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Abstract

At last year's Fordham Corporate Law Institute, under the heading "The Millennium Approaches," I spoke about the challenges that European Community ("EC" or "Community") competition law is facing or will face in the near future. I came to the conclusion that the time has come for a re-examination and modernization of our rules, in particular the implementing and procedural legislation. I reached this conclusion based upon three reasons.

EC COMPETITION SYSTEM—PROPOSALS FOR REFORM

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INTRODUCTION

At last year's Fordham Corporate Law Institute, under the heading "The Millennium Approaches,"[1] I spoke about the challenges that European Community ("EC" or "Community") competition law is facing or will face in the near future. I came to the conclusion that the time has come for a re-examination and modernization of our rules, in particular the implementing and procedural legislation. I reached this conclusion based upon three reasons.

First, a fundamental change is taking place in the environment in which EC competition law operates. This change is driven not only by developments for which the Community itself has opted, such as the single market and Economic and Monetary Union ("EMU"), but also by conditions that are inevitably imposed on us, such as the pressures of globalization and technological change.

Second, the accession of new Member States in the foreseeable future becomes an ever more real prospect. In March 1998, negotiations for accession were initiated with a first group of six candidate countries (Poland, the Czech Republic, Hungary, Estonia, Slovenia, and Cyprus). A further five countries (Romania, Bulgaria, Slovakia, Latvia, Lithuania) are continuing their preparations with a view to opening accession negotiations at a later stage.[2] Thus, a European Union with more than twenty-five Member States is on the horizon. The first of our two main challenges will be how to bridge the enormous economic gap between old and new Member States and how to avoid market distortions between advanced free-market countries and those com-

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1. Alexander Schaub, *The Millenium Approaches*, 1997 FORDHAM CORP. L. INST. (Barry Hawk ed., 1998).

2. Moreover, Malta has recently revived its application for membership.

pleting their transition to a market economy. The second main challenge is that our institutional and procedural laws, which were designed for a much smaller Community, will have to undergo an overhaul in order to keep the system workable and to allow the integration process to continue.

Third, there are new legal developments inside and outside the Community. The enforcement of competition principles has become more effective in most of the Member States. National competition laws are being set up or being reformed so as to be more efficient. Credible national competition authorities have been established, and there is increasing application of EC competition law not only by national courts, but also by national competition authorities. Moreover, growing interdependence between the European Union and third countries brings us into contact with their competition law and enforcement practice and makes necessary the conclusion of bilateral as well as multilateral agreements.

I. *THE BASIC ORIENTATION OF OUR REFORM EFFORTS*

Let me say some words about the basic orientation of our reform efforts. EC competition law operates in five main areas: (1) the control of Restrictive agreements and Abuses of dominant positions under Articles 85 and 86 of the Treaty establishing the European Community[3] ("EC Treaty"); (2) Merger Control; (3) Liberalization under Article 90;[4] (4) State aid control; and (5) International cooperation. While these different areas cannot be treated in all respects in the same way, the basic orientation of our reform efforts applies to all of them, albeit to substantially varying degrees. This basic orientation is to achieve several objectives that are closely inter-related. I think that it is useful to briefly describe these objectives before I turn to their implementation in the different areas of EC competition law.

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3. *See* Treaty establishing the European Community, Feb. 7, 1992, arts. 85, 86, O.J. C 224/1, at 28-29 (1992), [1992] 1 C.M.L.R. 573, 626-28 [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. The Treaty on European Union amended the Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, *as amended by* Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741.

4. *See id.* art. 90, O.J. C 224/1, at 29-30 (1992), [1992] 1 C.M.L.R. at 629.

A. *Our First Basic Orientation: The Commission Has to Concentrate on the Essentials*

1. What Are the Essentials?

Our experience shows that the essential issues that should be treated by the Commission at the European level cannot simply be defined on the basis of the criteria that determine whether Community law is applicable or not. In other words, not every competition issue that involves effects on trade between Member States (in Article 85/86 and State aid cases) or for which the thresholds under the Merger Regulation[5] are met, necessarily and under all circumstances has to be dealt with in Brussels. Where certain requirements are met some of these cases can be dealt with at least as effectively by national authorities and/or national courts. The reasons to keep the treatment of these cases on the national level are twofold: we want to ensure that decisions are taken as closely as possible to the citizens, and we recognize that the objectives pursued by EC competition law could not be better achieved if EC institutions dealt with these cases. This means that the criteria for identifying the essential competition issues and cases on which the Commission should concentrate follow the notions of subsidiarity and proportionality, more recently introduced in Article 3b of the Treaty establishing the European Community.[6] I do not intend to elaborate any further here on the question of whether these principles are exclusively or mainly designed for legislative action. The underlying ideas certainly also have a meaning for sensibly defining the roles that the Commission, national authorities, and courts should play in the enforcement of EC competition law. Consequently, the Commission should concentrate on those cases in which it can produce better results in terms of achieving the objectives of EC competition law as well as providing guidance and legal security within short, efficient, and transparent procedures. Thereby, we would provide an added value in comparison with national authorities or courts.

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5. Council Regulation No. 4064/89 on control of concentrations between undertakings, O.J. L 395/1 (1989), *corrected version in* O.J. L 257/13 (1990), *amended by* Council Regulation No. 1310/97, O.J. L 180/1 (1997), *corrigendum* O.J. L 40/17 (1998) [hereinafter Merger Regulation].

6. *See* EC Treaty, *supra* note 3, art. 3b, O.J. C 224/1, at 9 (1992), [1992] 1 C.M.L.R. at 590.

2. How Can the Commission Better Concentrate on These Essentials?

For the Commission to concentrate on the essentials, basically, three things, which go hand in hand, are needed. First, wherever possible, we need more decentralized application of the EC competition rules, but without jeopardizing coherence. This is mainly, but not exclusively, a matter for the enforcement of Articles 85 and 86. State aid and merger control, however, should not, in principle, be excluded from any decentralization. Therefore, certain (though still limited) elements of decentralization can be found in our concept for competition policy development in these two areas.

Second, adequate devices have to be found to free the Commission from unnecessary notifications. The Commission must regain the possibility to pursue a more proactive approach. By spending less time reacting to notifications that are of little interest from a policy point of view, it will have more time to deal with serious restrictions of competition, in particular those cases that it has chosen to take up either *ex officio* or following a complaint. The Commission will thereby gain space to set its own priorities rather than have an agenda imposed on it by an excessively rigid system of compulsory or quasi-compulsory notifications.

Third, less *a priori* and more *a posteriori* control must be established. More decentralization as well as securing a more proactive role for the Commission will lead to, and at the same time call for, reducing the amount of *a priori* control in favor of more *a posteriori* control. This *a posteriori* control will be exercised not only by the Commission but also to an increasing extent by national bodies. Where appropriate, this tendency should be promoted by further measures.

