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Modernization of EC Competition Law

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Abstract

Before discussing the future reforms, I shall recall the curious features of the current competition law regime that is likely to last for a year or two longer. I shall then consider the implications of the proposed enforcement reform and the difficulties of predicting how it will work. Then I will turn to the apparent radicalism but concealed caution of the proposed new rules on vertical restraints and whether the proposed new powers of investigation for the Commission of the European Communities (or 'Commission') are compatible with the Convention for the Protection of Human Rights and Fundamental Freedoms ("Human Rights Convention").

MODERNIZATION OF EC COMPETITION LAW

*Ian Forrester**

INTRODUCTION

It is a particular pleasure to be able to comment on proposals for reforms for which one has been calling over a long period.¹ Before discussing the future reforms, I shall recall the curious features of the current competition law regime that is likely to last for a year or two longer. I shall then consider the implications of the proposed enforcement reform and the difficulties of predicting how it will work. Then I will turn to the apparent radicalism but concealed caution of the proposed new rules on vertical restraints and whether the proposed new powers of investigation for the Commission of the European Communities (or "Commission") are compatible with the Convention for the Protection of Human Rights and Fundamental Freedoms² ("Human Rights Convention").

My impression is that the proposals in philosophical approach largely respond to most of the institutional criticisms with which we are familiar. The institutional and procedural changes will be profound. While the long-term goals are commendable, many questions of procedure en route to those goals are unsettled. The new regime will bring a great deal of uncertainty to large corporate groups who operate in several Member

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1. The period has indeed been long. I remember giving a speech in the summer of 1982, shortly before the birth of my first son, orally advancing the ideas which were set forth in the article I wrote with Chris Norall entitled *The Laicization of Community Law: Self-Help and the Rule of Reason: How Competition Law Is and Could Be Applied*, in 1983 FORDHAM CORP. L. INST. 305 (Barry Hawk ed., 1984); 21 COMMON MKT. L. REV. 11 (1984). That son is now 17 years old.

2. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 1955 U.N.T.S. 220 (effective Sept. 3, 1953) [hereinafter Human Rights Convention].

States. Today, such groups are able to assess fairly accurately their antitrust posture throughout the European Union (or "EU"), but will in the future lose much of this confidence as many more actors receive power to apply competition rules. Reducing these uncertainties should be an important concern of the Commission.

I. RISK OF RE-NATIONALIZATION AND LESS LEGAL CERTAINTY

The purpose of this gathering is to consider the broad implications and practical uncertainties, advantages, and disadvantages of the recently announced proposals for a fundamental reform in European competition laws. We have practitioners from five countries, the head of a national competition agency, and the Director General from the Commission. The latter says reform is indispensable and the methods proposed are the best available. The other six express a variety of doubts, and the level of hostility has risen during the balance of 1999. The comments of my colleagues on this panel express a number of concerns, of which two are prevalent: (1) that there is a risk of re-nationalization of the competition rules (the need for a "common competition culture," according to Erik Mohr Mersing); and (2) that there will be a danger of losing legal certainty. Dieter Wolf indeed mentioned this concern very recently to the European Parliament. Mario Siragusa points out various plausible procedural situations that would lead to uncertainty, as does August Braakmann. If one reads their papers (mine is no better), then one could get the impression that the new regime is fraught with risks.

Surely there are risks, but I think it would be unfair not to acknowledge that the reforms will be praiseworthy and courageous steps for which we have all been calling. There will be uncertainties and there will also be inconsistencies, but without reform the situation will become intolerably obscure. Reform is indispensable, and the Directorate General IV ("DG IV") deserves praise for facing this problem boldly.

