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EC Competition Law and Member State Courts

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Abstract

The main purpose of this paper is to critically analyze the "Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty" (the "Notice"), which the Commission of the European Community (the "Commission") published in 1993. Among the topics covered by the Notice the following deserve a closer analysis: the Commission's enforcement policy, the Commission's views on the application of Articles 85 and 86 by national courts, and the cooperation between national courts and the Commission.

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INTRODUCTION

The main purpose of this paper is to critically analyze the "Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty" (the "Notice"),[1] which the Commission of the European Community (the "Commission") published in 1993. However, before recal-

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1. Notice on Cooperation Between National Courts and the Commission in Apply-

ling certain elements of European Community ("EC") law in the application of Articles 85 and 86 of the EEC Treaty ("Article 85" and "Article 86") by national courts in EC Member States, some facts and figures should first be examined.

This paper does not address the parallel application of national competition law, the application by national courts of competition clauses of international agreements entered into by the European Community, the implications for national courts of the EEC Merger Control Regulation, the special rules for public enterprises (Art. 90/2/EEC), or European Coal and Steel Community competition law, as these topics are not covered by the Notice.

A. *Preliminary Facts and Figures*

The following table lists the number of cases in which national courts expressly enforced Article 85 or Article 86:[2]

	1989	1990	1991	1992	1993
Belgium	9	7	4	3	—
Germany	11	10	9	5	3
Denmark	—	2	—	2	—
Spain	—	1	1	2	1
France	23	17	4	1	—
United Kingdom	10	1	2	1	—
Greece	3	4	2	1	—
Italy	1	6	—	—	—
Luxembourg	—	1	—	—	—
The Netherlands	3	5	—	—	—
Portugal	—	2	—	—	—
	61	36	22	15	4

ing Articles 85 and 86 of the EEC Treaty, O.J. C 39/6 (1993) [hereinafter Commission Notice].

2. Figures compiled by the author from unpublished work done by the Research and Documentation Division, Court of Justice of the European Communities, Survey of Over 10,000 Judgements of National Courts, 1993 (on file with the European Community Court of Justice). These figures are not exhaustive. The author is indebted to the staff of the Research and Documentation Division of the Court of Justice for their prompt and invaluable assistance.

This table does not purport to be entirely complete, as quite a few judgements remain unreported. This article does not deal with the role Articles 85 or 86 played in these cases. In fact, little is known about the degree of enforcement of EC competition law by national courts.[3] The Commission has asked a group of independent experts to carry out a study. A preliminary draft is being examined by the Commission's Directorate General for Competition and has not yet been made publicly available. Even if one were to multiply these figures by three, they would still be remarkably low when compared to the activities of the Commission. The following table illustrates how much more active the Commission is in EC competition law.[4]

	1989	1990	1991	1992	1993 (until 11/08)
Notifications	206	201	282	246	172
Complaints	93	97	83	110	73
Own initiative proceedings	67	77	23	43	23
Files closed	428	868	835	729	—

The data on enforcement by national courts and by the Commission obviously represent only the tip of the iceberg. The Commission no longer needs to be notified of many restrictive agreements as a result of eleven "block exemption" regulations.[5] Figures are not available, but experience suggests that businessmen, when made aware of the situation, are willing to have their agreements drafted so as to come under a "block exemption" and hereby benefit from an exemption without having to go through the process of notification. On the other hand, this may be counterbalanced by the fact that businessmen often take

3. *See generally* Editorial Comments, 30 COMMON MKT. L. REV. 681, 684 (1993) (stating little is known about enforcement of Community competition law by national courts).

4. *See* COMMISSION NINETEENTH REPORT ON COMPETITION POLICY 55, ¶ 36 (1990) (figures for 1989); COMMISSION TWENTIETH REPORT ON COMPETITION POLICY 111, ¶ 91 (1991) (figures for 1990); COMMISSION TWENTIETH-FIRST REPORT ON COMPETITION POLICY 60, ¶ 73 (1992) (figures for 1991); COMMISSION TWENTIETH-SECOND REPORT ON COMPETITION POLICY 80, ¶ 126 (1993) (figures for 1992). For 1993, figures are available from the Commission's Directorate General for Competition, Brussels, Belgium.

5. "Block exemption" is a term of art that refers to regulations whereby the EC Commission declares that the provisions of Article 85(1) of the EEC Treaty do not apply to certain categories of agreements.

risks and do not notify the Commission of restrictive agreements. They often do so with impunity because their business partners seldom complain to the Commission.

The usual explanation as to why there is relatively little civil litigation implicating Articles 85 and 86 in national courts involves a number of factors, such as the cost of national proceedings, the absence of adequate remedies in some jurisdictions,[6] the lack of familiarity with EC competition rules, and the prevailing culture and philosophy of the judiciary and the parties themselves.

It is doubtful whether the last two factors, which played a role in the past, are still significant. Competition law is probably the area of EC law with the highest visibility and on which most has been written. Moreover, in EC Member States, "[t]he process of spontaneous, autonomous legal alignment through the adoption of legal rules modelled on Articles 85 and 86 is . . . continuing,"[7] which indicates a large measure of political acceptance throughout the EC of the value of the competition rules established in the EEC Treaty.

