

Fordham International Law Journal

Volume 16, Issue 2

1992

Article 3

EEC Competition Practice: A Thirty-Year Retrospective

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Donald L. Holley

Abstract

The choice in this Article is to focus on a limited number of points, and then to offer some general conclusions. The plan is to move as much as possible on a chronological basis, starting with the early confrontation in 1962 with the notification process under Regulation 17 and arriving at Council Regulation No. 4064/89 (the “Merger Regulation”), treating in between individual aspects of practice, such as dealing with the DG-IV staff, sources of law, the role of economics, and the role of national courts. The potential scope of each of these points of course leaves wide options to an author. The treatment in this Article is given with the hope that the reader may find themes that strike responsive chords. If the effect is only to stimulate thought, the undertaking will have been worth the effort.

EEC COMPETITION PRACTICE: A THIRTY-YEAR RETROSPECTIVE*

Donald L. Holley**

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* A version of this Article will be published in 1992 *FORDHAM CORP. L. INST.* (Barry E. Hawk ed., 1993). Copyright © Transnational Publications, Inc., 1993.

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INTRODUCTION

The content a reader might expect from the title of this Article is not immediately obvious. Indeed, it would seem to give a blank check to the writer. And it is certain that no two practitioners would do the same thing with the possibilities offered. The subject tempts the writer simply to reminisce and to pontificate—to develop favorite topics at the expense of what might have been more useful to the reader. These traps may not have been avoided, but at least the recognition of the dangers should have been salutary.

We note that the title is not European Economic Community (the “EEC” or “Community”) competition law, but rather *practice*, although practice is obviously so close to the law that it is often not possible to see the dividing line. Nevertheless, the thrust of the Article is not on the law as such but on the problems with which counsel have been confronted, the way in which the Commission of the European Communities (the “Commission”) and to some extent the European Court of Justice (the “Court of Justice”), have reacted to those problems and influenced the conditions of practice, the roles counsel—both in-house and outside counsel—have taken on, and the perceptions counsel have had of the way the practice has developed. The comments will also include some prospects for the future which a review of the past may suggest—at least issues for future consideration, not necessarily answers.¹

1. For a detailed and enlightening review of EEC competition law based on historical perspective, see D. G. GOYDER, *EEC COMPETITION LAW* (1988). A review some years ago by a Commission official of many of the themes treated in the present Article is found in Jean-François Verstryngne, *Current Antitrust Policy Issues in the EEC: Some Reflections on the Second Generation of Competition Policy*, in 1984 *FORDHAM CORP. L. INST.* 673 (Barry E. Hawk ed., 1985). Seven years later another Community official with a similar background convincingly promoted EEC competition policy from “second generation” to “maturity.” Jonathan Faull, *The Enforcement of Competition Policy in the European Community: A Mature System*, in 1991 *FORDHAM CORP. L. INST.* 139 (Barry E.

In connection with this review, the Article will refer occasionally to the status of the law and of the Community institutions.²

The significance of the term "thirty years" in the title will probably be obvious to most readers. It was in 1962 that the practice of EEC competition law began, upon the issuance of Council Regulation No. 17/62 ("Regulation 17").³ Over the preceding four years the seed had been there—the automatic nullity provision of Article 85(2) of the Treaty Establishing the European Economic Community (the "EEC Treaty")⁴—but, of course, nothing had happened. The issuance of Regulation 17 was an energizing shock.

The mechanism of the "grace period" allowed by Regulation 17 for notifications, in order to obtain retroactive validity, seemed itself to have a marked effect. There was a rush of many companies to notify by the second deadline of January 31, 1963—perhaps to a considerable extent under an assumption of a legal obligation to notify. U.S. companies were prominent among these notifiers.

During the five to ten years following issuance of Regulation 17, the atmosphere for practice of EEC competition law was formed by certain salient characteristics. First, there prevailed a strong skepticism on the part of European companies about the significance and practical impact of the new rules. On the other hand, major U.S. companies involved in Europe often showed a real interest and seemed generally to take the matter more seriously, no doubt primarily because of their own experience with U.S. antitrust law. Fundamental legal issues were still being debated, many of which may seem curious today, but which at that time were very real, for example, whether Article 85(1) applied to vertical restrictions.⁵

Hawk ed., 1992) [hereinafter Faull, *Enforcement of Competition Policy*], reprinted in 15 *FORDHAM INT'L L.J.* 219 (1991-1992).

2. Developments will be traced through papers published by the Fordham Corporate Law Institute, and in that connection the present Article should be considered an additional tribute to the contribution of its Director, Barry E. Hawk, Esq., as well as to the efforts of those who have produced the papers.

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

4. Mar. 25, 1957, art. 85(2), 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 3 (1958), amended by Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [treaty as amended referred to hereinafter as EEC Treaty].

5. For a major contribution in these early years to the understanding of the new

The Directorate-General for Competition ("DG-IV") staff seemed determined to develop and maintain its own approach, in particular without wanting to appear to rely on approaches of the U.S. or German authorities on the same issues. Of course, this is in part easily understandable. Already in the early 1960s the concept of market unity was the dominant force in EEC competition law, and that in itself was a valid reason for the Commission to strike an independent course. However, it seemed, even at that time, that the concentrated focus on the concept of market unity may have been leading the Commission into ignoring from time to time certain precepts of sound competition-based analysis.

From the point of view of the practitioner, a central feature of that initial period was the existence of a small and specialized competition bar. This group was characterized by a certain pride, and even fervor, among a relatively small group of specialists. Each one knew almost everyone else active in the area, and each one knew a substantial percentage of the DG-IV staff. These early conditions have, of course, undergone constant mutations, and today the landscape is in most respects, for better or for worse, beyond recognition when compared to those days.

So much for nostalgic reminiscences. Let us turn now to the development of the law and, in particular, of the practice of the law. At the beginning, counsel had little guidance. Once Regulation 17 was issued there were detailed procedural rules, and those have, of course, held up rather well over the ensuing thirty years—a tribute to the drafters. As readers will know, before the end of 1962 the Commission had also issued two interpretative notices—one on patent licensing⁶ and one on commercial agency agreements.⁷ And, of course, these have held up much less well.⁸

rules by U.S. companies, see ARVED DERINGER, *THE COMPETITION LAW OF THE EUROPEAN ECONOMIC COMMUNITY: A COMMENTARY ON THE EEC RULES OF COMPETITION (ARTICLES 85 TO 90) INCLUDING THE IMPLEMENTING DIRECTIVES* (1968).

6. Communication relative aux accords de licence de brevets, 139 J.O. 2922 (1962), *withdrawn by* O.J. C 220/14 (1984).

7. Communication relative aux contrats de représentation exclusive conclus avec des représentants de commerce, 139 J.O. 2921 (1962).

8. Certainly the patent and agency notices were welcome and gave counsel food for thought for many years. However, the general nature of the patent notice offered little guidance. The agency notice, on the other hand, had the unintended effect of

The sustained desire for greater legal certainty publicly demanded by counsel throughout the Community over a long period was satisfied only little by little, and, of course, even in the long run only in part. Case law began to develop slowly, very slowly, but a number of the cases in the 1960s laid down important fundamental principles for evaluating both horizontal and vertical arrangements under Article 85 of the EEC Treaty. Counsel were enlightened by a few big cartel cases, a number of market unity/export restraint cases, and in 1967 by the first block exemption regulation on distribution agreements.⁹ Despite the prominence of the cartel cases, application of the market unity concept to vertical agreements involving private companies was the dominant theme.¹⁰

By 1972, the Commission was able to issue its *First Report on Competition Policy*, covering the years 1962-1971.¹¹ The *First Report* listed fifty-one cases decided under Articles 85 and 86 of the EEC Treaty, of which only three related to Article 86. Of those fifty-one cases, nineteen had been decided in 1971. All three of the Article 86 cases had been decided in 1971: they were *GEMA*,¹² *S.I.A.E.*,¹³ and *Continental Can*.¹⁴ The acceleration was obvious. It brought on not only regulations but also "case law" in every form, including formally decided cases, no-

virtually eliminating all agency agreements, whether covered by the notice or not, from the field of European Economic Community [hereinafter EEC] competition law, at least until the European Court of Justice [hereinafter Court of Justice] began to give substance to the rules on agency agreements. The area of agency agreements is still the source of guesswork, while waiting for the Commission of the European Communities [hereinafter Commission] to complete a new notice.

9. Commission Regulation No. 67/67, 57 J.O. 849 (1967), O.J. Eng. Spec. Ed. 1967, at 10.

10. For an article by the present Competition Director-General, which not only reviews the past emphasis but sets forth the future goals of the Commission, see Claus-Dieter Ehlermann, *The Contribution of EC Competition Policy to the Single Market*, 29 *COMMON MKT. L. REV.* 257 (1992).

11. In particular, in the early years the annual *Commission Reports on Competition Policy* [hereinafter *Reports*] were an extremely valuable tool for practitioners not only as documentation but also as an expression of the Commission's views as to the policy it was following and as to the significance of each of the cases. As time went on, the *Reports* decreased somewhat in relative value, as non-official documentation increased and as the Commission found other ways to express publicly its policy and to comment on its cases, and also as the *Reports* began to appear later and later in the year following that to which they related.

12. J.O. L 134/15 (1971), [1971] C.M.L.R. D35.

13. J.O. L 254/15 (1971), [1972] C.M.L.R. D112.

14. J.O. L 7/25 (1971), [1972] C.M.L.R. D11

tices of intention to take favorable action, press releases, and the annual *Commission Reports on Competition Policy* (the "Reports").

In the 1970s, counsel saw the first move toward merger control and noted the continuation of the Commission's preoccupation with applying Articles 85 and 86 to vertical agreements. The 1980s saw a number of trade association cases¹⁵ and some traditional big cartel cases and the development of the law in new directions, in particular through a series of important block exemption regulations. The focus had remained on application of the competition rules to private companies, but in the latter part of the decade, there were more and more developments relating to state-controlled monopolies and to private sectors of the economy where the state was much involved. The EEC competition law system had reached a new stage of development. Whole new practice areas were added at a steady clip. The financial and service areas were developed by new case law,¹⁶ as was the agricultural sector.¹⁷ Detailed competition rules were issued for the various sectors of the transport industry.¹⁸ Telecommunications and the media

15. See John Temple Lang, *Trade Associations and Self-Regulation Under EEC Antitrust Law*, in 1984 FORDHAM CORP. L. INST. 605 (Barry E. Hawk ed., 1985); see also David S. Evans, *Trade Associations and the Exchange of Price and Nonprice Information*, in 1989 FORDHAM CORP. L. INST. 709 (Barry E. Hawk ed., 1990); Aldo Frignani, *Some Critical Thoughts on EEC Antitrust Policy Towards Trade Associations, Vehicles Distribution and Franchising Agreements*, in 1984 FORDHAM CORP. L. INST. 583, 590 (Barry E. Hawk ed., 1985). Since these articles were written, the Commission has adopted an important decision on information exchanges in UK Agricultural Tractor Registration Exchange, O.J. L 68/19 (1992). The decision has been appealed. *Fiatagri U.K. v. Commission*, Case T-34/92, O.J. C 149/8 (1992); *John Deere v. Commission*, Case T-35/92, O.J. C 149/9 (1992).

16. The Commission listed the banking and insurance sectors for the first time in its *Thirteenth Report*, which covers 1983. COMMISSION THIRTEENTH REPORT ON COMPETITION POLICY ¶¶ 67-69 (1984) [hereinafter COMMISSION THIRTEENTH REPORT]. The following year it devoted a section to the subject in the "Main decisions and measures by the Commission" chapter of the *Report*. COMMISSION FOURTEENTH REPORT ON COMPETITION POLICY ¶¶ 74-79 (1985) [hereinafter COMMISSION FOURTEENTH REPORT]. The following year, the Commission simply called the section "Decisions in the services sector." COMMISSION FIFTEENTH REPORT ON COMPETITION POLICY ¶¶ 68-71 (1986) [hereinafter COMMISSION FIFTEENTH REPORT].

17. See Tom R. Ottervanger, *Antitrust and Agriculture in the Common Market*, in 1989 FORDHAM CORP. L. INST. 203 (Barry E. Hawk ed., 1990).

18. In its *Report* for 1983, the Commission began keeping readers up-to-date as to preparation of transport rules. COMMISSION THIRTEENTH REPORT, *supra* note 16, ¶ 47. The first decisions in the transport sector were listed in the *Report* covering 1985. COMMISSION FIFTEENTH REPORT, *supra* note 16, ¶ 74. For a recent survey showing the

were brought into focus.¹⁹ The Commission finally turned its attention to the energy sector.²⁰ State monopolies subject to Article 90 of the EEC Treaty came under closer scrutiny,²¹ as did the obligations of the Member States in regard to EEC competition rules.²² And throughout this decade the Commission became increasingly active in controlling the grant by Member States of competition-distorting aid to enterprises, both private and state-controlled.²³

Today, even a casual observer is struck by the rapid advance of EEC competition law. An annual review of U.S. anti-trust law shows a complex but slow progression resulting mainly from a multitude of court cases, with legislation by and large affecting only the fringes, more like the movement of a glacier. The image produced by an annual review of EEC competition law is more like that of an avalanche, where the flow of

extent of development of air transport law, see John Temple Lang, *Air Transport in the EEC—Community Antitrust Law Aspects*, in 1991 FORDHAM CORP. L. INST. 287 (Barry E. Hawk ed., 1992); see also John Balfour, *The EC Competition Rules and Airport Access*, in 1991 FORDHAM CORP. L. INST. 397 (Barry E. Hawk ed., 1992).

19. See Colin Overbury & Piero Ravaoli, *The Application of EEC Law to Telecommunications*, in 1989 FORDHAM CORP. L. INST. 271 (Barry E. Hawk ed., 1990); Peter-Armin Trepte & Vernon E. Vig, *Telecommunications, "Public" Undertakings and Procurement Obligations*, in 1989 FORDHAM CORP. L. INST. 313 (Barry E. Hawk ed., 1990).

20. The Commission first included an energy section in its *Report* covering 1989. COMMISSION NINETEENTH REPORT ON COMPETITION POLICY ¶ 32 (1990).

21. See John Temple Lang, *Community Antitrust Law and Government Measures Relating to Public and Privileged Enterprises: Article 90 EEC Treaty*, in 1984 FORDHAM CORP. L. INST. 543 (Barry E. Hawk ed., 1985); Giuliano Marengo, *Legal Monopolies in the Case-Law of the Court of Justice of the European Communities*, in 1991 FORDHAM CORP. L. INST. 197 (Barry E. Hawk ed., 1992); Aurelio Pappalardo, *Measures of the States and Rules of Competition of the EEC Treaty*, in 1984 FORDHAM CORP. L. INST. 515 (Barry E. Hawk ed., 1985); Piet Jan Slot, *Public Enterprises Under EEC Law: The Lame Ducks of the Nineties?*, in 1991 FORDHAM CORP. L. INST. 255 (Barry E. Hawk ed., 1992); Richard Wainwright, *Public Undertakings Under Article 90*, in 1989 FORDHAM CORP. L. INST. 239 (Barry E. Hawk ed., 1990).

22. See René Joliet, *National Anti-Competitive Legislation and Community Law*, in 1988 FORDHAM CORP. L. INST. 16-1 (Barry E. Hawk ed., 1989); Pierre Pescatore, *Public and Private Aspects of Community Competition Law*, in 1986 FORDHAM CORP. L. INST. 381 (Barry E. Hawk ed., 1987); Jean-François Verstryngne, *The Obligations of Member States As Regards Competition in the EEC Treaty*, in 1988 FORDHAM CORP. L. INST. 17-1 (Barry E. Hawk ed., 1989).

23. See Manfred Caspari, *State Aids in the EEC*, in 1983 FORDHAM CORP. L. INST. 1 (Barry E. Hawk ed., 1984). State aids constitute an important part of the work of the Directorate-General for Competition [hereinafter DG-IV]. Directorate E, which is devoted exclusively to State aids, included 21% of DG-IV personnel in 1991 (78 out of a total of 373). Practice under the rules for State aids is distinct and different from that under Articles 85 and 86 of the EEC Treaty, which is the thrust of this Article.

new legislation is all important and where the central role played by the Commission allows important changes often with little or no notice.

The accelerating pace of these developments has, of course, had a profound impact on the nature of EEC competition law practice. There are many more lawyers involved, of many nationalities, a substantial number of those lawyers having offices in Brussels. Big companies have opened offices in Brussels to keep a watch on Community developments, and lawyers in those offices have begun to function in a government-relations capacity that gets them involved in competition matters.

Also, the pace of life in the law continued to accelerate throughout the 1970s and 1980s. Counsel had enjoyed some protection thanks to a leisurely postal system, but the facsimile machine put them at the mercy of clients who could be, and often were, on the other side of the planet. Specialties among EEC competition lawyers tended to develop on a sector-by-sector basis, since it was no longer possible for any one person to have all subjects in his grasp, certainly not within the response periods clients demanded.

Faced with such a situation, how can an author dealing with a subject of this kind find a guideline for self-restraint? Choices have to be made. The choice in this Article is to focus on a limited number of points, and then to offer some general conclusions. The plan is to move as much as possible on a chronological basis, starting with the early confrontation in 1962 with the notification process under Regulation 17 and arriving at Council Regulation No. 4064/89 (the "Merger Regulation"),²⁴ treating in between individual aspects of practice, such as dealing with the DG-IV staff, sources of law, the role of economics, and the role of national courts. The potential scope of each of these points of course leaves wide options to an author. The treatment in this Article is given with the hope that the reader may find themes that strike responsive chords. If the effect is only to stimulate thought, the undertaking will have been worth the effort.

24. Council Regulation No. 4064/89, O.J. L 395/1 (1989), *corrected version in O.J. L 257/13 (1990)* [hereinafter Merger Regulation].

I. THE CHALLENGES OF THE NOTIFICATION PROCESS

Regulation 17 took care of many important points, once it was adopted by the Council in 1962, but probably the most significant was the institution of the notification process.²⁵ That event created enormous interest. No one quite knew what to make of the notification phenomenon at the time. A lot of people are still in that state. However, much has been learned over the years, in particular about the practical limitations of the process.

The early suspicion that the notification process would be important turned out to be true. Its importance in the day-to-day work of counsel can hardly be overstated. For any counselor regularly consulted by companies negotiating an agreement, in dispute as to the enforceability of an agreement, or subject to an investigation concerning an agreement, the factor of notification can be a critical one, shaping counsel's advice. Indeed, over the years it has provided tremendous challenges to counsel, as they attempt to reconcile as best they can the technical and pragmatic considerations involved. This Article will focus on these challenges. It will not attempt to provide a manual for operating the process.

