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The Case for a Reform of Regulation 17/62: Problems and Possible Solutions from a Practitioner's Point of View

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Abstract

This Essay first describes the shortfalls of the current enforcement regime under Regulation 17 and the practical problems that undertakings experience in enforcement proceedings. It then discusses the suggestions for reform of Regulation 17. Finally, this Essay illustrates that although amendments and changes to the current procedural rules could solve some of the problems undertakings are facing in competition proceedings today, in order to address these problems effectively, changes to the underlying institutional system will be necessary.

THE CASE FOR A REFORM OF REGULATION 17/62: PROBLEMS AND POSSIBLE SOLUTIONS FROM A PRACTITIONER'S POINT OF VIEW

*Frank Montag**

Regulation 17 should not be regarded as incapable of change. It is not Pandora's box, which will release all human ills if it is opened. Nor is it the Ark of the Covenant within which is contained the law on the tables of stone. If it is an ark, it is Noah's Ark, after thirty years needing refitting and a new coat of pitch to match its sister ship the Merger Regulation.¹

INTRODUCTION

The competition law rules of the European Community ("EC" or "Community") have been in force for forty years. In that time, there have been several small and some major reforms and amendments to these laws, the most noticeable of these being the adoption of the Merger Control Regulation² ("MCR") in 1989. Surprisingly enough, however, the fundamental procedural rules for the application of Articles 85 and 86 of the Treaty establishing the European Community³ ("EC Treaty"), which are

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1. HOUSE OF LORDS SELECT COMMITTEE ON THE EUROPEAN COMMUNITIES, ENFORCEMENT OF COMMUNITY COMPETITION RULES, FIRST REPORT, 1993-94, ¶ 142 [hereinafter SELECT COMMITTEE ON THE EUROPEAN COMMUNITIES, FIRST REPORT].

2. Council Regulation No. 4064/89, O.J. L 395/1 (1989), *corrigendum* O.J. L 257/13 (1990), *as amended by* Council Regulation (EC) No. 1310/97, O.J. L 180/1 (1997) [hereinafter Merger Control Regulation].

3. Treaty establishing the European Community, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 573 [hereinafter EC Treaty], *incorporating changes made by* Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719 [hereinafter TEU]. The Treaty on European Union ("TEU") amended the Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty], *as amended by* Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA].

contained in Regulation 17/62⁴ ("Regulation 17"), have remained unchanged for almost forty years.⁵ Today, the European Commission ("Commission") is pondering a number of suggestions for reforms of EC competition law and its procedural rules.⁶ The topics under discussion include a new approach for dealing with vertical restraints. Following its Green Paper on Vertical Restraints in EC Competition Policy⁷ ("Green Paper"), set forth last year, the Commission has recently published proposals for a new block exemption for vertical agreements as well as for some procedural reforms.⁸ New block exemptions for horizontal agreements are also under discussion.⁹ Furthermore, the Commission published a draft regulation laying down procedural rules for the enforcement of the Community provisions on State aids.¹⁰ Moreover, the Commission recently adopted a revised regulation on the hearings of undertakings in competition proceedings.¹¹ Finally, a major reform of Regulation 17, the regulation governing the Community competition law enforcement procedure, has been under discussion for some time.

Of these various reform proposals, this Essay concentrates on those regarding reform of the procedures for enforcing competition law. There have, over the years, been many criticisms made of the present rules of procedure for enforcing EC compe-

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

5. In an area of law that is as dynamic as competition law, to have a regulation remain unchanged for more than thirty years is a phenomenon in itself. Dieter Wolf, *EC Competition Law - The Millennium Approaches*, in 1997 *FORDHAM CORP. L. INST.* 365 (Barry Hawk ed., 1998).

6. EUROPEAN COMMISSION, XXVIITH REPORT ON COMPETITION POLICY 1996 at 24-25, 66 (1997) [hereinafter COMMISSION, XXVIITH REPORT].

7. European Commission, Green Paper on Vertical Restraints in EC Competition Policy, COM (96) 721 Final (Jan. 1997) [hereinafter Green Paper].

8. See Commission Communication, O.J. C 365/3 (1998) (from Commission on application of EC competition rules to vertical restraints) [hereinafter Follow-up to the Green Paper on Vertical Restraints]; see also Commission Proposal, O.J. C 365/27 (1998) (for Council Regulation (EC) amending Regulation 19/65/EEC concerning application of Article 85(3) of Treaty to certain categories of agreements and concerted practices).

9. COMMISSION, XXVIITH REPORT, *supra* note 6.

10. See Commission Proposal, O.J. C 116/13 (1998) (for Council Regulation (EC) laying down detailed rules for application of Article 93 of EC Treaty); see also Opinion of the Economic and Social Committee, O.J. C 284/10 (1998).

11. Commission Regulation No. 2842/98, O.J. L 354/18 (1998) (on hearing of parties with certain proceedings under Articles 85 and 86 of EC Treaty).

tion law.¹² While such criticisms have not gone unnoticed, the reforms introduced to date have all been cosmetic in the sense that they have left the basic procedural framework provided for in Regulation 17 untouched. Increasingly, however, it is being recognized that if the problems inherent in the current system are to be fully addressed, some degree of structural change is needed with respect to Regulation 17 itself.

The protection of free competition within the Community has always been considered one of the fundamental principles of Community law. In order to put this principle into practice, having a system of rules that guarantee an effective enforcement procedure is of fundamental importance. Therefore, the significance of the procedural framework for the enforcement of competition policy cannot be overestimated.

This Essay addresses the reform of Regulation 17 from a practitioner's point of view. It is submitted that the quality of any rules of procedure depends on the extent to which such rules are able to fulfill three basic objectives. First, the enforcement of the competition rules should be as fast, as efficient, and as cost-effective as possible. Second, the procedures in place should be transparent and should offer a sufficient degree of legal certainty. Finally, there should be adequate procedural guarantees in place to protect the rights of all the parties involved. The current situation and the various proposals put forward for reforming Regulation 17 must therefore be considered in light of these three objectives.

This Essay first describes the shortfalls of the current enforcement regime under Regulation 17 and the practical problems that undertakings experience in enforcement proceedings. It then discusses the suggestions for reform of Regulation 17. Finally, this Essay illustrates that although amendments and changes to the current procedural rules could solve some of

12. See, e.g., SELECT COMMITTEE ON THE EUROPEAN COMMUNITIES, FIRST REPORT, *supra* note 1; Alan J. Riley, *Competition Procedures Re-evaluated: The House of Lords Report*, 15 EUR. COMPETITION L. REV. 247 (1997); Claus-Dieter Ehlermann, *Zukünftige Entwicklungen des Europäischen Wettbewerbsrechts*, 1994 EUZW 647; Wernhard Möschel, *Reform des europäischen und des deutschen Kartellrechts*, 1995 EWS 249; Frank Montag, *The Case for a Radical Reform of the Infringement Procedure Under Regulation 17*, 17 EUR. COMPETITION L. REV. 428 (1996); Matthew Levitt, *Access to the File: The Commission's Administrative Procedures in Cases Under Articles 85 and 86*, 34 COMMON MKT. L. REV. 1413 (1997); C.S. Kerse, *The Complainant in Competition Cases: A Progress Report*, 34 COMMON MKT. L. REV. 213 (1997).

the problems undertakings are facing in competition proceedings today, in order to address these problems effectively, changes to the underlying institutional system will be necessary.

I. *THE NEED FOR REFORM*

The need for reform of the current enforcement procedure has become apparent during the past thirty-five years of the application of Regulation 17. It is useful to provide a short summary of the problems that have come to light with respect to the Commission's practice. In assessing these problems, a general distinction must be drawn between the two different procedures covered by Regulation 17: the infringement procedure, which is the procedure leading to a finding that Article 85 or 86 have been infringed and ultimately to the imposition of fines, and the notification procedure, which is the procedure applicable when undertakings request negative clearance or an exemption from the application of Article 85(2) for their commercial agreements.