Attempting to explain the benign neglect that characterizes parties' approaches to the enforcement of EC competition law in national courts, a distinguished writer recently listed the following five factors:

> (1) *Fact finding*: the capacity of national courts to obtain and review documents, and to assess relevant facts adequately, varies widely and is virtually non-existent in some jurisdictions.
> (2) *Different rules on nullity under Article 85(2)*: the civil consequences of nullity are not the same throughout the EC.
> (3) *The opportunities for obtaining interim relief*: these opportunities vary greatly from jurisdiction to jurisdiction.
> (4) *The right to damages*: damages awarded on the basis of an infringement of Article 85 and Article 86 are available in limited, and different, circumstances.
> (5) *Divergent attitudes to costs*: there are three principal systems: (i) the losing party bears the successful party's costs; (ii) the losing party can be ordered to pay part of the successful party's legal fees; and (iii) each party is required to bear its

6. *See, e.g.*, Jeffrey Goh, *Enforcing EC Competition Law in Member States*, 3 EUR. COMPETITION L. REV. 114 (1993) (describing situation in United Kingdom).

7. Claus-Dieter Ehlermann, *The Contribution of EC Competition Policy to the Single Market*, 29 COMMON MKT. L. REV. 257, 258 (1992).

own costs.[8]

Further research would be needed to establish a correlation between these differing approaches and the variations in enforcement per Member State. One should probably add to these factors the burden of proof, which, at least in some jurisdictions,[9] is higher than that involved in complaining to the Commission. The Commission will do a substantial part of the fact-finding itself. The parties may prefer to rely on national competition rules (if any) in national courts to avoid the need to show that trade between Member States is affected.

I. *OVERVIEW OF THE LAW ON ENFORCEMENT OF EC COMPETITION RULES*

It may be helpful to recall EC law relating to the enforcement of EC competition law by national courts as it stands. It is within the constraints of these rules that the Notice was drafted.

A. *General Aspects of EC Competition Law*

Turning to EC law, there are two general aspects to be considered. First, there is a particular system of division of responsibilities between the EC and its Member States, between the EC courts and the national courts, and, in the area of competition law, between the Commission and national courts. Up to now, the day-to-day implementation of EC law has been left to Member States, which act within the framework of their own legislation. There are some departures from this system, such as the implementation of competition rules. Implementing regulations, however, provide that Member State authorities have the power to apply Article 85(1) and Article 86 as long as the Commission has not initiated proceedings.[10] The EC courts have only such jurisdiction as is expressly conferred on them by the

8. David Hall, *Enforcement by National Courts*, *in* PROCEDURE AND ENFORCEMENT IN E.C. AND U.S. COMPETITION LAWS (P.J. Slot & A. McDonnell eds. 1993). Hall mentions two additional factors: divergent approaches to Article 177 references and different rules relating to arbitration. *Id.* These, however, explain inconsistent enforcement rather than the low level of enforcement of EC competition rules.

9. *See, e.g.*, Wulf-Henning Roth, *The Application of Community Law in West Germany: 1980 - 1990*, 28 COMMON MKT. L. REV. 137, 172 (1991) (discussing burden of proof in Germany).

10. Council Regulation No. 17/62, art. 9(3), 13 J.O. 204 (1962), O.J. Eng. Spec. Ed. 1959-62, at 89.

various EC treaties: they have no "subject matter jurisdiction."[11] Therefore, it is not enough for a dispute the adjudication of which involves a question of EC law to be subjected to this jurisdiction. The common law judge of EC law is the national judge.

Second, there are no provisions in the EEC Treaty concerning the enforcement of EC law by national courts. Despite the fact that the sometimes divergent approaches of Member States' procedural laws may hinder the enforcement of EC law,[12] there is an obvious reluctance to address in the EC framework issues of judicial organization in Member States. When lawyers discuss this topic they usually consider that it should be dealt with by agreements negotiated between Member States.[13] The Court of Justice has taken the view that:

> Articles 100 to 102 . . . of the Treaty enable the appropriate steps to be taken as necessary, to eliminate differences between the provisions laid down . . . by law, regulation or administrative action in Member States if these differences are found to be such as to cause distortion or to affect the functioning of the common market.[14]

In *Rewe-Handelsgesellschaft Nord mbH and Rewe-Markt Steffen v. Hauptzollamt Kiel* (the *Butterbuying Cruises* case),[15] the Court of Justice stated that the Treaty "was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law."[16] Apart from the 1968 Convention on Judicial Compe-

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11. Treaty Establishing the European Economic Community, arts. 177-183, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 3, 76-78 (1958) (conferring jurisdiction) [hereinafter EEC Treaty].

12. *See, e.g.*, Peter Oliver, *Le Droit Communautaire et les voies de recours nationales*, CAHIERS DE DROIT EUROPÉEN 348 (1992); *see also* Ami Barav, *Enforcement of Community Rights in the National Courts: The Case for Jurisdiction to Grant An Interim Relief*, 26 COMMON MKT. L. REV. 369 (1989).

13. *See, e.g.*, J. Mertens de Wilmars, Rapporteur General, Federation Internationale de Droit Européen, *L'Efficacite des differentes techniques nationales de protection juridique contra les violations du droit communautaire par les autorites nationales et les particuliers*, 1 REMEDIES FOR BREACH OF COMMUNITY LAW 1.1, 1.38 (1980).

