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Modernization of EC Competition Law: Reform of Regulation No. 17

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Abstract

Ladies and Gentlemen, at last year's conference I presented to you a wide variety of ongoing and proposed reforms with which the European Union intends to meet actual and future challenges for its competition policy. Today, one year later, we have made considerable progress in many respects. Most importantly, with our White Paper of 28 April 1999, we have launched the process for a fundamental reform of the rules implementing Articles 81 and 82 of the Treaty establishing the European Community ('EC Treaty'), which are currently laid down in Council Regulation No. 17. Anticipating your expectations and my fellow panelists' contributions, I will today concentrate on the reform of Regulation No. 17.

MODERNIZATION OF EC COMPETITION LAW: REFORM OF REGULATION NO. 17

*Dr. Alexander Schaub**

INTRODUCTION

Ladies and Gentlemen, at last year's conference I presented to you a wide variety of ongoing and proposed reforms with which the European Union intends to meet actual and future challenges for its competition policy.¹ Today, one year later, we have made considerable progress in many respects. Most importantly, with our White Paper of 28 April 1999,² we have launched the process for a fundamental reform of the rules implementing Articles 81 and 82 of the Treaty establishing the European Community³ ("EC Treaty"), which are currently laid down in Council Regulation No. 17.⁴ Anticipating your expectations and my fellow panelists' contributions, I will today concentrate on the reform of Regulation No. 17.

* Director-General of the Directorate-General Competition of the European Commission. The author wishes to express particular gratitude to Rüdiger Dohms of the Directorate-General Competition, who made an essential contribution to the preparation of this Essay.

1. Alexander Schaub, *EC Competition System—Proposals for Reform*, 1998 FORDHAM CORP. L. INST. (Barry Hawk ed., 1999).

2. White Paper on Modernisation of the rules implementing Articles 81 (ex 85) and 82 (ex 86) of the EC Treaty, COM (99) 101 Final (May 1999). Also published on the World Wide Web under <http://europa.eu.int/comm/dg4/entente/other.htm#dgiv_pdf_wb_modernisation>.

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]. The Treaty establishing the European Community ("EC Treaty") was amended by the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Oct. 2, 1997, O.J. C 340/1 (1997) [hereinafter Treaty of Amsterdam]. These amendments were incorporated into the EC Treaty, and the articles of the EC Treaty were renumbered in the Consolidated version of the Treaty establishing the European Community, O.J. C 340/3 (1997), 37 I.L.M. 79 [hereinafter Consolidated EC Treaty], *incorporating changes made by* Treaty of Amsterdam, *supra*; Consolidated EC Treaty, *supra*, art. 81-82, O.J. C 340/3, at 208-09 (1997), 37 I.L.M. at 93-94 (ex Articles 85-86).

4. See Council Regulation No. 17/62, 13 J.O. 204 (1962), O.J. Eng. Spec. Ed. 1959-62, at 87 (citing first regulation implementing Articles 81 (ex 85) and 82 (ex 86) of EC Treaty).

I. WHY DO WE NEED A REFORM OF REGULATION NO. 17?

The present system for the implementation of Articles 81 and 82 was established by Regulation No. 17 in 1962 and has been substantially unchanged ever since. With regard to control of restrictive agreements, the prohibition under Article 81(1) can be applied not only by the European Commission ("Commission"), but also by national competition authorities and national courts. However, only the Commission is empowered to grant exemptions for notified agreements on the basis of Article 81(3). This has led to a highly centralized notification and authorization system, which was certainly useful in the early years. However, already today it no longer ensures satisfactory protection of competition and it would certainly not meet the challenges of the future. The major shortcomings of the current system are its inefficiency and the insufficient involvement of national authorities and courts in the enforcement of the European Community (or "EC") competition rules. Both aspects have a negative impact on the effective protection of competition and this is the central reason why we are now proposing a fundamental reform. Our experience has shown that the notification system hardly contributes to the protection of competition: in thirty-seven years of Regulation No. 17, only nine formal prohibition decisions have emerged from pure notification cases, *i.e.*, cases in which there was no additional complaint. The substantial number of notifications, which in their large majority do not pose significant competition problems, does however distract the Commission from pursuing grave infringements of competition law, particularly those that are never notified.

At this point, it is important to understand that the principal motivation behind our reform project is not the workload as such that the notification system creates for the Commission. It is rather the fact that a substantial part of the Commission's resources is tied up in a notification business that does not essentially contribute to the protection of competition. Since the Commission's competition resources will always be limited, efficiency considerations now make it imperative to concentrate them fully on serious infringements that are pursued in *ex officio* and complaint procedures.

In the same spirit of improving the protection of competition, we find it untenable that the Commission's exemption mo-

nopoly continues to block the appropriate participation of national authorities and courts in the enforcement of Article 81. This is deplorable since the institutional and factual preconditions for a successful enforcement of the EC competition rules at the Member State level have remarkably improved in the last decade. It is therefore now possible to have more EC competition cases decided by national bodies that are nearer to the markets and the people concerned. This will improve acceptance of competition policy among the citizens and contribute to developing a common competition culture throughout the Community. In any event, the centralized system created by Regulation No. 17 in 1962 for a Community of 6 Member States with 170 million inhabitants and 4 working languages is now, after several enlargements and progressive integration of markets, no longer appropriate for a Community of 15 Member States with 380 million inhabitants and 11 official languages. The imminent further enlargement to a Community of 20-25 or even 30 Member States now makes a fundamental reform of Regulation No. 17 inevitable if we want to maintain a workable system and to ensure the effective protection of competition.

In summary, our philosophy, which by the way not only applies to the reform of Regulation No. 17 but also to other projects that we have started in the last few years, can be summarized as follows:

- the Commission must concentrate on the really important cases;
- national authorities and courts must get seriously involved in the enforcement of the EC competition rules;
- procedures must be simplified and to become less bureaucratic;
- a uniform and coherent application of the EC rules must be ensured;
- an adequate level of legal certainty must be maintained.