The origin of the problem goes back to the days of the drafting of the EEC Treaty. As will be well-known to most readers, a basic choice was made in devising Article 85 not to adopt the U.S. approach, which would have implied a simple prohibition later subject to the broad application of a Rule of Reason to temper the absoluteness of the prohibition. With a perspective of thirty-five years since the EEC Treaty was signed, we ought to be able to venture a judgment as to whether that choice was a wise one. Many counsel have serious doubts, the author included. However, that question today seems largely academic. The choice was made. For better or for worse, the choice has been or is now being repeated in new Member State legislation,²⁶ and it must be lived with. Apart

25. Approximately three months later, the Commission issued Regulation No. 27, which implemented the procedure for applications for negative clearance and notifications for exemption and set forth the format. Commission Regulation No. 27, 35 J.O. 1118 (1962), O.J. Eng. Spec. Ed. 1959-62, at 132, *amended by* J.O. L 189/1 (1968), O.J. Eng. Spec. Ed. 1968-II, at 400, *amended by* O.J. L 172/7 (1975), *amended by* O.J. L 240/1 (1985).

26. For a review of such legislation, see generally Kurt Stockmann, *Trends and*

from the impact of block exemption regulations, such modification of the system as takes place will almost certainly be through case law, it being almost inconceivable that the wording of Article 85 will be changed.

What did the EEC Treaty's choice of the exemption system mean, from counsel's point of view? The issues are well known, the principal ones being (a) whether there is a legal obligation to notify any agreement or concerted practice that might reasonably be thought to have the effects described in Article 85(1), (b) the role that risk of fines will play in a decision to notify, (c) the circumstances in which the risk of unenforceability will suggest that notification be made, and (d) the reactions counsel can expect from the Commission either to the filing of a notification or to a failure to notify.

The answers to these questions only began to become clearer after a rather long period. Indeed, even today there are broad areas of uncertainty. Nevertheless, thirty years of operations under the system have allowed norms and expectations to be established. Counsel have become more comfortable with the notification process, although the variety of approaches is still extreme.

As to whether the parties to a potentially restrictive agreement have a legal obligation to notify, counsel had to wait quite a while before the Court of Justice confirmed that there was no such obligation.²⁷ Of course, this response left counsel with the burden of weighing the considerations that go into deciding whether to take advantage of the opportunity to notify.

Insofar as the immunity from fines is concerned, it became reasonably clear over a period of time that the immunity derived from a notification has been a less important incentive to notify than was probably thought by the persons who invented the system. As experience showed, the risk of fines is high in

Developments in European Antitrust Laws, in 1991 FORDHAM CORP. L. INST. 441 (Barry E. Hawk ed., 1992) [hereinafter Stockmann, *Trends and Developments*] (referring to the laws of Belgium, Greece, Ireland, Italy, Portugal, and Spain, which couple a prohibition of restrictive practices with an exemption procedure). The Commission's annual *Reports on Competition Policy* follow these developments.

27. SA *Musique Diffusion Française v. Commission*, Joined Cases 100-03/80, [1983] E.C.R. 1825, 1902, [1983] 3 C.M.L.R. 221, 331.

the case of abuses, export restrictions, and cartels.²⁸ However, these are the areas least likely to be the subject of notifications. It is rare that a notification will be filed to cover a potentially abusive agreement, for reasons that are in large part obvious.²⁹ As for export restrictions, if counsel advised the notification of an outright export restriction, the step would in most cases reflect on his familiarity with EEC law. Of course, there do exist possibly justifiable contractual provisions that operate as export disincentives about which counsel might want a notification to protect against fines. As to notification of cartels, counsel have had occasion to become familiar with the limited category of cartels which might possibly be entitled to an exemption. This is not a rich area for notifications.

In respect to a notification to avoid the risk of invalidity, and to obtain the possibility of an exemption with retroactive effect to the date of notification, counsel sometimes discovered, after considerable thought, that there did exist situations where the critical nature of the risk of invalidity would in itself suggest notification. However, in practice, these situations seemed to be rare.

In regard to what counsel could expect from the Commission upon a failure to notify, counsel for some time feared a negative reaction. However, finally there seemed to be no convincing evidence that parties to an agreement that turned out to be entitled to an exemption had been seriously prejudiced by delaying notification until circumstances appeared to demand it. There was fear in some circles that an injury could result from a negative bias on the part of the Commission toward a notification filed only when an agreement ran into trouble. No doubt such situations did arise, but the consideration came not to seem a critical one.

As to the Commission's possible reaction to a filing of a notification, in the early years it was clear that the Commission was not likely to be able to react at all for a long time, if ever. This left a lot of counsel perfectly content. The clients contin-

28. A rough count as of July 30, 1992 reveals that approximately 82% of the fines have come within these categories: 19% involved abuse of dominant positions, 29% were based on price-fixing or other cartel activities, and 34% concerned export bans or other restrictions on parallel imports.

29. Of course, in theory, a notification of an abusive agreement would not protect against fines, but, in practice, it does in most cases.

ued operations as if the agreement had been exempted. Indeed, once the lack of reaction came to be expected, it happened that notifications were filed upon the basis of such an expectation. Today the situation has changed radically, and it seems that such an expectation is no longer prudent. The pace of arrivals of new notifications is such that, in theory, they can be screened without much delay, allowing the Commission at least to establish a priority on cases to be treated.³⁰ Few applications request formal approval, and the Commission may allow a notification that causes no alarm to sit for a very long time before reacting or even giving any evidence it has read the notification. If the notification arouses particular interest, the parties may receive an enquiry letter from the Commission in the weeks or months following the notification.

We noted earlier that the attitudes of counsel toward actual practices of the notification system tend to vary widely. Confrontations on the issue between counsel involved in negotiation of new agreements have been frequent and often prolonged. The situation has sometimes arisen from opposing business interests of the parties, but it is also fair to say that, in the past at least, the trends have run by nationality to a certain extent. There appeared to be "notifying" nationalities and "non-notifying" nationalities. British counsel tended to advise notification, in particular in the years immediately following U.K. accession. From the beginning, French and Italian counsel tended not to. German counsel were in a special situation because of their healthy respect for the Federal Cartel Office (the "FCO") and often close personal working relationship with it. But generally it seems that while they regularly consulted the FCO, the Germans were not a "notifying" crowd in Brussels.

Habits of relevant national law, or lack of it, and patterns of national practice of course played a role. Under U.K. law there still exists a mandatory notification procedure, albeit on terms virtually unrelated to the EEC rules. U.S. companies were unaccustomed to notification, in light of U.S. practice. On the other hand, the larger U.S. companies by and large tended to be compliance-oriented, and, from the beginning,

30. In 1991, notifications arrived at the pace of about one per working day—a total of 282 for the year.

the U.S. companies normally were willing to consider at length with counsel the advisability of notification. At the same time, in-house counsel of those U.S. companies, who frequently were bound vis-à-vis management by a strict antitrust compliance program to conform to EEC and other competition rules, faced their own dilemma. They did not want to approve clauses contrary to Article 85(1) of the EEC Treaty, and, on the other hand, did not want to notify; thus, they were interested in finding a reasonable basis to justify not filing a notification.

Disagreements of counsel on whether to notify continue to arise, of course, and no doubt always will. However, over time a greater sophistication has developed among counsel who deal with the matter regularly, leading to a somewhat more uniform approach. This seems to have led to a more selective use of the notification process. Let us look at the evolving attitudes.

A. *How to Notify*

The early notifications were often brief, amazingly so. A review of the notifications dated January 31, 1963 (the deadline under Regulation 17 for two-party agreements to benefit from retroactive effect) is instructive in this regard. Questions could have been raised at the time as to whether such succinct notifications were valid, meaning, among other things, effective in preventing fines, but the Commission seems not to have pursued this possibility except in cases where a restriction objected to was not included in the notification. The issue in any event seems to have been eventually resolved in large part by the Court of Justice.³¹

The situation changed considerably in 1985 when the Commission issued its revised Form A/B and the detailed instruction note.³² New standards of precision were set, and

31. *De Vereniging ter Bevordering van de Belangen des Boekhandels (VBBB) v. Eldi Records B.V.*, Case 106/79, [1980] E.C.R. 1137, 1148, [1980] 3 C.M.L.R. 719, 734-35. The Court of Justice held that if the full agreement was attached to the notification, it could not be rejected because the Form A/B failed to identify all of the restrictive clauses. *Id.* at 1149, [1981] 3 C.M.L.R. at 735. It would seem a fortiori that the Commission could not reject a form for providing insufficient market data. The Form CO used under the Merger Regulation is, of course, governed by different rules.

32. Commission Regulation No. 2526/85, O.J. L 240/1 (1985).

DG-IV even made available a most useful sample notification that was relatively brief. Whether notifications filed after that amendment often met the Commission's expectations for completeness is another question. It seems unlikely that they did. Most often, each notification will be more or less complete depending on what counsel conceive to be the minimum the situation requires. Of course, counsel's concepts of the minimum will vary dramatically. On the other hand, some notifications are made overly long by the inclusion of unnecessary material. In such cases, the Commission staff may well miss the few jewels in the haystack.

As for the future, we might suppose that becoming accustomed to filing a detailed and complete form under the Merger Regulation, counsel might be inclined to file a more complete Form A/B than in the past, in particular in connection with cooperative joint ventures.³³ Counsel may expect more rapid informal reactions from the Commission if the notifications are helpfully complete. On the whole, however, the minimalist approach seems likely to prevail.

B. *Whether to Notify*

As we have noted, attitudes of counsel have evolved in regard to whether to notify, although the nature and extent of the changes are difficult to assess because of the continuing range of attitudes. It is in part a question of how counsel have conceived their own role. Companies will often want simply to be told whether to notify. On the other hand, the process is one of weighing a series of often complex factors. Business decisions are involved, for example, whether to amend the agreement to avoid the question, or to sign the agreement with the terms the parties want and which counsel consider possibly exemptible and then notify it. Regardless of who makes the decision, obviously counsel bear a heavy responsibility in guiding a company's decision. At times there have arisen suspi-

33. In this connection, a significant problem in notifying under Regulation 17 is the need to identify the relevant markets, but without having had the benefit of the consultation process usually involved with filing a notification under the Merger Regulation. It is understandable that counsel will not want to tie companies down to a defined market, and, furthermore, somewhat doubtful that the markets identified in a notification on Form A/B would correspond to those that would be found by the Commission.

cions that counsel have advised notification because it can in itself be an interesting piece of legal work that does not go unremunerated, and in the long term can lead to even more interesting work in negotiating with the Commission on the matter. Sometimes the situations have been such that a recommendation to notify hardly seems justifiable on any basis other than counsel's affection for the notification process—although it is dangerous to leap too quickly to presumptions of this kind in view of the variety of attitudes counsel sincerely hold as to the notification process. In-house counsel, on the other hand, will often have a strong bias against notification, for reasons that are for the most part obvious.

From the company's point of view, it has appeared over the years that often in a company's final decision to file a notification it is a question of that company's concept of its own image. Is it a "complier" in competition law matters? A complier may tend to notify when there is a significant restriction as to which the company can present no reasonable case for a negative clearance because it does not want to be seen as "violating" Article 85(1) of the EEC Treaty. On the other end of the spectrum, there are "stone-wallers." They will tend not to notify except in extreme circumstances, which might include the virtual certainty that the operation will provoke either complaints from third parties or enquiries from the Commission. A significant number of companies tend to be situated near one end or the other of this spectrum. Many more adopt intermediate approaches. Some take the position that even a "complier" need not feel its "good citizen" obligation to notify an agreement that is thought entitled to an exemption.

In any event, the process of deciding whether to notify is often highly complicated, and the practitioner's approach more sophisticated than the summary comments just given might suggest.³⁴ Indeed, one gets the impression that the fre-

34. Various aspects of the notification phenomenon have been treated in the Fordham Corporate Law Institute papers: Ian Forrester & Christopher Norall, *The Laicization of Community Law Self-Help and the Rule of Reason: How Competition Law Is and Could Be Applied*, in 1983 FORDHAM CORP. L. INST. 305 (Barry E. Hawk ed., 1984); Michael J. Reynolds, *Practical Aspects of Notifying Agreements and the New Form A/B*, in 1985 FORDHAM CORP. L. INST. 705 (Barry E. Hawk ed., 1986); Mario Siragusa, *Notifications of Agreements in the EEC—To Notify or Not To Notify*, in 1986 FORDHAM CORP. L. INST. 243 (Barry E. Hawk ed., 1987).

quency of notification may be inversely proportionate to the sophistication of the counsel. It seems likely that the filing of most of the 282 Forms A/B made in 1991 could not be justified under any reasonable filing policy. On the other hand, a large number of agreements probably could reasonably have been filed and were not.

There is a question as to whether the Commission now still wishes to encourage notifications. In the past, it has, for a number of obvious reasons, including curiosity as to what was going on, simplicity of enforcement and, in the end, control over the situation and jurisdiction over practices, which in a sense comes down to power. When the DG-IV staff has been approached on a matter that could be considered to raise any question of conformity with Article 85(1) of the EEC Treaty, while the staff has often seemed to want to be helpful, the recommendation almost invariably has been "go ahead and notify, and then we will see," or, in more favorable circumstances, "we think that is likely to be all right on the basics, but notify and we will let you know." Less often, the response has been "we think that it is all right for an exemption, but if you don't notify we won't bother you unless there is a complaint." Of course, there are a number of reasons for the staff to encourage a notification. One is that a Form A/B properly filled out will give most of the pertinent data and arguments in the organized fashion to which the DG-IV staff is accustomed and allow a quicker informal response. Indeed, counsel have recently noticed an increased reluctance of the staff to give even informal reactions before seeing a completed Form A/B.

In any event, the decision to notify is up to the company, as guided by counsel. The company, after advice from counsel, has often hesitated to notify, not only because it did not wish to go on record as to the relevant product market and perhaps other elements of its business, but also because, and perhaps more importantly, it feared that even when the basic arrangement was clearly defensible, at least in terms of being exemptible, the DG-IV staff would pick up a number of details and demand changes in provisions that would almost certainly never have raised troublesome legal problems were the agreement not to have been notified. And it must be said that experience over the years has tended to confirm fears of this kind.

C. The Future?

In regard to the future, probably the most significant issue is that of delays. The prospect of long delays has been a strong deterrent to notification in the past, probably stronger than it should have been. Companies have often asked counsel how long it will take to get an exemption, meaning a formal decision, and on hearing the answer will sometimes want to leap to the decision not to notify. Of course, the situation is not so simple, since an overture to the DG-IV staff has in most situations allowed enough reassurance for the parties to proceed to implementation of an arrangement without a formal response, or even without a comfort letter actually in hand. Nonetheless, the prospect of a delay is a significant element even when these factors have been taken into account. More recently, counsel have seen well-informed companies work hard to make a joint venture "concentrative" in order to benefit from the relatively short time periods the Merger Regulation imposes on the Merger Task Force. The Commission's recent promise to act relatively quickly (but perhaps not quickly enough) on notifications of cooperative joint ventures is an important event for joint ventures, but not necessarily indicative of the situation companies will face in regard to other kinds of agreements. It seems that despite the helpful measures taken, the Commission staff is still probably not equipped to take care of notifications as promptly as companies need.

As for counsel, the same dilemmas that have plagued them in the past will most likely persist. However, the Commission seems engaged, in the interest of all, in an endeavor to reduce the occasions when a notification seems called for. New developments will modify the conditions of this central part of EEC practice: concepts such as those of ancillary restrictions (a cousin of the U.S. Rule of Reason), additional block exemptions, and more and more precedents, notices, and regulations to clarify still further the status of agreements. These we shall consider one by one.

II. MIXED COMFORT FROM THE BLOCK EXEMPTIONS

Once it was seen what an impossible burden individual exemptions imposed on the Commission, it was obvious that something had to be done. Block exemption regulations were

an immediate, albeit partial, remedy. The use of block exemptions was, in fact, virtually inevitable, once the choice made by the EEC Treaty drafters was interpreted to be that of a system involving virtually automatic condemnations subject to exemption.

As is well known, the Community reacted rather quickly. In 1965, only three years after the introduction of Regulation 17, the Council issued the first regulation authorizing the Commission to issue block exemptions in defined areas³⁵ and, only two years later, issued Commission Regulation No. 67/67 ("Regulation 67/67"), covering both exclusive sales territories and exclusive purchasing of goods for resale.³⁶ Most of the flood of notifications the Commission received in 1962 and 1963 related to distribution arrangements.³⁷ A block exemption covering such agreements was thus the most needed, and also the easiest to draft. While counsel may have had misgivings at first at the prospect of basically following a Commission-prescribed form for their distribution agreements, they soon recognized that Regulation 67/67 was a success: short, easy to read, logical, responding to a strong need, and, by and large, corresponding to business reality. Counsel were troubled by numerous questions of interpretation, some of which remain open today, even after the two new distribution regulations of 1983.³⁸

Before the issuance of the block exemption regulation,

35. Council Regulation No. 19/65, 8 J.O. 533 (1965), O.J. Eng. Spec. Ed. 1965-66, at 35.

36. See Commission Regulation No. 67/67, 57 J.O. 849 (1967).

37. The Commission received approximately 40,000 notifications in the first years of the application of Articles 85 and 86. COMMISSION NINTH REPORT ON COMPETITION POLICY ¶¶ 1-2 (1990) [hereinafter COMMISSION NINTH REPORT]. Of these, approximately 30,000 concerned exclusive dealing arrangements. The bulk of the cases—over 25,000—were settled under Regulation 67/67. COMMISSION FIRST REPORT ON COMPETITION POLICY ¶ 48 (1972); COMMISSION NINTH REPORT, *supra*, ¶¶ 20-22.

38. Commission Regulation No. 1983/83, O.J. L 173/1 (1983), *corrected by* O.J. L 281/24 (1983); Commission Regulation No. 1984/83, O.J. L 173/5 (1983), *corrected by* O.J. L 281/24 (1983). An example of an issue left open is that of the dividing line between a sale of a product for resale, which would enter into the scope of the block exemption, and the sale of a product for use, which would not. The Commission helped somewhat in §§ 9-10 of its 1984 Notice. Commission Notice Concerning Commission Regulations 1983/83 and 1984/83, §§ 9-10, O.J. C 101/2, at 3 (1984). However, the Notice still left the matter very much open, and few Commission decisions have dealt with the problem, leaving pharmaceutical and other counsel in a

practitioners had found distribution law to be a most uncertain area. The 1967 regulation had a profound impact on them by virtually codifying the field of exclusive distribution and of exclusive purchasing for resale. Dark corners continued to exist, calling for the advice of counsel,³⁹ but, by and large, legal work in regard to distribution became less interesting. Selective distribution rose to replace this work in part. The principal guidelines in that area became rather quickly traced through the joint efforts of the Commission and the Court of Justice, although the conceptual nature of the distinction between quantitative and qualitative criteria left counsel much room for speculation, and, in general, selective distribution remained an interesting area of practice,⁴⁰ unaffected by block exemptions, except in regard to automobiles.