14. Comet BV v. Produktschap voor Siergewassen, Case 45/76, [1976] E.C.R. 2043, 2053, ¶ 14, [1977] 1 C.M.L.R. 533, 551. The same language is used in a judgement handed down on the same day. Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland, Case 33/76 [1976] E.C.R. 1989, [1977] 1 C.M.L.R. 533.

15. Rewe-Handelsgesellschaft Nord mbH and Rewe-Markt Steffen v. Hauptzollamt Kiel, Case 158/80 [1981] E.C.R. 1805, [1982] 1 C.M.L.R. 449.

16. *Id.* at 1838, ¶ 44, [1982] 1 C.M.L.R. at 483.

tence and Enforcement of Judgements[17] (and a few *ad-hoc* provisions on particular aspects to be found in EC secondary legislation), these issues have so far not been dealt with either in agreements between Member States or in EC legislation. The only exception in the EEC Treaty is Article 85(2), which states that agreements or decisions prohibited pursuant to Article 85(1) are automatically void.[18] Practically, the only case law is that of the Court of Justice.

B. *EC Law Enforcement by National Courts*

The Court of Justice has developed a series of general principles or rules that clarify the duty to ensure full operation of EC law for Member States and national courts under Article 5 of the EEC Treaty.[19] The following appear particularly relevant to the topic of this paper:

- Equality of treatment of legal actions to enforce EC law and those to enforce national law.[20]
- National rules may not be such as to make the exercise of rights granted by the EC legal system practically impossible.[21]
- National courts must set aside a rule of national law preventing "a court seised of a dispute governed by [EC] law from granting interim relief in order to ensure full effectiveness of the judgement to be given on the existence of the rights claimed under [EC] law."[22]
- Member States have the duty to ensure that infringements of EC law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance, and which

17. 1968 Convention on Judicial Competence and Enforcement of Judgements, O.J. L 304/77 (1978).

18. EEC Treaty, *supra* note 11, art. 85(2), 298 U.N.T.S. at 46-47.

19. *See* Koen Lenaerts, *Rechtsbescherming en rechtsafdwinging: de functies van de rechter in* HET EUROPEES GEMEENSCHAPSRECHT 181 (Mys & Breesch, Gent 1993) (identifying seven such principles or rules).

20. *See Rewe-Handelsgesellschaft*, [1981] E.C.R. at 1838, [1982] 1 C.M.L.R. 449, 483.

21. *See* Amministrazione delle Finanze dello Stato v. SpA San Giorgo, Case 199/82, [1983] E.C.R. 3595, 3612, ¶ 11, [1985] 2 C.M.L.R. 658, 688.

22. The Queen v. Secretary of State for Transport, *ex parte* Factortame Ltd., Case C-213/89, [1990] E.C.R. I-2433, 2439, ¶ 21, [1990] 3 C.M.L.R. 1, 16-17.

make the penalty effective, proportionate and dissuasive.[23]

As far as the enforcement of Articles 85 and 86 is concerned, the following elements of the law as it stands are important:

- Article 86 has direct effect.[24] Article 85(1) EEC has direct effect where implementing regulations have been enacted.[25] These articles now directly affect all sectors of the economy.
- Provisions of block exception regulations have direct effect.[26]
- National courts are not "national authorities" within the meaning of Article 89 of the EEC Treaty,[27] except where national courts function as "national authorities" or where they review decisions of such national authorities. Unlike "national authorities" national courts are not barred from adjudicating disputes involving the enforcement of Article 85(1) or Article 86 against collusive or abusive conduct in respect of which the Commission has opened proceedings.[28]
- Block exemption regulations are binding on national courts in the sense that national courts may not modify the scope of block exemption regulations.[29] The

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23. Commission of European Communities v. Greece, Case 68/88, [1989] E.C.R. 2965, 2985, ¶ 24, [1989-1990 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 95,396.

24. Belgische Radio en Televisè and Société belge des auteurs, compositeurs et éditeurs v. SV SABAM and NV Fonior, Case 127/73 [1974] E.C.R. 51, 62, ¶ 16, [1974] 2 C.M.L.R. 238, 246 [hereinafter BRT v. SABAM]; Ahmed Saeed Flugreisen and Silver Line Reisebüro Gmbh v. Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V., Case 66/86 [1989] E.C.R. 803, 848, ¶ 33, [1989-1990 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 95,219.

25. Ministère public v. Lucas Asjes, Joined Cases 209-213/84, [1986] E.C.R. 1457, 1470, ¶ 68, [1986] 3 C.M.L.R. 173, 219, ¶ 68.

26. SA Fonderies Roubaix-Wattrelos v. Société nouvelle des Fonderies A. Roux and Société des Fonderies JOT, Case 63/75 [1976] E.C.R. 111, 118, ¶ 11, [1976] 1 C.M.L.R. 538, 548.

27. *See* EEC Treaty, *supra* note 11, art. 89, 298 U.N.T.S. at 49-50 (demonstrating that national authority not cited in Article 89).