II. *OPTIONS FOR REFORM OF REGULATION NO. 17*

How best to achieve these objectives with regard to the implementation of Articles 81 and 82 has been intensely discussed in the Directorate-General for Competition over the last three

years. At this point, I would like to concentrate on the most important options.

A. *The First Option*

The first option is to maintain a system of notification and authorization, but to abolish the Commission's exemption monopoly and to share the power to grant constitutive exemptions between the Commission and national competition authorities. Cases would be allocated between the different authorities according to the center of gravity criterion: Where the center of gravity of the effects of a restrictive agreement is confined to one Member State, the competition authority of that State is competent for dealing with a notification and deciding upon the exemption. All other cases are examined and decided by the Commission.

In our view, this option is not convincing for several reasons:

- First, the overall number of notifications would not be reduced, but merely distributed between competition authorities. The number of notifications would possibly even increase.
- Second, the vast majority of notifications would remain uninteresting and distract the Commission and national authorities from pursuing more serious infringements. Thus, the inefficiency of the notification system would be spread to national authorities instead of allowing them and the Commission to overcome their reactive position and to adopt a pro-active approach.
- Third, in view of the increasing integration of markets across national borders, the potential for decentralizing a notification and authorization system is limited. The effect of an exemption decision issued by a national authority is limited to that Member State and will not satisfy companies seeking legal security in all the Member States where the agreement is intended to operate. Instead of filing multiple notifications with several national authorities, companies rather will notify with the Commission.
- Fourth, the center of gravity criterion is too vague, given

the fact that important legal consequences such as immunity from fines and exemption retroactivity are connected with the act or date of notification.

- Fifth, those Member States that currently have no notification system (such as France or Luxembourg) would be obliged to establish one. This would mean complication of procedures and more bureaucracy instead of simplification of procedures and less bureaucracy.
- Sixth, a particular weakness of this option would be that any administrative authorization system prevents national courts from applying Article 81 in its entirety. Inasmuch as a restrictive agreement would have been notified and an exemption could not be definitely ruled out, national courts would remain obliged to stay their proceedings until the Commission or the national authority had decided upon the application of Article 81 (3). This would impede the practical effectiveness of private action as a means of protecting competition as well as individual rights.
- Finally, this option would contain special dangers for uniformity and coherence, since national authorities in their exemption practice could be tempted to treat domestic companies more leniently than the Commission would do.

B. A Second Model

During the discussions, a second model has emerged. It would maintain an administrative notification and authorization system, either in its current centralized form or with decentralization towards the national authorities, and combine this model with simplification of procedures and possibly an extension of the waiver of prior notification under Article 4(2) of Regulation No. 17 to all agreements. The general rule under Regulation No. 17 is that exemptions cannot take effect for the time before the notification of the agreement, while for agreements falling under Article 4(2) the exemption can be backdated to the day of conclusion of this agreement. In the course of reforming our policy on vertical restraints, we have extended Article 4(2) to all vertical agreements. The aim was to avoid damage for those companies that at the moment of concluding their agreement

erroneously thought they were covered by the market share-based group exemption regulation and therefore had refrained from prophylactically notifying for an individual exemption. Upon later discovering that such notification was necessary, they would not have been able to avoid a period of incurable nullity between the date of conclusion of the agreement and the date of its notification. That is the reason why, with effect from June 18, 1999, Article 4(2) of Regulation No. 17 was extended so as to cover all vertical agreements⁵.

Nevertheless, for several reasons we do not think that the further extension of Article 4(2) to all (*i.e.*, including horizontal agreements) would be a general and sustainable solution:

- First, even agreements falling under Article 4(2) would have to be notified to the Commission, or a national competition authority in the decentralized system, if and when the question of their exemptability is raised, such as in a prohibition procedure before a national authority or in litigation before a national court.
- Second, companies could continue to notify prophylactically to the Commission or to national authorities, thus distracting them from pursuing the more severe infringements in *ex officio* and complaint cases. The necessary concentration of competition authorities' activity on the important cases would risk not to be ensured.
- Third, maintaining the Commission's exemption monopoly would continue to block effective participation of national authorities and courts in the enforcement of EC competition law. And even if the Commission shared its exemption power with the national authorities, national courts would remain blocked and the effectiveness of private enforcement impaired. In fact, the extension of Article 4(2) would even strengthen the blocking effect against national courts. Outside Article 4(2), national courts can today safely apply Article 81(1) if no notification has been made at all, or at least for the time before a notification was made. With the generalization of Article 4(2), the prospect that a notification might come at some later point in time and lead to an

5. Council Regulation No. 1216/1999/EC, O.J. L 148/5 (1999).

exemption taking effect from the concluding day of the agreement would discourage national courts even more from applying Article 81(1).

- Finally, as far as simplification of procedures is concerned, the important point is that this becomes interesting only after the central features of the enforcement system concerning the concentration on the severe infringements and the involvement of national authorities and courts have been put right. Otherwise, more efficient procedures would just attract more notifications without improving the protection of competition.

C. The New System Proposed by the Commission's White Paper

All the above-stated reasons taken together have led the Commission to conclude that a more far-reaching reform is necessary. To this end, the White Paper proposes a new system, which is based on the direct applicability of the exception in Article 81(3). The transition would be achieved by a new Council Regulation replacing Regulation No. 17 and providing that the Commission, national competition authorities, and national courts in all proceedings for the application of Article 81(1) would also consider Article 81(3) and apply this provision where its four conditions are fulfilled. Article 81 would thus become a unitary norm, directly applicable in its entirety and composed of a rule establishing the principle of prohibition under paragraph 1 and a legal exception under paragraph 3. Without the need for an explicit administrative authorization, restrictive agreements would be valid as long as they fulfilled the four conditions under Article 81(3). The Commission, national competition authorities, and national courts would have parallel competence for the application of Article 81 in its entirety. Since 1958, this is already the case in respect of Article 82.

