. L 33/44 (1989), [1990] 4 C.M.L.R. 535.

85. *Id.* at 67-68, [1990] 4 C.M.L.R. at 577-79.

sult of which effective competition would be significantly impeded" in article 2 of the Merger Regulation include joint dominance?[86] Does the absence of the words "by one or more undertakings" found in Article 86 matter in this respect?[87]

Time will tell, but my personal view is that the Merger Regulation must be interpreted in a way that allows the Commission to enforce competition policy fully, in accordance with the principles set out in Articles 3(f), 85, and 86 of the EC Treaty.[88]

Accordingly, concentration within an oligopoly or involving one or more members of it cannot simply escape the regulation's attention. The text of the regulation does not limit the notion of dominant position to one undertaking. Moreover, the Article 86 reference to "one or more undertakings" relates to the element of abuse, and not to that of dominant position.[89] Both Article 86 and article 2 of the Merger Regulation refer to "a dominant position."[90] Article 86, which prohibits abuses, mentions the possibility that there may be one or more offenders.[91] The language of article 2 is rightly more impersonal, since it considers the structural impact of a concentration on competition. In my submission, the Merger Regulation is applicable to concentrations which create or strengthen a *joint* dominant position as a result of which effective competition is significantly impeded. Therefore, a merger between companies A and B where A/B and C jointly dominate a market could be prohibited.

But all this is for the future. For the present, I merely wish to show that Article 86 is alive and well, that some important issues have been resolved recently, and that the Community has the provision and the procedures to prevent abuse of market power.[92]

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86. Merger Regulation, *supra* note 1, art. 2, O.J. L 257/13, at 17 (1990).

87. EC Treaty, *supra* note 3, art. 86.

88. *Id.* arts. 3(f), 85, 86.

89. *Id.* art. 86.

90. *Id.*; Merger Regulation, *supra* note 1, art. 2, O.J. L 257/13, at 17 (1990).

91. EC Treaty, *supra* note 3, art. 86.

92. For a recent U.S. discussion on the future of enforcement of section 2 of the Sherman Act, see Symposium, *The Future of Government Enforcement of Section 2 of the Sherman Act*, 59 ANTITRUST L.J. 523 (1991).

V. *MEMBER STATES' OBLIGATIONS*

The extent of Member States' obligations to comply with competition law has long been a controversial issue. The precise interpretation of Articles 5 and 90[93] has occupied lawyers' minds and must have worried politicians too when echoes reached them of the legal debates. In recent years, the Court of Justice and the Commission have taken decisive steps to clarify law and policy in this area.[94]

Taking Article 5 first as the general expression of the obligation of EC loyalty, or *Gemeinschaftstreue*, it is now clearly established that Member States may not encourage, approve, confirm, or extend conduct that violates the EC's competition rules.

Article 90 has proved controversial as a more detailed expression of the principles underlying Article 5. This is probably because Article 90(3) provides that the Commission may issue decisions or directives to Member States to enforce Article 90. In particular, the power to issue directives has been controversial because the Commission is not normally empowered to legislate, and Article 90(3) does not provide for any consultation or involvement of the European Parliament or Council of Ministers.

The Commission has now issued two directives based on Article 90(3) to liberalise the telecommunications sector.[95] A celebrated legal battle took place over the first of these directives, which concerned terminal equipment. This led to the Court of Justice's judgment of March 19, 1991 in *France v. Commission*.[96] The Court held that Article 90(3) empowers the Commission to adopt directives laying down general rules to specify ("*préciser*") Member States' Treaty obligations regarding the undertakings referred to in Article 90(1) and (2), i.e. public undertakings, those to which Member States grant special or exclusive rights, and those entrusted with the operation

93. EC Treaty, *supra* note 3, arts. 5, 90.

94. *See generally* John Temple Lang, *Community Constitutional Law: Article 5 EC Treaty*, 27 COMMON MKT. L. REV. 645-81 (1990).

95. Commission Directive No. 90/388, O.J. L 192/10 (1990) (telecommunications services); Commission Directive No. 88/301, O.J. L 131/73 (1988) (telecommunications terminal equipment).

96. France v. Commission, Case C-202/88 (Eur. Ct. J. Mar. 19, 1991) (not yet reported).

of services of general economic interest or having the character of a revenue-producing monopoly.[97] This is a major breakthrough and gives the Commission a potent instrument and considerable responsibility for the enforcement of competition policy and single market principles.