28. *See BRT v. SABAM*, Case 127/73, [1974] E.C.R. 51, 62 ¶ 16, [1974] 2 C.M.L.R. 238, 246; Ahmed Saeed Flugreisen v. Zentrale zur Bekämpfung unlauteren Wettbewerb, Case 66/86 [1989] E.C.R. 803, 848, ¶ 33, [1989-1990 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 95,396.

29. Stergios Delimitis v. Henninger Bräu AG, Case C-234/89, [1991] E.C.R. I-935, [1992] 5 C.M.L.R. 210 [hereinafter Delimitis].

fact that an agreement does not fulfil the conditions of a block exemption regulation, however, does not mean that it is therefore prohibited by Article 85(1).

- Individual exemptions are binding on national courts; comfort letters are not.[30]
- Where an agreement prohibited by Article 85(1) has not been notified, exemptions are as a rule not possible. A national court can thus declare such agreement void without the risk of a subsequent conflicting exemption decision by the Commission.[31]

On the following aspects, no case law exists on the implication of other actions of the Commission on a national court.

- A "negative clearance."[32]
- The rejection by the Commission of a complaint. In a letter by which it rejects a complaint following the guidelines set out in *Automec S.r.l. v. E.C. Commission, Joined Cases T-24/90 & T-28/90* ("*Automec II*"),[33] the Commission is not bound to express an opinion on the substance of the complaint (unless the action is within its exclusive powers, such as the withdrawal of an exemption).[34]

In other words, the Commission does not need to make a prima facie finding of an infringement. Instead, the Commission may and can assume that the alleged infringement is established for the purpose of assessing whether the infringement justifies the initiation of a proceeding for the Community interest. Examples of factors to be considered include: "the importance of the alleged infringement for the functioning of the common market," "the likelihood of finding an infringement" and "the

30. *Cf.* NV L'Oréal and SA L'Oréal v. PVBA De Nieuwe AMCK, Case 31/80, [1980] E.C.R. 3775, 3792-93, ¶¶ 22 & 23, [1981] 2 C.M.L.R. 235, 254.

31. *Delimitis*, [1991] E.C.R. at I-993, ¶ 52, [1992] 5 C.M.L.R at 253.

32. Thinam Jakob-Siebert, 2 KOMMENTAR ZUM EWG-VERTRAG 1987, ¶ 13 (4th ed., Baden-Baden 1992) (discussing Article 87). Many writers consider that national courts are not bound by a "negative clearance." *See id.* at 1988 n.104. *Contra* Dominique Berlin, *L'application du droit communautaire de la concurrence par les autorités françaises*, 27 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 379, ¶ 126 (1991).

33. Automec S.r.l. v. E.C. Commission, Joined Cases T-24/90 & T-28/90, [1992] E.C.R. 2223, [1992] 5 C.M.L.R. 431 (Ct. First Instance) [hereinafter Automec II].

34. B.J. Drijber, Note, *Case T-24/90, Automec S.r.l. v. Commission, Judgement of the Court of First Instance of 18 September 1992*, 30 COMMON MKT. L. REV. 1237 (1993).

scope of the investigation that would be required for that purpose."[35]

- A decision by the Commission finding that a given practice or conduct infringes Article 85(1) or Article 86.[36]

In *Stergios Delimitis v. Henninger Bräu AG, Case C-234/89* ("*Delimitis*"), the Court refers in an obiter dictum to the risk of national courts making decisions that conflict inter alia with those taken by the Commission in the implementation of Articles 85(1) and 86. The Court stated that "such . . . conflicting decisions would be contrary to the general principle of legal certainty."[37] In the Notice, the Commission considers that national courts are not formally bound by a decision issued by the Commission on the agreement, decision or concerted practice at issue.[38]

- A "settlement."[39]

A fairly important number of cases are settled by the Commission. In a number of cases, the Commission terminated, suspended, or decided not to open proceedings as a result of commitments entered into by parties.[40] Although the "Community interest" may be served by this informal competition policy, the interests of third parties may not be satisfied.

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35. *Automec II*, [1992] E.C.R. 2223, [1992] 5 C.M.L.R. at 479.

36. *See* Helmuth Schröter, 2 KOMMENTAR ZUM EWG-VERTRAG, *supra* note 32, at 1493-94, ¶ 162. Most writers take the view that such decisions are "declaratory". *Id.*; *see* Jakob-Siebert, *supra* note 32, at 1494 n.612. Other writers consider that such decisions are binding on national courts. *See e.g.*, Berlin *supra* note 32, at 421, ¶ 126.

37. Delimitis, Case C-234/89, [1991] E.C.R. I-935, I-992, ¶ 47, [1992] 5 C.M.L.R. 210, 251-52.

38. Commission Notice, *supra* note 1, at 8, ¶ 20. "Such statements [a decision, opinion, or other official statement issued by an administrative authority and in particular by the Commission] provide national courts with significant information for reaching a judgment, even if they are not formally bound by them." *Id.*

39. COMMISSION TWENTY-SECOND REPORT ON COMPETITION POLICY 83, ¶ 126 (1993). According to the XXII Report on Competition Policy, 553 cases were "settled" because the agreements were no longer in force, their impact was too slight, the complaint had become moot or because the investigation had not revealed any anti-competitive practice. *Id.*

40. *See* Jacques H.J. Bourgeois, *Undertakings in EEC Competition Law in* PROCEDURE AND ENFORCEMENT IN E.C. AND U.S. COMPETITION LAW, *supra* note 8, at 66 (discussing Commission's decisions to suspend proceedings in light of undertakings by parties).