We believe that this is the model that is best suited to the European Union of the future and which meets our reform objectives most certainly. In short, it improves the protection of competition by allowing the Commission and national competition authorities to concentrate on the serious infringements, and by fully involving national authorities and courts in the application of the European competition rules. It benefits industry by simplifying administrative control through the abolition of

the notification procedure and by promoting the application of one set of rules—the EC rules—to cases with an effect on trade between Member States. And it can ensure—as I will show—consistent application of these rules and an adequate level of legal security for industry.

III. DETAILS OF THE COMMISSION'S REFORM MODEL

Let me now expand a little more on the details of our proposal and its advantages.

A. *Our Proposal Is Based on Four Pillars*

The first pillar is the abolition of the notification and authorization system in respect of Article 81. In the new system, there will be no authority, whether Community or national, to which restrictive agreements will have to be notified and which issues decisions creating rights for companies, *i.e.*, constitutive exemptions. Instead, if restrictive agreements fulfill the four conditions of Article 81(3), then they will be legal as from the date of their conclusion and for as long as the four conditions continue to be met. This means not only that the Commission's exemption monopoly will disappear, but also that the power and the necessity to issue exemption decisions—instead of being shared between the Commission and national authorities—will be abolished altogether. This avoids the problems of allocating notifications between national competition authorities and the Commission. It also means that the related danger of laxist application of Article 81(3) by national authorities is eliminated, as formal exemption decisions will no longer exist. Protection of competition will be improved by allowing both the Commission and national authorities fully to concentrate on serious infringements.

The second pillar is that as a result of the direct applicability of Article 81(3), both national competition authorities and national courts will be enabled to participate fully in the enforcement of EC competition rules. There will be full parallel competence of the Commission, national competition authorities, and national courts in respect of the application of Articles 81 and 82. As well as the Commission, national authorities pursuing an *ex officio* or complaint procedure, and national courts having to decide upon the validity of an agreement and possibly about

damages, will all be able to decide themselves whether Article 81(3) applies and act accordingly. Thus, their procedures will be expedited, and this will further enhance the protection of competition.

Closer co-operation between national competition authorities and the Commission within a future network of competition authorities throughout the European Union is the third pillar of our proposal. Ensuring efficiency and coherence calls for the creation of such a network. Today, the Commission can co-operate more easily and more closely with U.S. enforcement agencies than with those within the European Union. We need to put an end to this unsatisfactory situation.

Lastly, the shift to a system of enforcement based on *ex post* control of restrictive agreements requires a strengthening of the instruments at the Commission's disposal. For example, we propose to strengthen the Commission's power of inquiry by allowing it to interview individuals at Commission offices and take minuted statements. The penalties for the provision of incorrect or misleading information also need to be updated. They have not been changed since 1962 and we propose that they should be aligned on those in the Merger Regulation.⁶

In the proposed new system, complaints will play a much more important role in detecting and repressing serious infringements. Therefore, it is necessary to simplify and improve the procedures for handling complaints. That is why we propose to introduce a time limit of four months within which the Commission must indicate whether it proposes to conduct a substantive investigation. It is essential that complainants are told rapidly of the Commission's intentions. Where the Commission does not intend to investigate, complainants will be able to turn to national competition authorities and/or national courts. We do not propose a time limit for the substantive investigation of complaints. Such a time limit would make little sense as the complexity and nature of antitrust investigations vary widely. We also propose to adopt a notice on complaints. This notice would serve a number of purposes. First, it would provide guidance to

6. Council Regulation No. 4064/89/EEC on the 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).

complainants on the criteria to be used to determine which matters should best be dealt with by the Commission and which by national competition authorities or courts respectively. Secondly, it would explain the remedies that a complainant can hope for from the Commission, that is, an order requiring an infringement to be put to an end, fines for the perpetrators, and interim measures in cases of urgency. Meanwhile, damages and findings of nullity of agreements remain within the sole competence of national courts.

B. The Competences of Commission, National Competition Authorities, and National Courts in the New System

1. The Commission

In the new system, EC competition policy will continue to be determined by the Commission. As guardian of the EC Treaty and guarantor of the Community interest under the supervision of the European Court of Justice ("ECJ"), the Commission will have to play a special role in orientating competition policy and ensuring the consistent application of the competition rules. To this end, the Commission will develop the legislative framework surrounding Articles 81 and 82, and it will issue leading decisions in individual cases.

In a system of directly applicable exception, it will be crucial to reinforce the legislative framework comprising block exemption regulations, notices, and guidelines. This is essential for ensuring uniformity and coherence in the application of the rules by different decision makers and it will provide foreseeability for economic operators. The Commission will retain exclusive competence for formulating, proposing, and in some instances adopting these different forms of legislative texts. Block exemption regulations are directly applicable laws that national competition authorities and national courts will have to respect when they apply European/national competition law. Notices and guidelines, in which the Commission explains its policy, will provide orientation for national decision makers.