B. *Our Second Basic Orientation: The Reformed System Must Ensure More Efficient Enforcement*

This means that we have to strive for: (1) more efficient procedures; (2) a greater number of decision-makers applying EC competition rules; and (3) a network among these decision-makers.

C. *Our Third Basic Orientation: The Reformed System Must Guarantee a Coherent Application of the Rules and a Reasonable Level of Legal Certainty for the Benefit of Economic Operators*

In a system with different decision-makers, special provision has to be made for coherent treatment of similar cases and other aspects of legal certainty. Consequently, there should be: (1) only one set of substantive rules for cases with effect on interstate trade; (2) guidance on the interpretation of these rules provided by central bodies; and (3) centralized judicial review.

II. *THE APPLICATION OF THESE BASIC ORIENTATIONS OF REFORM IN DIFFERENT AREAS OF EC COMPETITION LAW*

Merger control and liberalization under Article 90 of the EC Treaty are currently running quite smoothly. These areas of EC Competition law will not be the subjects of major reforms in the immediate future. In the sphere of international relations, the task is not to reform an existing concept, but to develop a system for the first time through bilateral and multilateral competition agreements. Consequently, in view of the challenges that I described in the beginning, our priority areas of reform on which we are currently concentrating are State aid and the enforcement of Articles 85 and 86.

A. *State Aid*

1. The Objectives and the Projects

For the modernization of State aid control, two reform projects are most significant. These are the introduction of group exemptions and the codification of the Commission's State aid control procedures.

Both projects have made some progress during the last twelve months. In the field of group exemptions, the Council has accepted the Commission's proposal and on May 7, 1998, adopted an enabling regulation[7] on the basis of Article 94 of the

7. Council Regulation No. 994/98 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid, O.J. L 142/1 (1998).

EC Treaty.[8] This regulation empowers the Commission to adopt group exemption regulations for certain categories of State aid. The Commission is currently drafting its first group exemption regulation, which will cover state aid to small and medium size enterprises ("SMEs"). With regard to codifying the Commission's State aid control procedures, on February 24, 1998, the Commission issued a proposal for a Council regulation,[9] which is also based on Article 94. We hope that the Council will reach an agreement on the proposal in November.[10]

The objectives of the modernization exercise that we have begun in the State aid sector are: (1) to increase the effectiveness of State aid control; (2) to enable the Commission to concentrate on the essential and important cases; and (3) to improve transparency and legal certainty. With the prospect of enlargement of the European Union, we need to streamline, to simplify, and to clarify procedures, thus helping the candidate countries to align their legislation with Community law as well as helping the Commission to deal with the additional workload that will result from the accession of these countries.

2. The Instrument of Regulations Based on Article 94 of the EC Treaty

The fact that the Commission has made the basic decision to use Article 94 of the EC Treaty as the legal basis for the modernization of State aid control constitutes a major change in its position. For the pursuit of its reform projects, the Commission could have stuck to its traditional instruments such as frameworks, guidelines, notices, and communications. These have proven to be of considerable value for stating the Commission's interpretation of substantive and procedural issues. These instruments, however, cannot provide the required legal certainty, and in some areas their large number has not led to more

8. *See* EC Treaty, *supra* note 3, art. 94, O.J. C 224/1, at 31 (1992), [1992] 1 C.M.L.R. at 631-32.

9. Commission proposal for a Council Regulation (EC) laying down detailed rules for the application of Article 93 of the Treaty establishing the European Community, O.J. C 116/13 (1998).

10. In fact, the Industry Council of 16 November 1998 reached a political agreement on the regulation on State aid procedures. The European Parliament delivered its opinion on January 14, 1999. The Council finally adopted the regulation on March 22, 1999 (No. 659/1999). It has been published in O.J. L 83/1 (1999) and has entered into force on April 16, 1999.

transparency in the end. The Commission, therefore, thinks that the route of formal secondary legislation, which it is now pursuing with caution, can be a more appropriate way to ensure the required transparency and legal certainty. This strategy involved a certain risk that once a proposal was submitted to the Council, it was out of the Commission's control and the very wide powers that the EC Treaty conferred upon the Commission could be reduced. On the other hand, at the end of the 1990s, the Commission's State aid policy is well-established and has the support of the Court of Justice, and it can be expected that Member States generally accept the Commission's powers. So far, the Commission's strategy has worked well and the Council has fully respected its powers in the ongoing modernization process.

3. Group Exemptions for State Aid

a. The Mass Problem

The Commission faces an ever-increasing number of notifications of State aid cases. We lose too much time in examining notifications of State aids that are obviously compatible with the Common Market. In numerous frameworks and guidelines the Commission has laid down concrete criteria for the compatibility of aid, and Member States increasingly draft their aid schemes in line with this guidance. Under these circumstances, the added value of a Commission decision confirming that the published criteria have been met is very limited. The formalism of carrying out notification procedures in these cases, however, has a substantial impact on the Commission's resources and obviously also on those of the Member States. Moreover, it prevents the Commission from concentrating on larger, more complex, and more distorting cases. Against this backdrop, the Commission considered a simplification of procedures appropriate where its level of experience allowed it to define precise compatibility criteria and where it could be observed that Member States generally respected these published criteria. Both conditions are generally met in the area of horizontal aid. The enabling Regulation adopted by the Council empowers the Commission to issue group exemption regulations concerning State aid for SMEs, research and development (or "R&D"), environmental protection, employment, and training as well as for regional aid. The Com-

mission has to attach to any group exemption regulation mandatory conditions relating to admissible purposes of aid, categories of beneficiaries, admissible thresholds, cumulation of aid, and conditions of monitoring. The approach and contents of the forthcoming group exemption regulations will mainly follow the lines of existing practice and to a large extent translate the criteria of the guidelines and frameworks into the more effective and reliable legal form of a regulation.

In terms of simplification of procedures, group exemption regulations will not only have the advantage of liberating the Commission of a large number of notification procedures in routine cases, but also free the Member States from the administrative burden of notification and allow them to award aid, which is covered by a regulation, immediately and without a standstill period. Outside the scope of the group exemption regulations, the traditional notification procedure will continue to apply.

b. Decentralization

State aid control is the area where, under the present circumstances, there are the clearest limits to decentralization. In particular, the entrustment of administrative State aid control to the authorities of the Member States would not be advisable. Due to the conflict of interests, into which probably even a separate national supervisory body would run, it cannot be expected that the national level would provide equally effective or even better control than the Commission. Under the present system there is also limited scope for direct applicability of State aid rules by the national courts. In fact, only the standstill clause laid down in the last sentence of Article 93(3) of the EC Treaty[11] is directly applicable. Following an action brought by an interested party against the grant of State aid, a national court can at present only state that the subsidy is a State aid in the sense of Article 92 of the EC Treaty.[12] In case the grant has not been notified to the Commission, the national court has to take all appropriate measures, including an order for recovery, so that the *status quo ante* is reestablished.

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11. *See* EC Treaty, *supra* note 3, art. 93(3) O.J. C 224/1, at 31 (1992), [1992] 1 C.M.L.R. at 631.