A. *What Was the Problem?*

European competition law functions in a manner quite different from what the words of the regulations and decisions

would suggest. In theory, the system is based on a broadly interpreted prohibition, which catches many kinds of conduct regarded as routine and not in any way illegal or anti-competitive by most business people. For example, exclusive agreements, whereby one party promises to deal only with the other, are widely regarded as pro-competition rather than restrictive. It was clear, however, from the early days that the prohibition of Article 81(1)³ (ex Article 85) applied to such contracts. These contracts are prohibited by Article 81(1), void under Article 81(2)⁴ and fineable pursuant to Regulation 17/62,⁵ unless exempted under Article 81(3).⁶

The procedural and institutional theory was that the parties to a transaction which might be prohibited by of Article 81(1) could, and should, present the facts about their agreement to the Commission in the form of a notification. The Commission would consider the pro-competitive merits of the deal by applying the four criteria set out in Article 81(3). The parties would thereby avoid the nullity which otherwise would apply pursuant to Article 81(2), retain immunity from fines, and, if eligible, receive an exemption.

Requests for a specific exemption were a necessary procedural consequence of the early decision of DG IV about how to interpret Article 81(1). This decision probably seemed easy when first announced. The question centered around whether the basic prohibition of Article 85(1) should apply to all agreements which technically contain some competitive restriction as part of a larger agreement intended to be pro-competitive. Or should the prohibition catch only "bad agreements," namely

3. Consolidated version of the Treaty establishing the European Community, art. 81 (1), O.J. C 340/3, at 208 (1997), 37 I.L.M. at 85, (ex Article 85) [hereinafter Consolidated EC Treaty], *incorporating changes made by 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] (amending Treaty on European Union ("TEU"), Treaty establishing the European Community ("EC Treaty"), Treaty establishing the European Coal and Steel Community ("ECSC Treaty"), and Treaty establishing the European Atomic Energy Community ("Euratom Treaty") and renumbering articles of TEU and EC Treaty).

4. Consolidated EC Treaty, *supra* note 3, art. 81(2), O.J. C 340/3, at 208 (1997), 37 I.L.M. at 93 (ex Article 85).

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

6. Consolidated EC Treaty, *supra* note 3, art. 81 (3) O.J. C 340/3, at 208 (1997), 37 I.L.M. 93 (ex Article 85).

those which any cartel agency would want to prosecute? Should European Economic Community ("EEC") competition law have a rule of reason whereby the legality of a matter could be examined by the individual in light of the totality of its terms and purposes? Or should the provisions of Article 81(1) catch any clause that restricted competitive freedom? The infant EEC institution, facing ignorant or hostile enterprises, judges, and no doubt, crafty legal practitioners, opted for caution. It would be by the use of Article 81(3) as an escape valve and not by the creative parsing of Article 81(1) that competition analyses would be made. So the core text of EEC competition law was a broad prohibition whose consequences were mitigated by the availability of exemption.

One very important question, therefore, for national competition authorities whose laws are worded identically to the Treaty establishing the European Community ("EC Treaty") is whether they will interpret the basic prohibition as the Commission did in the past, or as the Commission says it will interpret it in the future. As we will see, that choice has major procedural and substantive implications for the future. This early choice established the constitutional primacy of the Commission in applying the competition rules.⁷ It had shared power with the national courts to interpret Articles 81(1) and 82, sole power to apply Article 81(3), and the duty to deliver the legal responses for which its primacy and its interpretation of Article 81(1) created a need.

For more common categories of agreement, such as exclusive distributorships or technology licenses, the Commission promulgated block exemption regulations that granted an automatic exemption to contracts falling within their terms. These block exemption regulations had some good consequences, but they also had the effect of constituting a *de facto* minimum standard, indeed a compulsory standard in the eyes of industry.

7. Prior to the judgment of the European Court of Justice (or "Court") in *BRT/SABAM*, Case 127/73, [1974] E.C.R. 51, [1974] 14 C.M.L.R. 238, the direct effect of Article 81(1) was not established, so it was argued that only the Commission for the European Communities ("Commission") could interpret Articles 81 and 82 and certainly only the Commission could grant exemptions. The Court in *BRT/SABAM* confirmed that Articles 81 and 82 were part of national law, which could be invoked before national courts. Thereafter, the Commission regularly encouraged the use of national courts to enforce competition law and hoped that national courts award damages for breaches of competition law.