As far as the infringement procedure is concerned, many companies feel that the current regime does not sufficiently guarantee their procedural rights. The duration of proceedings before the Commission has often been criticized as well and has even lead to judicial proceedings before the Court of First Instance and the European Court of Justice. Taken together, these factors have led to a general lack of acceptance of Commission Decisions in infringement procedures. With respect to the notification procedure provided for by Regulation 17, this Essay illustrates that the major problem that companies are encountering today is a lack of legal certainty caused by the enormous number of agreements notified to the Commission for an individual exemption. The Commission is no longer able to deal properly with these cases and has, therefore, been engaging in the more than doubtful practice of sending comfort letters to the parties that the Commission itself does not consider legally binding.

A. *Infringement Procedure*

The shortfalls of the current rules governing the infringement procedure and the problems that arise from them in practice for undertakings have already been described by the author

in greater detail elsewhere.¹³ The following assessment recalls the most important issues.

Antitrust infringement procedures under Regulation 17 can lead to the imposition of substantial fines. Article 15 of Regulation 17 allows fines of up to ten percent of the turnover of each of the undertakings participating in the infringement.¹⁴ A procedure leading to such serious sanctions must provide for the full observance of fundamental principles of law designed to protect the individual subject to the procedure. These include the principle of *in dubio pro reo* as well as the fundamental rights of defense, such as the right to be heard and the right to access the Commission's file. The existing procedural rules laid down by Regulation 17 do not sufficiently ensure that these principles are respected.

Under antitrust infringement procedures, undertakings are frequently given the impression that their defenses have not been heard because the wording of the Commission's final decisions is often almost identical to the wording of the Commission's statements of objections. This practice raises serious doubts as to the practical value of the parties' rights of defense in proceedings before the Commission. Although the undertakings have a right to an oral hearing before an independent hearing officer, practice has shown that it is extremely difficult for the hearing officer to influence the position of the case handlers within Directorate General ("DG") IV.¹⁵ It appears similarly difficult to influence the Commission's decision by submitting written answers to the statement of objections. Again, practice shows that the Commission rarely changes its position during the course of the administrative procedure.

It is submitted that this practice effectively undermines the fundamental principle of *in dubio pro reo* throughout the in-

13. See Montag, *supra* note 12.

14. For the calculation of fines, see European Commission ("Commission") Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No. 17 and Article 65(5) of the Treaty establishing the European Coal and Steel Community ("ECSC Treaty"). O.J. C 9/3 (1998) (Commission Guidelines).

15. See Hartmut Johannes, *Erfahrungen eines Anhörungsbeauftragten, in EUROPARECHT, KARTELLRECHT, WIRTSCHAFTSRECHT, FESTSCHRIFT FÜR ARVED DERINGER* 293 (Everling et al. eds., 1993); Marc Van der Woude, *Hearing Officers and EC Antitrust Procedures: The Art of Making Subjective Procedures More Objective*, 33 COMMON MKT. L. REV. 531 (1996).

fringement proceeding.¹⁶ It appears that the fundamental reason for this problem may be the fact that the Commission officials handling infringement cases function both as investigators and as those responsible for drafting the final decision. Being responsible for the case from the beginning of the investigation until the drafting of the final decision imposing fines would appear to make any Commission official less open to the defenses put forth by the undertakings. As a result, the burden of proof in the administrative proceeding is practically reversed.

Moreover, the present procedural framework does not sufficiently safeguard an undertaking's right to be heard and, in particular, its right of access to the Commission's file. Regulation 17 does not include any provisions on the right of access to such files. It has taken years of judicial proceedings before the European courts for this fundamental right to be fully enforced, the Court of First Instance finally doing so in the *Soda Ash* cases.¹⁷ The exact scope of this right is, however, still unclear.¹⁸ The right of the parties to a hearing is laid down by Articles 19(1) and (2) of Regulation 17.¹⁹ Additional specific provisions concerning the hearing are contained in the recently adopted Regulation 2842/98.²⁰ It is hoped that the recent Commission notice on the internal rules of procedure for processing requests for access to the file,²¹ which the Commission adopted in order to ensure compatibility between its administrative practice and the case law of the Court of Justice, will effectively improve the situa-

16. See Montag, *supra* note 12, at 429-30.

17. See Solvay v. Commission, Case T-30/91, [1995] E.C.R. II-1775, [1996] 5 C.M.L.R. 57; Imperial Chemical Industries v. Commission, Case T-36/91, [1995] E.C.R. II-1847, [1996] C.E.C. (CCH) 137.

18. The Court of First Instance will, however, have the opportunity to further clarify the scope of the undertakings' rights of defense in infringement proceedings in the *Steel Beams* and *Cement* cases that are currently pending before the Court. In both cases the parties have claimed that the Commission's decisions are invalid due to insufficient access to the Commission's files, and in both cases the Court had ordered the Commission to give the parties full access during the court proceedings.

19. Council Regulation No. 17/62, *supra* note 4, art. 19(1), (2), O.J. Eng. Spec. Ed. 1959-62, at 92.

20. Commission Regulation No. 2842/98, *supra* note 11, O.J. L 354/18 (1998); Follow-up to the Green Paper on Vertical Restraints, *supra* note 8, O.J. C 365/3 (1998).

21. Commission Notice, O.J. C 23/3 (1997) (notice on internal rules of procedure for processing requests for access to file in cases pursuant to Articles 85(2) and 86 of EC Treaty, Articles 65 and 66 of ECSC Treaty, and Council Regulation (EEC) No. 4064/890) [hereinafter Commission Notice on the Internal Rules of Procedure for Processing Requests for Access to the File].

tion. These rules have not yet been tested in court, however, and they expressly do not relate to the rights of third parties and complainants in particular.

Finally, another aspect of the enforcement procedure that has been the subject of much criticism is the lengthy duration of antitrust enforcement proceedings. An analysis of decisions adopted by the Commission under Articles 85 and 86 of the EC Treaty shows that on average it took the Commission almost four years to adopt a decision. In some cases, the Commission took as long as nine years and three months,²² seven years and ten months,²³ and six years and six months²⁴ to make decisions. The Commission is not subject to any legal time frames with regard to the investigation and the adoption of a decision in antitrust enforcement proceedings. This factor often leaves the undertakings in a position in which for several years they have no indication whatsoever as to the outcome of the investigations carried out by the Commission. As a result, undertakings have begun to challenge Commission decisions before the Court of First Instance, alleging that proceedings of undue duration are contrary to Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR").²⁵

The Commission's practices with respect to infringement proceedings bring to light several major flaws in the current procedural system, illustrating the need for fundamental reforms. The Court of First Instance has accepted the basic argument that the administrative proceedings before the Commission are subject to the procedural guarantees of Article 6 of the ECHR.²⁶ In *Stichting Certificatie Kraanverhuurbedrijf & Federatie Nederlandse Kraanverhuurbedrijven v. Commission*, however, the court held that the duration of almost four years could not be considered undue

22. Commission Decision No. 92/212/EEC, O.J. L 95/50 (1992) (Eurocheque).

23. Commission Decision No. 92/163/EEC, O.J. L 72/1 (1992) (Tetra Pak II).

24. Commission Decision No. 85/202/EEC, O.J. L 85/1 (1985) (Wood pulp).

25. See *Stichting Certificatie Kraanverhuurbedrijf & Federatie Nederlandse Kraanverhuurbedrijven v. Commission*, Joined Cases T-213/95 & T-18/96, [1997] E.C.R. II-1739. The Court of Justice will have to deal with this issue in *Baustahlgewebe*, Case C-185/95, which is currently pending before the Court. Advocate General Léger, in his opinion of February 3, 1998, took the view that overlong proceedings before the European courts constitute an infringement of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") and that such an infringement gives rise to a claim for damages.

26. See *Stichting Certificatie Kraanverhuurbedrijf*, [1997] E.C.R. at II-1764.

because the duration of each individual stage of the proceedings had not been excessively long.