12. *See id.* art. 92, O.J. C 224/1, at 30 (1992), [1992] 1 C.M.L.R. at 630.

Due to the direct applicability of group exemption regulations, these regulations will grant more responsibility to national bodies. National authorities will have to monitor themselves in order to ensure that their aid schemes are within the limits of a group exemption regulation. And national courts, upon actions brought against the aid, will be able to decide the case and to dismiss the action if they are convinced that the conditions of a group exemption regulation are fulfilled. In this sense, block exemption regulations will contribute to decentralization.

c. Limited Shift to *A Posteriori* Control

A significant consequence of group exemption regulations is that, within their scope of application, they shift the current *a priori* control on the basis of notifications to the Commission to an *a posteriori* control of whether the conditions for exemption have been respected. Such *a posteriori* control is not exclusively exercised by the Commission. It can also be carried out by national courts. Within the scope of the group exemption regulations, *a priori* control will also become self-control to be exercised by the national authorities insofar as they themselves have to check whether their aid schemes comply with the conditions of the relevant regulation. Outside the group exemption regulations, the Commission's traditional *a priori* control will continue to apply.

Fears that the new group exemption element in the system might weaken the control of State aid are unfounded. The Commission has not only the means to model a group exemption regulation according to the specific problems involved in a certain category of aid. It will also keep the power to amend a regulation where necessary. Moreover, provision has been made that the *a posteriori* control of whether the conditions for a group exemption are met shall be as effective as the previous notification system, though less bureaucratic. By way of summary reports, Member States will have to keep the Commission informed about their application of the group exemption regulation. In case of doubt or following a complaint, the Commission will be able to require the Member State to submit all information necessary to verify compliance with the exemption. Third parties who suspect that State aid granted without notification to the Commission does not fulfil the conditions for exemption not only can complain to the Commission but also can seek clarifica-

tion at the national level. They can bring an action against the State in the national courts, invoking the prohibition under Article 92(1) of the EC Treaty[13] as well as the non-applicability of the group exemption regulation.

d. *De Minimis* Rule

The enabling regulation also provides for a legal basis upon which the Commission can establish a threshold-related *de minimis* rule. This rule was previously only defined in a notice. Below the thresholds, a subsidy will not be considered to constitute a State aid in the sense of Article 92(1)[14] and therefore not require notification.

4. The Regulation on State Aid Procedures

The Commission's proposal for a procedural regulation aims at improving transparency and legal certainty in State aid procedures by bringing the procedural rules together in one coherent and binding legal text. At present, Article 93 of the EC Treaty[15] is the only legal provision on procedures. On the basis of this article, a set of rules has been developed through both the Commission's practice and the case law of the Court of Justice. Where important procedural issues have arisen or been clarified, the Commission has issued notices and communications, normally published in the Official Journal. Legally speaking, these texts contained no more than an interpretation by the Commission of certain procedural questions and did not provide legal certainty apart from possible self-binding effects. Moreover, the piecemeal fashion in which procedures developed resulted in a fragmentation of rules that reduced the clarity of the system provided for in the Treaty. While aiming to make the rules transparent, the multiplication of interpretative texts finally created less transparency. Integration of the procedural rules into one coherent text was thus required.

The second objective of the procedural regulation is to reinforce the efficiency of State aid control. The Commission's longstanding experience has revealed some weak points in the sys-

13. *See id.* art. 92(1), O.J. C 224/1, at 30 (1992), [1992] 1 C.M.L.R. at 630.

14. Therefore, strictly speaking, the *de minimis* rule is not a group exemption for State aid.

15. *See id.* art. 93, O.J. 224/1, at 31 (1992), [1992] 1 C.M.L.R. at 631.

tem, in particular with regard to unlawful aid and recovery. In order to provide the Commission with all the necessary means to ensure effective control, the proposal seeks to enlarge the control system with some new instruments such as recovery injunctions against unlawfully paid aid or on-site visits to beneficiaries of aid.

B. *Merger Control*

1. The Amendment of the Merger Regulation of March 1, 1998

Our experience with the amended Merger Regulation in the first six months has been positive though limited. There were eight additional cases as a result of the new thresholds, which will lead up to approximately fifteen to twenty additional cases per year. The number of notified mergers has increased significantly since the Merger Regulation came into force in 1990 (about fifty cases yearly in the early years to 170 cases in 1997 and probably 200 cases in 1998). Nevertheless, the additional increase following the amendment of the Regulation (Article 1(3))[16] was felt to be acceptable for reasons of subsidiarity. The principle of subsidiarity is not a one-way road. The new system of an additional set of lower turnover thresholds aims at avoiding multiple notifications of one and the same concentration in different Member States and thus has the same aim as the original threshold, i.e., to avoid multiple control in different Member States and to centralize the treatment of such cases in Brussels. The justification for this new system is that such an operation can, in terms of length and cost of procedure, be better dealt with on the European level.

As regards full function joint ventures, all of them are now treated as concentrations under Article 3(2) of the Merger Regulation, and they are therefore dealt with under the procedures of that regulation. Where the creation of such a joint venture has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, the amended Regulation (Article 2(4)) now subjects such cooperative spillover to an appraisal under the criteria of Articles 85(1) and 85(3) of the EC Treaty for establishing whether the operation is

16. *See* Merger Regulation, *supra* note 5, O.J. L 40/17 (1998).

compatible with the Common Market. In the first six months, spill-over aspects were considered in eight cases, all of which ended with authorizations because there were no serious doubts as to the compatibility with the Common Market.[17] In all these cases, the Commission came to the conclusion that Article 85(1) was not applicable because there was no appreciable restriction of competition. The test of how well the appreciation of spill-over aspects really functions is still to come. It will take place when a restriction in the sense of Article 85(1)[18] is found to exist and Article 85(3) has to be assessed. As far as the allocation of tasks inside Directorate General IV is concerned, where a full function joint venture entails the possibility of cooperative spill-over, the assessment of the entire operation under the Merger Regulation is carried out by the sectoral unit that is in charge of applying Article 85 in the relevant sector.

2. Referrals by the Commission to a National Competition Authority

The reform of March 1, 1998 has also enlarged the possibilities for the Commission under Article 9 of the Merger Regulation[19] to refer a case to a national competition authority where the effects of the concentration are felt on a market within this Member State that presents all the characteristics of a distinct market. After initial hesitation, the Commission has since 1996 used this provision more frequently. Due to the reform, this trend will probably continue. The referral of a concentration allows the inherent rigidity of the threshold system to be mitigated and, in line with subsidiarity, can be used to allow Member States to deal with cases that could not be handled better at the European level.

3. Possible Reforms in the Long Run

While Directorate General IV is able at the moment to deal with all notified mergers, the accession of new Member States and the further integration of European markets will certainly bring about an increase in notifications to the Commission. The

17. *See* Council Regulation No. 4064/89, O.J. L 395/1 (1989), *corrected version in* O.J. L 257/13 (1990).