Many contracts might be regarded as legitimate by the parties but, containing unblest features, could not fit within a block exemption. In theory, such contracts needed specific attention from DG IV to be legally valid.

The reality was rather different. The issuance of an exemption was a major piece of rule making, not the mere answering of questions raised by a private party. Exemptions were reserved for flagship cases. Each exemption decision was preceded by an elaborate series of meetings, exchanges of correspondence, and in some cases, hearings. The actual decision was a lengthy review of all possible factual, economic, and legal issues. The grant of an exemption was often conditional upon some very significant concessions by the parties.⁸ So while an exemption in theory conferred a benefit, it would frequently be upon terms deemed onerous; so onerous that many procedures remained suspended for years (indeed forever), as the parties could not reach consensus with DG IV. This in itself could not have been criticized had the Commission the capacity to answer the number of requests for exemptions it received. But plainly it did not have that capacity. The statistics were astonishing.

In the thirty-seven year history of European Community (or "EC") competition law since the adoption of Regulation 17 in 1962, only 222 specific exemption decisions have been issued. One hundred and thirty-six of these were issued beginning with the adoption of Regulation 17 until the end of 1979. In the ensuing period of nearly twenty years, there were only eighty-six exemption decisions. Since 1981, Chris Norall and myself have written an annual review of competition law developments. The first part in each review is a report card noting the numbers of notifications and complaints filed, the decisions taken, the fines imposed, and the like. We were struck to observe how few decisions were taken by DG IV. They were so few in number that the Commission emphasized comfort letters as an alternative way of

8. See, e.g., Commission Decision No. 89/467, O.J. L 226/25 (1989) (granting exemption to UIP pursuant to Article 81(3)). In this instance, UIP provided undertakings that, *inter alia*, no committee of UIP made up of UIP partner firms would discuss plans to release, distribute, or market individual films of any partner. In its Decision in EBU/Eurovision System, No. 93/403 O.J. L 179/23 (1993), meanwhile, the Commission granted an exemption to allow the system, conditional upon the EBU and its members ensuring that third parties had access, via a sub-licensing regime, to television rights acquired collectively by the EBU.

closing files. The number of open files thereby has been sharply reduced in the last five years. The productivity of the institution was in fact far higher than the number of scalps might imply, since as well as comfort letters and other means of closing a case without the procedural burdens of a formal decision, the work of the institution included legislation and advice to individual parties. Our observation, however, was that the Commission normally did not and, according to the procedures by which it had elected to be governed, physically could not take, formal decisions routinely granting exemptions in specific cases.

Thus, all the letters of advice prepared by young lawyers (and a few old ones) which, after describing the broad scope of Article 81, the consequences of nullity, and the risk of fines, stated that an exemption was available to cure the problem, were wrong. The heart, or one of the hearts, of the enforcement mechanism established for the competition rules was a fiction. This phenomenon had major theoretical and practical consequences. Notifications were being submitted on the erroneous assumption that huge fines might be imposed upon parties to agreements that contained (technically speaking) restrictions on competition (as these were conceived by DG IV's early theorists), but which would have had a fair chance of receiving the Commission's formal or informal blessing if they had been notified. In reality, fines and condemnations attached to conduct that was in essence unacceptable and not to conduct that would have been eligible for an exemption had it been notified.

The best reason for notifying therefore was not to avoid fines, but to obtain a tactical advantage in the event that the other contracting party chose to try to evade its contractual obligations by arguing that EC competition law prohibited the deal.⁹ Thus, filing a notification that provoked no hostile reaction from DG IV was a means of attaining the higher moral ground in the event that a controversy arose. Most who notified did not hope to receive an exemption (unless they had been badly advised) and probably hoped not to receive an exemption, as this would only be accorded after commercially painful concessions. The sagacious notified in the hope that they would receive no reaction whatsoever. Thus, notification was a means of perpetu-

9. One client observed that this was equivalent to saying: "I have been living in sin for the past several years without knowing it."

ating and protecting oneself from challenges to agreements, rather than a means for the ultra-scrupulous to obtain legal certainty.