Taken together, these shortfalls in the current procedural system have led to a lack of acceptance of the Commission's decisions in infringement proceedings. Only a small number have remained unchallenged, whereas the large majority of decisions have been challenged by the parties before the European courts.²⁷

B. *Notification Procedure*

Under Article 85, all agreements including provisions that are restrictive of competition are in principle unenforceable and must be notified to the Commission for an individual exemption in order to be legally valid. As only a small number of agreements are covered by the block exemptions adopted by the Commission, there are an enormous number of cases pending before the Commission.²⁸ Due to the Commission's limited resources, it is practically impossible for it to deal with all these notifications in the way prescribed by Regulation 17. As a result, the Commission adopted its practice of issuing so-called "comfort letters" instead of formal exemption decisions. Comfort letters are issued by DG IV itself, unlike formal decisions, which must be approved by the entire Commission. The contents of comfort letters vary on a case-by-case basis. There are both "negative clearance" comfort letters sent if the notified agreement does not fall within Article 85(1) and "exemption" comfort letters sent if the agreement merits an individual exemption. Comfort letters contain very limited reasoning in some cases, but more often do not provide any reasoning at all. In general, the Commission merely states that at the time that the comfort letter is issued it does not see any reason to intervene against the respective agreement and will therefore close the file. The Commis-

27. See Montag, *supra* note 12, at 430-32 (setting forth list of cases).

28. In 1997 alone, the Commission opened 499 new cases under Articles 85 and 86, of which 221 were notifications. In 1996, there were 447 new cases, of which 206 were notifications and in 1995, of 521 new cases, 360 were notifications of agreements under Article 85. The Commission is, however, still dealing with a considerable backlog of cases. The overall number of Article 85 and 86 cases—including infringement procedures—pending before the Commission in 1997 was 1262. The Commission closed as many as 517 cases in 1997, out of which only 27 were closed by a formal decision. See COMMISSION, XXVIITH REPORT, *supra* note 6, at 38-40.

sion reserves the right to change this view and may open proceedings at any time.

Comfort letters are not published and are only served on the notifying parties. In most cases, the Commission merely publishes a very short so-called "Carlsberg Notice"²⁹ in the C series of the Official Journal of the European Communities ("O.J."), which identifies, in a few words, the activities pursued and requests comments. This way of proceeding offers the least degree of publicity to the undertakings involved. In more complex cases, the Commission tends to publish more detailed notices in the C series of the O.J., describing the agreement in question in more detail than foreseen by Article 19(3) of Regulation 17. Comfort letters following such a detailed publication have been termed "qualified comfort letters." Moreover, some comfort letters receive even greater publicity through press releases. None of these publications will, however, change the nature of the comfort letter. A comfort letter is an informal administrative letter, not binding upon the national courts or the Commission. Thus, in general, comfort letters leave the parties with an entire lack of legal certainty, a fact that makes undertakings feel increasingly uncomfortable.³⁰

Although in principle the parties may demand a formal decision rather than being content with a comfort letter, this choice remains merely theoretical for two reasons. First, due to the enormous backlog of cases it is unlikely that the parties will receive a formal decision from the Commission in under two or three years. There have even been cases where parties notified agreements as long as fifteen years ago without ever receiving a clearance decision to date. Second, there are even cases in which the Commission, despite the fact that the parties insisted

29. These short form notices are named after the *Carlsberg-Tetley* case in which the Commission first adopted this practice. See Commission Notice, O.J. C 97/21 (1992) [hereinafter *Carlsberg-Tetley*].

30. Luis Ortiz Blanco takes the view that "in practice most notifying parties are happy with comfort letters: around ninety percent of them reply in the affirmative to the question on Form A/B asking whether they would agree to a comfort letter." LUIS ORTIZ BLANCO, EC COMPETITION PROCEDURE 269 (1996). The mere fact that most undertakings agree to close the proceedings with a comfort letter, however, does not prove that undertakings feel comfortable with this practice. The primary reason for agreeing to a comfort letter rather than insisting on a formal decision is the time factor: undertakings prefer to have a, albeit non-binding, resolution in the foreseeable future rather than waiting years for a formal decision.

on a formal decision in their application form, still only sent them a comfort letter and flatly refused to issue a formal decision.

This situation leaves undertakings with a lack of legal certainty as to the compatibility of their agreements with EC competition law. The Commission is not entirely unaware of these problems, and in 1992 it adopted an internal guideline providing that in the case of a notification of a structural co-operative joint venture falling under Article 85, the parties should receive a first indication of the Commission's position within two months following the notification.³¹ Thus, the Commission recognized undertakings' need for a timely decision and for a sufficient degree of legal certainty in cases involving significant investments. Following the recent reform of the MCR, however, all structural joint ventures, such as full function joint ventures, must be notified according to the procedural rules of the MCR and therefore no longer fall under the procedure provided for by Regulation 17. The Commission has recently indicated that it intends to apply time limits for an initial review to other notifications under Regulation 17 as well. In practice, however, the Commission often takes considerably longer than two months before issuing either a comfort letter or a warning letter.

Receiving a mere indication of the Commission's view and a subsequent comfort letter within a relatively short period of time may solve the time problem. It does not, however, solve the problem of legal certainty. Undertakings are still faced with the fact that they will not be able to receive a formal decision within an acceptable time. Unlike the MCR under which the Commission must issue a formal clearance decision after five months at the latest, undertakings planning a transaction that does not fall within the scope of the MCR, but under Article 85 are forced to build their investment on comfort letters if they do not want to postpone the transaction for years while waiting for a formal decision from the Commission. Undertakings are thus left with the choice of either postponing a project for an indefinite time or running the risk of going ahead on the basis of a comfort letter that the Commission might renounce as soon as complaints

31. See Commission Press Release IP/92/1111 (Dec. 12, 1992); see also C.S. KERSE, *EC ANTITRUST PROCEDURE* 2.28 (1994) (providing for detailed assessment of Commission's practice).

from competitors or customers become known.³²

II. PROPOSALS FOR REFORM

Practitioners have put forward a number of different proposals for reforming the present enforcement procedure of EC competition law under Regulation 17. The following part first discusses suggestions put forward for amendments and improvements to the existing procedure under Regulation 17. It then turns to the more radical proposals suggesting modifications to the existing institutional structure. These proposals may, therefore, be characterized as "institutional reforms."

A. *Non-institutional Reforms*

The proposals for non-institutional reforms of Regulation 17 may again be divided into reforms concerning the infringement procedure and reforms concerning the notification procedure.

1. Infringement Procedure

As has been illustrated above, the major shortfalls in the way that infringement proceedings are currently carried out by the Commission are the insufficient guarantee of the undertakings' rights of defense and the undue duration of the proceedings. In order to remedy these defects, the following procedural reforms have been suggested.

a. Strengthening the Rights of Defense

In order to improve the position of undertakings in infringement proceedings and to ensure that their procedural rights are respected by the Commission, it is important to have clear guidelines on rights of access to the file. As already mentioned, the Court of First Instance acknowledged an undertaking's right of access to the Commission's files in the *Soda Ash*

32. Ortiz Blanco argues that the Commission considers comfort letters as having almost the same status as formal decisions and that, in the Commission's view, a case could not be reopened at any later stage. ORTIZ BLANCO, *supra* note 30, at 272. Practical experience has proved this to be an overly-optimistic view. In fact, there have been several instances in which the Commission reopened cases in which comfort letters were issued following complaints by competitors and then demanded that amendments be made to the agreement in question.

cases.³³ In these cases, the court held that the undertakings must be granted access to all documents that could potentially be exculpatory and that the decision regarding which documents are exculpatory could not be left to the Commission. Although the general principle has, therefore, been established, the *Soda Ash* rulings still leave open a large number of questions regarding the precise scope of the right of access to the file, including the question of who should have this right and at what stage of the proceedings. Following the *Soda Ash* rulings, the Commission adopted internal rules of procedure for processing requests for access to the file.³⁴ These guidelines are, however, not legally binding and do not create individual rights for the undertakings involved. A suggestion has therefore been made to set forth provisions concerning the right of access to the file directly in Regulation 17 or in a separate regulation. Such an amendment would provide the undertakings with legal certainty as to the scope of their rights of defense and would also put more pressure on the Commission to respect these rights strictly.

In order to tackle the problem of the lack of objectivity in antitrust procedures before the Commission, the nomination of an independent hearing officer responsible for proper conduct of the Commission's oral hearing was introduced by the Commission in 1982.³⁵ In 1994 the role of the hearing officer was further extended when he was granted the power to decide who is to be heard orally and whether third parties should be heard, as well as the power to fix the deadlines for written replies under Article 11 of Regulation 99/63.³⁶ In order to cope with these increased responsibilities it will, however, be necessary to appoint more than just one hearing officer, as is the current practice of the Commission.