At the beginning of the 1980s, the field of intellectual property remained open for counsel who liked to speculate on unclear subjects. EEC case law and the 1962 notice on patent licenses left enormous space for such speculation, and this area remained an active and interesting one for practitioners throughout the 1970s and into the 1980s. Indeed, prior to the issuance of the 1984 patent regulation,⁴¹ a number of EEC competition lawyers spent a large percentage of their time advising on patent licensing matters, during the latter part of the period on the basis of the successive drafts of the patent regulation.⁴² Once the patent regulation was issued in final form,

continuing effort over the last quarter century to predict the dividing line that will actually be set.

39. See Roger Daout, *Distribution Under EEC Law—An Official View*, in 1983 FORDHAM CORP. L. INST. 441 (Barry E. Hawk ed., 1984); Helmut R.B. Schröter, *The Application of Article 85 of the EEC Treaty to Distribution Agreements—Principles and Recent Developments*, in 1984 FORDHAM CORP. L. INST. 375 (Barry E. Hawk ed., 1985); Floris O.W. Vogelaar, *The Overall Policy of the Commission Concerning Distribution in the Light of Recent Developments: Some Capita Selecta*, in 1986 FORDHAM CORP. L. INST. 185 (Barry E. Hawk ed., 1987).

40. For a thorough review of the development of the law as of 1986, see Paul Demaret, *Selective Distribution and EEC Law After the Ford, Pronuptia and Metro II Judgments*, in 1986 FORDHAM CORP. L. INST. 149 (Barry E. Hawk ed., 1987) [hereinafter Demaret, *Selective Distribution*].

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

42. See Hartmut Johannes, *Technology Transfer Under EEC Law—Europe Between the Divergent Opinions of the Past and the New Administration: A Comparative Law Approach*, in 1982 FORDHAM CORP. L. INST. 65 (Barry E. Hawk ed., 1983); John Temple Lang, *European Community Antitrust Law and Joint Ventures Involving Transfer of Technology*, in

however, it was so detailed, albeit complex, that the bigger companies tended to apply the regulation through their in-house counsel, resorting to outside advisors only in special situations.⁴³ Similar conditions existed before and after the issuance of the know-how regulation in 1988.⁴⁴

From counsel's point of view, the industrial property block exemptions can also be counted as a success for the Commission. However, it may be noted that this success was due in part to a willingness of the Commission to seek, over an extended period, the views of the legal profession and industrial property circles in the drafting of the block exemption regulations, and to take those views into account to a considerable degree.⁴⁵ This fact is not without importance for the future, both as notice to the Commission of the possible utility of such consultation and as notice to the profession of its opportunity to contribute to the development of EEC law in a useful way.

The other block exemptions had a lesser impact on the life of practitioners. The franchising regulation,⁴⁶ which can be considered an adjunct to the distribution regulation, in its nar-

1982 FORDHAM CORP. L. INST. 203 (Barry E. Hawk ed., 1983); Mario Siragusa, *Technology Transfers Under EEC Law: A Private View*, in 1982 FORDHAM CORP. L. INST. 95 (Barry E. Hawk ed., 1983).

43. For a study of post-regulation patent issues, see James Venit, *In the Wake of Windsurfing: Patent Licensing in the Common Market*, in 1986 FORDHAM CORP. L. INST. 517 (Barry E. Hawk ed., 1987); see also Willy Alexander, *The Horizontal Effects of Licensing a Technology As Dealt With By EEC Competition Policy*, in 1988 FORDHAM CORP. L. INST. 11-1 (Barry E. Hawk ed., 1989). The enforceability of patents and other intellectual property, closely related to licensing issues, is treated in Norbert Koch, *Article 30 and the Exercise of Industrial Property Rights to Block Imports*, in 1986 FORDHAM CORP. L. INST. 605 (Barry E. Hawk ed., 1987).

44. Commission Regulation No. 556/89, O.J. L 61/1 (1989). The situation at that time is reviewed in Norman E. Rosen, *New EEC Regulation on Knowhow Licensing*, in 1988 FORDHAM CORP. L. INST. 10-1 (Barry E. Hawk ed., 1989). The regulation had been previewed two years earlier in Sebastiano Guttuso, *Know-How Agreements*, in 1986 FORDHAM CORP. L. INST. 477 (Barry E. Hawk ed., 1987).

45. Representations to the Commission on the successive drafts of the patent regulation were made in many forms and over a long period, but the most spectacular event was the 1979 hearing, which involved a large number of counsel and the Commission staff in prolonged confrontation on a wide range of issues.

46. Commission Regulation No. 4087/88, O.J. L 359/46 (1988); see Jean-Eric de Cockborne, *New EEC Block Exemption Regulation on Franchising*, in 1988 FORDHAM CORP. L. INST. 13-1 (Barry E. Hawk ed., 1989); Jean Dubois, *Franchising Under EEC Competition Law: Implications of the Pronuptia Judgment and the Proposed Block Exemption*, in 1986 FORDHAM CORP. L. INST. 115 (Barry E. Hawk ed., 1987); Roger J. Goebel, *The Uneasy Fate of Franchising Under EEC Antitrust Laws*, in 1984 FORDHAM CORP. L. INST. 453 (Barry E. Hawk ed., 1985); Alan Silberman, *The EEC Franchising Regulation: A*

rower field seems quite usable by counsel. The 1985 research and development regulation,⁴⁷ on the other hand, raises such acute problems of interpretation, which case law will probably never resolve, that it has been of much less use than the others.⁴⁸ The amendment of this regulation now planned will not extend to clarification of the ambiguities. An interpretative notice would help.

The block exemptions profoundly modified the nature of practice of EEC law, for better and for worse. For better, they tended to give clarity and simplicity. For worse, they tended to obscure the reasoning process and rigidify the forms of contracts, and, to some extent, the freedom to contract.

As to clarity, much was quite straightforward and some was not. The regulations introduced the art of interpreting the block exemption, although counsel often disagreed as to the rules of the art. Problems arose as to what a provision of the regulation covered, or as to what kinds of unmentioned restrictions removed the benefit of the block exemption. More obscure issues arose as to the "normative" values of block exemption regulations, i.e. the extent to which a block exemption established rules applicable outside the scope of the regulation, "by analogy" in other cases.⁴⁹ Also, counsel have some-

Potential Laboratory For Examining EEC Competition Policy, in 1988 FORDHAM CORP. L. INST. 14-1 (Barry E. Hawk ed., 1989).

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

48. A main source of the problem seems to be that the Commission had focused on research and development [hereinafter R&D] joint ventures between competitors, whereas most such ventures seem to be formed between companies in a vertical relationship, and the logic of the regulation's provisions concerning permissible and impermissible restrictions is much less obvious in the case of verticality. Also, the meaning of certain key terms, such as "joint exploitation," was not sufficiently spelled out. A further difficulty was apparently raised by the Commission's attempting to rush through the regulation by the end of a Commissioner's term in 1984. See e.g., Demaret, *Selective Distribution*, *supra* note 40 (concerning the need for mature deliberation and consultation). For detailed studies of R&D under EEC law, see Alexis Jacquain & Bernard Spinoit, *Economic and Legal Aspects of Cooperative Research: A European View*, in 1985 FORDHAM CORP. L. INST. 487 (Barry E. Hawk ed., 1986); Jürgen Lindemann, *A Practical Critique of the EEC Joint Research Rules and Proposed Joint Venture Guidelines*, in 1986 FORDHAM CORP. L. INST. 341 (Barry E. Hawk ed., 1987); Denis McInerney, *Antitrust Scrutiny of Joint Research and Development Ventures in the United States and the European Economic Community*, in 1986 FORDHAM CORP. L. INST. 355 (Barry E. Hawk ed., 1987).

49. See Council Regulation No. 19/65, *supra* note 35, art. 1(3), O.J. Eng. Spec. Ed. 1965-66, at 36. For example, counsel have been known to advise use in non-exclusive distribution agreements or in agreements not involving distribution of the

times wandered off the trail of logic by assuming that the granting of a block exemption to certain clauses means that such clauses always need an exemption.⁵⁰ In doing so, they have failed to stop and think, for example, whether in a certain situation the exclusivity was not restrictive and did not call for counsel to subject an agreement to the format of the block exemption regulation.

Counsel have encountered particularly difficult issues concerning the extent to which coverage under a block exemption precludes attack of the practice in question under national competition law.⁵¹ The Commission is undertaking a somewhat timid and partial explanation in its forthcoming notice on the application of Articles 85 and 86 of the EEC Treaty in the national courts.⁵² It remains to be seen, however, how the Commission's statements will be interpreted by the national courts and the national authorities, in particular when it comes to block exemptions, as opposed to individual exemptions.⁵³

export restraints exempted by Regulation 1983/83. The Commission itself seems to have contributed to confusion in this respect by stating that the "hiring out of goods in return for payment comes closer, economically speaking, to a resale of goods than to a provision of services" and can, therefore, be "covered by the Regulations," which of course cover only goods for "resale." Commission Notice Concerning Commission Regulations 1983/83 and 1984/83, *supra* note 38, §§ 8, 12, O.J. C 101/2, at 3 (1984). On the basis of such reasoning, the two distribution regulations might also be deemed to cover non-integrated agency relationships, since they also might be thought to "come closer" to resale than to services.

50. In the industrial property regulations, the Commission, having waited for the Court of Justice to rule, did take this point into account by including as a recital the acknowledgment that under *L.C. Nungesser KG v. Commission*, Case 258/78, [1982] E.C.R. 2015, [1983] 1 C.M.L.R. 278, an exclusive grant was not necessarily a restriction under Article 85(1) of the EEC Treaty. However, this step seems not to have served to cancel the frequent assumption just described. Commission Regulation No. 2349/84, ¶ 11, O.J. L 219/15, at 16 (1984); Commission Regulation No. 556/89, ¶ 6, O.J. L 61/1, at 2 (1989). The "white" clauses, exempted by the regulation when exceptional circumstances make an exemption needed, are, of course, in a different category.

51. The issue of the way in which the rule of the priority of Community law over national law actually works in practice is one of the most complex and susceptible to arcane and erudite pronouncements from scholarly quarters that EEC competition law has so far produced. The subject was treated more clearly than it normally is in Kurt Stockmann, *EEC Competition Law and Member State Competition Laws*, in 1987 FORDHAM CORP. L. INST. 265 (Barry E. Hawk ed., 1988).

52. See *infra* notes 132-38 and accompanying text (regarding Commission's position on application of Articles 85 and 86 of the EEC Treaty by Member State courts).

53. Not surprisingly, Member States tend to think they should have a considerable degree of liberty in regulating activity covered by block exemptions. The issue has arisen recently in connection with possible regulation by the U.K. competition

The problem comes up in connection with the reported position of the Irish authorities that agreements covered by an EEC block exemption such as Regulation 1983/83 should nevertheless be notified under the new Irish competition law.⁵⁴

From the practical point of view for counsel, to a certain extent the block exemptions serve the role that an EEC Rule of Reason would have served, had there been one of general applicability. The subject will be pursued below, in connection with a review of counsel's search for a Rule of Reason.

III. *LOOKING FOR A RULE OF REASON*

It was in 1962 that EEC competition lawyers began asking themselves in earnest by what criteria a contractual restriction should be judged under Article 85(1) of the EEC Treaty. They are still asking the question. Will every restriction on the commercial freedom of an independent party need an exemption to be enforceable, as long as it has an appreciable effect in the market and also may have an appreciable impact on trade between Member States? Or will only "unreasonable" restrictions fall under Article 85(1) of the EEC Treaty? Obviously no question can be more central to daily life in the practice of EEC competition law.

The indications that counsel got from the Commission, and also from the Court of Justice in the early years, suggested that the first answer should be counsel's working hypothesis. A restriction was a "restriction." However, many jurists absorbed in EEC law continued to pursue the subject, arguing that the approach of the U.S. courts in the years following adoption of the Sherman Act⁵⁵ should be followed in Europe, at least insofar as the existence of the exemption procedure permitted.⁵⁶

authorities of automobile distribution practices permitted by the EEC block exemption regulation covering automobile distribution, Commission Regulation No. 123/85, O.J. L 15/16 (1985); MONOPOLIES AND MERGERS COMMISSION, 1 NEW MOTOR CARS: A REPORT ON THE SUPPLY OF NEW MOTOR CARS WITHIN THE UNITED KINGDOM, 1992, Cmnd. 1808, at 370-71, 399. The issue raised by the report was not resolved, and probably will not be until the Court has ruled again on the matter, in somewhat more precise terms than it did in *Walt Wilhelm v. Bundeskartellamt*, Case 14/68, [1969] E.C.R. 1, [1969] 8 C.M.L.R. 100.

54. Competition Act, No. 24 (1991) (Ir.).

55. 15 U.S.C. § 1 (1988).

56. Judge Joliet, at an early date and long before he joined the Court of Justice,

Meanwhile counsel continued to confront the issue at every turn in their practice—in counseling on drafting of agreements and their enforceability, on advising whether to notify, or in completing the Form A/B. They may have hesitated to go so far as to argue to the Commission in a pending matter that a “Rule of Reason” should apply, at least not in those words.⁵⁷ That would have been asking too much of the Community authorities—to accept so directly an American concept that at least at first glance appeared incompatible with the exemption structure of Article 85 of the EEC Treaty. Indeed, it seems to be only during the last few months that DG-IV staff members are willing to go so far as to use the term “Rule of Reason” to refer to what approach the Commission may or may not take in a given area—and even that is only in conversation.

In other words, in conceptual terms the issue with which the practitioner of EEC competition law has been faced from the beginning is that of the dividing line between that which can be given a negative clearance and that which is enforceable only upon exemption. In more practical terms, counsel asks what chances there may be later to show that an agreement is

examined the issue in depth through a comparative law approach. RENÉ JOLIET, *THE RULE OF REASON IN ANTITRUST LAW: AMERICAN, GERMAN AND COMMON MARKET LAW IN COMPARATIVE PERSPECTIVE* (1967).

57. In this Article, the term “Rule of Reason” refers, unless a different sense is clearly applicable, to the concept as currently known in U.S. case law. “Ancillary restriction” will refer to the doctrine being developed in EEC law that is similar to the U.S. doctrine of “ancillary restraints.” Although the relationship between the U.S. Rule of Reason and the concepts of similar nature that have developed in certain areas of EEC competition law are complex, there does exist a close relationship. It has been described by a number of writers. See, e.g., Barry E. Hawk, *The American (Anti-trust) Revolution: Lessons for the EEC?*, 9 EUR. COMPETITION L. REV. 53 (1988); Bastiaan van der Esch, *EC Rules on Undistorted Competition and U.S. Antitrust Laws: The Limits of Comparability*, in 1988 FORDHAM CORP. L. INST. 18-1 (Barry E. Hawk ed., 1989); see also J.E. Ferry, *The Repose of Certainty and the Necessity of Uncertainty*, in 1978 FORDHAM CORP. L. INST. 1 (Barry E. Hawk ed., 1979).

The U.S. Rule of Reason has been summarized on countless occasions. For a recent forward-looking summary, see Phillip Areeda, *A Second Century of the Rule of Reason*, 59 ANTITRUST L.J. 143 (1990). He lists three determinants for applying the U.S. rule: (i) the type of threat to competition, (ii) whether the restraint is of sufficient magnitude to be “unreasonable,” and (iii) whether the challenged conduct has any redeeming virtues that outweigh the detriments it might cause. Were this lucid and simple formulation to be applied in a study of EEC competition law decisions over the last 30 years, a great deal could be determined about the nature of the Community decision-making process and where it is going.

enforceable when it is challenged, without having recourse to the uncertainties and delay of Article 85(3) of the EEC Treaty. While both counsel and the Commission have occasionally ignored this distinction, it can obviously be critical.⁵⁸

The need for an EEC Rule of Reason was to a certain extent and in certain limited areas taken care of by the block exemption regulations.⁵⁹ However, whatever their virtues, the block exemptions are obviously only a partial solution to the problem of legal certainty and only a very limited application of a Rule of Reason.⁶⁰ The block exemptions leave untouched

58. An agreement or a clause of an agreement that needs an exemption but does not have one will not be enforceable in court. In principle it can also be the basis of fines, although in the many borderline cases that tend to raise this problem, fines are hardly ever a problem. Thus, if an exclusivity clause comes within the rule of the Court of Justice's judgment in *L.C. Nungesser KG v. Commission*, Case 258/78, [1982] E.C.R. 2015, [1983] 1 C.M.L.R. 278, as being an ancillary restriction, or of the judgment in *Delimitis v. Henninger Bräu AG*, Case C-234/89, [1991] E.C.R. 935, [1992] 4 C.M.L.R. 210, as not being of appreciable impact on competition or on trade between Member States, it is enforceable without an exemption. Otherwise, only if it comes within a block exemption or has been given a specific exemption will it be enforceable.

59. For example, exclusive patent licenses are automatically exempted, at least in the absence of non-exempted restrictions, just as they would tend to be valid under a U.S. Rule of Reason. Of course, block exemptions are generally easier to apply with certainty to a given factual situation than is a Rule of Reason. As noted, there has always been a strong drive in the Community for legal certainty. The block exemptions did provide a degree of certainty, at least for the areas covered. An EEC Rule of Reason would not, of course, provide the same degree of security to a company but would, after a time, provide a considerable degree of security and an analytical framework that would allow greater flexibility not only as to agreements within the specific area of the present block exemptions but also in regard to agreements that for one reason or another simply fell outside the scope of any block exemption.

60. The Commission set out to fill holes one at a time by a block exemption per industry. The automobile regulation, Commission Regulation No. 123/85, O.J. L 15/16 (1985), is now the subject of re-evaluation prior to its expiration in 1995. An insurance regulation will be added. Council Regulation No. 1534/91, O.J. L 143/1 (1991) (authorizing the Commission to adopt a block exemption for the insurance sector); Draft Commission Regulation, O.J. C 207/2 (1992) (draft block exemption for certain agreements, decisions, and concerted practices in the insurance sector). Competition in the transport sector is the subject of separate procedural rules, which also cover the Commission's grants of block exemptions in that sector. Transport was specifically excluded from the scope of Regulation 17 by Council Regulation 141/62, 124 J.O. 2751 (1962), O.J. Eng. Spec. Ed. 1959-62, at 291, *amended by* 210 J.O. 3141 (1965), *amended by* 306 J.O. 1 (1967). Subsequently, procedural regulations were adopted to apply EEC competition rules to transport by rail, road, and inland waterway, J.O. L 175/1 (1968), O.J. Eng. Spec. Ed. 1968-I, at 302, maritime transport, O.J. L 378/4 (1986), and air transport, O.J. L 374/1 (1987), *amended by* O.J. L 122/2 (1991), *amended by* O.J. L 240/18 (1992). The Commission was given the power to grant certain block exemptions in the air transport sector, O.J. L 374/9

many important areas of commercial activity, most of which will never be covered by a block exemption. The comfort they have given to counsel, and to the Commission, is great as far as it goes.