At this point, the connection with the reform of our policy concerning vertical restraints becomes clear. In this area, we have already begun to strengthen and clarify the legal framework and to adopt a more economic approach. The current sec-

tor-specific regulations⁷ will be replaced by one broad block exemption regulation covering all vertical restraints, except for car distribution.⁸ The draft of the new regulation, which we have published for comments in September 1999,⁹ foresees that all vertical agreements up to a market share of thirty percent¹⁰ will be exempted, except for a limited number of "blacklisted" hard core restraints. The new regulation would therefore only define which type of restriction is not exempted. We would thus overcome the legalistic form-based approach that characterizes the current regulations and which has a straitjacket effect by attempting to define all clauses that are exempted. The aim of market share-based block exemptions is to provide a safe harbor for all those companies not holding significant market power. Within this safe harbor, they will no longer be obliged to examine the legality and validity of their agreements. Above the market share threshold, vertical agreements will not be presumed to be illegal, and Commission guidelines will help companies to assess the compatibility of their agreements with Article 81(1) and 81(3). Consequently, in September 1999 we have also published draft guidelines on vertical restraints for comments by third parties.¹¹ The aim is to adopt the new block exemption regulation before the end of the year 1999 and to start applying it together with the guidelines from June 1, 2000.¹²

7. Commission Regulation No. 1983/83/EEC on the application of Article 81(3) of the EC Treaty to categories of exclusive distribution agreements, O.J. L 173/1 (1983), *corrigendum* O.J. L 281/24 (1983); Commission Regulation No. 1984/83/EEC on the application of Article 81(3) of the EC Treaty to categories of exclusive purchasing agreements, O.J. L 173/5 (1983), *corrigendum* O.J. L 281/24 (1983); Commission Regulation No. 4087/88/EEC on the application of Article 81(3) of the EC Treaty to categories of franchise agreements, O.J. L 359/46 (1988).

8. Council Regulation No. 1475/95/EC on the application of Article 81(3) of the EC Treaty to certain categories of motor vehicle distribution and servicing agreements, O.J. L 145/25 (1995), will expire on September 30, 2002.

9. O.J. C 270/7 (1999).

10. The market share cap refers to the 30% share held by the supplier in the relevant market on which he sells the contract goods or services, or—in case of exclusive supply obligations—the 30% share held by the buyer in the relevant market on which he purchases the contract goods or services.

11. O.J. C 270/12 (1999).

12. In fact, the new block exemption regulation was adopted on December 22, 1999 (Commission Regulation No 2790/1999 on the application of Article 81(3) of the EC Treaty to categories of vertical agreements and concerted practices, O.J. L 336/21 (1999)). The final version maintains all basic features of the draft regulation as published on September 30, 1999. The new regulation stipulates that the exemptions provided for in Commission Regulations Nos. 1983/83/EEC, 1984/83/EEC, and 4087/88/

In the same spirit of strengthening and clarifying the legal framework and providing better orientation for industry, we have also started the overhaul of our policy with regard to horizontal restraints. This will lead to the presentation of new draft block exemption regulations and guidelines in the course of the year 2000.

Apart from the legislative framework, the Commission will concentrate on combating serious infringements by individual prohibition decisions. These will set precedents, shape European competition policy, and provide further orientation for national decision makers. It is still under discussion whether under certain exceptional cases, the Commission would also adopt non-infringement decisions, stating that a certain agreement does not infringe Article 81 because it is not even caught by the prohibition in paragraph 1 or because it is covered by the exception in paragraph 3. However, in contrast to the constitutive exemption decisions in the current system, non-infringement decisions would be declaratory only. Non-infringement decisions are not meant to satisfy individual companies' request for legal security. The Commission would issue them in the public interest exclusively, in particular where an agreement raises questions that are new and where, in the interest of ensuring legal clarity and coherent application of the rules, it seems sensible to provide the other decisions makers, as well as economic operators, with guidance regarding the Commission's approach. Non-infringement decisions would therefore not push the Commission back into its reactive role but could be one of the instruments it would employ in leading a pro-active competition policy.

Another instrument will be decisions by which the Commission accepts commitments given by companies in order to prevent a prohibition decision from being issued against them. Those decisions will render commitments binding upon the parties and enable third parties to rely on them in national courts. Commitments would be offered by the parties concerned or

EEC shall continue to apply until May 31, 2000. From June 1, 2000, the new regulation will apply until its expiry on May 31, 2010. The prohibition laid down in Article 81(1) EC Treaty shall not apply during the period from June 1, 2000 to December 31, 2001 in respect of agreements already in force on May 31, 2000 that do not satisfy the conditions for exemption provided for in the new regulation but which satisfy the conditions for exemption provided for in Regulations Nos. 1983/83/EEC, 1984/83/EEC, and 4087/88/EEC.

would be proposed by the Commission. In practice, securing commitments would provide possibilities of fine tuning similar to the fine tuning currently exercised where an exemption decision is subjected to conditions and obligations.

2. National Competition Authorities

Successful involvement of national competition authorities in the enforcement of EC competition rules in the first place obviously depends on them being empowered by their Member States to apply Articles 81 and 82 EC Treaty. In the last twelve months, the score has not changed: eight Member States have empowered their authorities,¹³ while seven have not.¹⁴ As the Commission's exemption monopoly seems to have been the main ground for the remaining seven Member States not to empower their authorities, we have reason to expect that this will change once our proposed reform is implemented. In fact, some countries, such as Sweden and Denmark, are already anticipating our reform by preparing new legislation empowering their competition authorities to apply Articles 81 and 82.

In the new system, Commission and national competition authorities will cooperate in a close network characterized by shared principles and the development of a common competition culture. The need for a common competition culture cannot be overstated and I believe that this will be key for the smooth functioning of the network, which in turn will be decisive for the success of our reform model. In particular, uniform and coherent application of the rules and the development of a level playing field throughout the European Union will depend to a large extent on the functioning of the network. I will come back to this point.

Once empowered to apply Articles 81 and 82, national authorities will be able to issue the same types of decision as the Commission, *i.e.*, prohibition decisions, decisions accepting commitments or rejecting complaints, and interim measures decisions. Moreover, national authorities will have the power to withdraw the benefit of a group exemption regulation if agree-

13. These states are: Belgium, France, Germany, Greece, Italy, Netherlands, Portugal, and Spain.

14. These states are: Austria, Denmark, Finland, Ireland, Luxembourg, Sweden, and the United Kingdom.

ments covered by that regulation on a separate national market create restrictions of competition that are incompatible with Article 81(3). With effect from June 18, 1999, we have already created this withdrawal possibility with regard to all existing block exemption regulations in the area of vertical restraints.¹⁵

3. National Courts

Full involvement of national courts in the application of Articles 81 and 82 in their entirety is one of the advantages of the Commission's reform model. Direct applicability of Article 81(3) will enable national courts to decide themselves, and immediately, upon enforceability or nullity of an agreement, as well as on damages.