18. *See* EC Treaty, *supra* note 3, art. 85(1), O.J. C 224/1, at 28 (1992), [1992] 1 C.M.L.R. at 626.

19. *See* Merger Regulation, *supra* note 5, O.J. L 40/17 (1998).

ECU250 million threshold for Community turnover will be more easily attained and the likelihood that the current two thirds rule is applicable will decrease. This could make it increasingly difficult for the Commission to handle all notified cases with the required care while respecting the tight time limits under the Merger Regulation. Article 1(4) of the Merger Regulation[20] obliges the Commission to report to the Council on the operation of the thresholds and criteria set out in Article 1(2) and (3) of the Regulation before July 1, 2000.[21] Moreover, Article 9(10) states that the provisions on referral of cases to Member States may be re-examined at the same time. The Commission is therefore in any event obliged to reflect upon these two key elements that define jurisdiction. On the one hand, this exercise does not necessarily have to lead to any reform of the current system if there is no objective need. On the other hand, if a need for reform is found, it will not necessarily have to be confined to the aspect of jurisdiction. All will depend on the nature of any deficiencies that the current system might reveal in the future. The Commission could then use its July 2000 report to the Council as an opportunity to introduce into the discussion any options relating to jurisdiction or to procedure and substance of the examination under the Merger Regulation that seem appropriate for solving the problems.

C. *International Cooperation*

International cooperation in competition matters is the logical consequence of globalization. The first priority is to coordinate competition authorities' actions in cases of world market scale. Another important objective, which requires some perseverance, is to establish international rules, to ensure their enforceability, and thereby to provide more legal certainty on the international level. These objectives are matters to be pursued in bilateral relationships, such as between the European Union and the United States, as well as in international organizations, in particular the Organization of Economic Cooperation and Development (the "OECD") and the World Trade Organization (the "WTO").

20. *See id.* O.J. L 40/17 (1998).
21. *Id.*

1. The Bilateral EU-US Relationship

The Agreement Between the Government of the United States and the Commission of the European Communities regarding the Application of their Competition Laws[22] (the "1991 EU-US Competition Cooperation Agreement") is currently working smoothly. In the last twelve months, it has played a role in several cases, out of which the WorldCom/MCI merger[23] was probably the most important. The Commission's investigations, and negotiations of remedies, were undertaken in parallel with the examination of the case by the U.S. Department of Justice (the "DOJ"). The process was marked by close cooperation between the two authorities, including exchanges of views on the analytical method to be used, coordination of information gathering, and joint meetings and negotiations with the parties. After the parties had undertaken to divest MCI's Internet assets, thus eliminating the overlap with WorldCom's Internet business, the operation received clearance from the Commission and from the DOJ in July 1998. Following the divestiture of the relevant business to Cable&Wireless, the merger was put into effect shortly thereafter. The WorldCom/MCI case constitutes a good example of using the elements of traditional comity, which the 1991 EU-US Competition Cooperation Agreement contains. Traditional comity aims at bringing the respective positions that competition authorities on both sides hold and the remedies that they seek together so as to avoid creating a harmful effect to the market of the partner.

Positive comity goes beyond this and enables one side adversely affected by anticompetitive conduct carried out in the other's territory to request the other side's competition authority to take enforcement action. While the 1991 EU-US Competition Cooperation Agreement already contained a few elements of this principle, it soon appeared that certain conflicts could be avoided by using the positive comity concept more extensively. Our efforts to strengthen the relevant provisions of the 1991 EU-US Competition Cooperation Agreement have now led to the

22. Agreement between the government of the United States of America and the Commission of the European Communities regarding the application of their competition laws, O.J. L 95/45 (1991), *corrected version in* O.J. L 131/38 (1995).

23. WorldCom/MCI (II) case M.1069, adopted on July 8, 1998.

1998 EU-US Positive Comity Agreement,[24] which entered into force in June 1998. This agreement, like the 1991 EU-US Competition Cooperation Agreement, does not alter existing law, nor does it require any change in existing law. It does, however, create a presumption that when anticompetitive activities occur in the whole, or in a substantial part, of the territory of one of the parties and affect the interests of the other party, the latter "will normally defer or suspend its enforcement activities in favour of" the former. This is expected to happen particularly when these anti-competitive activities do not have a direct, substantial, and reasonably foreseeable impact on consumers in the territory of the party deferring or suspending its activities. Deferral will only occur if the party in the territory of which the restrictive activities are occurring has jurisdiction over these activities and is prepared to deal actively and expeditiously with the matter. When dealing with the case, that party will keep its counterpart closely informed of any developments in the procedure, within the limits of its internal rules protecting confidentiality. We hope that implementation of the 1998 agreement will turn positive comity into the principle clearly to be preferred against stretching one's own competition law towards extraterritorial application.

In the future, the European Union will seek to intensify its cooperation with the United States and—where possible—to establish similar cooperation agreements with other important countries or trading blocks. The recent wave of mega mergers in oligopolistic world markets is only the most prominent example underlining the need for a network of effective bilateral cooperation. Moreover, it points to an increasing need for multilateral action and international competition rules.

2. The Multilateral Perspective

We believe that multilateral organizations should play an increasing role in providing instruments for regulatory and case specific cooperation. From this perspective, we welcome the OECD Recommendation on Competition Cooperation as last revised in 1995.[25] A further step has now been made by the 1998

24. Agreement between the European Communities and the government of the United States of America on the application of positive comity principles in the enforcement of their competition laws, O.J. L 173/28 (1998).

25. OECD Revised Recommendation of the Council Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting International

OECD Recommendation on Hard Core Cartels.[26] It aims at improving the effectiveness and efficiency of OECD members' law enforcement against hard core cartels by eliminating or reducing statutory exceptions that create gaps in the coverage of competition law and by removing the legal restrictions that deny competition agencies the authorization to provide investigative assistance to foreign competition agencies.

Strengthening bilateral and multilateral cooperation, however, will not solve all the problems created by the increasing number of global competition cases. The Commission is therefore convinced that we need a set of binding international competition rules and that the WTO is the appropriate body in which they should be elaborated. The advantages of international rules are evident and can be briefly summarized. First, they can be part of a strategy on market access overcoming exclusionary anticompetitive practices. Second, they promote gradual convergence of national competition laws. Third, they help to avoid unnecessary duplication of work and costs. While our U.S. colleagues still remain hesitant, we are confident that we will be able to convince them of the benefits of this approach.

3. The Relationship Between the European Union and Its Future Member States in Central and Eastern Europe

The competition rules prevailing between the European Union and the Associated Countries of Central and Eastern Europe are contained in bilateral agreements. They are part of the so-called Europe Agreements,[27] which concern a broader set of policies. The Europe Agreements tackle a number of competition issues directly through explicit provisions, but they also go further than that by containing a clause on approximation of legislation. These two aspects clearly illustrate the idea that liberalization of trade goes in parallel with adopting regulations in the field of competition. More generally, it fits into the philosophy that governments are required to enforce competition rules

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Trade, OECD Doc. C (86) 44/Final (May 21, 1986), *replaced by* C (95) 130/Final (July 28, 1995).