At the beginning counsel gathered that anything in the nature of an EEC Rule of Reason might well be limited to a few well-defined areas, the resale restraint involved in selective distribution being an early and simple example.⁶¹ However, it was clear that the decisions applying these concepts were not legislative acts, and it seemed that if they were to be explained it could only be on the basis of some legal principle which would necessarily apply outside the narrowly limited fields involved in the cases decided. For a long time, counsel could distinguish no recognition by the Commission or the Court of Justice of a broadly applicable principle. Then the term "ancillary restriction" began to appear, apparently first in connection with joint ventures.⁶² A number of years later the use was

(1987), amended by O.J. L 217/15 (1990), amended by O.J. L 240/19 (1992). It has used this authority to adopt block exemptions that currently govern ground handling services, O.J. L 10/7 (1991), certain consultations relating to capacity, slot allocations, and tariffs, O.J. L 10/14 (1991), and computer reservation systems, O.J. L 10/9 (1991). Proposed regulations would amend and extend the latter two block exemptions. In the maritime transport sector; the Council has authorized the Commission to grant block exemptions for certain agreements between liner shipping companies, termed "consortia." O.J. L 55/3 (1992). In regard to block exemptions, see generally *supra* text accompanying notes 35-54.

61. The concept was applied in connection with selective distribution in the *SABA* case, first by the Commission in 1975, O.J. L 28/19 (1976), [1976] 1 C.M.L.R. D61, and then by the Court of Justice in 1977. *Metro SB-Grossmärkte GmbH & Co. KG v. Commission*, Case 26/76, [1977] E.C.R. 1875, [1978] 2 C.M.L.R. 1. There were other significant developments during the following decade. The Commission's 1979 notice on subcontracting arrangements was clearly based on the concept. In 1982, exclusivity clauses in the license of intellectual property were made subject to such an analysis by the Court of Justice in *L.C. Nungesser KG v. Commission*, Case 258/78, [1982] E.C.R. 2015, [1983] 1 C.M.L.R. 278. Further, in 1985, in connection with a non-compete covenant for the sale of a business, the Court of Justice developed the concept in *Remia BV and Verenigde Bedrijven Nutricia N.V. v. Commission*, Case 42/84, [1985] E.C.R. 2545, [1987] 1 C.M.L.R. 1. The Court of Justice in that case was in fact building upon a concept used by the Commission in *Reuter/BASF*, O.J. L 254/40 (1976), [1976] 2 C.M.L.R. D44, and pursued by the Commission in *Nutricia/de Rooij and Nutricia/Zuid-Hollandse Conservenfabriek*, O.J. L 376/22 (1983), [1984] 2 C.M.L.R. 165. In 1986, restraints in a franchising agreement were recognized by the Court of Justice as being covered by such a concept in *Pronuptia de Paris GmbH v. Pronuptia de Paris Irmgard Schillgalis*, Case 161/84, [1986] E.C.R. 353, [1986] 1 C.M.L.R. 414.

62. Jonathan Faull, *Joint Ventures Under the EEC Competition Rules*, 5 EUR. COMPETITION L. REV. 358 (1984).

made a subject of EEC regulatory law by its inclusion in the Merger Regulation.⁶³ At the time the Commission in its Notice Regarding Restrictions Ancillary to Concentrations⁶⁴ even ventured to use the term "reasonable" in defining the legal limits of an ancillary restriction.

But despite the fact that the list of applicable circumstances has grown to such a degree, the real test of the outer limits of this area of law may well come forth more clearly in the reasonably near future in development of EEC competition law as it relates to commercial agency agreements.⁶⁵

While even an attentive observer may be unsure as to where the law now stands in this regard, it is clear that we have seen an important evolution over the years. It is also clear that no attempt should be made in this paper to provide a restatement of present law.⁶⁶ We shall content ourselves to look upon the struggle of counsel to see more clearly on this subject all these years, and in that connection to search for the exact role of "reason" in EEC competition law. When will reason

63. Council Regulation No. 4064/89, O.J. L 257/13 (1990); see Commission Notice Regarding Restrictions Ancillary to Concentrations, O.J. C 203/8 (1990); Donald L. Holley, *Ancillary Restrictions in Mergers and Joint Ventures*, in 1990 *FORDHAM CORP. L. INST.* 423 (Barry E. Hawk ed., 1991) (developing the distinction, not necessarily always of practical use, between those restrictions that are "inherent" in a valid transaction and those which are "ancillary").

64. O.J. C 203/8 (1990).

65. In connection with DG-IV's prolonged work on a notice on agreements with commercial agents to replace the 1962 Notice, see COMMISSION TWENTY-FIRST REPORT ON COMPETITION POLICY ¶ 133 (1992) [hereinafter COMMISSION TWENTY-FIRST REPORT], it seems that one of the more difficult issues to resolve is that of what restrictions a principal can impose on an agent that is not integrated, and how the acceptance of such restrictions can be explained as a matter of EEC competition law.

66. The Fordham Corporate Law Institute papers are of particular importance in this regard. The subject was examined in depth in two 1987 papers: Helmuth R.B. Schröter, *Antitrust Analysis Under Article 85(1) and (3)*, in 1987 *FORDHAM CORP. L. INST.* 645 (Barry E. Hawk ed., 1988); Michel Waelbroeck, *Antitrust Analysis Under Article 85(1) and Article 85(3)*, in 1987 *FORDHAM CORP. L. INST.* 693 (Barry E. Hawk ed., 1988). However, case law continues to move, and it would be useful to have an annual review of this subject. Professor Michel Waelbroeck devoted a section to the subject in his 1989 review, Michel Waelbroeck, *Annual Review of EEC Competition Cases 1988-1989*, in 1989 *FORDHAM CORP. L. INST.* 181, 190-91 (Barry E. Hawk ed., 1990). For a brief, but useful, status report, see Faull, *Enforcement of Competition Policy*, *supra* note 1. In what is certainly an interesting thesis that warrants further study, Mr. Faull sees the EEC Rule of Reason as it now stands and as it may develop limited to an ancillary restriction doctrine adjusted to exclude restrictions which divide the Community on territorial lines, at least until the single market is firmly established.

alone prevail? When must resort be had to the exemption process?

Would a full-blown EEC Rule of Reason provide the long-sought-for certainty? No doubt it would not. But that is no valid ground for counsel to resist its growth. The continued development of an EEC Rule of Reason should be welcomed by counsel. Such growth as has already taken place constitutes an enormously important development. While it complicates legal analysis for counsel and places a burden on the Commission and the national courts, it permits a much needed flexibility in EEC competition law that so far has been lacking. The EEC competition law system has tended to work easily only if an agreement fits in one of a series of pigeon-holes covered by a block exemption or other "safe harbor" or if it has the explicit approval of a small group of officials looking out for a huge segment of the world's economy.

In retrospect, it seems that the calls of counsel and scholars for a broader acceptance of a Rule of Reason in EEC law have not gone unheard, in particular at the Court of Justice, and that there is not only a hope but also an expectation for a continued development and clarification of the underlying principles and the scope of their applicability. Counsel will continue to bear a responsibility of pressing for development of these concepts, in particular when dealing with DG-IV, and later as appropriate before the Community courts in Luxembourg as well as in national courts. DG-IV on its side will bear the responsibility of taking seriously the analysis of these matters, without waiting for counsel to press the issue upon them. The matter is, of course, closely related to that of economic analysis, discussed below.

IV. *SOME TURNING POINTS IN CASE LAW THAT HAD AN IMPACT ON PRACTICE*

While the process may seem somewhat of a detour from the main subject, the author cannot resist, perhaps in part from nostalgia, reviewing briefly a few important cases that have had a particular impact not only on the shape of EEC competition law but also on that of the daily life of persons practicing that law.

It does happen from time to time in the history of the law

that a whole field is created, overnight, and the next morning its provisions are sitting there, to a considerable extent empty of meaning, waiting to be given some content not only by the regulators and the courts but also, and first, by counsel. It is an awesome responsibility. The entry into effect of the EEC Treaty in 1958 brought about such a moment. This was in particular the case in regard to competition law—that being one area of supranational law subject to immediate application by the Commission, at least as soon as the procedural rules were in place, which of course occurred in 1962.

A fascinating aspect of the practice of EEC competition law over the thirty-year period, and one that has brought great personal satisfaction to many counsel, is observing the irregular but constant development of the law—and from time to time participating in that development. Each practitioner who has worked during a substantial part of this period will have a personal view of which are the important events. There follows one such list of fifteen EEC cases that have had a marked impact on the development of professional life for the practitioner.⁶⁷

A. *Grundig—Court of Justice, 1966*,⁶⁸ *Commission, 1964*⁶⁹

The judgment was the first one rendered by the Court of Justice on an appeal from a Commission decision. Counsel to a party in the case told the author several years later that the case had decided all the fundamental points of EEC competition law. While that is probably an overstatement, so many fundamental points were settled that the case may fairly be considered the grandfather of the many developments which followed. Absolute territorial protection had been sought for a national distribution system, and it was made clear to legal advisors what value the Commission and the Court of Justice would place on the unity of the market. Intra-brand competition had to be protected by Article 85(1), even though it might be at the expense of inter-brand competition. Article 85 did apply to vertical agreements. These and other points settled

67. The cases are arranged by order of the date of the judgment on review by the Court of Justice when there was such a review.

68. *Établissements Consten SARL and Grundig-Verkaufs-GmbH v. Commission*, Joined Cases 56 & 58/64, [1966] E.C.R. 299, [1966] C.M.L.R. 418.

69. *Grundig—Consten*, 161 J.O. 2545 (1964), [1964] C.M.L.R. 489.

by *Grundig* are now accepted by EEC counsel as not only fundamental but obvious.

B. Deutsche Grammophon—*Court of Justice, 1971*⁷⁰

When the Court of Justice introduced the “free-flow” concept of Article 30 into the competitive relationship between companies by limiting the ability of a copyright owner to block parallel imports of copyrighted items marketed in another Member State with the owner’s consent, it in one stroke filled a void, and in effect created a new area of law over which many counsel were to devote years of work. The Article 30 rules have, of course, been continuously developed since 1971,⁷¹ although the development now seems to be slowing before the law has reached maturity.

One important impact on practitioners was immediately to integrate the world of intellectual property into that of EEC competition law. A new group of practitioners, previously only marginally concerned, was brought into the EEC competition world. The revolutionary interpretation of Article 30 seems now, in retrospect, to have been a salutary step in the development of the EEC legal system, but the immediate response both from existing EEC counsel and from the new group sometimes bordered on consternation, occasionally mixed with indignation.

C. Raymond—Nagoya—*Commission, 1972*⁷²

To the surprise of many, the Commission accepted jurisdiction to rule upon an export prohibition imposed on a Japanese licensee by a French licensor. The concept of the potential effect on trade between Member States, as well as the

70. *Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Grossmärkte GmbH & Co. KG*, Case 78/70, [1971] E.C.R. 487, [1971] C.M.L.R. 631.

71. See HARMUT JOHANNES, *INDUSTRIAL PROPERTY AND COPYRIGHT IN EUROPEAN COMMUNITY LAW* (1976); Willy Alexander, *The Applicable Rules of EEC Law: Antitrust and the Free Movement of Goods*, in 1974 *FORDHAM CORP. L. INST.* 209 (Barry E. Hawk ed., 1975); Norbert Koch, *Article 30 and the Exercise of Industrial Property Rights to Block Imports*, in 1986 *FORDHAM CORP. L. INST.* 605 (Barry E. Hawk ed., 1987); Guy J. Pevtchin & Leslie Williams, *Pharmon v. Hoechst: Limits on the Community Exhaustion Principle in Respect of Compulsory Patent Licenses*, in 1986 *FORDHAM CORP. L. INST.* 287 (Barry E. Hawk ed., 1987); Bastiaan van der Esch, *Industrial Property Rights Under EEC Law*, in 1983 *FORDHAM CORP. L. INST.* 539 (Barry E. Hawk ed., 1984).

72. *J.O. L* 143/39 (1972), [1972] C.M.L.R. D45.

broad territorial scope of the EEC rules in general, became much clearer to counsel.⁷³

D. Dyestuffs—*Court of Justice, 1972*;⁷⁴ *Commission, 1969*⁷⁵

For the first time the Court of Justice defined a concerted practice, and defined it in broad terms that prepared counsel somewhat for the broader language of the Court of Justice in the 1975 *Sugar* cases.⁷⁶ The Court of Justice also confirmed at least one basis for the applicability of EEC law to companies situated outside the Community (a basis extended in the Court of Justice's judgment in *Wood Pulp*, treated below).

E. Continental Can—*Court of Justice, 1973*;⁷⁷
*Commission, 1972*⁷⁸

The *Continental Can* case seemed at the time to signal the beginning of merger control when the Court of Justice sustained the Commission's idea, if not its implementation, to apply Article 86 to an acquisition of a competitor by a dominant company. The immediate practical impact was limited, as could have been foreseen,⁷⁹ because the concept was not considered to permit control of the constitution of a dominant position. The case did, however, begin almost immediately the real process of merger control when in July 1973 the Commission submitted to the Council a draft merger regulation. This was the beginning of the process that culminated in 1989 in

73. The jurisdictional dimension of Articles 85 and 86 based on a potential effect on trade between Member States has been of great importance to practitioners. Case law has proceeded by small steps, not always in the same direction. See Jonathan Faull, *Effect on Trade Between Member States and Community: Member State Jurisdiction*, in 1989 FORDHAM CORP. L. INST. 485 (Barry E. Hawk ed., 1990).

74. *Imperial Chemical Indus. v. Commission*, Case 48/69, [1972] E.C.R. 619, [1972] C.M.L.R. 557; *J.R. Geigy AG v. Commission*, Case 52/69, [1972] E.C.R. 787, [1972] C.M.L.R. 557; *Sandoz AG v. Commission*, Case 53/69, [1972] E.C.R. 845, [1972] C.M.L.R. 557.

75. *Dyestuffs*, J.O. L 195/11 (1969).

76. *Coöperatieve vereniging 'Suiker Unie' UA v. Commission*, Case 40/73, [1975] E.C.R. 1663, [1976] 1 C.M.L.R. 295.

77. *Europemballage Corp. & Continental Can Co. v. Commission*, Case 6/72, [1973] E.C.R. 215, [1973] C.M.L.R. 199.

78. *Continental Can*, J.O. L 7/25 (1972), [1972] C.M.L.R. D11.

79. See Karen Banks, *Mergers and Partial Mergers Under EEC Law*, in 1987 FORDHAM CORP. L. INST. 373 (Barry E. Hawk ed., 1988), reprinted in 11 FORDHAM INT'L L.J. 255 (1987-1988); Valentine Korah, *Joint Ventures (Exemption or Clearance), Mergers and Partial Mergers*, in 1987 FORDHAM CORP. L. INST. 429 (Barry E. Hawk ed., 1988).

the Merger Regulation, that very important development with so many implications for counsel as well as companies.

F. SHV/Chevron—*Commission, 1974*⁸⁰

In setting forth the grounds for acceptance without the need for exemption of a “partial merger” that resulted in an entity jointly held by companies that had been competitors, and where one of the parents remained a potential competitor of the jointly held company, the Commission laid the basis not only for counsel to exercise on countless occasions their ingenuity to arrange deals that would fit into this slot, but also for the famous and counsel-consuming distinction between concentrative and cooperative joint ventures set forth in the Merger Regulation.⁸¹

G. Vacuum Interrupters—*Commission, 1977*⁸²

The Commission had occasion to examine jointly-held companies in the preceding years, and had summarized these activities in its *Fourth Report on Competition Policy*.⁸³ However, it was only in 1977 that it issued its first decision in what might be considered a typical joint venture between competitors, outside a special area such as nuclear energy. Almost every big company in Europe was involved in one or more joint ventures, and very few of those had been notified. New joint ventures were being formed all the time. Counsel faced the issue of whether to notify existing joint ventures, or only new ones, or to lie low and hope for the best. Most counsel have never fully resolved this dilemma.

80. SHV/Chevron, O.J. L 38/14 (1975), [1975] 1 C.M.L.R. D68.

81. In 1977, the Commission seemed to be drawing back from the partial merger concept when it decided *De Laval—Stork*, O.J. L 215/11 (1977). In *De Laval—Stork*, the Commission determined, in circumstances not so different from those of *SHV/Chevron*, that the parents remained potential competitors. *De Laval—Stork*, O.J. L 215/11, at 14-19 (1977). However, in the end the partial merger doctrine survived.

82. Vacuum Interrupters Ltd, O.J. L 48/32 (1977), [1977] 1 C.M.L.R. D67.

83. COMMISSION FOURTH REPORT ON COMPETITION POLICY ¶¶ 37-42 (1975). A recent update on Commission policy concerning cooperative joint ventures is given in Barry E. Hawk, *Joint Ventures Under EC Law*, in 1991 FORDHAM CORP. L. INST. 557 (Barry E. Hawk ed., 1992) [hereinafter Hawk, *Joint Ventures Under EC Law*], reprinted in 15 FORDHAM INT'L L.J. 303 (1991-1992).

H. *United Brands*—*Court of Justice, 1978*;⁸⁴
*Commission, 1975*⁸⁵

The *United Brands* case first showed the broad potential of Article 86 in control of abuses of dominant positions, when the Court ruled on a variety of abuses related to the banana market. While the leading demonstrative role of *United Brands* has now been partially eclipsed by *Tetra Pak II*,⁸⁶ it was *United Brands* that brought Article 86 into the daily lives of counsel. At the time, of course, it was not evident with what energy and imagination the Commission would press the possibilities of that EEC Treaty provision.

I. *Hugin*—*Court of Justice, 1979*⁸⁷ *Commission, 1977*⁸⁸

When the Court of Justice ruled that a cash-register manufacturer held a dominant position in regard to parts for its own line, leaving the impression that the Commission's finding of a duty to supply a former distributor would have been upheld if trade between Member States had been affected, attention of the legal profession was obtained throughout the Community. While the case is rarely cited by the Commission or the Court of Justice, it continues to raise vexing questions in the day-to-day life of counsel.

J. *AM & S*—*Court of Justice, 1982*⁸⁹

The case which ruled on the extent of legal privilege in EEC competition proceedings could hardly be omitted from any list of attention-getting cases for counsel. The ruling shocked in-house counsel, worried independent counsel who were not members of an EEC bar, and visibly elated a number of independent counsel who did belong to Member State bars. The story is a long one, not yet finished.⁹⁰ For present pur-

84. *United Brands Co. v. Commission*, Case 27/76, [1978] E.C.R. 207, [1978] 3 C.M.L.R. 83.

85. *Chiquita*, O.J. L 95/1 (1976).

86. *Tetra Pak II*, O.J. L 72/1 (1992).

87. *Hugin Kassaregister AB v. Commission*, Case 22/78, [1979] E.C.R. 1869, [1979] 3 C.M.L.R. 345.