Having confirmed the Commission's powers, the Court upheld the directive's abolition of exclusive import and marketing rights for telecommunications terminal equipment by referring to its Article 30 case law,[98] to the fact that such exclusive rights prevent any other would-be suppliers from offering their goods to customers, and to the likelihood that the monopolies are unable to supply customers with the full range of available products, complete information as to what the market can offer, and guarantees of quality.[99]

In this last ground for upholding the Commission directive's abolition of exclusive rights (the inability of the monopoly to satisfy consumer demand), one may discern the argument used later by the Court in *Höfner and Elser v. Macrotron, GmbH*[100] and to a certain extent by the Court of First Instance in the *Radio Telefis Eireann*, *BBC*, and *Independent Television Publication* cases[101] discussed above. A monopolist or dominant undertaking that seeks to monopolise a downstream market and cannot satisfy actual or potential demand in that market is clearly acting anti-competitively. When the conditions for their application are met, Articles 86 and 90 may prohibit such attempted monopolisation. In the telecommunications judgment, the Court of Justice used this as one of two arguments, the first of which is based on Article 30.[102] There are therefore free movement of goods *and* competition law arguments in favour of the abolition of exclusive rights.

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97. *Id.*

98. *See* Procureur du Roi v. Dassonville, Case 8/74, [1974] E.C.R. 837, [1974] 2 C.M.L.R. 436.

99. *France*, slip op. ¶¶ 33-35.

100. Case C-41/90 (Eur. Ct. J. Apr. 23, 1991) (not yet reported).

101. Radio Telefis Eireann v. Commission, Case T-69/89, [1991] E.C.R. __, [1991] 4 C.M.L.R. 586 (Ct. First Instance); British Broadcasting Corp. & BBC Enter. Ltd. v. Commission, Case T-70/89, [1991] E.C.R. __, [1991] 4 C.M.L.R. 669 (Ct. First Instance); Independent Television Publications Ltd. v. Commission, Case T-76/89, [1991] E.C.R. __, [1991] 4 C.M.L.R. 745 (Ct. First Instance).

102. France v. Commission, Case C-202/88 (Eur. Ct. J. Mar. 19, 1991) (not yet reported).

The Court of Justice went on to synthesize these two fundamental Community principles when it considered exclusive rights to connect, bring into service, and maintain terminal equipment. The Court read Article 30 in light of Article 3(f), holding that because of the uncertainty as to whether the holder of such exclusive rights would be able to provide reliable service for all types of terminal equipment, or even have any interest in doing so for a competitor's equipment, it followed that once the exclusive marketing right had gone, connection, bringing into service and maintenance must be liberalised as well.[103] The free movement of goods in conditions of undistorted competition requires no less. For similar reasons expressed in terms of equality of opportunity, the Court upheld the Commission's insistence that the body responsible for regulatory standards and approvals be separated from the undertaking marketing equipment.[104]

I will not go any further in analysing this landmark judgment. For present purposes, it is enough to record that Article 90, in conjunction with the Treaty provisions relating to competition, free movement and other Community rights and obligations, enables the Commission to act decisively to liberalise markets where regulation stands in the way of a single competitive market without justification relating to public service obligations. The Commission has already issued a number of decisions to Member States based on Article 90(3). In addition to the two telecommunications directives to which I have referred, I expect to see directives in such fields as electricity, gas, postal services, and satellite communications. Over the next few years, it will not be surprising to see Article 90(3) become a major instrument of competition policy to create and sustain the single market. The fundamental principle guiding action in this area should be insistence on liberalisation to provide for free movement and undistorted competition in all fields outside a hard core of public service requirements that Member States may choose to have fulfilled by conferring exclusive or special rights on one or a limited group of undertakings.

I do not deny that the application of Article 90 still poses

103. *Id.* slip op. ¶ 41.
104. *Id.* ¶ 51.

serious legal and political problems. Ways must be found to overcome these problems without in any way diminishing the Commission's Treaty-based powers and obligations. My point here is that there can no longer be any doubt that Member States—and the Commission for that matter—are bound by Treaty rules to give full effect to competition law in all the various capacities in which they may affect competition. This is not a mandate for privatisation or an attack on the public sector: it is a reminder that the Community is based on a system of undistorted competition in its single market without internal frontiers.[105] The Community, Member States, and public and private companies must all comply with this fundamental "constitutional" principle.

VI. *"SPECIAL" SECTORS*

I have already mentioned the extension of competition policy to the transport sector through the adoption of a comprehensive set of procedural rules. Cases and block exemptions have followed, and today one can say that EC competition law is fully applied and enforced in respect of all modes of transport. There is still draft legislation pending in the Council relating to air transport within Member States and between the Community and foreign countries, but it can no longer be said that transport is a special sector outside the realm of competition policy. There are special procedural rules, but Articles 85 and 86 apply to all modes of transport. So, for that matter, do Article 90 and the Merger Regulation.