Until February 1, 1999, the right of undertakings to be

33. See *Solvay SA v. Commission*, Case T-30/91, [1995] E.C.R. II-1775, [1996] 5 C.M.L.R. 57; *Imperial Chem. Indus. v. Commission*, Case T-36/91, [1995] E.C.R. II-1847, [1996] C.E.C. (CCH) 137.

34. Commission Notice on Internal Rules of Procedure for Processing Requests for Access to the File, O.J. C 23/3, at 3 (1997).

35. COMMISSION OF THE EUROPEAN COMMUNITIES, TWELFTH REPORT ON COMPETITION POLICY 1981, at 36-37 (1982).

36. Commission Decision No. 94/810/ECSC, EC, O.J. L 330/67 (1994) (decision regarding terms of reference of hearing officers in competition procedures before Commission).

heard was further elaborated on by Regulation 99/63.³⁷ Regulation 99/63 confirmed companies' right to be heard prior to the Commission adopting a decision against them. It also provided for the conditions under which a company could request an oral hearing, for example if such company showed sufficient interest or if the Commission intended to impose a fine upon the undertaking in question.³⁸ Furthermore, Regulation 99/63 laid down the procedure for hearings to be carried out by the Commission³⁹ and gave the Commission the right to set time limits for the parties' submissions.⁴⁰ In the transport sector, specific procedural rules on hearings used to exist.⁴¹

The Commission recently adopted a revised regulation on hearings in procedures under Articles 85 and 86 of the EC Treaty.⁴² Regulation 2842/98, which entered into effect on February 1, 1999 and which replaces Regulation 99/63, Regulation 1630/69, section II of Regulation 4260/88, and section II of 4261/88, provides for a uniform procedure for hearings in all cases involving Articles 85 and 86. This regulation distinguishes between hearings of parties who received a statement of objections, hearings of notifying parties and complainants, and hearings of other third parties. No such clear distinction was drawn in Regulation 99/63. Regulation 2842/98 does not bring about any fundamental changes to the rules under Regulation 99/63. The rights of third parties, in particular of complainants, however, are clarified. Whereas Regulation 99/63 did not expressly refer to complainants, Regulation 2842/98 provides that the Commission has to send them a copy of the statement of objections and set a time limit for their comments.⁴³ Moreover, if a complainant so requests, the Commission may then give him the right to take part in an oral hearing and to state his arguments there.⁴⁴ This clarification will certainly strengthen the position

37. Council Regulation No. 99/63, 127 J.O. 2268 (1963), O.J. Eng. Spec. Ed. 1963-64, at 47.

38. *Id.* art. 7, O.J. Eng. Spec. Ed. 1963-64, at 48.

39. *Id.* arts. 8-10, O.J. Eng. Spec. Ed. 1963-64, at 48.

40. *Id.* arts. 2, 5, 6, 11, O.J. Eng. Spec. Ed. 1963-64, at 47-49.

41. Commission Regulation No. 1630/69, 209 J.O. 11 (1969), O.J. Eng. Spec. Ed. 1969, at 381; Commission Regulation No. 4260/88, O.J. L 376/1 (1988); Commission Regulation No. 4261/88, O.J. L 376/10 (1988).

42. Commission Regulation No. 2842/98, O.J. L 354/18 (1998).

43. *Id.* art. 7, O.J. L 354/18, at 20 (1998).

44. *Id.* art. 8, O.J. L 354/18, at 20 (1998).

of complainants in infringement proceedings.

Regulation 2842/98 also includes some changes to the existing rules, however, that will work to the detriment of undertakings involved in proceedings under Articles 85 and 86. For example, Regulation 2842/98 replaces written minutes taken of oral hearings with a mere recording of such hearings.⁴⁵ This reform was apparently introduced in order to speed up proceedings, as the drafting of written protocols usually takes about six weeks. It is doubtful, however, that the introduction of tape recordings will indeed significantly speed up the infringement proceedings. Instead, there will be no written document on the file to which either the Commission officials or the undertakings involved can have access. The undertakings' oral arguments will, therefore, no longer be included in the file in writing. This loss of certainty does not seem to be outweighed by the time that may be saved by abandoning written protocols. Moreover, Regulation 2842/98 provides that the Commission is under no obligation to take into consideration statements that the parties submitted after the expiration of the time limit set by the Commission for written answers to the statement of objections.⁴⁶ This approach constitutes a significant change, as compared to the former rules under Regulation 99/63, which did not include any indication that the time limit for answers to the statement of objections was a preclusive period.

Finally, Regulation 2842/98 does not address the issue of interim measures. In its judgment in *Camera Care*,⁴⁷ the Court of Justice recognized the Commission's authority to adopt interim measures, and the Commission subsequently adopted a practice note on how it intended to make use of this competence. To date, there are, however, still no formal rules of procedure covering interim measures by the Commission. It would be very desirable from a business point of view to have such rules, in particular with regard to time limits for the adoption of interim measures by the Commission. Such time limits should have been included in the revised Regulation 2842/98. Practitioners have raised this point in their comments to the draft proposal for a

45. *Id.* art. 12(4), O.J. L 354/18, at 21 (1998).

46. *Id.* art. 4(1), O.J. L 354/18, at 20 (1998).

47. *Camera Care Limited v. Commission*, Case 792/79, [1980] E.C.R. 119, [1980] 1 C.M.L.R. 334.

reform of Regulation 99/63. It is regrettable that the Commission did not recognize the practical need for such an amendment.

b. Duration of the Proceedings

Tackling the problem of the undue duration of infringement proceedings before the Commission poses an even more difficult quandary. It is impossible to provide for fixed timetables, at least in the first phase of the infringement proceedings such as the investigatory phase. The time that a proper investigation of a case requires depends on various factors such as the complexity of the case, the number of undertakings involved, the accessibility of information, etc. It is, therefore, impossible to judge the necessary time in advance and to place a certain time limit on an investigation. Only after the investigation itself has been completed and the statement of objections has been served on the parties, could certain time limits be introduced. Time limits could, for example, be set for the parties' answers to the statement of objections and for the Commission's final decision after receiving all comments from the parties. Such deadlines for the parties already exist, however, and are fixed by the Commission in the statement of objections. All in all, it is rather doubtful that the infringement procedure could indeed be significantly sped up by introducing time limits.

c. Restructuring within DG IV

A solution that might at least partly solve the existing problem of lack of objectivity would be a restructuring of DG IV by separating the investigation activities from the decision-making process. This separation would provide a clearer distinction between the two stages of infringement proceedings with, in the first stage, one administrative level carrying out investigations and drafting the statement of objections and, in the second stage, another administrative level drafting the first decision to be adopted by the College of Commissioners.

After the first stage, the case would be transferred to another administrative unit independent from the one that carried out the first stage of the proceedings. At the second stage, the respective officials would have to evaluate the evidence collected in the first stage and the statements given by the parties in re-

sponse to the statement of objections. This second administrative unit should ideally be unbiased as to the result of the investigations carried out by the first level and should approach the case as objectively as possible.

There are, however, a number of deficiencies in this reform proposal. First, it would require a significant increase in personnel within DG IV and would thus practically double the administrative expenditure for dealing with a case. Second, it is not unlikely that the duration of proceedings would be prolonged because of the involvement of two separate groups of officials. As both must study the case intensively, the overall time required for dealing with the case would most certainly increase.

Thus, although offering a relatively easy way of introducing more objectivity to the proceedings, a mere internal restructuring within DG IV would thus not ultimately provide a satisfactory solution for the fundamental defects in the infringement procedure.

It should be mentioned that following a recent internal restructuring within DG IV, a new unit exclusively in charge of cartel investigations has now been formed.⁴⁸ By contrast, under the previous internal structuring of DG IV, each unit—other than the Merger Task Force, which is exclusively dealing with the application of the MCR—was allocated a certain industry sector and was in charge of all infringement and notification proceedings concerning that sector. Whether the new “Cartel Task Force” will be able to handle infringement procedures more quickly and more efficiently remains to be seen. It will certainly not be able to solve the lack of objectivity of the proceedings.