II. THE NOTICE

Among the topics covered by the Notice the following deserve a closer analysis: the Commission's enforcement policy,[41] the Commission's views on the application of Articles 85 and 86 by national courts,[42] and the cooperation between national courts and the Commission.[43]

A. *The Commission's Enforcement Policy*

The Commission restates views put forward in *Automec II* on priorities: these are to focus on notifications, complaints and own initiative proceedings having particular political, economic or legal significance for the EC.[44] According to the Commission, a sufficient Community interest does not exist in examining a case "when the plaintiff is able to secure adequate protection of his rights before the national courts."[45]

1. The Respective Functions of the Commission and National Courts

The view of the Commission's function — safeguarding the public interest of the Community[46] — as opposed to the national courts' function — safeguarding the rights of private individuals[47] — is obviously too "black and white."[48] The Commission appears to recognize the lack of a precise division between the functions of the Commission and the national courts since it accepts implicitly that there is sufficient Community interest where adequate protection of private parties' rights is not available in national courts.[49]

In *Automec II* while making the distinction between the respective functions of the Commission and of national courts the Court of First Instance stated:

In this context the question for the Court is whether the

41. Commission Notice, *supra* note 1, at 7-8.
42. *Id.* at 8.
43. *Id.* at 9-11.
44. *Id.* at 7, ¶ 14.
45. *Id.* ¶ 15.
46. *Id.* at 6, ¶ 4.
47. *Id.*
48. *See* Drijber, *supra* note 34, at 1244-49 (discussing European Community interest and conditions for referring complainant to national court).
49. Commission Notice, *supra* note 1, at 7, ¶ 15.

> Commission was right, in this particular case, to conclude that there was not sufficient Community interest in pursuing the examination of the matter on the ground that the applicant . . . could also submit to [the Italian] courts the question of whether BMW Italia's distribution system was compatible with Article 85(1) EEC."[50]

It would thus seem that the availability of a remedy in national courts is an element to be considered by the Commission when assessing the Community interest. On the other hand, the public interest is an element that national courts are allowed to take into account and, in certain cases, are required to take into account.

What exactly is meant by "adequate protection of his [private parties'] rights in national courts,"[51] and how far the Commission should go in examining such protection are open questions. In addition, the question of the Commission's obligation to investigate a case if it were to find that no available remedies existed in national courts remains unanswered. In such a hypothetical case, the Commission would probably be bound to act. The Commission has the necessary powers and there would be no other course of action open to private parties.[52]

2. Effect of the Rejection of a Complaint

The Notice states that national courts should ascertain "whether the agreement, decision or concerted practice has already been the subject of a decision, opinion or other official statement issued by . . . the Commission."[53] While not binding on national courts, such statements provide them with "significant information for reaching a judgement."[54]

According to the guidelines set forth in *Automec II*, when rejecting a complaint, the Commission is bound to evaluate the factual and legal aspects of the complaint.[55] As already pointed out, the Commission could very well reject a complaint on the

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50. Automec II, Joined Cases T-24/90 & T-28/90, [1992] E.C.R. 2223, [1992] 5 C.M.L.R. at 479.

51. Commission Notice, *supra* note 1, at 7, ¶ 15.

52. In such a case there is a clear analogy with anti-dumping and anti-subsidy complaints, where the only remedy available to private parties is action by the Commission.

53. Commission Notice, *supra* note 1, at 8, ¶ 20.

54. *Id.*

55. Automec II, Joined Cases T-24/90 & T-28/80, [1992] E.C.R. 2223, [1992] 5 C.M.L.R. at 478, ¶ 79.

grounds of absence of Community interest without expressing prima facie views on the substantive merits of the complaint.

There are obviously two sides to the question whether the Commission should express such views. If it does not, the Commission loses a chance to ensure enforcement in line with its interpretation of the law. If it does, the defendant in the national court starts with a handicap if the national court considers this as "significant information for reaching a judgement."[56] If the Commission expresses prima facie views on the substantive merits of the complaint, it ought not to do so without hearing the respondent.

B. *Commission Views on the Application of Articles 85 and 86 by National Courts*

There are two different concerns underlying the Notice: (1) encouraging more enforcement by national courts, and (2) avoiding decisions that may conflict with those taken or envisaged by the Commission.[57] The Notice, which is partly analytical and partly exhortative, often reflects these two concerns simultaneously. Rather than trying to distinguish these two concerns, it seems appropriate to examine the Notice itself.

1. Enforcement of Article 85(1)

The Notice deals with a series of cases that involve the risk of inconsistent decisions. The Commission draws on certain legal principles derived from the case law of the Court of Justice that would permit the avoidance of inconsistent decisions. As to the substance:

> national courts should ascertain whether the agreement, decision or concerted practice has already been the subject of a decision, opinion or other official statement issued by an administrative authority and in particular by the Commission. Such statements provide national courts with significant information for reaching a judgement, even if they are not formally bound by them.[58]

The above statement probably reflects the law as it stands.