88. *Hugin/Liptons*, O.J. L 22/23 (1978), [1978] 1 C.M.L.R. D19.

89. *AM & S Europe Ltd. v. Commission*, Case 155/79, [1982] E.C.R. 1575, [1982] 2 C.M.L.R. 264.

90. See David Edward, *Constitutional Rules of Community Law in EEC Competition*

poses, perhaps it suffices to say that the situation is not a comfortable one for companies and for counsel not members of Member State bars, but it has not, for various reasons, produced the problems expected in 1982.

K. Nungesser—*Court of Justice, 1982*;⁹¹ *Commission, 1978*⁹²

We have already had occasion to refer to *Nungesser* in connection with the growth of an EEC Rule of Reason. The case had been recognized by counsel and the Commission as a future landmark long before it was decided. The drafting of the patent regulation had been held up waiting for the Court to rule on the enforceability of exclusivity and other clauses in agreements dealing with rights to plant varieties. The judgment was fully as interesting as expected.⁹³ The case still serves as a fundamental point of departure for analysis by counsel of new problems.

L. Pioneer—*Court of Justice, 1983*;⁹⁴ *Commission, 1979*⁹⁵

The Commission's decision imposing a EUA4,350,000 "exemplary" fine on Pioneer Electronic Europe and substantial fines on its distributors in cases relating to exports between Member States startled the business world and made it easier for EEC counsel to focus attention of executives on compliance programs. While some four years later the Court reduced the amount of fines slightly, the case continued to serve as a warning. Since then, fines have more than kept up with inflation, of course, so far topped by *Tetra Pak II* at ECU75,000,000.⁹⁶

Cases, in 1989 FORDHAM CORP. L. INST. 383, 396-99 (Barry E. Hawk ed., 1990) [hereinafter Edward, *Constitutional Rules*], reprinted in 13 FORDHAM INT'L L.J. 111 (1989-1990); Otfried Lieberknecht, *Comments on Constitutional Rules*, in 1989 FORDHAM CORP. L. INST. 419, 422 (Barry E. Hawk ed., 1990).

91. L.C. Nungesser KG v. Commission, Case 258/78, [1982] E.C.R. 2015, [1983] 1 C.M.L.R. 278.

92. Breeders' Rights—Maize Seed, O.J. L 286/23 (1978), [1978] 3 C.M.L.R. 434.

93. See Eleanor M. Fox, *Maize Seed: A Comparative Comment*, in 1982 FORDHAM CORP. L. INST. 151 (Barry E. Hawk ed., 1983).

94. SA Musique Diffusion Française v. Commission, Joined Cases 100-03/80, [1983] E.C.R. 1825, [1983] 3 C.M.L.R. 221.

95. Pioneer Hi-Fi Equipment, O.J. L 60/21 (1980), [1980] 1 C.M.L.R. 457.

96. O.J. L 72/1 (1992). Tetra Pak has appealed the decision. Tetra Pak v. Commission, Case T-83/91, O.J. C 331/15 (1991). In regard to fines, see Faull, *Enforce-*

M. Remia—*Court of Justice, 1985*;⁹⁷ *Commission, 1983*⁹⁸

When the Court of Justice basically approved the Commission's decision concerning the acceptability of non-compete clauses to protect the purchaser of a business, it did so in broad terms that recalled *Nungesser*, but the fact that the judgment was outside the area of intellectual property, in the more general activity of buying and selling businesses, seemed to give it added impact. Whether counsel immediately recognized the long-term potential of the case for their practice is another question. A case along the same lines of *Nungesser* and *Remia* was to follow in 1986 with *Pronuptia*.⁹⁹

N. Philip Morris—*Court of Justice, 1987*;¹⁰⁰
*Commission, 1984*¹⁰¹

In a sense the ruling of the Court of Justice in *Philip Morris* was a narrow one, upholding the Commission's finding of a lack of a competitive impact in the particular circumstances of this significant minority interest in a competitor.¹⁰² However, the judgment did clarify a point of great industrial and legal importance. Perhaps more significantly, it seemed to give the Commission the added impetus it needed to push the Merger Regulation for adoption by the Council, with all the well-

ment of Competition Policy, supra note 1; Peter O. Sutherland, *EEC Enforcement Policy: Recent Developments and Future Prospects*, in 1986 FORDHAM CORP. L. INST. 325, 331 (Barry E. Hawk ed., 1987).

97. *Remia BV and Verenigde Bedrijven Nutricia N.V. v. Commission*, Case 42/84, [1985] E.C.R. 2545, [1987] 1 C.M.L.R. 1.

98. *Nutricia/de Rooij and Nutricia/Zuid-Hollandse Conservenfabriek*, O.J. L 376/22 (1983), [1984] 2 C.M.L.R. 165.

99. *Pronuptia de Paris GmbH v. Pronuptia de Paris Irmgard Schillgalis*, Case 161/84, [1986] E.C.R. 353, [1986] 1 C.M.L.R. 414; see Michel Waelbroeck, *The Pronuptia Judgment: A Critical Appraisal*, in 1986 FORDHAM CORP. L. INST. 211 (Barry E. Hawk ed., 1987).

100. *British American Tobacco Co. and R.J. Reynolds Indus. v. Commission*, Joined Cases 142 & 156/84, [1987] E.C.R. 4487, [1988] 4 C.M.L.R. 24.

101. *Philip Morris/Rembrandt/Rothmans* (Eur. Comm'n Mar. 21, 1984) (not yet reported) (rejecting complaint); see COMMISSION FOURTEENTH REPORT, *supra* note 16, ¶¶ 98-100.

102. See Mario Siragusa, *Current Procedural and Litigation Aspects of Mergers and Takeovers*, in 1989 FORDHAM CORP. L. INST. 509 (Barry E. Hawk ed., 1990); Christopher Bellamy, *Mergers Outside the Scope of the New Merger Regulation—Implications of the Philip Morris Judgment*, in 1988 FORDHAM CORP. L. INST. 22-1 (Barry E. Hawk ed., 1989).

known impacts that instrument has had and will have on the practice of EEC law.

O. Wood Pulp—*Court of Justice, 1988*,¹⁰³ *Commission, 1984*¹⁰⁴

In setting a basis of jurisdiction over non-EC companies not far from the “effects” doctrine,¹⁰⁵ the Court by and large confirmed the position the Commission had long held and thus solidified the broad geographic significance of EEC law, in a way bound to extend the geographic area of counsel involved, as well as the lives of those counsel already involved.

Of course, a list of cases central to development of counsel’s job and role could be much longer, and the above list omits a number of cases of capital importance to the development of EEC law as such. We shall stop with the listing of these cases and content ourselves with noting certain additional cases in progressing through the other points.

V. SOURCES OF LAW AND PRECEDENTS

In the early days of EEC competition practice, counsel looked eagerly for guidance as to official interpretations of the rules, “precedents” of any kind. There were so few cases, and those that did exist left so many points open, that counsel called upon to interpret the rules on a regular basis were constantly alert for any kind of indication of how officials might react to a certain kind of business activity. Even twenty years ago there was little case law and few books of commentary, and the commentary was a bit speculative. A speech by the Director-General was big news for those seeking all possible clues for problem solving. It would perhaps be excessive to say that today there is proliferation, but there certainly is a great deal of material. Counsel face a serious problem of how to manage the use of it—what importance to attach to each form of evidence of official positions. The mass of raw material is such

103. A. Åhlström Osakeyhtiö v. Commission, Joined Cases 89, 104, 114, 116, 117, 125-29/85, [1988] E.C.R. 5193, [1988] 4 C.M.L.R. 901.

104. Wood Pulp, O.J. L 85/1 (1985).

105. See Walter Van Gerven, *EC Jurisdiction in Antitrust Matters: The Wood Pulp Judgment*, in 1989 FORDHAM CORP. L. INST. 451 (Barry E. Hawk ed., 1990); see also José Pérez Santos, *The Territorial Scope of Article 85 of the EEC Treaty*, in 1989 FORDHAM CORP. L. INST. 571 (Barry E. Hawk ed., 1990).

that for most practitioners it is not usable without a good deal of "processing" done by others.

A question arises as to what extent this mass of material provides answers. In some mature legal systems a practitioner can expect to find a precedent for almost any given situation that will give a considerable degree of guidance for the problem faced at the moment. In the EEC competition law practice, despite the quantity of material accumulated over the years, that stage has not been reached. Two issues are raised: what is available as guidance, and what is that material worth in terms of quality and usefulness in predicting future official positions.

Apart from the Court of Justice's judgments, discussed later, the most obvious candidates for precedents are the now large number of cases decided by the Commission and published in the *Official Journal*. They are becoming more and more accessible to practitioners as data banks and other software mechanisms are developed. There had been about 340 formal decisions through June 30, 1992 based on Articles 85 or 86, not including Commission action related to the 121 notifications made to date under the Merger Regulation.¹⁰⁶ How many of these actually turn out to be useful as guidance is another question.

Apart from the formal decisions, there are the notices of proposed favorable action by the Commission, issued under Article 19(3) of Regulation 17 and published in the *Official Journal*. Many of these are not followed by a formal decision. Counsel have long sincerely regretted that these notices often provide only the vaguest kind of guidance. Not only are they usually not explicit but also they often do not specify whether the arrangement was thought entitled to a negative clearance or rather to an exemption, much less which clauses fell into which category and why.

The ranks of potential precedents are further augmented by cases settled and covered only by a Commission press release, sometimes supplemented by newspaper reports. On oc-

106. In 1991, there were 13 decisions, which is slightly above recent averages. These figures do not include "19(3)" notices of intention to take favorable action, procedural decisions, decisions concerning State aids, or decisions under the competition provisions of the Coal and Steel Treaty. COMMISSION TWENTY-FIRST REPORT, *supra* note 65, ¶ 73.

casation a settled case is described briefly in the monthly *Bulletin of the European Communities* or in the annual *Commission Report on Competition Policy* without having been covered in a press release.¹⁰⁷

After the passage of a number of years in the implementation of EEC competition law, there began the organization of the materials in a more systematic way. The most significant step in the early period was the commencement in 1972 of the Commission's publication of its annual *Commission Report on Competition Policy* (the *First Report* covering the ten years through 1971). European monthly and quarterly reviews began providing opportunities for commentaries on specific EEC competition cases or other issues. The Fordham Corporate Law Institute began its series of published papers in 1974. Both professors and practitioners began writing books, a number of them of particular value, and by 1992 the mass of available material had grown to such an impressive size that effective use by the practitioner requires a series of judicious choices.

Each counsel has his or her own preferred materials and preferred manner of approaching study of a problem, and these will be very different. For each counsel, however, there remains the basic question: how much weight can be attached to each of the various sources of official thinking.

As we have observed, formal Commission decisions are the most obvious candidates for precedents. However, over a period of time questions have arisen in the minds of counsel as to whether the formal decisions in themselves actually carry much weight with the Commission staff in treating new matters. A feeling exists that the DG-IV staff does not think in terms of case precedents but rather of an uncodified set of rules as to what will and will not be permitted. These rules may or may not be applied on the basis of the policy objectives behind them or the economic circumstances of the matter in hand. The content of these rules does evolve over a period of time, and new decisions can be evidence of this evolution, use-

107. The settled cases constitute the vast bulk of Commission "case law." In 1991, the Commission listed 835 cases having been closed during the year (146 by sending comfort letters), as opposed to the 13 formal decisions on the substance of Articles 85 and 86. *Id.*

ful to that extent. Perhaps this is what we should expect. After all, whatever may be the situation in civil law courts, civil law counsel are not generally themselves precedent-oriented. Most of the DG-IV staff think in civil code terms. Nevertheless, there does seem to be an expectation, perhaps mistaken, on the part of practitioners that new matters will be treated with greater attention to decided cases and prior rulings, interpreted in light of policy objectives and economic circumstances.

Thus formal decisions applying Article 85(1) often seem to be based on application of simplified rules. Exemption decisions applying Article 85(3) raise special considerations since they necessarily involve application of discretion in a weighing process. However, here also it is important for counsel to study the manner in which the weighing process works in order to be able to predict future use of discretionary authority.

Innovation is particularly impressive in Article 86 cases, although the Court of Justice, by and large, has accepted the Commission's imaginative lead. However admirable, the degree of innovation in Article 86 cases is such that serious problems are still created for counsel attempting to give reliable advice. "Bright lines" have been created in abuse cases that permit reasonably reliable predictions in regard to certain kinds of behavior, but the range of potentially abusive behavior in some areas, such as refusals to deal, remains so broad that counsel still often have great difficulty.¹⁰⁸

Despite what has been noted about their lack of value as precedents, it must be said that formal Commission decisions have been of immense interest to counsel in developing a feeling as to the way future situations will be handled by the Com-

108. For a review of these various issues and others relating to Article 86, see Eleanor M. Fox, *Abuse of a Dominant Position under the Treaty of Rome—A Comparison with U.S. Law*, in 1983 *FORDHAM CORP. L. INST.* 367 (Barry E. Hawk ed., 1984); Eleanor M. Fox, *Price Predation—U.S. and EEC: Economics and Value*, in 1989 *FORDHAM CORP. L. INST.* 687 (Barry E. Hawk ed., 1990); 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 E. Hawk ed., 1990); Thomas E. Kauper, *Whither Article 86? Observations on Excessive Prices and Refusals to Deal*, in 1989 *FORDHAM CORP. L. INST.* 651 (Barry E. Hawk ed., 1990); Valentine Korah, *A Comment on Professor Fox's Paper on Article 86*, in 1983 *FORDHAM CORP. L. INST.* 423 (Barry E. Hawk ed., 1984); Michel Waelbroeck, *Bi-Annual Review of EEC Competition Cases 1989-1991*, in 1991 *FORDHAM CORP. L. INST.* 111 (Barry E. Hawk ed., 1992).

mission—and that, after all, is the basis of counselling in EEC competition law. Formal decisions have provided an incomplete but almost inexhaustible guide to official thinking. Whether the decisions are long or short, right or wrong, carefully drafted or less well put together, useful pieces of “advice” can be gleaned. Even a decision which on the surface may appear banal may contain a useful tip.

In view of the treasures of insight available from formal Commission decisions, it was with some unease that counsel saw the Commission apparently moving away from formal decisions toward comfort letters, in an effort to handle the overflow of pending matters and give more rapid answers still providing a degree of security. Of course, comfort letters had been around for some time. They were considered no threat to case law. However, when in 1982 the Commission instituted a practice of issuing comfort letters following a “19(3)” notice,¹⁰⁹ it was feared that the development would reduce the supply of formal decisions. Clearly the new practice could be expected to be beneficial in facilitating administration of cases, as well as in allowing parties to go forward with an operation when they were willing to do so with a comfort letter of this particular kind but otherwise would have required a formal decision.¹¹⁰ The fear, however, was that the Commission in concentrating on “19(3)” notices to be followed by comfort letters would turn its attention away from writing full explanations in formal decisions.¹¹¹ The “19(3)” notices may be of some value as indications of Commission positions or attitudes, and as such help counsel. Occasionally they even establish paramete-

109. Such a notice is meant to give third parties the opportunity to object. See Council Regulation No. 17, *supra* note 3, art. 19(3), O.J. Eng. Spec. Ed. 1959-62, at 92; see also COMMISSION TWELFTH REPORT ON COMPETITION POLICY ¶¶ 29-31 (1983).

110. Indeed, issuing more formal decisions did not offer a real alternative to reduce the back-log, because the Commission was incapable of processing formal decisions in regard to all pending cases. From that point of view, the development of the comfort letter issued following a “19(3)” notice was no loss to the development of case law.

111. In practice, there seemed to have been no substantial lessening of formal decisions in the first part of the 1980s. However, in the three-year period ending in 1991 the Commission issued considerably fewer decisions per year on the substance of Articles 85 and 86 than it had in the preceding six years. The use of the “19(3)” notice plus comfort letter does not seem to explain this evolution. In 1991, the Commission issued only five “19(3)” notices followed by comfort letters, compared with 13 decisions. See COMMISSION TWENTY-FIRST REPORT, *supra* note 65, ¶ 73.

ters that serve as clear limits on what will be approved in the future. Counsel have long felt, however, that they could be much more useful than they are with a bit more effort on the Commission's part.

In terms of sources of EEC competition law, the Court of Justice's judgments have served a different role and are used in a different way.¹¹² In terms of volume, the Court of Justice has been producing about as many competition law judgments each year as the Commission produces decisions on the substance of Articles 85 and 86. Counsel have not always found the Court of Justice's judgments easy to interpret. The difficulty of producing a wholly coherent judgment when the Court of Justice acts *per curiam* is obvious. On the other hand, no one can contest the authority of the Court of Justice's judgments (except to the extent that the judgments of the Court of First Instance of the European Communities (the "CFI") are subject to review by the Court of Justice), whereas many counsel consider the Commission decisions more in the nature of "allegations" and sometimes refer to them as such. The Commission itself certainly studies the Court's judgments with care, although from the point of view of enforcement policy has not always been seen by counsel to follow the Court of Justice's lead. When the Court of Justice refrains from overturning a Commission decision, the Commission (and counsel also) may act as if the Commission's approach was entirely justified, seeming not to follow through on the bases of the Court of Justice's judgment.¹¹³ In this respect, it seems likely that the

112. Various aspects of the Court of Justice's role in development of EEC Competition law are reviewed in J. Mertens de Wilmars, *Statement of Reasons and Methods of Interpretation in the Case Law of the EC Court of Justice Relating to Articles 85 and 86*, in 1987 FORDHAM CORP. L. INST. 607 (Barry E. Hawk ed., 1988); Francis G. Jacobs, *Court of Justice Review of Competition Cases*, in 1987 FORDHAM CORP. L. INST. 541 (Barry E. Hawk ed., 1988); Gordon Slynn, *EEC Competition Law from the Perspective of the Court of Justice*, in 1985 FORDHAM CORP. L. INST. 383 (Barry E. Hawk ed., 1986); Bastiaan van der Esch, *The Principles of Interpretation Applied by the Court of Justice of the European Communities and their Relevance for the Scope of the EC Competition Rules*, in 1991 FORDHAM CORP. L. INST. 223 (Barry E. Hawk ed., 1992), reprinted in 15 FORDHAM INT'L L.J. 366 (1991-1992); Michel Waelbroeck, *Judicial Review of Commission Action in Competition Matters*, in 1983 FORDHAM CORP. L. INST. 179 (Barry E. Hawk ed., 1984).