2. Notification Procedure

Any reform of Regulation 17 with regard to the notification procedure would have to attempt to provide a greater degree of legal certainty for the parties and to speed up the proceedings in cases where a notification to the Commission is necessary.

a. Reducing the Notification Requirements

As discussed above, most of the problems that undertakings encounter today with the notification procedure under Regula-

48. Commission Press Release, IP/98/1060 (Dec. 3, 1998).

tion 17 stem from the fact that an excessively large number of agreements fall within the ambit of Article 85, as defined by the case law of the Court of Justice, and must, therefore, be notified to the Commission for an individual exemption in order to be legally valid. The only cases in which a notification is not necessary are agreements that are covered by one of the Commission's block exemptions or those that do not have any significant influence on competition within the Community and, therefore, fall under the *de minimis* rule. Due to the rather narrow scope of these block exemptions and the large number of conditions that an agreement must fulfill in order to benefit from the block exemption, however, very few agreements are clearly caught. In many cases, undertakings would rather notify an agreement in order to avoid the risk that it might not be covered by the block exemption.

Such notification is all the more important because the Court of Justice takes the view that the entire agreement will be considered invalid under Article 85(2)—even if only one clause contained therein infringes Article 85(1)—if that clause cannot be separated from the rest of the agreement without the agreement losing its commercial sense.⁴⁹

Undertakings not notifying an agreement, therefore, not only run the risk of partial invalidity of the clauses infringing Article 85(1), but also face the possible consequence of their entire agreement being void.

i. The Commission Proposal for Vertical Restraints

In order to reduce the number of cases in which a notification is necessary, suggestions have been put forward ranging from a general abolition of the notification requirement in favor of an interventionist approach, to the less radical approach of adopting broader block exemptions covering a larger number of agreements than the existing block exemptions. In 1997, the Commission opened a debate on the reform of the current notification system with regard to vertical agreements.⁵⁰ In its Green

49. See, e.g., *Etablissements Consten & Grundig Verkaufs GmbH v. Commission*, Joined Cases 56, 58/64, [1966] E.C.R. 299, 310, [1966] 5 C.M.L.R. 418, 475; *Société Technique Minière v. Maschinenbau Ulm*, Case 56/65, [1966] E.C.R. 235, 245, [1966] 5 C.M.L.R. 357, 376; *Stergios Delimitis v. Henninger Bräu AG*, Case C-234/89, [1991] E.C.R. I-935, I-990, [1992] 5 C.M.L.R. 210, 250.

50. Green Paper, *supra* note 7, COM (96) 721 Final.

Paper, the Commission listed various options for dealing with vertical restraints in the future. After reviewing the written submissions that the Commission received on the Green Paper, it has now put forward a proposal for dealing with vertical restraints in the future. The proposal includes both a new broad block exemption for vertical agreements and amendments to Regulation 17.⁵¹

The Commission suggests adopting a broad block exemption for vertical agreements covering not only goods for resale, but also intermediate goods and goods undergoing transformation, as well as services. The Commission also intends largely to replace the present white list approach—which lists all clauses that are exempted with the consequence that everything else is not exempted—with a black list approach. The Commission considers that this approach will give companies more legal security than the present narrow clause-based block exemption approach.⁵² Moreover, the Commission intends to introduce a market share cap above which undertakings would no longer benefit from the block exemption. The present suggestions are to introduce either a one-threshold-system, where the threshold would lie between the range of twenty-five to thirty-five percent market share, and thus clearly below what is usually perceived as the level of dominance, or a two-threshold-system where the first and main market share threshold would be around twenty percent. Above the twenty percent threshold, there would be room to exempt certain vertical restraints up to a higher level of around forty percent.⁵³

The Commission intends to combine this broad block exemption with an amendment to Regulation 17, providing for the possibility of retroactive exemptions for vertical restraints. Under the present system, Commission decisions pursuant to Article 85(3), in general, cannot take effect earlier than the date of notification.⁵⁴ Only in cases covered by Article 4(2) of Regulation 17, such as cases in which undertakings are not under an

51. See Follow-up to the Green Paper on Vertical Restraints, *supra* note 8, O.J. C 365/3 (1998); Commission Proposal, *supra* note 8, O.J. C 365/27 (1998).

52. Follow-up to the Green Paper on Vertical Restraints, *supra* note 8, O.J. C 365/3 (1998).

53. *Id.* at 19.

54. Council Regulation No. 17/62, *supra* note 4, art. 6(1), O.J. Eng. Spec. Ed. 1959-62, at 87.

obligation to notify the respective agreement to the Commission, can the Commission grant a retroactive exemption taking effect as of the date the agreement was entered into if the parties decide to notify.⁵⁵ In its follow-up paper to the Green Paper on vertical restraints ("follow-up paper"), the Commission suggests extending Article 4(2) of Regulation 17 to all vertical restraints, thus enabling it to grant retroactive exemptions to vertical agreements not falling under the broad block exemption.

ii. Further Proposals for Reform

Although the Commission's follow-up paper has, in general, been perceived favorably by practitioners, the proposals put forward therein may not be sufficient to solve the major procedural problems undertakings are facing in notification proceedings today.

First, it is doubtful whether the suggestions put forward by the Commission will, in practice, indeed lead to greater legal certainty for undertakings. The introduction of a market share cap as the decisive factor in deciding whether a vertical agreement falls within the block exemption will result in great practical difficulties for undertakings. The definition of the relevant market and the calculation of the market shares of the parties involved in that market are difficult and often involve complex economic assessments. As any practitioner of competition law is aware, the issue of defining the relevant product market and geographic market is one of the most difficult and often unreliable exercises of competition law. Although the recent Commission notice on the definition of the relevant market⁵⁶ provides some guidelines as to the method of defining markets, in practice it does not make this assessment any more reliable for the undertakings. The new block exemption for vertical agreements would, therefore, leave undertakings with the problem that each time they would try to establish whether a certain agreement must be notified to the Commission, they would have to carry out a complex market analysis before arriving at a conclusion that, in any event, would be dependent on economic factors rather than on a legal assessment.

55. *Id.* art. 6(2), O.J. Eng. Spec. Ed. 1959-62, at 87.

56. Commission Notice, O.J. C 372/5 (1997) (notice on definition of relevant market for purposes of Community competition law).

The possibility of retroactive exemptions under Articles 4(2) and 6(2) of Regulation 17 for all vertical agreements not falling within the block exception will mitigate some of the legal uncertainty resulting from the market share caps in the block exemption. Retroactive exemptions will relieve companies of the obligation to notify in advance in order to obtain the benefit of an individual exemption *ex tunc*. The companies will not run the risk of having operated under a void agreement if a notification is handed in at a later stage. Thus, if a company makes a mistake in assessing its market share and decides not to notify an agreement to the Commission although the market share caps provided for in the block exemption are exceeded, that company can still benefit from an exemption taking effect as of the effective date of the agreement even if it were to notify the agreement at a later stage.

The possibility of a retroactive exemption should, however, not be limited to cases where undertakings made an error in assessing their market shares, such as where the agreement in question would fall within the block exemption were it not for the market share cap. The follow-up paper leaves some uncertainty as to this point by referring frequently to possible errors in the parties' assessments of their market shares. Retroactive exemptions should be available for all vertical restraints and the parties should not be under any obligation to explain why the agreement was not notified immediately after signature.

The possibility of retroactive exemptions will have to be taken into consideration by national courts through litigation. National courts will need to suspend the proceedings and wait for the Commission's decision even where a notification is submitted after the agreement has entered into force. Because notifications may, therefore, frequently occur when litigation in national courts has already arisen, it would be desirable for the Commission to deal with such cases in an appropriate time frame in order not to disrupt the proceedings at the national level. One method of solving this problem could be a form of opposition procedure that would lead to an automatic exemption if no action is taken by the Commission within a certain time limit. Such opposition procedures already exist today under some block exemptions, such as Regulation 240/96 on

technology transfer agreements.⁵⁷ The rules for such a procedure would have to be provided for in the proposed block exemption for vertical restraints.

b. Fixed Timetable for Decisions

In order to solve the problem of the excessive length of time that it currently takes for the Commission to adopt a formal decision in the notification procedure, it has been suggested that a timetable be introduced for the decision modeled on the provisions of the MCR. The practice of the Merger Task Force has indicated that it is possible to carry out a proper investigation of a notified agreement within one month in order to establish whether the agreement needs to be reviewed more closely or whether no serious competition law issues arise. There appears to be no valid reason why the Commission should not be able to perform a similar assessment with regard to Article 85 cases within a comparably short time.