It used to be argued that such sectors as financial services and energy were somehow outside the normal scope of competition policy. This was never the case, and recent decisions and statements confirm this clearly. Agriculture, which is governed by a special regulation,[106] has also seen a number of decisions in recent years applying Article 85.

Finally, in this brief discussion of so-called special sectors, coal and steel still have their very own treaty with its own competition rules. The Treaty Establishing the European Coal and

105. EC Treaty, *supra* note 3, art. 3(f).

106. Council Regulation No. 26/62, 30 J.O. 993 (1962), O.J. Eng. Spec. Ed. 1959-62, at 129.

Steel Community ("ECSC")[107] will expire in 2002, and it is expected that from then on coal and steel will be subject to the EC competition rules. In practice, we are already trying to align ECSC rules and procedures on their EC counterparts whenever possible in law. Several important decisions have been taken recently, and it is the Commission's stated intention to treat coal and steel like all other sectors of the economy when enforcing competition policy.

It is sometimes said that other products, perhaps computers or semi-conductors, are the coal and steel of the 1990s and deserve special treatment in recognition of their "strategic" status. I have no doubt that competition policy should and is well able to take account of all the specific economic and technical ramifications of these industries. However, I do not think that a special status, let alone a special treaty, is at all appropriate.

It would represent a step backwards from the comprehensive coverage of EC competition policy which is a sign of its maturity and ability to deal with the economy as a whole.

VII. *FINES*

There is no *machismo* in imposing high fines: that would certainly not be a sign of maturity. In fact, without revealing any secrets, I can say that, as a proportion of turnover, Commission fines for serious violations of Articles 85 and 86 have not increased greatly over the last few years. Of course, turnover is a wide concept, and the Commission looks at both total, world-wide turnover and so-called "relevant" turnover in the relevant geographical market of the product or service concerned.

Nevertheless, it is clear Commission policy to impose high fines to punish companies that commit serious violations of Articles 85 and 86. There is now a well developed system of aggravation and mitigation that is applied in addition to the basic criteria of article 15 of Regulation No. 17: intent or negligence, and the nature and gravity of the infringement.[108] Fines are now reaching high figures, such as 75 million ECU in

107. ECSC Treaty, *supra* note 10.

108. Regulation No. 17, *supra* note 2, art. 15, O.J. Eng. Spec. Ed. 1959-62, at 91-92.

a recent Article 86 decision,[109] and the Commission's policy is to punish and thereby to deter serious violations such as price cartels, market sharing, territorial segregation, and abuses of dominant position.[110] Fines are not intended to compensate for the damage done by the infringing party or parties. Damages are available in national courts as a remedy for breaches of Community competition law, but not before the Commission.

VIII. *INTERNATIONAL DIMENSION*

It has become clearer than ever in the last few months that the market economy with competition policy as practised in the EC and the United States is a highly attractive model for countries in Central and Eastern Europe and in other parts of the world as well. This should not make us complacent, but rather should encourage us to redouble our efforts to develop responsible answers to the questions posed by the internationalisation of our economies.

The EC has been busy negotiating binding competition rules and procedures identical in nearly all respects to those already in force within the EC to apply in the European Economic Area that we have agreed to set up with the countries of the European Free Trade Association.[111] In addition, competition rules are a fundamental feature of a network of agreements between the Community and other European countries. The Commission represents the EC in the various international fora in which competition policy is discussed. In addition to these multilateral relations, the Commission has a wide variety of regular bilateral contacts with competition authorities in foreign countries.

With the United States, it was felt that there was a sufficient identity of views on the basic principles and importance of competition policy to negotiate a bilateral EC-U.S. agree-

109. Tetra Pak Rausing SA v. Commission, Case T-51/89, [1990] E.C.R. __, [1991] 4 C.M.L.R. 334 (Ct. First Instance).

110. Perhaps another result of the Commission's fining policy is the recent "confession" by a Swedish company. *See* John Burton, *Stora Tells of Role in Packaging Cartel*, FIN. TIMES, Sept. 24, 1991, § I, at 3.

111. The agreement is not yet concluded. *See* Opinion 1/91 (Eur. Ct. J. Dec. 14, 1991) (not yet reported) (delivering Court's opinion regarding draft agreement between EC and countries of European Free Trade Association).

ment to provide for consultations, exchanges of information and, where possible, avoidance of disputes. The agreement, signed on September 23, 1991, provides for a number of innovations in international law and relations in respect of competition policy which augur well for the development of EC-U.S. relations in this area.[112] Commission Vice-President Sir Leon Brittan launched the idea of an agreement in his Lauterpacht lectures in Cambridge in February 1990,[113] and the U.S. response was so encouraging that it was possible to complete negotiations in a little more than a year.