113. When the Court of Justice held in *L.C. Nungesser KG v. Commission*, Case 258/78, [1982] E.C.R. 2015, [1983] 1 C.M.L.R. 278, that an exclusivity clause did not necessarily constitute a restriction under Article 85(1), the Commission showed no eagerness to develop the underlying principle. Likewise, after *Remia BV and Verenigde Bedrijven Nutricia N.V. v. Commission*, Case 42/84, [1985] E.C.R. 2545,

weight of Court of Justice precedents will grow, and probably change the nature of practice to a considerable extent, as the CFI issues more and more detailed opinions covering a wide variety of legal issues.¹¹⁴

VI. *THE PRACTITIONER AND THE COMMISSION*

A. *Interaction of Counsel with the Commission Staff*

Each EEC competition lawyer has had his own experiences with the staff of DG-IV, and could no doubt line up a string of anecdotes, a few amusing, others less so. How can one make sense out of such a mass of experiences without falling into the trap of forming generalizations that would be unfair to the staff, and occasionally to counsel? Maybe it is not possible.

For many counsellors in EEC competition law, the practice of the law has been above all that of interaction with the staff of DG-IV. The special nature of the EEC competition law system requires continuing contacts with the staff, in part because of the exemption process. In the Community the situation is somewhat different from that existing in the United States, where consultation with federal authorities is not extensive except in the case of mergers subject to prior notification. Armed with *per se* rules and the U.S. Rule of Reason, counsel in the United States will normally arrive at their own conclusions as to the risk of damages, fines and non-enforceability, only rarely seeking a Business Review Letter from the U.S. Department of Justice.

In the case of EEC practice, the considerations are different. The same risk evaluation takes place, but each element has a different weight. The risk of having damages awarded by a national court is, for the time being, still remote. In regard to fines, while the Commission is able to surprise counsel in application of its fining policy, fines are more or less predictable in regard to those kinds of situations in which official guidance might likely be sought. As to enforceability, when it de-

[1987] 1 C.M.L.R. 1, the Commission long failed to exploit in new areas the possibilities of the Court's judgment accepting without exemption the validity of appropriate non-compete clauses protecting the buyer of a business.

114. The prospects for the CFI were examined in John Temple Lang, *The Impact of the New Court of First Instance in EEC Antitrust and Trade Cases*, in 1987 *FORDHAM CORP. L. INST.* 579 (Barry E. Hawk ed., 1988).

pend mainly on the view of the DG-IV staff as to the need for and availability of an exemption, their views at an early stage may well be important.

As to the actual experience of counsel with the Commission staff, this Article will not undertake to award performance notes to the staff as a whole, or to any particular member of the staff, although the comments given may reflect favorably or unfavorably on the staff, the system, and counsel. As noted, the perspective from which comments are given will obviously vary widely from one counsellor to another, depending on the nature of that person's practice and the individual's approach, as well as on the accidents which life produces.

The principal themes which come to mind in connection with such a review are accessibility, objectivity, delays and the end result. Obviously, some of these are closely related to other topics of this Article. Experience with the Merger Task Force will be covered in a subsequent section of this Article.

1. Accessibility

The judgment may be ventured that the key to the degree of success that has been obtained by the Commission in the difficult administration of a system of this kind is the accessibility of the staff to meetings with counsel and executives for preliminary review. Without such availability in a system that is so much based on automatic condemnations and discretionary exemptions, the system would probably by and large have become discredited in the eyes of the business community. This possibility to consult on short notice with the DG-IV staff has thus tempered considerably the uncertainties and delays inevitably raised by the dichotomy between Articles 85(1) and 85(3) and the exemption process.

Of course the question arises—access to whom, in what Directorate or section, and at what level? In the early days the structure of DG-IV was somewhat different, as many counsel will recall. One group, in Directorate A, was involved mainly in inspections, and most companies were not eager to volunteer to seek their guidance. In the other Directorates there was relatively little specialization of staff by product, but a certain focus on types of legal issues. For one particular company, thus, there was not necessarily much continuity in the identity of the staff members with whom they dealt. However, the

present organization of DG-IV has now been in place for some time, and one tends to forget that there was ever anything else. The situation will be commented on in light of the present organizational structure.

As a result of the organizational changes, when a problem arises in regard to a particular product or service, it has almost always been possible to identify, in advance of any overture, which Director and which section chief will ultimately be in charge—although on occasion jurisdictional questions as between Directorates within DG-IV have created problems for counsel and companies. And these product-specific staff are usually the first persons counsel will contact once a decision to do so is made. Occasionally that decision has depended upon an evaluation by counsel of the probable reaction of the particular staff members expected to be involved, based on prior experience. Inevitably counsel have found wide differences in approach, sometimes based on national origin in the case of younger staff members, in personality, and in reaction time.

In any event, when counsel has asked the DG-IV staff for a meeting, the request has almost always been accepted, usually on short notice. Normal conditions, such as providing written data in advance, may be attached. And the ready availability of the staff for discussions, by and large, has continued throughout the period that the matter is pending before the Commission. That has been the rule, and it no doubt will continue to be the rule, although we can imagine that the staff's patience may be sorely tried at times and that they may wonder whether their good nature is not being taken advantage of. So much for accessibility. What comes of it?

2. Objectivity

Access to the Directorate handling the matter has, quite understandably, not always been sufficient to keep counsel happy. They have not on every occasion been convinced that the Commission staff is viewing the matter in the correct way, that is, the same way as counsel, and therefore are inclined to think that the staff lacks objectivity.¹¹⁵ The well-known com-

115. From the early days, questions have arisen as to whether the Commission tends to discriminate on the basis of nationality, which first meant against U.S. multinationals, and later also against Japanese companies. The prominence of U.S. com-

plaint that the Commission staff, acting as prosecutors, are not in a good position to be objective arises even in this early stage, in non-contentious matters as well as in Commission-initiated proceedings. Has there indeed been such a bias which has impeded fair and expeditious handling of matters at the level of dialogue with the companies? Perhaps the situation is not as bad as some commentators have suggested. The DG-IV staff is, by and large, composed of a serious group of lawyers and economists who are committed to enforcing the EEC competition rules. They may occasionally be arbitrary, or otherwise unreasonable, or misguided. Even counsel can be at times. But it would be a mistake to think that there exists a pervasive norm of bias.

Serious problems of seemingly arbitrary or unreasonable acts on the part of the staff have arisen, of course. They have at times appeared to result from a lack of realization on the part of the staff as to the consequences of their actions—for example, the impact on a company of the launching of an investigation or the extent of the burden on a company of demanding information which reflection would have shown was not needed. Also, the power which the staff wields directly over companies, via the effect on companies of staff attitudes, permits an arbitrariness, fortunately rarely clothed in arrogance, that has sometimes been discouraging to counsel and injurious to companies. Solid evidence presented by companies can be summarily rejected by the staff on the basis of superficial preconceptions. This kind of thing will, of course, happen in any administrative agency. It is a question of degree. Counsel generally have felt they can cope with such situations in DG-IV as long as they are faced with fundamentally capable officials.

What safeguards have counsel found available over the years when they have not been satisfied with the actions or proposed actions of the staff? There is the obvious possibility of going over the head of the section-chief to the Director of the Directorate within DG-IV which is in charge, but sometimes

panies in the list of defendants in the earlier period seemed to give some basis for such a thought, as did the first large "exemplary" fine levied against Pioneer. It seems unlikely, however, that a careful study would reveal that any discrimination was involved.

this can be seen, in advance, as likely to be counter-productive for one reason or another. Another possibility has been to seek support from the policy staff in Directorate A, but the DG-IV case-handler rarely welcomes this. Moreover, the extent to which this is feasible in a given situation has been and will probably remain uncertain. In any event, the degree to which it will be useful in a given situation has been difficult to assess. Counsel are sometimes tempted to seek to "convert" the Legal Service to counsel's position, but certainly DG-IV does not expect such action to be taken, and, presumably, the Legal Service itself would not normally expect such an approach. There is also the possibility of "appeal" to the office of the Director-General, but it seems that counsel tend to utilize this recourse with a degree of discretion, for various reasons.

Recourse to the level of the Commissioner's cabinet will tend to come immediately to the minds of company executives. This obvious possibility can be an important resource, in particular in matters of major industrial importance, but again many considerations are involved. Over the thirty years of EEC competition law, counsel have seen the role and attitude of the Competition Commissioner and his cabinet change. The more active participation of the Competition Commissioner in recent years has been a major event in the life of the law as well as of practitioners, and it now seems that the future development and enforcement of EEC competition law will depend on the identity of the Commissioner to a much greater extent than would at one time have been thought possible. The role of the Commissioner and his cabinet is thus subject to continual re-evaluation by counsel. The resource also raises the element of a possible accentuation of the political dimension. Indeed, the absence or presence of that dimension is a recurring theme of EEC competition law practice. That dimension is not absent when a company decides to seek support from another Directorate-General, most often from one involved in industrial policy, or from the cabinet of another Commissioner, sometimes one whose home country has an interest in the affair. While such support may be available, it has by and large appeared that it usually will not count for much with DG-IV.

Still another dimension of support that has political overtones is that at the national level aimed at advice to be given to

the Commission by the national members of the Advisory Committee. Any general statement as to this process would necessarily be vague, in view of the wide variations in situations and, in particular, attitudes at the national level. The process of contacting the national authorities does in itself seem a legitimate one. It is not essentially political, but rather based on the same legal and economic criteria that should guide DG-IV. Nevertheless, in practice it can become political; such a possibility obviously is more pronounced in the case of some national authorities than in others.

In any event, it has seemed to counsel of capital importance that there be someone else to whom they can turn when they suspect that they are not getting as sympathetic a hearing as the excellence of their arguments deserve. It is decidedly in the interest of their mental and physical health that there be some such safety valve, even if it does not turn out to be of a great deal of use in a particular case.

3. Delays

A further recurrent issue has been that of the time it takes the DG-IV staff to deal with matters. In this connection it seems appropriate to refer to the DG-IV staff, or the "Services," rather than to the "Commission," since in almost every case companies have been satisfied with assurances resulting from an informal review, perhaps with a letter from the Services but with no formal approval from the Commission.

There has been wide criticism of the entire EEC competition law system on the basis of persistent delay. A great deal of it is no doubt justified. However, it must be recognized that the delay results, to a considerable extent, from the system itself. It is bound to be the case that there will be frustrating delays in any structure in which the validity of agreements will depend not upon compliance with rules but rather upon the administrative decision of a small group of people working for an economic area as large as the Community. So the problem is implicit, but it is nevertheless fair to judge how the system has worked and what has been done over the years to reduce the size of the problem.

As to the performance of the DG-IV staff in meeting the time requirements of companies, it is, of course, not possible to make a general statement that one could expect to meet

with broad acceptance among practitioners. Experience has been so varied, and there will always be so many variables. Goodwill and a general helpfulness in regard to the timing problem seem to be the rule. Arbitrariness and a failure to respond are not absent. Understaffing is endemic and is bound to remain so. Product specialization among DG-IV staff is positive but can cause bottlenecks that create real problems, in particular when the product specialist disappears and there is no immediate replacement. And since the DG-IV staff cannot possibly take care of everything that everyone expects them to do, there has always been the question of priorities and allocation of resources. The priority that DG-IV has given to matters has no doubt been subject to a considerable amount of planning,¹¹⁶ but in the end a significant part of the actual giving of priority has so far apparently been subject to fortuitous circumstances.

Another factor influencing the time it takes the staff to respond in any given matter is that of the capacities of the staff members involved. A constant challenge for those responsible for running DG-IV has been the recruiting of the best possible candidates for staff positions. Without undertaking to judge the success in this regard, we can simply note that the process is bound to be a major part of the foundation of any degree of success that is achieved in carrying out what is clearly a most demanding task of making DG-IV function properly. This factor would appear to be more important in reducing delays, as

116. Priorities are established in an annual work program, not available to the public. A general order of priorities is stated in the Commission's draft Notice on the Application of Articles 85 and 86 of the EEC Treaty by National Courts, referred to in the COMMISSION TWENTY-FIRST REPORT, *supra* note 65, ¶ 70. Section II of the currently available draft notice, IV/1009/91 - EN Rev. 1., states that the Commission intends to give priority to notifications, complaints, and own-initiative proceedings having "particular political, economic or legal significance for the Community." The draft goes on to suggest that notifications without "general significance" will normally be dealt with by comfort letters but that complaints without particular significance should be handled by national courts or national competition authorities. Implementation of such a policy would, of course, radically change the role the Commission has so far played as a complaint-handler, and would no doubt frustrate many would-be complainants, given that expectations have been built up over a period of years by the willingness the Commission has so far shown to pursue well-founded complaints. The CFI recently advanced the law on these points in *Automec Srl v. Commission*, Case T-24/90, [1992] E.C.R. __, [1992] 5 C.M.L.R. 431 (Ct. First Instance) [hereinafter *Automec II*]; see *infra* text accompanying notes 132-38 (dealing with EEC competition law in Member State courts).

well as in producing good end results, than the number of officials involved.

Whatever the causes of the delay in a particular case may be, those running DG-IV have been able to take appropriate measures only when they know that an unsatisfactory hold-up exists. Counsel have had an opportunity to make those in charge aware of such problems. Aside from the obligation to complain, counsel have not, however, generally felt the need to sink into resignation. It has usually been possible at least to take steps to improve the situation by making clear from the beginning of dealings with the DG-IV staff on a particular matter what the real needs for urgency are, and then cooperating to provide complete and accurate information as needed to meet the time constraints. Obviously such precautions have not always resolved the problem.

4. Quality of the Result

As to the further dimension of interaction, the end result, we have already considered certain elements that enter into it, in particular objectivity. But what about the quality of the product that comes out of the interaction? That product is normally in the form of settled cases, not formal decisions, and both settled cases and formal decisions can involve concessions or undertakings on the part of the company.¹¹⁷

The majority of matters brought before the Commission are closed with little difficulty, and little inconvenience for the parties.¹¹⁸ In more difficult cases, there is no doubt that the Commission has often imposed settlement conditions that, in retrospect, seem difficult to justify on an objective basis. The issue then becomes whether the Commission's action was high-handed, or simply misguided. No doubt there have been occasions of both. On the whole, however, it seems fair to say that the dialogue that has resulted in a settlement of a matter, or in an adjustment of an agreement to permit exemption, has

117. See Ivo Van Bael, *The Antitrust Settlement Practice of the EEC Commission*, in 1985 *FORDHAM CORP. L. INST.* 759 (Barry E. Hawk ed., 1986) [hereinafter Van Bael, *Antitrust Settlement Practice*].

118. In 1991, as the Commission announced in its *COMMISSION TWENTY-FIRST REPORT*, *supra* note 65, ¶ 73, 676 cases were closed because the agreements were no longer in force, they had no significant impact, the complaints had become moot, or no anticompetitive practice was found.

most often produced a situation which the parties consider compatible with their basic business interests. Still, they may be disappointed as to the obligation to change aspects of their arrangements when they are not at all convinced of the need.

Thus, in the end, while much patience can be required on the part of counsel, the accessibility of the Commission staff which makes dialogue possible has seemed, by and large, to produce results consistent with a realistic enforcement of EEC competition policy, despite the obstacles posed by the exemption process.

B. *Procedure Before the Commission*

In the practice of EEC competition law over the first thirty years, for many counsel the most stimulating experience has been the handling of cases before the Commission, from the time of the beginning of an investigation, through the answering of Statements of Objections, through the Oral Hearing, and during this process and afterwards, negotiating with the Commission on amendments to agreements or on undertakings. The rules of the game have not always been clear. However, over a period of time the procedures in regard to on-the-site inspections, business secrets, access to the file and other such matters have become developed.¹¹⁹ In regard to procedural safeguards to protect fundamental rights, it would be unfair to say that the Commission has been insensitive, but there have been problems. During many years counsel had the impression that when they objected to the Commission's position, only a small percentage of the points raised against the Commission during review of decisions in Luxembourg would be accepted by the judges. Largely as a result of continuing efforts by counsel, the law has now moved into what may be considered a mature procedural system.¹²⁰ Recent action by the CFI has cast a new light on the role of procedural technicalities.¹²¹

119. See Helmut W. Kreis, *Commission Procedures in Competition Proceedings: Recent Reforms in Practice and Law*, in 1983 *FORDHAM CORP. L. INST.* 145 (Barry E. Hawk ed., 1984); see also Van Bael, *Antitrust Settlement Practice*, *supra* note 117. The matter is regularly followed in a separate section of the Commission's annual *Reports*. See, e.g., *COMMISSION FOURTEENTH REPORT*, *supra* note 16, ¶¶ 46-48.

120. See Edward, *Constitutional Rules*, *supra* note 90.

121. *Re the PVC Cartel: BASF AG v. Commission*, Joined Cases T-79, 84-86,

Throughout the thirty-year period, a fundamental issue of contention has been what counsel describe as the dual role of the Commission as "prosecutor" and "judge." Much has been said about this subject by commentators, and the issue has even come before the Court of Justice.¹²² The issue relates to every stage of enforcement activity—for example, from the time members of the DG-IV staff make "dawn-raids." While the Commission staff claim they are not really "prosecutors," presumably on the ground that EEC law is not of a criminal nature, they are certainly considered by companies as such, and for present purposes we shall retain that appellation. Of course counsel expect a prosecutor to search aggressively for documents that might show evidence of violations when there is good reason to think that such documents exist, but there is a limit, and it is not clear that the contours of that boundary are as yet well enough defined.

A new stage of the dual-role problem comes when the Commission starts evaluating the documents it has obtained, either in searches or as a result of sending out Article 11 letters. When the Commission has the information it thinks it needs, where does it go from there? The Commission often has appeared to counsel to make up its mind once and for all without waiting for the views of the parties concerned.¹²³ In

89, 91-92, 94, 96, 98, 102 & 104/89, [1992] E.C.R. ___, [1992] 4 C.M.L.R. 357 (Ct. First Instance). The Commission has appealed the CFI's judgment. Case C-137/92 P, O.J. C 152/18 (1992).

122. In *SA Musique Diffusion Française*, a distributor sought annulment by the Court of Justice of the Commission's decision in *Pioneer Hi-Fi Equipment*, O.J. L 60/21 (1980), [1980] 1 C.M.L.R. 457, on the ground of such a dual role. *SA Musique Diffusion Française*, Joined Cases 100-03/80, [1983] E.C.R. 1825, [1983] 3 C.M.L.R. 221. The Court of Justice rejected the request on the ground that the Commission is not a "tribunal" within the meaning of the Human Rights Convention. *SA Musique Diffusion Française*, [1983] E.C.R. at 1827, [1983] 3 C.M.L.R. at 315. The Commission has shown that it is aware of and sensitive to such comments. Upon reorganization of DG-IV in 1984, merging the inspection unit into the case-handling Directorates, the Commission took the occasion to explain that the move would not worsen the situation because the coordination unit would help maintain the equilibrium. COMMISSION FIFTEENTH REPORT, *supra* note 16, ¶ 45.