According to its internal guidelines, the Commission will usually endeavor to perform a first assessment of the case within two months of the date of notification. After this period, undertakings should receive a first indication as to whether the Commission sees any serious competition law concerns. In practice, however, this internal rule is not always observed and the first assessment often takes considerably longer than two months. It would, therefore, be preferable to have a fixed timetable as provided for by the MCR.

After completing an initial review within a period of two months, the Commission would have either to issue a clearance decision or to serve a warning letter on the notifying parties, thereby indicating that it will enter into a closer examination of the case. The Commission should then have a sufficiently generous time limit for reviewing the more complex and problematic cases for which a warning letter has been issued. This period of time should be comparable to the duration of the second stage investigation under the MCR. It is interesting to note, in this context, that in the Commission's recent notice on the application of the competition rules to access agreements in the tele-

57. Commission Regulation No. 240/96, art. 4, O.J. L 31/2, at 9 (1996) (regarding application of Article 85(3) of EC Treaty to certain categories of technology transfer agreements).

communications sector,⁵⁸ the Commission takes the view that an access dispute before a national regulatory authority (or "regulatory authority") should be resolved within a reasonable period of time, normally not extending beyond six months of the matter first being brought to the attention of the regulatory authority. If this time limit is considered essential for an effective enforcement of competition law by national authorities, then there is no reason why this should not be true for decisions to be taken by the Commission itself.

c. Decentralization

The issue of decentralizing the power to apply Article 85(3) to national competition authorities (or "national authorities") has been under discussion for a long time. It has been argued that the burden on the Commission could be reduced and that the principle of subsidiarity could be put into effect if the national competition authorities were given the power to grant individual exemptions under Article 85(3) at least for a limited number of cases.⁵⁹ So far, the Commission itself has been very skeptical and, therefore, hesitant to adopt this approach.

In its recent follow-up paper to the Green Paper on vertical restraints, the Commission for the first time suggested an albeit very limited degree of decentralization of its powers under Article 85(3) to national competition authorities. Under the new block exemption for vertical restraints, national authorities would be granted the power to withdraw the benefit of the exemption under the regulation for their territories only if the conditions of Article 85(3) are no longer met.⁶⁰ If this proposal is enacted, the national authorities will have the task of supervising the application of Community competition law in their territories at least with regard to vertical restraints. It is doubtful that this proposal will significantly reduce the Commission's workload, as it will only include subsequent control of cases falling

58. Commission Notice, O.J. C 265/2 (1998) (notice on application of competition rules to access agreements in telecommunications sector).

59. For a discussion of this issue, see Claus-Dieter Ehlermann, *Implementation of EC Competition Law by National Antitrust Authorities*, 17 *EUR. COMPETITION L. REV.* 88 (1996); Dieter Wolf, *Mit der Verordnung Nr. 17 ins nächste Jahrtausend?*, 1994 *WuW* 289; SELECT COMMITTEE ON THE EUROPEAN COMMUNITIES, FIRST REPORT, *supra* note 1, ¶¶ 133-36.

60. Follow-up to the Green Paper on Vertical Restraints, *supra* note 8, O.J. C 365/3 (1998).

within the block exemption, but will not include decisions on applications for individual exemptions. Moreover, the Commission's proposal may lead to a situation where an agreement still benefits from the block exemption in some Member States while in other Member States the benefit of the exemption has been withdrawn by the local competition authority. The consequence would, therefore, be discrepancies in the legality of one and the same agreement in separate national legal orders and a significant degree of legal uncertainty.

These considerations illustrate that the issue of the Commission sharing powers under Article 85(3) is a complex problem that requires a debate not restricted to the case of vertical restraints, but a more general one. It would, therefore, be preferable for the Commission to approach this issue on a more general basis.

A delegation of the power to apply Article 85(3) and to grant individual exemptions to national authorities would involve serious problems that should not be underestimated. The Commission's role in the application of Community competition law is and has always been to secure the uniform application and development of the law. If the Member State authorities were free to apply Article 85(3) to cases brought before them, a disparity in the interpretation of the criteria for exemption under Article 85(3) would almost certainly be the result. Whereas some national authorities might tend to interpret the conditions for exemptions strictly, others might be tempted to apply them more leniently. It is not unlikely that forum shopping for the most lenient national authority would be the result.

In addition, national authorities in general can only give rulings regarding the territory over which they have jurisdiction. The problem of mutual recognition of exemption decisions adopted by national authorities would thus arise. If so-called "full faith and credit" provisions were to be introduced and decisions taken by a Member States authority were, therefore, automatically valid all over the Community, then the result would most certainly be serious problems of acceptance. It is hard to imagine the German *Bundeskartellamt* recognizing an exemption decision taken by one of the relatively young national competition authorities in the existing Member States. This problem would be further aggravated by the envisaged accession of new Member States.

Another serious problem that national competition authorities would face due to the application of Article 85(3) is the problem of conducting investigations in other Member States. National authorities neither have the legal powers nor the necessary resources to carry out investigations, including sending information requests to companies in other Member States. Only the Commission has the necessary means to investigate cases affecting markets in more than just one Member State. It is, therefore, hard to imagine how a national authority would be able to deal adequately with notifications affecting markets that extend beyond one Member State without the danger of neglecting important aspects of the case.

For these reasons, it is submitted that a decentralization of Article 85(3) powers, if considered at all, should only be considered for cases with a clearly national focus, such as those in which the restrictive effects of the agreement in question are basically restricted to the territory of one Member State. All cases affecting markets in more than one Member State should be the sole responsibility of the Commission. In order to ensure that national authorities do not exceed their powers under Article 85(3), various possible control mechanisms could be put into place. For example, a prioritization system could be put into effect under which the Commission would have the option to decide, at the time of notification, whether it should deal with the case or whether the Member State could carry on with its own investigation. This type of system would place an obligation on the Member State authority to notify the Commission automatically of every Article 85(3) notification that it receives. This procedure would be similar to the procedure provided for by Article 19 of the MCR under which the Commission is obliged to transmit to the national authorities copies of all merger notifications in order to enable them to make requests for referral of cases. In Article 85(3) proceedings, the Commission should then have the power to take jurisdiction over a case if the agreement affects competition in the territory of more than one Member State, it is necessary for the Commission to decide the case in order to safeguard the uniform application of Community law, or the Commission must reconcile conflicting decisions of national competition authorities.

Alternatively, a possible decentralization of Article 85(3) powers might also provide for a priority rule identifying an ex-

haustive list of cases over which the national competition authorities would have exclusive jurisdiction and reserving the remaining cases for Brussels. Such a regime would, however, have the disadvantage of being less flexible and of giving the Commission less opportunity to exercise jurisdiction over cases that could be better dealt with at the Community level.

In view of the serious problems that a decentralization of the power to grant individual exemptions under Article 85(3) would cause, it is doubtful whether there is much room at all for delegating powers under Article 85(3) to national authorities. If such powers were to be reserved for cases affecting the markets in one Member State only, then the number of cases eligible for a decision under Article 85(3) would be significantly reduced. In such cases, it is already doubtful whether competition in the Common Market is affected at all, so there may not even be an infringement of Article 85(1). Extending the national authorities' powers to grant exemptions under Article 85(3) to multinational cases would, however, cause even more serious problems, as shown above.

d. Extending the Powers of the Competition Commissioner

A possible way out of the dilemma caused by the excessive number of cases before the Commission on the one hand, and the rather complex procedure for the adoption of an exemption decision under Article 85(3) on the other hand, might be to delegate the power to adopt formal exemption decisions in clear cut cases to the Competition Commissioner (or "Commissioner") rather than to the entire College of Commissioners. This approach was chosen in the MCR, in which the Commission delegated the power to adopt a clearance decision in the first stage of the proceedings to the Competition Commissioner by way of an internal decision.⁶¹ Only in more complex and difficult cases will the Commission open second stage proceedings, where the final decision is then adopted by the entire College of Commissioners.⁶²

A similar solution may be envisaged for exemption decisions under Regulation 17. The central goal of such a reform must be to facilitate the process of adopting formal decisions in

61. Merger Control Regulation, *supra* note 2, art. 6, O.J. L 257/13, at 19 (1990).

62. *Id.* art. 8, O.J. L 257/13, at 19-20 (1990).

order to render comfort letters superfluous and thus to provide undertakings with more legal certainty.⁶³

Following the example of the Commission's practice under the MCR, the power to adopt an exemption decision under Article 85(3) in clear cut cases could be delegated to the Competition Commissioner. Alternatively, if the Commissioner should find, after an initial review, that the case was not clearly eligible for an exemption, the Commission could decide to investigate the case in more detail and to issue a warning letter. Such a procedure would relieve the Commission as a whole of the obligation to take a decision in every notification case, but would still provide the parties with a final decision that is enforceable in the courts. Such first phase decisions could replace the present comfort letters without putting too much strain on the Commission.