26. OECD Recommendation of the Council Concerning Effective Action Against Hard Core Cartels, OECD Doc. C (98) 35/Final (Apr. 28, 1998).

27. In the period between 1991 and 1996, the European Union has concluded such agreements with Poland, Hungary, the Czech Republic, Slovakia, Estonia, Lithuania, Latvia, Slovenia, Romania, and Bulgaria.

in their countries as a condition for being admitted as players in a globalized economy.

III. *THE MOST SENSITIVE REFORM: THE ENFORCEMENT OF ARTICLES 85 AND 86*

The other major area of reform to which the Commission will have to turn, in view of the challenges described above, is the way that we interpret and, in particular, the way in which we should enforce Articles 85 and 86 of the EC Treaty.[28] The starting point for the Commission in this area is that changes of the EC Treaty are not necessary and in any case for the foreseeable future not possible. The reforms to come will therefore not be a matter for an intergovernmental conference but for the competent Community institutions themselves to propose and to decide. The instruments of reform will be not only formal secondary legislation, but also interpretative guidelines, simple changes in practice, and increased involvement of national bodies.

A. *Ongoing Reforms*

The most important projects currently under way concern vertical restraints and horizontal cooperation agreements.

1. Vertical Restraints

a. Substance

On September 30, 1998, the Commission adopted a Communication on the application of the EC competition rules to vertical restraints.[29] This Communication is a policy paper, which, in essence, recommends a shift from the current legalistic approach relying on form-based requirements with sector specific rules to an economic effects-based system covering virtually all sectors of distribution.[30] It is proposed that this shift be achieved by one single block exemption regulation, which is

28. *See* EC Treaty, *supra*, note 3, arts. 85, 86, O.J. C 224/1, at 28-29 (1992), [1992] 1 C.M.L.R. at 626-28.

29. European Commission, Communication from the Commission on the Application of the Community Competition Rules to Vertical Restraints – Follow-up to the Green Paper on Vertical Restraints, COM (98) 522 Final (Sept. 30, 1998).

30. The Block Exemption Regulation on car distribution, which expires in 2002, is not covered by the current proposal.

wider than the present ones and which will cover all vertical restraints concerning intermediate and final goods and services. The block exemption will be based mainly on a black clause approach, i.e., defining what is not block-exempted instead of defining what is exempted. This approach will remove the straitjacket effect, a structural flaw inherent in any system that attempts to identify clauses that are exempted.

The principal objective of such a wide and flexible block exemption regulation is to grant companies that lack market power—and most companies do lack market power—a safe haven within which it is no longer necessary for them to assess the validity of their vertical agreements under the EC competition rules. In order to preserve competition and to limit the benefit of this exemption to companies that do not have significant market power, the block exemption will establish market share thresholds, beyond which companies cannot avail themselves of the safe haven.

For companies with market shares above the thresholds of the block exemption, it must be stressed that there will not be any presumption of illegality concerning their vertical agreements. The market share threshold will only serve to distinguish those agreements that are presumed to be legal from those that may require individual examination. To assist companies in carrying out such an examination, the Commission intends to issue a set of guidelines covering basically two issues: first, the application of Articles 85(1) and 85(3) above the market share cap; and second, the Commission's policy of withdrawal of the benefit of the block exemption, particularly in cumulative effect cases. Such guidelines should allow companies to make in most cases their own assessment under Article 85(1) and (3). The objective is to reduce the enforcement costs for industry and to eliminate as far as possible notifications of agreements that do not raise any serious competition problem.

With regard to the use of market share caps, the Commission has in its policy paper not yet decided between a system based on one or two thresholds. In a two-threshold system, the first and main market share cap would be twenty percent. Below this, it is assumed that vertical restraints have no significant net negative effects and therefore all vertical restraints and their combinations, with the exception of specified hardcore restraints, are exempted. Above the twenty percent threshold,

there is room to exempt certain vertical restraints up to a higher level of forty percent. This second threshold would cover vertical restraints that, on the basis of economic thinking and past policy experience, lead to less serious restrictions of competition. In this category would fall, for example, exclusive distribution mitigated by the possibility of passive sales and non-exclusive types of arrangements such as quantity forcing on the buyer as well as agreements between SMEs. A two-threshold system has the advantage of providing for an economically justified graduation in the treatment of vertical restraints. The principal drawback of such a system is its complexity and the risk of reintroducing formalistic criteria for the identification and definition of the individual vertical restraints covered by the higher threshold.

In a one-threshold system, all vertical restraints and their combinations, with the exception of hardcore restraints, are automatically exempted up to the level of a single market share cap. The level of such a cap has not been settled, but it will have to be below forty percent, the level at which single market dominance may start. It is likely to be in the range of twenty-five to thirty percent. The advantage of a single-threshold system arises from its simplicity, there being no necessity to define specific vertical restraints other than hardcore.

The category of blacklisted hardcore vertical restraints, which will not be block-exempted under any of the models just described, will in any event contain minimum and fixed resale price maintenance as well as agreements leading to absolute territorial protection. In its policy paper, the Commission also proposes to protect the possibility for arbitrage by both intermediaries and final consumers to a wider extent. The exact content of the hardcore list, however, is being left open at the moment.

As a result, due to the scope of the new block exemption regulation, which will be wider than the current ones taken together, the Commission will in the field of vertical restraints be liberated from a large part of its current work on individual notifications. The target is to have the new block exemption regulation in force by the year 2000.

b. Implementation

i. Extending the Scope of the Enabling Regulation No. 19/65

Council Regulation No. 19/65,[31] which enables the Commission to issue block exemption regulations, does not provide a sufficient basis for the new policy on vertical restraints. In its current form, the enabling regulation only allows the Commission to issue block exemptions with respect to bilateral exclusive supply or purchase agreements concluded with a view to resale of the goods concerned or agreements comprising restrictions on the acquisition or use of intellectual property rights. The Commission has now proposed to the Council to extend the scope of the enabling regulation so that block exemption regulations can cover all types of vertical agreements concluded between two or more firms, each operating at a different stage of the economic process. In fact, it will be possible to cover vertical agreements concluded in respect of the supply and/or purchase of goods for resale or processing or in respect of the marketing of services, including exclusive distribution agreements, exclusive purchasing agreements, franchising agreements and selective distribution agreements, and combinations thereof.

Finally, the proposed amendment of Council Regulation No. 19/65[32] will allow for decentralized withdrawal of the benefit of a group exemption regulation. Accordingly, where group-exempted vertical agreements or concerted practices create effects incompatible with Article 85(3) and these effects are felt in a Member State that possesses all the characteristics of a distinct market, the competent national authority will have the power to withdraw the benefit of the block exemption in its territory and to adopt a decision aimed at eliminating those effects. Instead of bringing a complaint to the Commission, third parties will in these cases turn to the national authorities.