It remains to be seen which other countries will wish to intensify their relations with the EC in the competition policy field in this way. The Commission will want to undertake such an endeavour only with countries demonstrably serious about applying and enforcing a comprehensive competition policy with consumer welfare and market access at its heart.

It seems to me that strong bilateral relations between serious competition authorities are more likely to be effective at this stage than attempts to draw up multilateral rules. In my view, the EC and the United States could usefully cooperate in providing training and advice to new market economies and in seeking the proper enforcement of competition laws where they are making the transition from the statute book to day-to-day business reality.

IX. *MERGERS*[114]

I do not intend to review the first year's enforcement of

112. Agreement on the Application of Their Competition Laws, Sept. 23, 1991, U.S.-E.C., 30 I.L.M. 1487 (1991).

113. BRITTAN, *supra* note 13, at 20-21.

114. *See* BRITTAN, *supra* note 13, at 23-56; Sir Leon Brittan, *The Law and Policy of Merger Control in the EEC*, 15 EUR. L. REV. 351 (1990); Barry E. Hawk, *The EEC Merger Control Regulation: The First Step Toward One-Stop Merger Control*, 59 ANTITRUST L.J. 195 (1990); Bernd Langeheine, *Substantive Review under the EEC Merger Regulation*, *in* 1990 FORDHAM CORP. L. INST. 481 (Barry Hawk ed., 1991); Michael Reynolds & Elizabeth Weightman, *European Economic Community*, *in* INTERNATIONAL MERGERS: THE ANTITRUST PROCESS 1 (J. William Rowley & Donald I. Baker eds., 1991); James S. Venit, *The Evaluation of Concentrations Under Regulation 4064/89: The Nature of the Beast*, *in* 1990 FORDHAM CORP. L. INST. 519 (Barry Hawk ed., 1991); James S. Venit, *The "Merger" Control Regulation: Europe Comes of Age . . . or Caliban's Dinner*, 27 COMMON MKT. L. REV. 7 (1990).

the Merger Regulation.[115] For my purpose, it is enough to say that the adoption of the regulation and the record so far in applying it amply justify the view that the EC's competition policy has reached maturity in its comprehensive coverage of economic issues. We waited a long time for a proper system of merger control, and it is gratifying to see the system working well. Of course, improvements are possible, indeed necessary. We look forward to lower thresholds by the end of 1993 at the latest. Law and policy on joint dominance need to be clarified. The joint venture guidelines will be helpful in understanding the law in a related and complex area. Case law will build up and we will all have much more to discuss as the first years go by. But for the time being, let us recognise that the last big gap in Community competition policy has been filled. The great debates about the Treaty's application to concentrations have subsided as we get on with the job of applying the regulation. It is a great challenge for the Commission and the Community's national authorities. I dare say that companies and lawyers would often say politely that they find it challenging too. With the regulation, EC competition policy has come of age.

CONCLUSION

In this brief survey of various topics of EC competition policy, I have tried to show that significant advances have been made in recent years in the establishment of a comprehensive and credible system of enforcement. I hope I have not trodden too firmly on the toes of those, usually Commission colleagues, who are dealing at this Institute with some of the topics I have touched upon in my *tour d'horizon*.

I hope too that I have not given the impression that everything is perfect in Brussels. Far from it: we are still a young institution establishing a new policy within a new legal system. But I do believe that we have reached an initial level of maturity. Perhaps we are now adolescent, thinking we know most of the answers but unsure of how to apply all of them to the problems life throws at us. We will certainly experience grow-

115. *See* H. Colin Overbury, *First Experiences of European Merger Control*, EUR. L. REV. COMPETITION CHECKLIST 1990, at 79 (1991).

ing pains and may even make mistakes! There are still gaps to be filled and questions to be asked and answered.

The Merger Regulation has brought with it the concept of one-stop shopping and the division of jurisdiction between the Commission and national competition authorities. The enforcement of competition law in a genuine single market in the EC should cause us to think about the implications of this approach for the enforcement of Articles 85 and 86. We certainly need to involve national authorities and courts more in the enforcement of EC competition policy. The EC already has, thanks to the foresight of the authors of the Treaty and the Court of Justice, a legal system capable of administering a system of law and policy enforcement involving both EC and national levels. In fact, the legal system was mature some years before the substance of policy. My hope now is that the maturity of law and policy will push us forward into the next phases of EC development in a rapidly changing world.