Since we published our proposals for reform in April 1999, some commentators have questioned a judges' ability to apply Article 81(3) in the appropriate way. I think concerns in this respect are not really justified for several reasons: First of all, the reinforced legal framework surrounding the EC competition rules, which I mentioned earlier, will provide judges with orientation especially with regard to Article 81(3). Judges will also retain the possibility to put economic, legal, and technical questions to the Commission, and finally they will have the possibility to refer to the European Court of Justice for a preliminary ruling under Article 234 (ex Article 177). Moreover, it is conceivable to improve further a judge's ability to apply competition law by special training programs or by encouraging Member States to consider the creation of specialized courts with responsibility for competition matters.

A decisive point is that Article 81(3) only provides a margin of appreciation with regard to the fulfillment of the four conditions for the exception; it does not leave a margin of discretion whether to apply Article 81(3), if the four conditions are fulfilled.¹⁶ If they are fulfilled, then the decision maker, whether

15. Council Regulation No. 1215/1999/EC *amending* Council Regulation No.19/65/EEC, O.J. L 148/1 (1999). This amendment also applies to the new vertical restraints block exemption Regulation No 2790/1999/EC, O.J. L 336/21 (1999).

16. *Ancides v. Commission*, Case 43/85, [1987] E.C.R. 3131; *Schöller Lebensmittel GmbH v. Commission*, Case T-9/39, [1995] ECR II-1611, II-1663, ¶ 140; *Société d'Hygiène Vichy*, Case T-19/91, [1992] E.C.R. II-415, II-456, ¶ 99; *Matra Hachette SA v. Commission*, Case T-17/93, [1994] E.C.R. II-595, II-631, II-633, II-637, II-641, II-644, II-649, ¶¶ 104, 111, 125, 134, 140, 156. Some other judgments by the European Court of

authority or court, has to apply the exception and therefore has to disapply the prohibition.¹⁷ Article 81(3) is therefore not a norm of discretion, the application of which is usually reserved to administrative authorities. It compares to Articles 81(1) and 82, which also require complex economic assessments, and which have always been directly applied by national courts. Moreover, the European Court of Justice¹⁸ has already acknowledged that national judges are capable of assessing the probability of exemption under Article 81(3) and to draw the appropriate conclusions for their procedure, for instance in interim measures decisions.

4. Case Allocation in the New System

In the new system, complainants will be able to choose freely whether to turn to the Commission, a national competition authority, or a national court. In the relationship between competition authorities, an important function of the network between the Commission and national authorities will be to develop transparent and flexible rules of allocating cases to the authority best placed to deal with them. This authority can ensure the best protection of competition in any particular case. It necessarily does not have to be either the Commission or one single national competition authority alone. In certain cases, it is conceivable that joint action by two national authorities might be the most appropriate solution.

The center of gravity of the restrictive effects certainly will remain a criterion for case allocation, but will lose much of its rigidity upon the abolition of the notification and authorization system. In a system that concentrates on prohibition decisions,

Justice (*e.g.*, *Metro v. Commission*, Case 26/76, [1977] E.C.R. 1875, 1916, ¶ 45) and by the Court of First Instance (*e.g.*, *Kraanverhuur*, Joined Cases T-213/95 & T-18/96, [1997] E.C.R. II-1739, II-1810, ¶ 190) refer to the Commission's "discretion" when applying Article 81(3). The context of each of these judgements, however, makes clear that what is meant is a margin of appreciation in assessing the four requirements under Article 81(3), not a margin of discretion that would allow the Commission to use political or any other considerations for not applying Article 81(3) where it had previously concluded that all four requirements of this provision were fulfilled.

17. *Consten & Grundig v. Commission*, Joined Cases 56 & 58/64, [1966] E.C.R. 299, [1966] C.M.L.R. 418; *Peugeot v. Commission*, Case T-23/90, [1991] E.C.R. II-653, [1993] 5 C.M.L.R. 540.

18. *Delimitis v. Henninger Bräu*, Case C-234/89, [1991] E.C.R. I-935, I-991-994, ¶¶ 43-55 (in particular ¶ 50), [1992] 5 C.M.L.R. 210, 257.

in order to stop a restrictive agreement—the effects of which are not centered in just one Member State—it may suffice to have it prohibited by a national authority in just one Member State. Other criteria for case allocation will include *inter alia* the effectiveness of investigative powers and legal means for settling the case, sanctions available, or particular Community interest.

Potential complainants will need guidance in order to avoid unnecessary rejections of their complaint, and in identifying the authority that is most likely to take up their complaint and provide adequate remedies. Therefore, we need to set out the remedies that can be obtained from the Commission and also to explain the concept of lack of Community interest under which the Commission is entitled to set priorities and reject complaints.¹⁹ We intend to address these issues in a Commission Notice. Ideally, in order to provide complainants with a full picture and the opportunity to compare *fora*, the conditions under which national authorities and national courts take up complaints, and the remedies they can provide should also be explained.

Finally, if after a procedure has started in one authority, another authority later turns out to be better placed to deal with the matter, case transfer should be possible. This will mainly take place on a voluntary basis, except for the Commission's power to withdraw a case from a national authority at any time. We are still discussing whether case transfer should be possible, not only vertically between the Commission and a national authority, but also horizontally between national competition authorities. In any event, efficiency demands that where case transfer takes place, the whole file including all confidential information can be transferred and that all the evidence contained in it can be directly used by the recipient authority. In this respect, many obstacles still need to be overcome at the EC level as well as at the national level. In particular, national provisions prohibiting the transfer of information to foreign and international authorities would need to be removed. Moreover, certain basic safeguards for the non-disclosure of the information transferred, and for its use only for the purpose for which it was collected, would have to be established throughout the Community.