Private parties, however, find it difficult to comply with the

56. Commission Notice, *supra* note 1, at 8, ¶ 20.
57. *Id.* at 10, ¶ 34 and at 8, ¶ 18.
58. Commission Notice, *supra* note 1, at 8, ¶ 20.

law as interpreted in such decisions, opinions or other official statements of the Commission. The law is particularly confusing where "comfort letters" are concerned.[59] While it is true that in the *Perfume cases*[60] the Court of Justice stated that the type of comfort letter that was in question did not bind national courts, the Commission should have drawn certain conclusions from its reliance on comfort letters. The Commission confirmed that it intends (as it is in fact doing already now) to use comfort letters as a rule to dispose of notifications in cases that have no Community interest.[61] Would it be so shocking to say that the Commission has come to the conclusion that comfort letters ought to be binding on national courts?

One may wonder whether there is not some inconsistency in the stand taken in the *Perfume cases* and in the Notice. On the one hand, national courts may not apply Article 85(3), ¶ 8, but on the other, they ought to take Article 85(3) type comfort letters into account.[62] Hopefully, the Court of Justice will be prepared in an appropriate case to draw the logical conclusions from its obiter dictum in *Delimitis*, where it stated that "[s]uch conflicting decisions would be contrary to the . . . principle of legal certainty. . . ."[63]

Regarding procedure, the Notice recalls the following existing solutions:

> (1) where the Commission has initiated a proceeding, national courts may stay their proceedings while awaiting the outcome of the Commission's action;[64]
> (2) national courts may stay proceedings and seek the Commission's views;[65]
> (3) national courts may submit questions for preliminary ruling to the Court of Justice;[66]
> (4) when national courts find that the conditions for applying Article 85(1) or Article 86 are not met, they

59. *See* SA Lancôme & Cosparfance Nederland BV v. Etos BV and Albert Heyn Supermart BV, Case 99/79, [1980] E.C.R. 2511, 2533, ¶ 11, [1981] 2 C.M.L.R. 43.

60. *Id.*

61. Commission Notice, *supra* note 1, at 7, ¶ 14.

62. *Id.* at 9, ¶ 25.

63. Delimitis, Case C-234/89, [1991] E.C.R. I-935, I-992, [1992] 5 C.M.L.R. 210, 252, ¶ 47.

64. Commission Notice, *supra* note 1, at 8, ¶ 22.

65. *Id.*

66. *Id.*

should pursue their proceedings even if there has been a notification to the Commission;[67] and
(5) when national courts find that the conditions for applying Article 85(1) or Article 86 are met, they must rule that the conduct at issue infringes EC competition law and take the appropriate measures.[68]

As to the first potential solution, it is doubtful that national courts would stay proceedings on the ground that the Commission has initiated proceedings, except in the unlikely event that the parties request them to do so. In addition, and this applies to the second and third solutions as well, in many instances the issue will arise in summary proceedings and national courts will be even more reluctant to stay proceedings. One would probably have to convince a national court that an important question of principle is involved and demonstrate that a stay of proceedings does not adversely affect the parties' interests. The second solution raises another issue that will be considered when examining what the Notice has to say about cooperation between national courts and the Commission. As to the fifth solution, the Notice does not state whether this concerns conduct that has been reported to the Commission, or conduct against which the Commission has initiated proceedings. In view of what is stated in the first solution, the Commission probably meant that in the latter case the national courts are not bound to find an infringement and take appropriate measures. The fifth solution also raises another issue that concerns the application of Article 85(3).

2. Application of Article 85(3)

This is not the end of the story for national courts. National courts must also verify whether the conduct at issue has been or will be exempted by the Commission under Article 85(3). The Notice examines a series of cases:

(a) the conduct at issue benefits from an individual exemption;[69] national courts are bound by it;
(b) the conduct at issue falls within the scope of a

67. *Id.* at 8-9, ¶ 23.
68. *Id.* at 8, ¶ 20.
69. *Id.* at 9, ¶ 25.

block exemption;[70] national courts are bound to apply the block exemption regulation;

(c) there is a comfort letter stating that the conditions for applying Article 85(3) have been met with respect to the conduct at issue;[71] national courts are not bound by it but may take account of it "as a factual element;"

(d) the agreement, decision or concerted practice has not been notified to the Commission; an exemption is ruled out, except for agreements, etc. . . . that did not need to be notified; national courts may decide that the agreement, etc. . . . is void;[72]

(e) the agreement, decision or concerted practice has been notified to the Commission and the Commission has not yet ruled on the notification; national courts should (the Notice says "will") assess the likelihood of an exemption being granted;[73] if a national court takes the view that the conduct at issue cannot be exempted by the Commission, it "will" take the measures to comply with Article 85(1) and (2). If not, the national court should suspend the proceedings while awaiting the Commission's decision.[74]

As to (c), reference is made to earlier comments on comfort letters. As to (d), the Notice states that national courts *may* decide that the agreement is void. In view of the introducing paragraph (24), this point assumes that a national court finds that the conduct at issue infringes Article 85(1). Except where the agreement did not need to be notified, in such cases national courts *must* decide that it is void under Article 85(2).[75] Point (e) is obviously the most difficult one. It calls for two comments. First, it requires the national courts to second-guess the Commission. The Notice attempts to deal under the heading "Cooperation Between National Courts and Commission" with the difficulties that national courts may face in engaging in such an exer-