It is questionable whether such a delegation might be possible by way of an internal Commission decision as provided for in Article 11 of the Commission's Rules of Procedure⁶⁴ or whether it would require an amendment to Regulation 17 or possibly even changes to the EC Treaty itself. According to the Court of Justice's case law, which was reflected in the Commission's internal rules of procedure, the Commission may only delegate clearly-defined management or administrative measures to one of its members.⁶⁵ It follows from the European Court of Justice's judgments in *AKZO*,⁶⁶ *PVC*,⁶⁷ and *Commission v. Germany*⁶⁸ that decisions finding a person guilty of an infringement of Community law are subject to the principle of collectivity, whereas merely preparatory, intermediate decisions can be delegated. In *Commission v. Germany*⁶⁹ and *ASPEC*,⁷⁰ the court stressed that

63. See SELECT COMMITTEE ON THE EUROPEAN COMMUNITIES, FIRST REPORT, *supra* note 1, ¶ 120.

64. Commission Decision No. 93/492/EEC, O.J. L 230/15 (1993), amended by Commission Decision No. 95/148/EC, O.J. L 97/82 (1995) (amending rules of procedure) [hereinafter Euratom].

65. Euratom, art. 11, O.J. L 97/82, at 82 (1995).

66. *AKZO Chemie BV v. Commission*, Case 5/85, [1986] E.C.R. 2585, 2614-16 [1985-1986 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,366, at 17,380, 17,385-386.

67. *BASF and Others v. Commission*, Case C-137/92, [1994] E.C.R. I-2555, I-2651-52, [1994] 2 C.E.C. (CCH) 152, 220.

68. *Commission v. Germany*, Case C-191/95 (ECJ Sept. 29, 1998) (not yet reported).

69. *Id.* ¶ 37.

where the adoption of the decision is left to the Commission's discretion and involves a thorough investigation of complex factual and legal questions, there is also no room for a delegation.

The present wording of Article 85(3) leaves the Commission broad discretion as to whether to grant an individual exemption or not.⁷¹ It is therefore doubtful whether exemption decisions under Articles 6, 7, and 8 of Regulation 17 can be delegated to the Competition Commissioner by a merely internal delegation of powers because there would be no clear guidelines as to the cases eligible for a "first phase" decision.⁷²

It would, therefore, seem to be necessary for the Council to adopt a formal change to Regulation 17, providing that in notification procedures the Competition Commissioner can grant an individual exemption under Article 85(3) in certain clearly-defined cases.⁷³ These should include easy and clear cut cases in which there is no room for serious doubt as to the compatibility of the agreement with the criteria listed in Article 85(3), such as cases in which the Commission is left with practically no discretion to grant an exemption, as any other decision would constitute a misuse of powers. Such a delegation of powers would not appear to infringe the principle of collectivity as laid down by Article 163 of the EC Treaty because it would only cover cases in which the Commission's scope of discretion is limited and would also only refer to decisions that are favorable to the undertakings involved.

e. Administrative Fees for Exemption Decisions

The Commission's lack of resources with respect to personnel is frequently put forward as one of the main reasons for the long duration of notification proceedings and the Commission's inability to issue more formal exemption decisions. In order to equip the Commission with the necessary financial means to provide DG IV with more staff, fees for individual exemptions in notification proceedings and possibly also for decisions under the MCR could be introduced. The collection of fees for deci-

70. *ASPEC and Others v. Commission*, Case T-435/93, [1995] E.C.R. II-1281, II-1323-24.

71. The provisions of paragraph 1 *may*, however, be declared inapplicable.

72. See KERSE, *supra* note 31, at 6.46.

73. See SELECT COMMITTEE ON THE EUROPEAN COMMUNITIES, FIRST REPORT, *supra* note 1, ¶¶ 116-18.

sions taken by national competition authorities is a common feature in several Member States including Germany, Ireland, and the United Kingdom.

Provided that they are not excessively high, companies are generally prepared to pay such fees to the competent competition authority if, in turn, they can rely on receiving a formal decision within an acceptable period of time. Having more legal certainty is perceived by companies as being well worth paying an administrative fee.

f. Strengthening the Position of the Parties' Representatives

In notification proceedings, practitioners often encounter the practical problem that under Regulation 17 and Regulation 3385/94 the Commission must serve all documents and decisions on the parties, but there is no obligation to serve them on the parties' representatives. In merger control proceedings, on the other hand, all communications from the Commission are made via the parties' representatives if such representatives have been named by the parties in their notification according to Form CO. Article 1 of Commission Regulation 477/98⁷⁴ provides that notifications can be submitted by representatives who are authorized to transmit and to receive documents on behalf of the notifying parties. Section 1.3 of Form CO accordingly asks for the name and address of one representative to whom all communication shall be directed.⁷⁵ In proceedings under Regulation 17 on the other hand, although Regulation 3385/94 also provides for the possibility of appointing representatives,⁷⁶ Regulation 3385/94 and Form A/B⁷⁷ do not give the parties the opportunity of appointing one representative to whom all communications will be directed. Lawyers are, therefore, frequently faced with the problem that their clients have been contacted by the Commission in writing or via telephone without the lawyer being informed of these contacts. Even if the parties officially appointed a representative in notification proceedings, the

74. Commission Regulation No. 447/98, O.J. L 61/1 (1998) (regarding notifications, time limits, and hearings provided for in Council Regulation (EEC) No. 4064/89 on control of concentrations between undertakings).

75. *Id.* annex, O.J. L 61/1, at 11 (containing Form CO relating to notification of concentration pursuant to Regulation).

76. Commission Regulation No. 3385/94, art. 1, O.J. L 377/28, at 28-29 (1994).

77. *See id.* annex, Form A/B, sec. 1.3, O.J. L 377/28, at 31 (1994).

Commission often does not serve a copy of its final decision or comfort letter to the officially-appointed representative.

This quandary leads to the problem that lawyers are often not aware of the precise amount of information exchanged between the parties and the Commission and that lawyers will often be the last to know that a decision or a comfort letter has been issued. This problem could be solved by putting the parties' representatives in the same position as they are under the MCR and, in particular, under Section 1.3 of Form CO, for instance by providing that if representatives have been appointed by the parties, then all written and oral communication must be directed to those representatives.

B. *Institutional Reforms*

Although the above suggestions would help cure a number of the problems existing under the current enforcement procedure, they would not solve the fundamental problems undertakings are facing today. In particular, the lack of objectivity in infringement proceedings under the current system could not be remedied by mere procedural reforms. In order to solve these problems effectively more radical institutional reform will be necessary.

1. The Creation of an Independent European Cartel Office

The idea of setting up a European Cartel Office (or "Cartel Office") is not at all new, dating back to the earliest days of the European Economic Community when the idea was first suggested by the German Government.⁷⁸ In subsequent years, the suggestion was made again, as criticism of the Commission's combined functions as prosecutor and judge in antitrust infringement proceedings grew stronger. The case for the creation of an independent competition law enforcement authority was further revived with the introduction of the MCR, which was adopted because it was widely felt that the exercise of merger control should be left to an independent body rather than to a political institution such as the Commission.