19. *Automec v. Commission*, Case T-24/90, [1992] E.C.R. II-2223, II-2277-2284, ¶ 84 *et seq.*, [1991] 4 C.M.L.R. 177, 1198.

IV. *ADVANTAGES OF THE NEW SYSTEM FOR INDUSTRY*

Let me now briefly mention some important advantages of the new system for industry: first, the reform will improve the protection of competition and thereby increase the welfare of society inside the internal market. Effective competition is essential for the creation and maintenance of an open market economy. It is the key not only to increasing the competitiveness of European companies inside the Community but also for globalizing international markets. It is moreover the only guarantor that consumers will get the best value and service at low prices. This is the main objective of the whole reform.

Second, abolishing the notification and authorization system will free companies from unnecessary bureaucratic burdens and delays. This means deregulation and simplification. Third, by allowing national competition authorities and national courts to decide upon Article 81 in its entirety, the blocking effect of the Commission's exemption monopoly is removed. As a consequence, the new system will more rapidly produce binding results concerning the legality and validity of agreements.

Fourth, pressure on national competition systems for convergence will grow. This will promote the development of a level playing field and the application of one set of rules—the EC competition rules—in all cases affecting trade between Member States. Legally, the abolition of the notification and authorization system at the Community level will not oblige Member States to abandon similar systems at the national level. Also, the principle of primacy of EC law over national law remains untouched. In practice, however, the combination of primacy of EC law with direct applicability of Article 81(3) by national authorities and national courts, and the extended use of directly applicable EC block exemption regulations, will increase the convergence pressure for national competition systems.

V. *CRITICISM EXPRESSED AGAINST THE NEW SYSTEM*

Let me finally turn to a number of objections raised against the new system.

A. *Compatibility of the Commission's Reform Model with the EC Treaty*

It is sometimes alleged that our reform model is not com-

patible with the EC Treaty and that moving to a system of directly applicable exceptions could not be achieved on the basis of a new implementing Council Regulation, but would require an amendment of the EC Treaty. In particular, it is said that the wording of Article 81(3), *i.e.*, the phrase "may be declared inapplicable" presupposes a constitutive administrative declaration, thus ruling out the direct applicability of this norm by national courts.

We do not agree with this view. It is uncontested that, in 1957, the authors of the EC Treaty could not agree whether restrictive agreements should be controlled by a notification and authorization system or by a system in which the exception rule under Article 81(3) is directly applicable. Therefore, Article 81(3) was based on the compromise formulation "may be declared inapplicable" in order to allow the establishment of either system. Had the authors of the EC Treaty opted for an administrative authorization system, the formulation would rather have been like in Article 65 of the Treaty establishing the European Coal and Steel Community: "the Commission shall authorise." The choice of enforcement system was thus left to the Council of Europe ("Council") when adopting the implementing regulation on the basis of Article 83. This provision empowers the Council *inter alia* to lay down detailed rules for the application of Article 81(3), taking into account the need to ensure effective supervision and simplification of administration. Article 83 does not prescribe the establishment of a particular type of system for the implementation of Articles 81 or 82. It allows the Council to empower, not only the Commission, but also national authorities and courts to apply Article 81(3). Within this framework, the Council in 1962, with regard to the control of restrictive agreements, chose to establish *via* Regulation No. 17 the current centralized notification and authorization system, in which the Commission has exclusive power to grant exemptions under Article 81(3). For the sake of ensuring effective protection of competition and simplification of control procedures in circumstances that have fundamentally changed since 1962, we think that it is now time to propose to the Council to abandon its previous choice and to establish the alternative system of a directly applicable exception *via* a new implementing regulation based on Article 83 of the EC Treaty.

Finally, as I have already indicated, Article 81(3) is of a na-

ture to be applied directly by national courts. This is because this provision is unconditional and sufficiently clear, and most importantly, it only contains a margin of appreciation, leaving no margin of political discretion not to apply it once its four conditions are fulfilled.

B. *Effectiveness of Competition Protection*

Some commentators on our reform proposal fear that the reform would weaken the protection of competition by degrading the prohibition principle to an abuse control system. In this regard, I want to re-state firmly that improving the protection of competition is the main objective of the reform. We intend to achieve this in the following way: first, the prohibition principle and its preventive effect will be fully maintained. Restrictive agreements not covered by Article 81(3) will be void *ab initio* and will therefore—unlike in an abuse control system—not enjoy provisional validity before an authority or court has intervened.

Second, there will not be a *de facto* degradation of competition protection to the level of abuse control either. On the contrary: the practical effectiveness of the prohibition principle will be re-enforced. On the one hand, resources will be concentrated on pursuing the serious infringements. On the other hand, national competition authorities and courts will fully and more effectively participate in the enforcement of Articles 81 and 82 in their entirety. They will be able to activate fully their specific strengths based on the fact that they are closer to their citizens and have special remedies at their disposal. Finally, the abolition of the notification system will eliminate immunity from fines, which are conditional upon notification. Overall, the new system will increase the deterrent effect of the prohibition rule so as to better protect competition.

C. *Uniform and Coherent Application of EC Law*

Compared to the current system, the decisive element of our reform model is the proposal to extend the direct applicability of Article 81(1) to Article 81(3) and thus to create parallel competencies for the Commission, national competition authorities, and national courts in the application of Article 81 as a whole. In comparison with the Commission's exemption monopoly, the new system could therefore give rise to new risks for

the uniform and coherent application of Article 81(3). However, in the first place, the practical risk of divergent decision making should not be overstated. Article 81(1) and Article 82 have already for several decades been subject to parallel competencies for the Commission, national authorities, and national courts, and very few problems have arisen.