70. *Id.* ¶ 26.
71. *Id.* ¶ 25.
72. *Id.* ¶ 28.
73. *Id.* ¶ 29.
74. *Id.* ¶ 30.
75. *Id.* ¶ 28.

cise.[76] The views of the Commission on this cooperation are somewhat optimistic. Second, in the event that a national court considers the conduct exemptible, apart from the reluctance of national courts to stay proceedings, the Notice here runs again into the contradiction between the view that national courts may not apply Article 85(3) and the desire that they should take account of comfort letters, as the Commission's stated intention is to dispose of notifications by comfort letters, except in cases presenting a Community interest.[77]

This contradiction can only be overcome if the Commission is prepared to issue formal exemption decisions in the cases referred to under (e). According to that hypothesis, however, the Commission would have to act more quickly than it usually does. The Commission has at least attempted to give priority to cases that are the subject of national proceedings and in which national courts have stayed proceedings to request information.[78]

C. *Cooperation Between National Courts and the Commission*

According to the Notice, national courts can ask the Commission for information.[79] The types of information available are discussed below.

1. Information of a Procedural Nature

National courts may request the following information: (1) has there been a notification? (2) Has the Commission initiated a proceeding? (3) Has the Commission taken a position by way of decision or comfort letter? (4) How much time will the Commission need to grant or refuse an exemption?[80]

2. Information of a Legal Nature

The Notice contemplates the possibility for national courts "[to] consult the Commission on points of law."[81] For example, the national courts may pose the following questions: (1) what is the Commission's customary practice in relation to the EC law at

76. *Id.* at 10, ¶ 37.
77. *Id.* at 7, ¶ 14.
78. *Id.* at 10, ¶ 37.
79. *Id.* ¶ 39.
80. *Id.* ¶ 37.
81. *Id.* ¶ 38.

issue? (2) When is there effect on trade between Member States? (3) When is there an appreciable restriction of competition? (4) The Notice even contemplates an "interim opinion" of the Commission on whether a contested agreement, decision or concerted practice is exemptible.[82]

3. Information of a Factual Nature

According to the Notice, national courts can obtain statistics, market studies and economic analyses from the Commission.[83]

4. Some Comments

These desired forms of cooperation deserve some comments. First, the legal basis for this cooperation on the part of the Commission lies in Article 5 of the EEC Treaty as interpreted in the first order in *J.J. Zwartveld & Others*.[84] The Commission's duty to communicate documents to national courts[85] is qualified by the interest of the Community.[86] The Commission's commitment to cooperate is further qualified in the Notice by "the general principle of sound administrative practice"[87] and in particular by the Commission's duty not to disclose information of a confidential nature.[88]

Second, such requests for information may raise due process issues. The Commission attempts to account for this in the Notice by undertaking "not [to] accede to requests for information unless they come from a national court, either directly, or indirectly through parties which have been ordered by the court concerned to provide certain information."[89] In the latter case, the Commission also undertakes "to ensure that its answer reaches all the parties to the proceedings."[90] The Notice does not, however, say anything about the conditions in which the Commission formulates its reply. In particular, where a national

82. *Id.*
83. *Id.* ¶ 40.
84. J.J. Zwartveld & Others, Case C-2/88 Imm, [1990] 3 C.M.L.R. 457.
85. Commission Notice, *supra* note 1, at 8, ¶ 22.
86. *Id.* ¶¶ 25-26.
87. *Id.*, *supra* note 1, at 10, ¶ 41.
88. *Id.* ¶ 42.
89. *Id.* at 11, ¶ 42.
90. *Id.*

court "consults" the Commission on points of law and seeks the Commission's interim opinion on the exemptibility of an agreement, the Commission will endeavor to provide the national court with a useful reply. In such cases, the Commission ought not submit its reply to the national court without having heard the concerned parties in Commission proceedings. The analogy to preliminary ruling proceedings in the Court of Justice is obvious. The argument that, unlike preliminary rulings by the Court of Justice, such "opinions" of the Commission are not binding on national courts is not very convincing. What would be the point of such opinions if the Commission does not expect that they will be followed by national courts?

Third, the Commission, on this point as well, expects more from national courts than they may be able or willing to do. The Notice refers dutifully to the limits of national procedural law.[91] It is, however, there that many obstacles lie.

Normally, in civil proceedings in EC Member States, the parties are in the driver's seat; they define the scope of the disputes before the court, and courts may not raise issues on their own motion. There is usually a qualified exception to this principle where national courts find that disputes brought before them involve the application of rules of public policy.[92] National courts usually must hear the parties to the dispute on the application of such rules of public policy. It remains to be seen whether all national courts consider Articles 85(1) and 86 as rules of public policy that they ought to raise on their own motion during the proceedings.

In addition, to varying degrees, the role of civil courts is a passive one as far as issues of fact are concerned. Normally, they are not allowed to bring into the proceedings facts that the parties did not submit to them.[93] This means that where a national court would on its own motion include in proceedings about an agreement before it the issue of the compatibility of such agree-

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91. *Id.* at 10, ¶ 37.