The new block exemption regulation will increase decentralization in yet another way. Under the existing system, there is no scope for national competition authorities to apply Article 85(1) if the companies draft their agreements in accordance with the group exemption regulations. Even companies with

31. Council Regulation No. 19/65/EEC of the Council on application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices, 36 J.O. 533 (1965), O.J. Eng. Spec. Ed. 1965-66 at 35.

32. *Id.*

strong market power and market shares up to 100% are exempted. Under the new system, above the market share cap of the block exemption regulation, there will be new space for national competition authorities to apply Article 85(1) in individual cases.

ii. Extending the Waiver from Prior Notification Granted by Article 4(2) of Regulation 17

The Commission also proposes to extend the scope of Article 4(2) of Regulation 17[33] with a view to granting a waiver from the prior notification requirement under Article 4(1)[34] in respect of all vertical agreements. According to Article 6(1) of Regulation 17,[35] the rule is that an exemption decision by the Commission cannot take effect before the date of the notification. In contrast to that, for agreements falling under Article 4(2) of Regulation 17, Article 6(2) enables the Commission to allow the exemption take effect from the date of conclusion of the agreement.

The proposed inclusion of all vertical agreements within Article 4(2) will have several beneficial effects. First, where a company has made a mistake in the assessment of its market share and is not covered by the block exemption, the Commission will be able to exempt retroactively to the date of conclusion of the agreement, provided all the conditions of Article 85(3) were fulfilled from the beginning. Second, artificial litigation before national courts, where the competition rules are often invoked to escape from contractual obligations even though there is no real competition problem, will be eliminated. Where exemption decisions can take effect from the date of conclusion of the agreement and not only from the date of its notification, there is no longer an incentive to litigate about agreements, which are caught by Article 85(1) but exemptible, with the intention of exploiting their nullity for the period between conclusion and notification. The proposed reform will therefore strengthen the civil enforceability of contracts by putting the emphasis on pro-

33. Council Regulation No. 17/62, art. 4(2), 13 J.O. 204 (1962), O.J. Eng. Spec. Ed. 1959-62, at 87, 88 (First Regulation implementing articles 85 & 86 of the Treaty Establishing the European Community).

34. *Id.* art. 4(1), O.J. Eng. Spec. Ed. 1959-62, at 88.

35. *Id.* art. 6(2), O.J. Eng. Spec. Ed. 1959-62, at 89.

tection of competition instead of protection of private interests often unrelated to competition.

Third, the number of notifications presently made with a view to obtaining legal security will diminish. Companies can first make their own assessment under Articles 85(1) and (3) and avoid the cost of notification unless the companies have a real doubt about the applicability of Article 85(3). Companies know that in the event of subsequent litigation it would not be too late to notify to the Commission in order to receive an exemption taking effect from the date of conclusion of the agreement. This ability to notify the Commission in the event of subsequent litigation will allow the Commission to reduce the *a priori* control system based on notifications and to concentrate, together with the competition authorities of Member States, on the more important cases, thereby increasing the efficiency of the EC competition rules. The objective is to reduce enforcement costs for industry and to eliminate as far as possible notifications that do not raise any serious competition problems.

2. Horizontal Restraints

The Commission is also reviewing its policy on horizontal cooperation agreements. Originally, the review was started as a complement to the exercise on vertical restraints and in the light of the expiring block exemption regulations on specialization[36] and research and development.[37] Meanwhile, the validity of these two regulations has been extended by three years to the end of the year 2000, which will give us sufficient time for this review exercise. Though the project's focus in the beginning was on R&D and specialization agreements, it soon became clear that we had to include in the review other notices such as the 1968 Notice on Cooperation Agreements,[38] the 1979 Notice on Sub-Contracting Agreements,[39] and the 1993 Notice on Co-operative Joint Ventures.[40] The Commission found that inevitably it

36. Commission Regulation No. 417/85 on the Application of Article 85(3) of the Treaty to Categories of Specialization Agreements, O.J. L 53/1 (1985).

37. Commission Regulation No. 418/85 on the Application of Article 85(3) of the Treaty to Categories of Research and Development Agreements, O.J. L 53/1 (1985).

38. Commission Notice concerning agreements, decisions, and concerted practices in the field of cooperation between enterprises, O.J. C 75/3 (1968), *corrected version in* O.J. C 84/14 (1968).

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

40. Commission Notice, O.J. C 43/2 (1993).

would have to look into other types of horizontal cooperation not covered by any regulations or notices such as joint buying, joint selling, and standardization agreements.

During 1997, an in-depth fact finding with European industry and Member States as well as a survey of literature and case law was carried out. The results revealed a number of points. First, horizontal cooperation is increasingly important for industry due to globalization and more dynamic markets. Second, the types of cooperation activities have changed over the last decade. For example, there are more joint ventures and outsourcing of R&D. Third, industry recognizes that, although horizontal cooperation can bring about efficiencies, such cooperation can also cause competition problems such as collusion between the cooperating partners or foreclosure/exclusion of competitors. In this context companies noted that the market power of the cooperating parties is an important assessment criterion. Finally, Community competition rules are criticized as rather unclear, narrow, and partly outdated.

The major aims of the review are to ensure clarity and consistency of policy. The current rules and notices are rather fragmented and are based on the legal forms of cooperation agreements. We, therefore, would like to come up with a more comprehensive approach that provides for an analytical framework for the assessment of horizontal cooperation in general. Greater emphasis should be put on economic criteria in order to distinguish between neutral or procompetitive agreements and anticompetitive ones. In this context, it is intended to increase transparency and to give better guidance to industry.

For certain types of agreements that are generally considered to be less restrictive, safe havens defined in terms of the combined market shares of the participating undertakings could be established. They could be complemented by black lists of certain *per se* prohibited behaviour. Within these clearly defined safe havens, undertakings would not have to engage in any further assessment of the validity of their agreements under the EC competition rules. For agreements falling above the market share threshold and for agreements of another, generally more restrictive type, the Commission would give guidance about how it would assess Articles 85(1), 85(3), and 86 in certain circumstances.

Moreover, as far as the implementation of this approach is concerned, one could imagine two options. The first would consist of a block exemption regulation applicable to the mentioned less harmful agreements up to the market share cap plus guidelines published by the Commission about its policy towards all other cases. Alternatively, the Commission could refrain from producing any new block exemption regulation after the current ones expire and instead rely exclusively on guidelines.

We are still in the initial phase of discussions about future orientations in this area and the models that I just sketched are only some of many options to be examined. Whatever the results, the public will be consulted, but probably not before 1999.