The risk of divergent decision making will be further reduced by the strengthening of the legal framework surrounding Article 81, as well as by key Commission decisions that will further clarify the application of this provision. Moreover, our concept relies on special mechanisms to avoid conflicting decisions, and finally on clear principles for the resolution of conflicts if they arise. Prevention of conflicts will mainly be based on intensive information and consultation between the Commission and national authorities in all procedures for the application of EC law. The Commission will thus be aware of these procedures and be able to identify and settle difficulties of interpretation and gaps in the legislative framework. The Commission will also continue to answer questions of a technical, economic, and legal nature put by the national courts. With the permission of a national court, the Commission should also be empowered to intervene in judicial proceedings as *amicus curiae*.

According to the judgment of the European Court of Justice ("ECJ") in the case of *Delimitis*,²⁰ national courts are obliged to avoid conflict with decisions that the Commission is preparing on the basis of Article 81. In these circumstances, the national court is called upon to suspend its procedure and ask the Commission for further information on the case, or ask the ECJ for a preliminary ruling. The obligation to avoid conflict must *a fortiori* also apply to decisions that the Commission has already adopted. Moreover, it results from the loyalty requirement in Article 10 of the EC Treaty that this obligation also extends to national competition authorities.

In the relation between national competition authorities and the Commission, the most important aspect is the establishment of a close network designed to develop a uniform enforcement practice and a common competition culture. This will reduce the scope for divergence. A feature of the network could

20. *Delimitis*, [1991] E.C.R. I-935, I-991-994, ¶¶ 43-55 (in particular ¶ 47), [1992] 5 C.M.L.R. 210, 257.

for example be an upgrading of the Advisory Committee into a forum for discussing all important EC law cases. As a last resort for avoiding divergence, the Commission would keep the power—similar to the current Article 9(3) Regulation No. 17—to withdraw a case from a national authority at any time.

In the light of these different preventive mechanisms, we expect only a limited number of divergences to arise in the new system. The resolution of these conflicts will follow from the role and the jurisprudence of the European Court of Justice. In particular, the national courts' obligation to avoid conflict with Commission decisions as well as the clarifying effect of preliminary rulings by the ECJ will come into operation wherever a decision by a national competition authority or by a lower civil law court is being appealed in an administrative court or a higher civil law court, like for any other direct application of EC law.

For decisions by national courts with which the Commission does not agree, this means that in case of "negative" judgments, *e.g.*, non-enforcement of an agreement, or award of damages, the Commission will normally leave it to the parties concerned to appeal to a higher court of law. According to the principle set out in the *Delimitis* case, this appellate court would have to avoid conflict with existing Commission decisions.

The appellate court could ask the ECJ for a preliminary ruling and, as the last instance, it would be obliged to do so. The Commission systematically presents its opinion to the ECJ in all preliminary ruling procedures. In case of "positive" judgments by a national court, because the agreement is either considered not to be restrictive or to be covered by Article 81(3), the Commission can still prohibit this agreement with effect *erga omnes*.²¹

Where the judgment of the national court was appealed, the appellate court would then, according to the *Delimitis* principle, be obliged to avoid conflict with the Commission decision. Where the judgment had already become definitive before the Commission issued its decision, the principle of *res judicata*

21. See "Ice cream case (Unilever/Mars)" case (Masterfoods Ltd v. HB Ice Cream Ltd, and HB Ice Cream Ltd v Masterfoods Ltd trading as Mars Ireland, Case C-344/98, reference to the ECJ for preliminary ruling, not yet decided) in which a national court (the Irish High Court) on May 28, 1992 had found that Articles 81(1) and 82 did not apply while the Commission on March 11, 1998 adopted a prohibition decision (O.J. L 246/1 (1998) based on Articles 81(1) and 82 (appealed against in HB Ice Cream Ltd v Commission, Case T-65/98, not yet decided).

would only cover the parties to the litigation. For the rest, the subsequent Commission decision would apply.

If, in spite of the network and the Commission's power to withdraw a case, a national competition authority manages to take a decision with which the Commission disagrees, then it will in the first place be up to the companies concerned to appeal to a court of law. This court will again have to observe the principle laid down in *Delimitis* to avoid conflict with existing Commission decisions. Finally, a reference for a preliminary ruling will clarify matters with the authority of the European Court of Justice.

Let me finally add a word on forum shopping. It is often alleged that the new system of parallel competencies would invite complainants to move from one national court to the next, or from one national competition authority to the next, until a court or authority is found which considers Article 81(3) to be inapplicable and thus prohibits the agreement, or rules that it is void and possibly awards damages. This would endanger the viability of contracts or networks of similar contracts covering several Member States.

It is important to stress that forum shopping only makes sense to the extent to which complainants can hope for divergent decision practice by the Commission, national authorities, and national courts. Therefore, our most important safeguards are all the measures and mechanisms designed to ensure uniformity and coherence, which I just explained. Moreover, with regard to national courts, the Brussels Convention of 1968,²² which applies in all Member States of the European Union, and the Lugano Convention of 1988²³ applying to all Member States of the European Economic Area,²⁴ further add to the control of forum shopping. According to these conventions, the complainant's choice of where to sue is in most cases limited to two *fora*: first, the national court where the defendant has his business seat; and second, for contractual litigation, the national court where the contractual obligation is to be executed; or for third parties seeking damages, the national court where the damage

22. 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (consolidated version), O.J. C 27/1 (1998).

23. Convention on jurisdiction and the enforcement of judgments in civil and commercial matters—Done at Lugano on 16 September 1988, O.J. L 319/9 (1988).

24. Agreement on the European Economic Area, O.J. L 1/1-606 (1994).

accrued. As long as litigation in one national court continues, other national courts will not admit an action concerning the same parties and the same object. Once a national court's judgment has become non-appealable (*res judicata*), that judgment is executable *inter partes* in all European Union/European Economic Area Member States and has to be recognized *inter partes* by all national courts throughout the European Union/European Economic Area. Finally, a clause on arbitration or determining the place of jurisdiction (the forum) and the applicable substantive law is common practice in most business contracts.