92. This practice is fairly common in the EC Member States and is reflected *inter alia* in Article 7 of the Convention on Law Applicable to Contractual Obligations. *See* BASIC DOCUMENTS ON INTERNATIONAL TRADE LAW 669-70 (Chia-Jui Cheng ed., Dordrecht, 1990) (reprinting Convention).

93. *See, e.g.*, Marcel Storme & Dagmar Coester-Waltjen, *L'Activisme du juge Der richterliche Activismus, IX World Conference on Procedural Law*, 1 GEN. REP. 405, 431 (Coimbra, 1991).

ment with Article 85(1), it could probably only do so on the basis of the facts as submitted by the parties. In such a case, it is highly doubtful that the national court could on its own initiative seek from the Commission facts necessary to establish the effect of the contested agreement on trade between EC Member States. Moreover, in many EC Member States' legal systems, judges are not allowed to seek views on points of law from third parties.[94]

CONCLUSION

Quite obviously, a mere notice must take the law as it stands; it cannot change it. One can hardly expect a notice to contribute substantially to resolving the legal obstacles that stand in the way of effective enforcement of Article 85(1) and Article 86 in national courts. This being said, one would have expected a less conservative stance of the Commission on comfort letters and a more enlightened interpretation of the more recent case law.

Some of the obstacles to effective enforcement are inherent in the law as it stands, providing for enforcement by national courts operating within the framework of national legal systems.[95] In theory, EC legislation could be enacted making improvement of judicial enforcement possible without putting the system of division of powers into question. If no such legislation is enacted, developments in the case law of the Court of Justice could move things in the right direction.

More enforcement by national courts, if national courts are able and willing to act as the Notice suggests under the heading "Cooperation between national courts and the Commission,"[96] will paradoxically lead to more work for the Commission, though this would be the case to a lesser extent if national courts were granted the power to grant exemptions.

More effective enforcement through more application by national courts, which probably implies that such national courts also have the power to grant exemptions, is at odds with more consistent enforcement, certainly under the law as it stands. Some take the view that it is impossible to achieve "decentraliza-

94. *Id.* at 476.

95. *See supra* text at 337-340 and accompanying notes (discussing European Community law enforcement by national courts).

96. Commission Notice, *supra* note 1, at 9.

tion" while at the same time preserving uniform application.[97] In this respect, one should bear in mind that enforcement of EC competition law, especially where it involves granting of exemptions, implies that the assessment of sometimes complex economic facts, decisions of national courts are thus less amenable to the uniforming effects of the preliminary ruling procedure.

At any rate, national courts will be reluctant, assuming that they may do so under their procedural rules, to seek opinions from the Commission.[98] They would be less reluctant to seek opinions from a court — and they would face fewer legal obstacles — if such opinions were given more promptly than Court of Justice judgments on preliminary questions. Giving such a role to the Court of First Instance would make sense in view of its jurisdiction for direct appeals in competition matters.[99]

It has been argued that more effective enforcement could be ensured if more cases were devolved to national competition authorities.[100] Referrals without further ado are questionable solutions. National competition authorities may already enforce EC competition rules provided that the Commission has not initiated proceedings. National competition authorities are not, however, bound to apply EC competition rules. There may be an opportunity to clarify that the issue in relation to a Commission decision referring cases to a national competition authority.[101] The record of national competition law is not very encouraging.[102] Even though several EC Member States have enacted national competition rules mirroring EC rules, there remain differences on policy and on enforcement between Member States

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97. Drijber, *supra* note 34, at 1248-49.

98. *See supra* text at 335 and accompanying notes (discussing reluctance to address judicial organization in Member States within EC framework).

99. *See supra* text at 335-36 and accompanying notes (discussing jurisdiction of EC courts).

100. Alan Riley, *More Radicalism, Please: The Notice on Co-operation between National Courts and the Commission in Applying Articles 85 and 86 of the EEC Treaty*, 3 EUROPEAN COMPETITION L. REV. 91, 94 (1993). For a similar proposition, *see* Mario Siragusa, *The Lowering of the Thresholds: An Opportunity to Harmonize Merger Control*, 4 EUR. COMPETITION L. REV. 139 (1993).

101. It concerns some of the SACEM cases: BENIM v. Commission and Tremblay v. Commission, O.J. C 43/25 (1993) (not yet reported). The requests for a preliminary ruling in *B.A.B. Le Club 7* and in *Le Dryat* have been withdrawn and were removed from the Court of Justice's registry on 14 May and 8 June 1993.

102. *See* Berlin, *supra* note 32, at 13; Roth, *supra* note 9, at 7, and accompanying text (discussing application of Community Law in West Germany).

and between Member States and the Commission. These differences are bound to inhibit both effective and consistent enforcement of EC competition rules.

In order to ensure consistency, it has been suggested that the Commission retain a guidance and supervisory role as well as "the ability to 'pull in' any particular case."[103] In light of the half-baked solution that the EC Council adopted with respect to Commission supervision of enforcement of government procurement rules,[104] one should not entertain illusions about a genuine sort of "guardianship" by the Commission over national competition authorities being accepted.

103. Riley, *supra* note 100, at 95.
104. Council Directive No. 89/665, O.J. L 395/33 (1989).