78. For a discussion of this proposal, see Claus-Dieter Ehlermann, *Reflections on a European Cartel Office*, 32 COMMON MKT. L. REV. 471 (1995); Ehlermann, *supra* note 12, at 650-52; SELECT COMMITTEE ON THE EUROPEAN COMMUNITIES, FIRST REPORT, *supra* note 1, ¶ 104.

The concept of an independent European Cartel Office was initially modelled after the German Federal Cartel Office, which is an independent administrative body charged with the surveillance of the principle of competition. Meanwhile, independent antitrust authorities have also been established in Belgium, Denmark, Finland, France, Greece, Italy, the Netherlands, Portugal, Spain, and the United Kingdom. According to the proposals put forward,⁷⁹ the scope of jurisdiction of an independent European cartel authority should be restricted to the application of Articles 85 and 86 to private undertakings, leaving to the Commission the public sector, such as the application of Article 90 and the rules on State aids. It has also been suggested that the Cartel Office's decisions should be made subject to an appeal to be lodged with the Commission or the Council.⁸⁰ Again, this proposal is based on the German model. In Germany, decisions by the Federal Cartel Office can be repealed by the Federal Ministry of Economics.

The main reason underlying the proposal for an independent European Cartel Office is the idea that an independent administrative body would be less exposed to political influence exercised by the Commission as a political institution. This problem was, in particular, considered imminent in the field of merger control. It was widely believed that the Commission's decisions in this area would very much be influenced by political rather than strictly competition law considerations. Practice has shown, however, that this fear was largely unfounded and there have been practically no cases where the College of Commissioners adopted a decision against the proposal of the Competition Commissioner. As far as the application of Articles 85 and 86 is concerned, the issue of political influence on the Commission's

79. See Statement of the German Federal Government on the Federal Cartel Office's Reports for 1989-90, Bundestagsdrucksache 12/847, June 26, 1991; Statement of the German Federal Government, in 9 Hauptgutachten der Monopolkommission 1990/91, Bundestagsdrucksache 12/5249, June 24, 1993 [hereinafter Statement of the German Federal Government 1990/91]; Statement of the German Federal Government on the Federal Cartel Office's Reports for 1991-92, Bundestagsdrucksache 12/5200, June 24, 1993 [hereinafter Statement of the German Federal Government 1991-92]; Thomas Groger & Thomas Janicki, *Weiterentwicklung des Europäischen Wettbewerbsrechts*, 1992 WuW 991, 997-98.

80. See Statement of German Federal Government 1990/91, *supra* note 79; Statement of German Federal Government 1991-92, *supra* note 79; Groger & Janicki, *supra* note 79.

decisions has always been less important. Also, there has been no evidence that over the past forty years the Commission was guided by political rather than competitive considerations to a greater extent than any of the national competition authorities.

Rather, it is submitted that the creation of an independent competition authority whose decisions would then be subject to political control by the Commission or by the Council would reinforce the possibilities of exercising political influence in competition cases. Whereas under the present system the Commission is acting as an impartial enforcement authority whose sole task is to apply Community competition law, under a revised system the Commission would be free to take industrial policy considerations into account. Such a system would, therefore, be more likely to lead to political decisions than the present enforcement procedure.

Moreover, the concept of an independent European Cartel Office would not seem to solve the fundamental problems faced by undertakings with regard to the infringement procedure and the notification procedure. The creation of an independent Cartel Office would not strengthen the procedural rights of undertakings in infringement procedures unless new procedural rules were adopted at the same time. It would also not solve the problem that the same administrative body is, at the same time, acting as prosecutor and judge. Furthermore, unless the new Cartel Office were to be equipped with considerably more officials, it would not be able to deal with the existing workload within a shorter time either. Therefore, the idea of a European Cartel Office does not provide a solution for the most important practical problems in competition enforcement proceedings today.

2. Infringement Decision by the Court of First Instance

A solution that would eliminate most of the shortfalls in the infringement procedure would be to reallocate authority between the Commission and the Court of First Instance,⁸¹ giving the Court of First Instance the competence to adopt the decision stating the existence of an infringement and imposing fines upon the undertakings involved. The Commission, in turn,

81. This proposal has been set forth and explained in detail by Montag, *supra* note 12, at 435-36.

would remain responsible for carrying out the investigation and for drafting the statement of objections.

The Commission would be able to concentrate on collecting evidence and conducting the preliminary procedure. Once the statement of objections had been presented to the parties and to the Court of First Instance, the Commission's involvement with the case would end. It would then be up to the Court of First Instance to carry out hearings of the parties and to evaluate the evidence and the arguments presented to it by the Commission and by the parties. The proceedings before the Court of First Instance would end with the adoption of the decision establishing whether an infringement of Community competition law took place and the imposition of fines.

Such a procedure would constitute a truly objective and fair proceeding with two entirely separate legal bodies acting as prosecutor and judge over the case. In the procedure before the Court of First Instance, its general rules of procedure would apply, guaranteeing full respect of the parties' fundamental procedural rights. This would make up for the possibility of some restrictions of procedural rights in the investigatory procedure. The involvement of the Court of First Instance would also solve the problem of the parties' right of access to the file, as the Court of First Instance itself would decide who would be granted access to the file and to what extent.

It is submitted that the involvement of the Court of First Instance would not significantly extend the duration of the overall proceedings. The procedure before the Commission would be significantly shorter than at present because it would end with the issuing of the statement of objections. The review of the case by the Court of First Instance would be made easier than under the current procedure because the Court of First Instance would have the Commission's full file containing all incriminating and exculpatory pieces of evidence. Under the current system, the Court of First Instance only receives those documents referred to in the statement of objections. Proceedings are therefore often unduly prolonged by the Commission's inability to produce certain exculpatory documents from the file upon the Court of First Instance's request.

Although the adoption of a decision by the Court of First Instance would, therefore, necessarily take somewhat longer

than if one and the same authority were to carry out investigations and to adopt the decision, this possibility would be more than outweighed by the fact that the decision was taken by an independent court. Such a decision would be far more acceptable to the undertakings and would in most cases render a further review by a court unnecessary.

Thus, the separation of powers in infringement proceedings between the Commission and the Court of First Instance could effectively solve all of the fundamental downfalls of the present enforcement regime.

III. OUTLOOK AND PERSPECTIVES

After forty years without any substantive changes, it is time for reform of the procedure for the enforcement of Community competition rules. A mere reform of the procedural rules laid down by Regulation 17 will, however, not be enough to solve all of the fundamental problems that undertakings are encountering in enforcement procedures today. Rather, the time has come for an institutional reform creating new competences and dividing competences between existing institutions.

Naturally, the proposals for institutional reforms outlined above would necessitate fundamental changes in the EC Treaty, and one might thus expect chances for such a reform to be rather small. The chances for institutional reforms, in particular with regard to the area of Community competition law and its enforcement by Community authorities, are, however, not as remote as one might expect. At the intergovernmental conference in Amsterdam, the Member States decided to open the Community for further applicants, in particular from Eastern Europe. No institutional changes were adopted, however, in order to prepare such accessions of new Member States. Rather, the Member States adopted a protocol laying down that at least one year before the membership of the European Union exceeds twenty, an intergovernmental conference shall be convened in order to carry out a comprehensive review of the provisions of the EC Treaty on the composition and functioning of the institutions.⁸²

Such a review will be necessary because the present institu-

82. Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Oct. 2, 1997, Protocol on the institutions with the prospect of enlargement of the European Union, O.J. C

tional framework is hardly suited for an enlarged Community comprising more than twenty Member States. It is hard to imagine how the Community institutions could continue to safeguard the application of Community law in even more Member States with even more official languages, taking into account the linguistic problems caused by the recent accessions of Sweden and Finland. It will, therefore, be necessary to approach fundamental institutional reforms in order to ensure that the Community continues to carry out its functions even after the accession of further Member States. It will be in the context of these necessary reforms, as envisaged by the Treaty of Amsterdam,⁸³ that the chance to approach a new institutional concept for the enforcement of Community competition law will arise.

340/1, at 111 (1997) (not yet ratified); *see* Commission Notice, O.J. C 340/111 (1997) (notice on protocol on institutions with prospect of enlargement of European Union).

83. *Id.*, O.J. C 340/1 (1997).