D. *An Adequate Level of Legal Certainty*

Ensuring an adequate level of legal certainty for industry is also one of the goals of our reform proposal. There are two levels of legal security: first, there is the one that the European Court of Justice has confirmed, *i.e.*, the need to avoid conflicting decisions in a system of parallel competencies.²⁵ That is a serious and legitimate interest of companies with which I have dealt already. The second aspect of legal certainty put forward by companies is the claim of an individual right to go to an authority in order to get confirmation of whether an individual agreement conforms with the law. This latter aspect is questionable and not the normal rule in a legal system. Surely, there is an obligation for authorities to make the rules as predictable as possible, but outside of a system of either generalized *ex ante* control or a system of exemption monopoly, there should not be a right to get a decision on each individual agreement as to its compatibility with the rules.

In addition, the current system does not produce legal security of the latter kind to any great extent. More than ninety-five percent of all notifications for exemption do not end with a formal decision but rather with a simple comfort letter²⁶ that is not binding for other decision makers and therefore does not protect companies against different assessments by national authorities or national courts. On the other hand, forty years of decisional practice by the Commission and the European Court of Justice have to a large extent clarified the interpretation of

25. See, e.g., *Delimitis*, [1991] ECR I-935.

26. In the last five years (1994-1998), the Commission has on average issued five formal exemption decisions and 173 comfort letters per year.

Articles 81(1) and 81(3) so that, also in this respect, it does not seem necessary to maintain the notification and authorization system.

We think that the proposed new system will even increase legal security in various respects. In the first place, the system of directly applicable exceptions automatically will legalize the huge number of agreements that—despite the fact that they meet the four conditions for exemption under Article 81(3)—have not been notified because companies wanted to avoid costs, delays, and other inconveniences. Under the current system these agreements are void for the bureaucratic reason of not having been notified to and exempted by the Commission.

In the second place, we intend to make the rules still clearer by issuing a new type of broader block exemption regulations that will be binding on national decision makers and which will furthermore be accompanied by guidelines, as well as by leading decisions in individual cases. We will also continue on the path to a more economic approach in our analysis, thereby reducing the likelihood of being caught by the prohibition under Article 81(1) and overcoming the form-based legalistic approach that characterizes our current block exemption regulations. As I have explained, we are already well advanced on this path in the area of vertical restraints and are preparing to take a similar route with regard to horizontal restraints. The forthcoming new block exemption regulation on vertical restraints, with its thirty percent market share cap, will exempt about eighty percent of all vertical agreements and in practice cover nearly all agreements concluded by small and medium-sized enterprises. For them, the concern of legal certainty is much more justified than for large companies.

Self-assessment in the new system will be mainly a task for large companies, who have access to expert legal advice. In this context, it is important to stress that, above the market share caps of the new regulations, agreements will not be deemed illegal, and that Commission guidelines will help companies to assess their position under Articles 81(1) and 81(3). Moreover, individual Commission decisions in leading cases will complement the existing body of case law that provides further orientation for self-assessment. These decisions will mainly be prohibitions.

With regard to imposing fines for substantive infringements, the only change will be the abolition of the immunity from fines that was connected with notification. Apart from that, the Commission's fining practice will not change. This means that hard core infringements will continue to be systematically fined. Other serious infringements in the so-called "gray area" will attract fines only if the prohibition of the conduct in question had previously been made clear by a precedent case, by the legislative framework, or by other official publications such as the *Commission's Annual Report on Competition Policy*.

We also have to stress that the current notification system is appreciated only by a limited number of companies and for a limited number of agreements, while large parts of industry already rely on self-assessment and no longer notify their exemptable agreements. Those companies will gain in a system of directly applicable exceptions that automatically legalizes such agreements from the day of their conclusion.

Nevertheless, we are currently discussing whether and to what extent it would be appropriate for the Commission to engage in a practice of issuing informal opinions, *i.e.*, some equivalent of the business review letters employed in the U.S. system, with regard to the compatibility of individual transactions with Articles 81 and 82. Should we go down this path, however, it will be vital for the success of our reform, and in particular our ability to concentrate on the serious infringements and to set our own agenda, that the Commission retains full discretion about whether and to what extent to react to individual requests for opinions. Moreover, it must be clear that opinions would only self-bind the Commission as long as no new facts arise. Towards national courts and competition authorities, Commission opinions would not be legally binding. Within the network of competition authorities, however, and once the Commission has issued a positive opinion about a certain conduct, it would be logical for it to prevent national authorities from prohibiting that conduct as long as no new facts are revealed. The consultation processes within the network, and ultimately the power to withdraw a case from a national authority, give the Commission sufficient instruments to do so.

CONCLUSIONS

To conclude, I want to stress once more the main objectives and features of the proposed reform. The reform pursues three main objectives:

- First, a more efficient protection of competition;
- Second, a less bureaucratic enforcement system;
- Third, a more level playing field for companies operating inside the Community.

The means to achieve these objectives are:

- First, the abolition of the notification and prior authorization system so as to allow the Commission and national competition authorities to concentrate their resources on the important and problematic cases in order to protect effective competition.
- Second, the participation of national competition authorities and national courts in the enforcement of Articles 81 and 82 in their entirety, thereby increasing the effectiveness and the deterrent effect of these rules.
- Third, greater impact of the rule of primacy of Community competition law by rendering Article 81(3) directly applicable and by strongly promoting the application of one set of rules instead of fifteen, and tomorrow twenty, twenty-five or even thirty different national standards.

I am convinced that this reform is beneficial for the Community as a whole, for companies and consumers alike, and I am therefore optimistic about the outcome of our White Paper.