123. The discussion in the text covers those situations in which the Commission has initiated an investigation or has satisfied itself that a complaint is well-founded. At the stage of receiving a complaint, the Commission typically has allowed the target of the complaint an opportunity to comment. It then normally has allowed the complainant the chance to make observations on those comments. These exchanges can continue for a year or more, and if a Statement of Objections is finally issued, it may in fact fairly represent the Commission's considered judgment after having heard

other words, it prepares and sends out the Statement of Objections and later finds it most difficult to depart from these "provisional" conclusions. While the Statement of Objections is only a formal charge, and is to be followed by written answers and normally a formal Oral Hearing, over time counsel have gotten the impression that it is not very likely that a company can make DG-IV change its mind on the fundamental issues involved. Should this be interpreted to mean that the Commission's prosecutorial mode has continued throughout the decision-making process? A suspicion has long existed among counsel that this is the case.

If the responsible Directorate in DG-IV appears to counsel to have sold itself on the outcome before the parties are fully heard, what resources have been available to parties? The Hearing Officer is one resource. The procedure before the Commission in connection with the Oral Hearing following a written response to a Statement of Objections some time ago became a focal part of the problems of both due process and objectivity. The institution of the Hearing Officer was established in 1982, in response to criticisms from legal and industrial circles on these points. It is fair to ask, a number of years later, what has been the experience of counsel with this effort to achieve these objectives.¹²⁴

It is obvious that the functioning of the present hearing procedure cannot easily be judged by any single practitioner. Counsel to a party in a proceeding can tell whether that hearing seemed to work properly or not. In particular, counsel will question whether parties were given sufficient opportunity to express their views and whether procedural safeguards were applied. But surely an important function of the Hearing Officer is to attempt to counterbalance any lack of objectivity on the part of the Directorate within DG-IV which has acted as prosecutor. The success or failure of this particular objective

virtually everything the parties have to say. In such circumstances, it is less surprising if the Commission is reluctant to change its mind in the course of the more formal stage of the proceeding.

¹²⁴ For the viewpoint of a Hearing Officer, see Hartmut Johannes, *The Role of the Hearing Officer*, in 1989 FORDHAM CORP. L. INST. 347 (Barry E. Hawk ed., 1990); see also COMMISSION EIGHTEENTH REPORT ON COMPETITION POLICY ¶ 44 (1989) [hereinafter COMMISSION EIGHTEENTH REPORT]; Terms of Reference of the Hearing Officer, in COMMISSION THIRTEENTH REPORT, *supra* note 16, at 273.

must, it would seem, for the most part remain a mystery for counsel and companies.¹²⁵ Presumably, counsel will rarely know to what extent the Hearing Officer has intervened with the Director, or at the level of the Director-General, or directly with the Commissioner, to try to obtain greater objectivity.¹²⁶ There are some indications that the staff of DG-IV does not expect him to. Of course, continuing suspicions of lack of objectivity may provoke the feeling on the part of counsel that the Hearing Officer has not intervened, or if he has that the effort has not been successful.

It seems to be recognized generally by counsel that the institution of the Hearing Office was a very useful step and that the role of the Hearing Officer on the whole has inspired greater confidence on the part of counsel in the decision-making process. The degree to which this is the case over a period of time will, of course, inevitably depend to a considerable extent on the ability and attitude of the person who holds the office.

The recent institution of the Court of First Instance may have an impact on these matters. Much more than was the case with the Court of Justice, the CFI in effect is expected by counsel to serve as a sort of continuation of the procedure before the Commission. Thus, while there is a great deal of addi-

125. The Court of Justice has refused to order the Commission to allow parties to a hearing access to the Hearing Officer's report. *Imperial Chemical Indus. plc v. Commission*, Case 212/86, __ E.C.R. __, [1987] 2 C.M.L.R. 500.

126. The Commission notes that the Hearing Officer has referred his observations directly to the Commissioner in only a few cases. COMMISSION EIGHTEENTH REPORT, *supra* note 124, ¶ 44. More recently, quite interesting indications were given by Hartmut Johannes, the current Hearing Officer, in an unpublished paper delivered on October 8, 1992 in Paris at the Colloque International organized by the Commission pour l'Etude des Communautés Européennes (C.E.D.E.C.E.). Mr. Johannes revealed that in 60% of the cases, his opinions reflected no disagreement with the Directorate in charge of the case, either in regard to procedural or substantive matters. In about 25% of the cases, he had proposed changes in the explanations given by the Directorate to substantiate its position. As to fines, in about 10% of the cases the Hearing Officer had taken the position that, contrary to the proposal of the Directorate, there should be no fine with respect to some or all of the parties, most often because the parties could not in the circumstances be considered to have acted "intentionally or negligently." In regard to the remaining five percent of cases, the Hearing Officer considered either that there had been no infringement of Articles 85 or 86 of the EEC Treaty or that due process had been withheld by the Commission in a significant way through insufficient periods allowed for defense, incomplete or unclear statements of objections or insufficient access by the parties to the Commission's file.

tional effort, time and cost involved, counsel can now be assured at least of the opportunity to attempt to obtain redress before the CFI for shortcomings of the Commission which previously went uncorrected. These would include shortcomings that seem to result from the Commission's dual role. Counsel appear inclined to take advantage of this opportunity and the CFI ready to assume the task. In any event, counsel may also hope that the likelihood of review by the CFI of these aspects of the Commission's decisions will in itself help to guarantee care by the Commission in observance of safeguards and objectivity in evaluation of evidence.

VII. THE ROLE OF ECONOMICS AND OF ECONOMISTS

From 1962 onwards, EEC competition lawyers have been asking themselves what role economic analysis will play in determinations under Articles 85 and 86. No one can reasonably disagree that EEC competition law is based on economics. The Court of Justice made clear at an early stage that each case must be judged in its economic context, in language that should not have been surprising.¹²⁷ Nevertheless, counsel have continued to wonder what this principle will mean in practice: whether the law will be applied by the Commission and the Court of Justice as an economic law, as opposed to somewhat of a codified law subject to an occasional degree of economic analysis. It is hard to conceive a question more central to the practice of EEC competition law. The suspense has continued over the years. In each situation, counsel have had to ask themselves whether they should undertake a full economic defense of their position, in particular whether the possibility that such evidence would be taken into account was great enough to warrant the cost and possible delay.

The need for decisions as to the possible pertinence and utility of economic analysis has arisen at every stage of the practitioner's professional life.¹²⁸ When a company asks for

127. *Société Technique Minière v. Maschinenbau Ulm*, Case 56/65, [1966] E.C.R. 235, 248, [1966] C.M.L.R. 357, 374.

128. The need for economic evidence arises even in regard to allegations of offenses that are as close as EEC law comes to *per se* rules. In defense of a cartel case where the charge is based upon express agreement among competitors to allocate a market, an economic argument may establish mitigating circumstances that will affect the amount of the fine.

guidance on the provisions of an agreement being negotiated, a question can arise as to whether a risk of fines exists, or perhaps as to whether a good-faith defense can be made, and the economic context is highly relevant. But up to what point will that relevance be recognized? What would the Commission say if the matter were eventually to come before it? Would the defense save the agreement, mitigate fines, or even save face? Counsel have been obliged to make predictions based on uncertain but generally pessimistic ideas as to the reception of economic evidence at the working level in DG-IV.

When the situation involves early discussions with the Commission on a pending matter, the same question becomes more acute. Counsel have had to guess whether the DG-IV staff will give a "knee-jerk" reaction on such fundamental issues as the relevant market—or if instead they will stop to reflect on the economics presented to them.

When a matter reaches the stage of defending a company before the Commission, the focus changes again. Counsel have had to prepare for the case, and in that connection decide what effort it is worth making to establish a position by the use not only of developed economic arguments but also of the testimony of independent economists.

Counsel generally have not been optimistic over the years, to say the least, about the impact of their own economic arguments or even the testimony of independent experts in Commission proceedings. Evaluations by individual counsel will, of course, result from individual impressions. A survey of case law can at the best give only a limited view of what is going on, in particular because most of the Commission's work is not reflected in decided cases. In any event, the situation cannot be understood without looking at institutions and attitudes.

It is of interest to focus a moment on the role of independent economists, and to compare the situation in the Community with that in the United States. In the United States professional economists are listened to with respect by the antitrust agencies and the courts, even though the structural situation is the same: an independent economist brought forth by a party will be one who supports the position of that party, and two opposing parties will have opposing economists if the case is before a court. In the Community economists are not listened

to with disrespect, but they seem simply not to be listened to enough. Why the difference? A number of partial explanations may be found, their relative importance varying from situation to situation. Sometimes the economist in the Community has no background in competition law, does not understand the legal issues, and insists on preparing testimony on the wrong economic issues. Sometimes the economist speaks in such elevated economic terms that laymen, including most DG-IV staff members, who are not economists, have little chance of understanding him.¹²⁹ Counsel bear a heavy responsibility, of course, to reduce the frequency of these situations by helping independent economists to explain clearly or by summarizing in clear terms the economic testimony given.

Apart from these considerations, there seems to exist a certain skepticism on the part of the Commission about the utility of an economist's testimony. If there is a complaining party it may have its economist, and of course if it does the defendant will probably feel obliged to retain its own. It is not rare that these two sets of economists disagree, and in any case the Commission may ignore them both, perhaps considering that they cancel one another out.

When it is the Commission rather than a complainant that is taking the initiative against a company, the company may decide to retain an economist. The Commission will in any event have available a staff economist, who will in principle have been consulted at any early stage of the development of the Commission's position. Once the Commission has adopted a position in a case that is going forward to a formal procedure, the Commission economist may, it is suspected, feel bound to defend the Commission position, particularly in the Oral Hearing. Perhaps that makes some sense as a part of what is in effect an adversary proceeding. It gives the Commission's economist the opportunity to challenge the defendant's economist, to draw him out and see to what extent he can defend his theses. However, counsel have wondered whether the role is less

129. See, e.g., Opinion of Advocate General Darmon, *In re Wood Pulp Cartel: A. Åhlström Osakeyhtiö v. Commission*, Joined Cases C-89, 104, 114, 116, 117, 125-129/85 (Eur. Ct. J. July 7, 1992) (not yet reported). The Advocate General stated that "the Court was confronted with a substantial body of economic argument, referring at times to theoretical models which, whilst doubtless familiar to an economist, are nevertheless, in my view at any rate, of manifest complexity." *Id.*, slip. op. ¶ 333.

one of "devil's advocate" than that of a prosecutor group determined to make its case, unwilling to consider the eventuality of changing an approach announced in a Statement of Objections.

The record of the Commission's receptiveness to economic evidence is hard to decipher. Certainly formal Commission decisions increasingly include detailed economic evaluations. That development is relevant, but it is not an answer. The question cannot be judged on such a quantitative basis, in particular because such a large percentage of the Commission's work is not reflected in formal decisions subject to appeal.

So is the situation entirely bleak? What can counsel do? The DG-IV staff members would certainly agree that they should keep an open mind in regard to economic testimony, in order to judge whether it is really convincing. And that should not be too much to ask of the Commission, despite its dual role. But counsel have been obliged all along to decide how to make the best of a bad situation, as they see it—by continuing to develop and press economic arguments, or by limiting such efforts. In practice economic arguments have often been pressed. It is not to be excluded that they have very often lacked credibility. And no doubt when the Commission listens to a series of truly unpersuasive economic arguments, its skepticism is pushed to a new level, in particular in respect of the company in question, but perhaps also generally in regard to the likelihood of hearing anything interesting in the way of economic testimony from companies. There is no doubt that counsel can improve the quality of economic evidence offered.

What does the past suggest about prospects for the future? Is EEC competition practice doomed to continue in this limbo where there exists too great a gap between the principle of the central role of economic evidence and the practice of its minor relevance? There are some reasons to think that the use and acceptance of economic testimony will grow. First, as we have noted, there are demands from all sides and they surely will have some effect. The people running DG-IV are certainly aware of the need to do something. The question is whether the institution can be moved to give effect to their desires, either by having intensive economic training for legal staff or having more economists with sufficient legal training.

Apart from these considerations, it may be hoped that economists in Europe will become increasingly experienced and learn how to give effective testimony, and that counsel will learn better how to explain that testimony and organize it when necessary. In addition, it may be that practice under the Merger Regulation could have a favorable spill-over effect on the rest of DG-IV. In the merger cases the structure of the law and procedure and often the amount at stake in each transaction, plus the fact that each case requires a fairly detailed written explanation from the Commission, seem to have brought about a fuller use of economic evidence. Experience to date as well as a review of the decisions under the Merger Regulation both suggest that this is the case. While it may be that practice under the Merger Regulation is not directly translatable into cases under Articles 85 and 86 of the EEC Treaty, for various reasons,¹³⁰ an impact should still take place. Counsel accustomed to using economic data in merger cases should be more likely to do likewise in other cases, and DG-IV might with more difficulty refuse to take into account economic arguments in cases treated under Regulation 17 while doing so under the Merger Regulation in regard to similar cases.

Another factor, perhaps of greater importance, is the influence on the Commission of prospective review of Commission decisions by the CFI. As to the reception by the CFI of economic evidence presented by the parties, the record is considerably more public than it is in the case of matters handled at the level of the Commission, but it is probably too early to draw definitive conclusions. It does appear that the CFI will be willing to entertain economic arguments, to weigh them and to reverse the Commission when appropriate.¹³¹ The prospect of

130. It is arguable, for example, that a relevant market and a dominant position ought to be defined differently in structural cases covered by the Merger Regulation than they are in behavioral cases under Article 86.

131. See, e.g., *Re Italian Flat Glass: Società Italiano Vetro SpA v. Commission*, Joined Cases T-68, 77, 78/89, [1992] E.C.R. __, [1992] 5 C.M.L.R. 302 (Ct. First Instance) [hereinafter *Flat Glass*]. The CFI can only have been encouraged in this direction by the Court of Justice's judgment in *Delimitis v. Henninger Bräu AG*, Case 234/89, [1991] E.C.R. 935, [1992] 5 C.M.L.R. 210. See Valentine Korah, *The Judgment in Delimitis: A Milestone Towards a Realistic Assessment of the Effects of an Agreement—or a Damp Squib?*, 14 EUR. INTELL. PROP. REV. 167 (1992); K.P.E. Lasok, *Assessing the Economic Consequences of Restrictive Agreements: A Comment on the Delimitis Case*, 12 EUR. COMPETITION L. REV. 194 (1991).

such a review, more complete than would have been given by the Court of Justice before the CFI was instituted, can hardly fail to have an impact on the practice of the Commission.

As a result of these developments, it may be that both counsel and the Commission will be led to involve economic experts at an earlier stage of the proceedings, in the development of a position, as opposed to bringing them in only after adoption of a position which economic experts may find difficult to defend.

VIII. *EEC Competition Law in National Courts*

Despite the obvious potential importance of the national courts in the practice of EEC competition law, these courts have not had an important role so far. It seemed certain from the beginning that they would eventually. Article 85(2) of the EEC Treaty itself proclaims agreements incompatible with the rule of Article 85(1) to be null and void. Also, it was recognized at an early date that national courts were, with unimportant exceptions, able to grant damages on the basis of national tort law for violations of the EEC competition rules, and the Commission began actively encouraging suits for damages and other remedies.¹³² But these efforts were a failure.

There were many reasons, most of them obvious, why there was no rush to test the EEC rules in national courts. It is not surprising that at the beginning the practitioner of EEC competition law was not much concerned with national courts. Counsel were, of course, required to think what might happen in a national court should the other party to an agreement raise the nullity defense of Article 85(2) in regard to one or more specific clauses, or in regard to the entire agreement.

132. In 1966, the Commission published a brochure describing the possibility of suing under national tort or similar law in the six countries then Member States. COMMISSION, *LA RÉPARATION DES CONSÉQUENCES DOMMAGEABLES D'UNE VIOLATION DES ARTICLES 85 ET 86 DU TRAITÉ INSTITUANT LA CEE*, série concurrence No. 1 (1966). Despite the reasonably clear legal situation, there apparently has not yet been a recorded award of damages based on Article 85 or Article 86 of the EEC Treaty. See John Temple Lang, *EEC Competition Actions in Member States' Courts: Claims for Damages, Declarations and Injunctions for Breach of Community Antitrust Law*, in 1983 *FORDHAM CORP. L. INST.* 219 (Barry E. Hawk ed., 1984); see also Ernst Steindorff, *Common Market Antitrust Law in Civil Proceedings Before National Courts and Arbitrators*, in 1985 *FORDHAM CORP. L. INST.* 409 (Barry E. Hawk ed., 1986); Stockmann, *Trends and Developments*, *supra* note 26.

But the other parties tended not to do so, and it occurred to very few to seek temporary injunctions or other remedies in national courts on the basis of EEC law. In any event, it was so easy to complain to the Commission, at little cost, and see what came of it. The Commission was found to be most receptive to complaints, and that too was understandable.

The situation did change somewhat over time, but only very slowly. A consciousness of EEC competition law had to become more generalized throughout the Community for most counsel in national litigation even to think of the EEC defense in a suit for enforcement of a contract, or of the many other possible implications in national court practice of EEC competition law. Now, thirty-five years after Article 85(2) went into effect, the EEC consciousness of the legal profession is much better developed, and litigation of EEC issues in national courts is becoming a more regular part of EEC practice. There have been a number of important and instructive cases. The total volume is not great, however.¹³³

The Commission has often stated that it has the main role in the application of the EEC competition rules. Of course, it has an exclusivity in regard to exemptions (although national courts are able to interpret block exemption regulations, and those regulations now cover many fields). However, taking a realistic look at its own incapacity to take care of enforcement all by itself, the Commission did, as noted, begin pushing at an early date for the national courts to play a greater role. The practitioner now is wondering what will happen, and when, if ever. It is obvious that for the future of the administration of EEC law, and thus for the life of the practitioner, a sharing of the application of the EEC competition rules between the Commission and the national courts would be a momentous development. Complaints would be accepted by the Commission only if they were of political, economic or legal significance for the Community. Exceptions would be made by the Commission when, because of the international nature of the matter or otherwise, the national courts did not provide a real-

133. The Commission has been tracking national court decisions applying Community competition law. COMMISSION NINETEENTH REPORT ON COMPETITION POLICY ¶¶ 109-18 (1990) (covering 1989 and listing 10 such cases); COMMISSION TWENTY-FIRST REPORT, *supra* note 65, annex V.B. (summarizing 13 cases for 1991). It is not known what percentage of the total the cases so reported might represent.

istic alternative.¹³⁴

Despite the general indisposition of parties to raise EEC law questions in national courts, and in particular to bring suits based purely on EEC law in national courts, the situation has, of course, arisen many times over the years and given counsel the occasion for weird and frustrating experiences. Sometimes the same issue of EEC competition law is pending before the Commission and a national court in regard to the same situation. Difficult problems arise, and despite the passages in the *Reports on Competition Policy*, the draft Notice on the application of EEC law by national courts and the *Automec Srl v. Commission* ("Automec II") judgment,¹³⁵ the manner in which the Commission will deal with these situations is far from resolved. Hard choices have been posed for counsel as well as for the DG-IV staff. During the early years the Commission seemed prepared to intervene on its own initiative to guide the national courts. More recently the Commission has seemed hesitant to give an opinion to a national court unless it has been solicited by the court, perhaps upon a request by a party.