B. *The Orientation of Further Reforms*

In the field of Articles 85 and 86, it is of particular urgency to look at the division of enforcement competences and at a possible reform of the procedural framework laid down in Regulation 17. For perhaps a too long time, this was taboo for the Commission. Today, it is a major task that still lies ahead of us. The debate, however, is not new. Different concepts have already been presented. We have not yet reached any preliminary conclusion. The following elements and options will certainly require further discussion.

C. *Increased Decentralization in the Application of EC Competition Law and Closer Cooperation Between the Commission and National Competition Authorities/Courts*

Increased decentralization in the application of EC Competition Law and closer cooperation between the Commission and national competition authorities or courts is a key element that will certainly be part of any new framework as it is both necessary and efficiency enhancing. More decentralization is necessary because the Commission alone could never guarantee effective protection against restrictions of competition. The Commission and national bodies have to cooperate and a common competition culture has to be developed. This cannot be ordered from the top by the Commission, but will have to grow all over the European Union. An increasing involvement of national bodies in the application of Community rules is already providing a fertile ground for such development. Moreover, cooperation be-

tween competition authorities is useful as it will promote an ever more similar control practice. Increased decentralization will also depend on the extent to which complainants and litigants can have the realistic expectation that national competition authorities and courts are able fully to solve the problems presented to them. Finally, increased decentralization and closer cooperation will promote the Community-wide acceptance of EC competition rules, which is an obvious problem in a further enlarged Europe. A number of obstacles to an efficient decentralization and closer cooperation, however, still remain. The issues to be tackled immediately are discussed below.

1. National Authorities' Power to Apply Articles 85(1) and 86

In each Member State, national competition authorities should be empowered to apply Articles 85(1) and 86. At the moment, the national competition authorities of only eight Member States have such power. The new Dutch competition authority joined this club on January 1, 1998. The group of seven Member States that still do not grant their competition authorities this power, might shrink in the foreseeable future. In Sweden there is a concrete reform bill, and in Luxembourg and Denmark a certain prospect exists that the relevant laws might be amended within the next two years. There are no such reform plans in Austria, Finland, and Ireland, and unfortunately the U.K. Government could not be convinced to foresee such power in the still pending U.K. Competition Law Bill. The competition authorities of these Member States can thus only apply their national competition law even in cases that involve effect on trade between Member States.

2. One Single Set of Substantive Rules for Cases with Effect on Interstate Trade, i.e., the EC Competition Rules

In the current system, in cases with effect on trade between Member States, national and EC competition law can be applied in parallel by national competition authorities and the Commission. Neither Regulation 17 nor the Commission's 1997 Cooperation Notice[41] could prohibit national competition authorities

41. Commission Notice on Co-operation between national Competition Authorities and the Commission in handling cases falling within the scope of Articles 85 or 86 of the EC Treaty, O.J. C 313/3 (1997).

from taking up a case on the basis of national law even if the Commission is dealing with it on the basis of Community law. The major difficulties arising from such a system of double control have been solved in the sense that the application of national law should not prejudice the coherent application of the EC competition rules throughout the Community and should respect the measures adopted for the enforcement of these rules.[42] For the sake of clarity and efficiency, it nevertheless seems in the interest of all the parties involved, competition authorities and courts as well as economic operators, to aim for a system in which only one set of substantive competition rules exists for cases with an effect on interstate trade. Logically, these would be the EC rules. This system would provide the best guarantee for a coherent application of the competition rules by different decision-makers. This is essential for promoting an integrated internal market where economic operators do not wish to be exposed to a diversity of national regulations and the risks of divergent treatment of similar cases.

The new system will have to be accompanied by a clear division of work between national competition authorities and the Commission. National authorities would normally deal with all cases involving effect on interstate trade, the effects of which have a center of gravity confined to one Member State. Such a division of labor presupposes that all Member States empower their competition authorities to apply EC competition law.

3. Instruments to Ensure Coherence in the Application of the EC Competition Rules

Various instruments should be introduced to ensure coherence in the application of EC competition rules. The present cooperation between national competition authorities and the Commission should be developed into a true network of competition authorities with binding obligations of information and of cooperation. In addition, the Commission should provide more guidance for national authorities and courts on the interpretation and application of Articles 85 and 86. This guidance can be achieved through more guidelines published by the Commission, more leading decisions by the Commission, and possibly the presence of the Commission as *amicus curiae* in national pro-

42. *See id.* points 5, 16-22.

cedures. Like in the present system, the Court of First Instance and the Court of Justice will maintain the final word on the validity of decisions taken by the Commission and on the interpretation of EC competition law that is applied in national judicial proceedings.

D. *The Central Open Question: Modernization of Regulation 17*

1. The Remaining Problems

Even if we solve all the issues that I just mentioned, we remain with several problems. It is foreseeable that increased decentralization of the kind just described—although being absolutely necessary—will not solve all the problems in the area of Article 85. In particular, two basic problems, which are interrelated, will remain.

a. The Commission Works Far Too Reactively

The Commission spends too much time dealing with what industry presents to it, in particular by way of notifications for exemption under Article 85(3), which often are of little interest from a competition policy point of view. Instead, the Commission should be enabled to adopt a more proactive approach, concentrating on issues that are important for competition policy and that should be taken up *ex officio* or on the basis of complaints. In particular, I think of cartels, where today our efforts are by far insufficient.

b. The Current System of Regulation 17 Is Becoming Inappropriate

Due to the particularly wide scope of Article 85(1), a great number of agreements require exemption under Article 85(3) in order to be legally enforceable. Consequently, for economic operators concerned about legal certainty, there is a substantial incentive to seek clarification upon the application of Article 85(3).

On this basis, Regulation 17 essentially does two things. First, for participants to an agreement who are concerned about legal certainty, Regulation 17 turns the incentive to have the applicability of Article 85(3) clarified into a quasi-obligation to notify by stipulating in its Article 6(1) that an exemption cannot take effect before the date of notification. In order to avoid the

risk of a period in which the agreement is irrevocably void, even though it might later have been exempted, parties will tend to notify on the date of the conclusion of their agreement.

Second, Regulation 17 sets a clear limit to any effort of decentralization by stipulating in its Article 9(1) that the Commission shall have the sole power to grant an exemption pursuant to Article 85(3). The consequences of the Commission's exemption monopoly are the following. First, it prevents national competition authorities and courts from making a full assessment, including positive aspects, of a restrictive agreement. Second, it leads to excessively centralized application in Brussels. Third, it stimulates the application of national competition law instead of EC competition law in cases with effect on interstate trade.

2. What Are Possible Solutions?

There are certainly many options for tackling the remaining basic problems of the current system. All of them will have to be analyzed and discussed very carefully.

a. "Rule-of-reason" Approach in Interpreting Article 85(1)

As already indicated, one of the reasons for the large number of notifications for exemption lies in the fact that the prohibition under Article 85(1) has traditionally been interpreted by the Commission and the Court in a particularly wide manner. This interpretation is partly due to a too legalistic approach in the past. And it is also due to the division within Article 85 under which the anticompetitive effects are mainly assessed under paragraph one while the procompetitive effects are assessed and weighed against the anticompetitive effects under paragraph three.