The most difficult problems arise when an agreement before a national court has been notified to the Commission. It may even be notified following a dispute arising in a national court. Should the Commission adopt a "hands off" attitude and let the matter be resolved on later reference to the Court of Justice if necessary? Or should it wait to see whether the national court resolves the matter properly, and intervene later if appropriate? The trial court may be outside the Community. What impact would that have on intervention? Should the Commission intervene before a national court if it is not happy

134. The subject is treated succinctly in the Commission's Draft Notice on the Application of Articles 85 and 86 of the EEC Treaty by National Courts. In a recent important judgment, the Tribunal confirmed that the Commission could reject a complaint, after the Commission had examined the facts brought forth by the complainant, such rejection being based on the ground that the matter was not of sufficient importance to the Community to be treated by the Commission and could be handled in a national court where, absent a showing to the contrary, the national court was deemed able to give an appropriate remedy. *Automec II*, Case T-24/90, [1992] E.C.R. __, [1992] 5 C.M.L.R. 431 (Ct. First Instance). It seems likely that the Commission will rely heavily on the *Automec II* judgment in seeking to get the national courts more deeply involved in the application of EEC competition law. For a treatment of the subject of complaints prior to *Automec II*, see J.E. Ferry, *The Sheriff Needs a Posse*, in 1991 *FORDHAM CORP. L. INST.* 169 (Barry E. Hawk ed., 1992).

135. Case T-24/90, [1992] E.C.R. __, [1992] 5 C.M.L.R. 431 (Ct. First Instance).

with pleadings one of the parties has filed in the national court? Can counsel always expect a national court to show deference to the handling by the Commission of a notified agreement as to which the Commission has begun an examination? The Commission's pending draft notice on the application of EEC competition law touches on some of these questions.¹³⁶ The present paper does not present the proper forum for speculation as to answers. In any event, it may be said that the lesson counsel have learned is to tread cautiously on these thorny paths, where bad surprises may lurk around any corner.

Counsel can take little comfort in the thought that in these difficult situations the DG-IV staff is often just as perplexed as counsel. On the other hand, counsel will certainly want to be as well informed as possible of the development of the Commission's attitude. To that extent, the Commission's current efforts to complete a notice on the application of Articles 85 and 86 by national courts are laudable. After an initial thought of virtually legislating in the area via a notice, the Commission now seems content to draw some general conclusions, which ought nevertheless to be of considerable use.¹³⁷ Regardless of the definitive form that notice takes, it seems likely to create endless problems of interpretation once matters start being handled in significant numbers in national courts. The obstacles and unresolved legal issues are enormous. "Decentralization" is not for tomorrow. However, the movement is clearly in that direction. The current prominence of "subsidiarity," provoked by debate on the Treaty on European Union (the "Maastricht Treaty"),¹³⁸ is a further wind of change that is already recognized as affecting the enforcement of the EEC competition rules.

136. See *supra* note 116 (regarding Commission draft notice).

137. See *supra* note 116 and accompanying text (regarding Commission draft notice). The current draft covers, although not in a detailed way, the principle of the precedence of EEC law over national law as that principle applies to the enforcement of exempted agreements. It emphasizes the need for the Commission to establish priorities in deciding what cases it will take on. The most detailed provisions concern the attitudes the national court should adopt toward the possibility of an exemption and the cooperation the Commission would envisage.

138. Treaty on European Union, [1992] 1 C.M.L.R. 719, *reprinted in* 31 I.L.M. 253 (1992).

IX. THE MERGER REGULATION

This Article has undertaken a retrospective of thirty years of EEC competition law practice, and we arrive now at the most recent major event—the 1989 Merger Regulation.¹³⁹ It is important not only for immediately obvious reasons relating to control of market structure but also because of a probable longer-term impact in other areas of EEC competition law practice. Of course we do not yet have much perspective, since the Regulation went into effect only in September 1990, but our perspective on earlier developments and our experience so far with the Merger Regulation may together permit some insight on the possible impact of the Regulation.

First, and perhaps most obviously, the Merger Regulation has added a considerable number of practitioners, of numerous nationalities. Those persons who divined the potential importance of this new practice area were not mistaken as to its scope. And if indeed the Commission's jurisdiction is extended upon an expansion of the "Community dimension" at the end of 1993, the change will obviously magnify the importance of the practice.

Practice under the Merger Regulation has shown a marked similarity to practice under merger control laws of a number of other countries, including the United States. And it is distinctly different in so many ways from practice based on Articles 85 and 86 of the EEC Treaty. The main concepts under the Merger Regulation that rely on prior EEC case law are, of course, those concerning the existence of a dominant position and the existence of a concentrative joint venture (or "partial merger"). These are crucial concepts that cannot be separated from prior law, although even these two concepts purport to be defined by the Merger Regulation and its official notices.¹⁴⁰ Even from the procedural point of view there exists a new and specific regulation, albeit of familiar terms. In addition, there is a single Merger Task Force taking care of these matters, and

139. Merger Regulation, *supra* note 24, O.J. L 257/13 (1990).

140. See Bernd Langenheine, *Substantive Review Under the EEC Merger Regulation*, in 1990 FORDHAM CORP. L. INST. 481 (Barry E. Hawk ed., 1991); Jeremy Lever, *Substantive Review Under the EEC Merger Regulation: A Private Perspective*, in 1990 FORDHAM CORP. L. INST. 503 (Barry E. Hawk ed., 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 E. Hawk ed., 1991).

one tends to deal with the same officials time after time. Immediate access and quick responses are the standard operating procedure. Within an unprecedented time period detailed decisions are issued. The Merger Regulation has, in effect, brought about a virtually new field of law, with its own body of case law and its own practice. That body of law is growing at an amazing rate. It is defined and accessible, almost immediately available in usable form.

As is well known, the Regulation represents the fruition of a twenty-year process which began with the Commission's 1970 decision in *Continental Can*¹⁴¹—an effort to regulate changes in market structure, other than those brought about by what are now called “cooperative” joint ventures. We shall not consider here the practice of EEC merger law at that earlier stage. The situation has been fundamentally changed by the arrival of the Merger Regulation.

Many of the innovations of the Merger Regulation as they relate to work of EEC counsel are obvious: the first mandatory notification rules, and the first subjection of the Commission to strict time limits; allocation of jurisdiction in a rigidly precise way, without precedent in EEC law, albeit on a politically determined basis;¹⁴² a notification requiring detailed data, in contrast to Form A/B, where the Commission only hopes for such data; and a notification demanding an up-front definition of the market, in contrast to Form A/B, which perhaps needs one but does not demand it.¹⁴³ The format has permitted the ac-

141. J.O. L 7/25 (1972), [1972] C.M.L.R. D11; see *supra* note 79 and accompanying text (regarding the impact of *Continental Can* on merger control); see also Ernst-Joachim Mestmäcker, *Merger Control in the Common Market: Between Competition Policy and Industrial Policy*, in 1988 FORDHAM CORP. L. INST. 20-1 (Barry E. Hawk ed., 1989); Dieter Schwartz, *New EEC Regulation on Mergers, Partial Mergers and Joint Ventures*, in 1988 FORDHAM CORP. L. INST. 21-1 (Barry E. Hawk ed., 1989).

142. In regard to jurisdiction, see Giorgio Bernini, *Jurisdictional Issues: EEC Merger Regulation, Member State Laws and Articles 85-86*, in 1990 FORDHAM CORP. L. INST. 611 (Barry E. Hawk ed., 1991); Jacques H.J. Bourgeois & Bernd Langeheine, *Jurisdictional Issues: EEC Merger Regulation, Member State Laws and Articles 85-86*, in 1990 FORDHAM CORP. L. INST. 583 (Barry E. Hawk ed., 1991), reprinted in 14 FORDHAM INT'L L.J. 387 (1990-1991); Martin Heidenhain, *Control of Concentrations Without Community Dimension According to Article 22(2) to (5) Council Regulation 4064/89*, in 1990 FORDHAM CORP. L. INST. 413 (Barry E. Hawk ed., 1991).

143. Generally, in regard to these questions, see Christopher Jones, *The Scope of Application of the Merger Regulation*, in 1990 FORDHAM CORP. L. INST. 385 (Barry E. Hawk ed., 1991); Colin Overbury & Christopher Jones, *EEC Merger Regulation Procedure: A Practical View*, in 1990 FORDHAM CORP. L. INST. 353 (Barry E. Hawk ed., 1991).

cumulation of an enormous amount of experience in only a two year period.¹⁴⁴

The Commission was of course faced with an enormous practical challenge when it began administration of the Merger Regulation, for the adoption of which it had worked so hard. The Commission's credibility was hanging in the balance. Counsel and the business community soon agreed that the administration of the Merger Regulation was turning out to be a big success. It is rare to see such unanimity on any one point within the Community. The apparatus and traditions are in place. Counsel would expect that the good functioning will continue.

Two further points may be made about practice, both relating to the future. The first concerns the nature of decision-making in regard to merger cases. There are two important issues that will affect practice. One is whether interim decisions to open in-depth investigations should be left to the vote of all the Commissioners if any Commissioner so demands, as opposed to the reported present practice of opening the "second stage" upon the decision of the Competition Commissioner, subject to the obligation on his part to inform the other Commissioners in advance, and if requested, to meet with concerned Commissioners. The second is whether decisions should be left to an independent body other than the Commission. These will not be pursued in detail in this Article, but we can note their possible impact on practice. It is not clear whether the two proposals would pull in opposite directions or not, the former increasing political influence and the latter reducing it.¹⁴⁵ For counsel devoted to the rule of law, as it can

144. Experience and other thoughts at the end of the first year were recorded in Eleanor M. Fox, *Merger Control in the EEC—Towards a European Merger Jurisprudence*, in 1991 *FORDHAM CORP. L. INST.* 709 (Barry E. Hawk ed., 1992); Barry E. Hawk, *Joint Ventures Under EC Law*, *supra* note 83; Angus Maciver, *The First Year of Enforcement Under the EEC Merger Regulation: A View From the Trenches*, in 1991 *FORDHAM CORP. L. INST.* 751 (Barry E. Hawk ed., 1992); Michael Reynolds, *The First Year of Enforcement Under the EEC Merger Regulation: A Private View*, in 1991 *FORDHAM CORP. L. INST.* 649 (Barry E. Hawk ed., 1992).

145. The format of an independent body, designed along the German model, would allow the decision of that body to be overruled by the Commission, which could take into account grounds other than those of competition policy. This is now the system in Germany, where the Minister of Economics can overrule the Federal Cartel Office. In Germany, the system functions well, a reversal rarely taking place. A modification of the Community system would in principle be designed to allow

be enforced in a system as impartial as possible and in the course of hard-fought legal battles, a movement toward a system of results based on political influence would be a most disheartening one.

The second issue pointing to the future concerns the possible influence of the Merger Regulation, as well as of practice under the Merger Regulation, and on practice in other areas of EEC competition law. We have already had occasion to review some of these points. It seems likely that there will be such an influence and that the question is one of degree.

The most immediate and obvious change would concern cooperative joint ventures. The possible influences are well-known. Faced with a distinction between concentrative and cooperative joint ventures which can require a degree of mystical foresight to discern with infallibility (a gift not possessed by most counsel), the question has arisen as to why they should be treated so differently in procedural terms—in particular why it should take so long to get a ruling on a cooperative joint venture. The Commission has accordingly undertaken to expedite treatment of cooperative joint ventures.¹⁴⁶ What this implies, and what the result may be, remain to be seen.

The relationship of cooperative and concentrative joint ventures raises several problems of practice. One is whether in

“political” decisions in merger cases, but to protect the evaluations against a continuing and insidious political dimension that might otherwise develop. However, whether such a Community system would work as well as does the German system is open to question for various reasons, including the lack of a consensus on the value of competition law enforcement in the Community and the possibility that the “independent” body would itself be subject to political influence.

146. On April 16, 1992, for example, the Commission published a notice of the notification for exemption under Article 85(3) of a proposed joint venture by which Allied-Lyons plc and Carlsberg A/S would merge their respective brewing and related distribution and wholesaling businesses in the United Kingdom into a joint venture to be named Carlsberg-Tetley. O.J. C 97/21 (1992). The form of notice followed the format of notices published in connection with the notification of concentrations under the Merger Regulation. This has been taken to suggest that the Commission proposes to treat cooperative joint ventures with a structural dimension within a time period similar to the maximum set forth in the Merger Regulation for review of concentrative joint ventures. Further light was provided by the recent announcement of the Commission’s approval of Transpetrol, a cooperative joint venture between subsidiaries of Preussag AG and British Petroleum plc, which notes explicitly that the Commission “concluded its inquiry within the same time limit as that provided under the Merger Regulation.” Commission Press Release, IP (92) 811 (Oct. 13, 1992); see Commission Press Release, IP (92) 52 (May 25, 1992) (speech by Sir Leon Brittan).

order to be entitled to expedited treatment the notification of a cooperative joint venture should be made with the same completeness as notification of a concentration on Form CO. A second question is whether the Commission will undertake to resolve cooperative joint venture problems—and the evident “non-equality” of expeditious handling of such joint ventures vis-à-vis concentrative joint ventures, by resort to a block exemption,¹⁴⁷ or whether a detailed notice, long planned, will suffice. A third issue is whether the concept of ancillary restrictions will function in the same way outside operations covered by the Merger Regulation. Of course, this is a point of substantive law, but it is one which goes to the heart of the practice by affecting counsel’s approach to any situation.¹⁴⁸ It could well be substantially clarified in a future notice on joint ventures.

We can also consider the question of interaction of counsel with the Commission staff, discussed above. Will the closer interaction that has been seen with the staff of the Merger Task Force lead both counsel and staff of Directorates B, C, and D to pattern their conduct on the greater rapidity and definitiveness of response that has been seen under the Merger Regulation? One would hope that there will be an influence in this direction, although the regulatory context of the Merger Regulation demands a close relationship and swift and sure reactions which Regulation 17 does not, and it seems in the nature of things that too big a gap will remain.

We have already considered the availability and pertinence of sources of law and precedents.¹⁴⁹ The Merger Regulation shows a revolutionary change in this respect. As we noted, the practice under the Merger Regulation is to release, rather rapidly, detailed letters which explain the basis of the decision and which give helpful guidance to counsel for future practice under the Merger Regulation. Precedents seem to play a greater role here than elsewhere in EEC competition law. This development could raise the expectations of counsel. How this aspect could be translated into practice is less

147. See *supra* notes 35-54 and accompanying text (discussing block exemptions).

148. See *supra* notes 55-66 and accompanying text.

149. See *supra* notes 106-14 and accompanying text (discussing sources of law and precedents).

clear, however. One possibility would be that DG-IV take this development into account in drafting its own decisions as well as its notices of proposed favorable action to be issued under Article 19(3) of Regulation 17. However quite the reverse may be the case. Seeing the short notices published by the Merger Task Force in the *Official Journal*, the rest of DG-IV could well wish to expedite matters by moving toward greater brevity.

In regard to the role of economics and economists,¹⁵⁰ the relationship between practice under the Merger Regulation and under Regulation 17 bears a possibility of influence. Again the question remains as to how it can be implemented in the attitudes of the DG-IV staff. Counsel will be more accustomed to use economists. Economists will be more accustomed to thinking in terms of EEC law and to making presentations to the Commission. Will the Merger Regulation and its impact on others lead the DG-IV staff to be more willing to think along economic lines? This remains to be seen, and practitioners will watch these developments and participate in them with great interest.

CONCLUSION

After all this retrospection, what general perception of events can be formulated, and what does the future hold?

First, as to the role of the EEC competition lawyers: Have they managed to serve the clients' interests and at the same time been faithful to their duty toward the law? The intellectual challenge of the law, as well as that of spirited defense of the client, have been met in exemplary fashion on countless occasions. As the knowledge of the law expands within the Community, the standards of practice seem to be improving. No doubt they could be improved further through increased emphasis on economics and more intensive reflection on the scope of Article 85(1) of the EEC Treaty. How about the ethical standards? EEC competition law counsel have been faced with a difficult situation, participating in the administration of the law on behalf of companies many of which do not believe in the law. To that extent, perhaps they have shared the experience of tax counsel, and like tax counsel they have sometimes

150. See *supra* notes 127-31 and accompanying text (discussing role of economics and economists in EEC competition practice).

faced the problems of dealing with clients who will do what they can to escape the law, even if it involves misleading public authorities. It is not possible to know to what extent counsel have met that challenge. It does seem important to recognize the challenge. It is, of course, a challenge that applies also to the Commission in its work—to inspire confidence in the determination of the Commission to follow the rules. Only when both sides meet this challenge will the system function in a proper way and bring the greatest degree of satisfaction to the participants and the public.

Second, as to the Commission and the Community courts, our retrospection suggests that the coping with the enormous problems of implementing the system in an environment not at all prepared for it has been commendable. The business community was not ready. Had Articles 85 and 86 of the EEC Treaty been submitted to a referendum, as the Maastricht Treaty has been, the chances of their acceptance would have been too thin to interest any betting agency in the outcome. But there were wise leaders in the right places, and the system has found a series of good administrators aware of the challenges and who have tried hard to remove the obstacles to an effective system. They have contributed greatly to the building of a unified market. As it becomes a reality they should be able to devote a larger percentage of their work to ensuring the existence of a competitive system. They need support at the level of the Council and Commissioners, who may not always be sufficiently informed. They also need the help of counsel in connection with development of the law in the ways noted. And that is the legal profession's responsibility.

Third, as to the future, it is amazing to see the extent of interest of law students and young lawyers in pursuing a career in which the application of the EEC competition rules will play a big part. They can obtain good early notions at the universities and special schools, such as the College of Europe. The real learning will come in practice. Let us hope that they will now come to the practice armed with a sufficient grounding in economics to allow them to play the full role that the scope of the law demands.

Finally, the practice of EEC competition law has been and will continue to be rich in non-material rewards of many kinds. It provides a kaleidoscope of ever-changing factual situations

and evolving legal rules in a moving political and macro-economic context. To what extent the Maastricht debate will change the context remains to be seen. The Commission will no doubt maintain its fundamental attributes for administration of the rules, even though it is now employing "subsidiarity" to promote decentralization to national courts. This decentralization, which is clearly desirable, will be one of the biggest challenges the system has faced, and it will provide major new challenges for counsel. Its prospects are far from clear. But that is certainly the wave of the future. It is in the nature of things, as is the development of national competition laws and a growing activeness of national competition agencies, as well as the extension of the EEC substantive rules to the European Free Trade Association countries.

The dynamics of the situation have been and will remain a source of endless wonderment to counsel. Participating in those dynamics can be exhilarating. Where will it all go? It will be a great experience finding out.