Under a rule-of-reason approach, one could imagine weighing many of the procompetitive and anticompetitive elements of an agreement already within Article 85(1). This type of balancing would have to go together with a shift from a legalistic, form-based approach to a more economic approach, which already characterizes our current policy reform concerning vertical restraints. As a result, fewer agreements would be caught by Article 85(1), and a reduction in the number of notifications could be achieved without even amending Regulation 17.

Apart from a few allusions to rule-of-reason considerations

under the notion of appreciable restriction of competition, the Commission has not followed this approach so far. Its policy rather was to maintain the division between Articles 85(1) and 85(3). Likewise, in the case law of the Court, only limited allusions to this principle can be found.[43] It would, however, not be impossible for the Commission gradually to change its policy while analyzing closely how the Court of Justice reacts. In other areas, most markedly in free movement of goods through the jurisprudence starting with the *Keck* judgment in 1993,[44] the Court has been willing to renounce from interpreting certain provisions in a way that had proved to be too wide and that had not really served the objectives pursued by them.

On the other hand, the rule-of-reason approach finds its limits in the EC Treaty, which has provided for the separation into Articles 85(1) and 85(3). A rule-of-reason could easily deprive Article 85(3) of its function and amount to an illicit factual amendment of the Treaty. The power to amend the Treaty solely lies with the Member States.

Another drawback is that a switch to a rule-of-reason approach, which the Commission could only implement gradually, i.e., step by step, would probably be too slow to provide effective remedies for the weaknesses of the present system. Moreover, in such a process, the Commission would have limited steering powers, as the evolution of this approach would depend on confirmation by the Court of Justice, which is difficult to predict.

b. Simplification of Procedures

As another option, one could try to further streamline the procedures. The procedure for rejection of complaints could be simplified. Notifications for exemption could in unproblematic cases end with abbreviated formal decisions modelled on the Article 6(1)(b) decisions under the Merger Regulation. In comparison with the present comfort letter practice, such decisions would offer more legal certainty by taking effect against everybody. This, however, could lead to the paradox of even increasing the number of notifications. Likewise, realistically speaking,

43. Nungesser and Eisele v. Commission, Case 258/78, [1982] E.C.R. 2015, [1983] 1 C.M.L.R. 278; Pronuptia v. Schillgalis, Case 161/84, [1986] E.C.R. 353, [1986] 1 C.M.L.R. 414.

44. Keck and Mithouard, Joined Cases C-267-68/91, [1993] E.C.R. 1-6097, 1-6131, ¶ 14, [1995] 1 C.M.L.R. 101, 125.

the introduction of time limits for decisions upon Article 85(3) to be taken by the Commission would rather increase the number of notifications. I do not want to be misunderstood on this point: I do not plead Directorate General IV's failure to deal with certain notifications swiftly as an argument against time limits. In contrast, however, to the further increasing but nevertheless limited number of mergers that fall under the Merger Regulation every year (probably 200 cases in 1998), one simply has to acknowledge that the number of agreements and concerted practices falling under Article 85(1), and therefore calling for an assessment under Article 85(3), is much higher. And it will significantly further increase in an enlarged Community of twenty to twenty-five Member States. The experience of the last decades and budgetary perspectives for the future make us believe that Member States will never give Directorate General IV sufficient resources to deal with all cases of notification under the present system.

c. Power to Exempt also for National Cartel Authorities

A further option would be to give the power to exempt under Article 85(3) also to national cartel authorities. This question has been the subject of some heated debate in the last years. Such a model would maintain the excessively large notification practice, but would liberate the Commission from a number of notifications that could adequately be dealt with by national authorities. As a consequence, the Commission would gain space for the above-mentioned more proactive approach in pursuing its policy in cases of Community-wide interest. Use could be made of the more effective and more far-reaching investigative powers that some national competition authorities have. Moreover, decisions would be made nearer to the companies that have to comply with them.

It is undeniable, however, that a decentralization of Article 85(3)[45] would also involve certain risks and drawbacks. First, the power to exempt under Article 85(3) is something genuinely different from the power to prohibit under Article 85(1). There would always be a danger of divergent decisions under Article 85(3) being taken by different national authorities in similar sit-

45. *See* EC Treaty, *supra* note 3, art. 85(3), O.J. C 224/1, at 28 (1992), [1992] 1 C.M.L.R. at 626.

uations. Second, exemption decisions taken by the competition authority of a Member State would be of limited value for economic operators if they could not take effect outside the territory of that Member State. Whether this is possible seems at least questionable.

d. Other Solutions

Other solutions and combinations of solutions could be considered. They would require more imagination and more courage than the options just described above. One starting point could be to state that the Commission should concentrate on detecting and prohibiting restrictions of competition instead of dealing with notifications for exemption under Article 85(3). The principal aim could be not to distribute the treatment of notifications for exemption between national competition authorities and the Commission, but to reduce the number of these notifications substantially.

Under this approach the separation of Article 85 into paragraph one and paragraph three on the level of the EC Treaty would not have to be changed. The issues that one would have to discuss rather concern Regulation 17. In 1962, this regulation established a system that separates the enforcement of Article 85(1) from that of Article 85(3) and subjects the latter to an administrative decision to be taken by one central authority at the end of a notification procedure. For those seeking legal certainty and enforceability of their agreements, Regulation 17 establishes a quasi-obligation to notify to the Commission because there can be no exemption decision without notification.

The choice of such a centralized authorization system based on quasi-compulsory notifications to the Commission can easily be explained by the circumstances prevailing in 1962. At that time, the Commission had hardly any information about existing agreements and practices. The Commission had not yet developed a decision-making practice and the judgments by the European Court of Justice were very few in number. Thus, there were practically no precedents set by European institutions that could have guided national authorities and courts. Moreover, in the Member States little to no competition legislation existed, very few competition authorities were in place, and hardly any of them was really active. Moreover, complainants would not have

turned to the Commission if it had not taken the leading role in the enforcement of Article 85.

It could be argued that thirty-six years later, circumstances have largely changed and that the centralized authorization system based on quasi-compulsory notifications to the Commission has possibly become excessive. Today, there is a substantial body of case law created by the Commission and the Court of Justice that provides guidance in many questions. The existence and power of the Commission is well known to complainants. And finally, the impact of the notification system on compliance with Article 85 has been shown to have reached its limits where it comes to the most serious restrictions of competition. They are usually carried out intentionally and would therefore not be notified to the Commission even under a fully-fledged system of compulsory notifications.

CONCLUSION

With regard to the modernization of Regulation 17, today it would obviously be premature to make a choice between any of the options that I have sketched in the foregoing. But I can say that—in order to achieve the objectives that we have to pursue—it will probably be necessary to touch on all or most of the parameters of reform that I outlined in this presentation. This will be the fascinating challenge that we have to tackle in the near future.