Many agreements were prohibited by Article 81(1), and thus, many agreements needed an exemption to gain legal validity. Hardly any specific exemptions were issued and only the Commission could consider a request for an exemption, since only the Commission could grant an exemption. Thus procedurally, the Commission's intervention was indispensable, although practically it was unavailable.

The Commission's internal procedures were oriented towards eliminating imperfections in proposed decisions and not towards taking decisions that were adequately reasoned and well founded. It was (and is) easier to prevent the taking of a decision than to procure the taking of a decision. If in doubt, then think again. The procedures were very cumbersome. One Director caused a mild uproar when he called on each of his staff members to aim to take one decision every two years. It is also relevant to note that the first twenty-five years of enforcement were dominated by cases concerning goods distribution, and above all, by the penalizing of any arrangement that hindered cross border selling activities by traders. The Commission uniquely used competition law as a tool of economic integration by forcing business people to accept that even if economic conditions in different Member States varied greatly, the supplier could not contractually prohibit cross border "free rider" selling. This preoccupation with a political goal was matched by some neglect of conventional trust-busting targets, such as cartels.

Although national courts were the obvious enforcement resource for competition rules, their theoretical competence was greatly limited by their constitutional inability to grant exemptions. Nevertheless, judges would receive guidance from the Commission in the form of either a comfort letter sent to a party or other correspondence in the course of the administrative procedure that might indicate what way the experts' thinking was moving. A comfort letter, even if it carried little legal weight, carried huge conviction because of the authority and respect ascribed to the Commission's views.

One possible solution to the Commission's incapacity to deliver legal answers for which its interpretation of the Treaty cre-

ated a need would have been to share competence to grant exemptions with national courts or national authorities. Commentators and officials consistently opposed this solution over the years, generally on the grounds that national judges could not be trusted to handle the complexities of economic theory, that there would be inconsistencies, and that the time to take risks was not yet ripe.¹⁰ Another possible solution would have been to change the basic interpretation of Article 81 so that instead of reading Article 81(1) as a prohibition curable by a blessing under Article 81(3)—an analysis that compels the intervention of a competition authority—the analysis would consist of a combined examination of the merits of the transaction based upon the entirety of Article 81. An alternative and a somewhat similar approach would be to apply a more relaxed standard by which certain provisions, which in their totality are likely to be regarded as pro-competitive, are held not to present competition problems at all.

In 1982 we contended that the staff of DG IV constituted a priestly class. They were keepers of the cult, fully acquainted with its higher economic mysteries. Only they could decide on difficult questions. They were based in Brussels, had been formed by years of study and experience, were incorruptible (and sometimes stern), and were superior in knowledge as well as position to most of the laity. The business desirous of lightening its heart and disposing of its doubts could discern the lawful way ahead only by making a confession to higher authority, and not by its own examination of its conscience. I thus contended that Brussels was to be regarded as a Catholic, not a Presbyterian, jurisdiction.¹¹ Barry Hawk, who after all teaches at a Jesuit institution, has confirmed this proposition and built a more comprehensive, indeed baroque, structure of the theological/legal whimsicalities, extending to an entire page of the Global

10. Stephen Kon and Eric Steindorff had an interesting battle on this subject. Compare Stephen Kon, *Article 81, para. 3: A Case for Application by National Courts and Giving National Courts Jurisdiction*, 19 COMMON MKT. L. REV. 541 (1982), with Eric Steindorff, *Article 81, para. 3: No Case for Application by National Courts*, 20 COMMON MKT. L. REV. 125 (1983). Compare Barry Hawk, *System Failure: Vertical Restraints and EC Competition Law*, 32 COMMON MKT. L. REV. 973 (1995), with Ian S. Forrester, *Competition Structures for the 21st Century*, 1994 FORDHAM CORP. L. INST. 445 (Barry Hawk ed., 1995).

11. Ian S. Forrester, Panel Discussion, *The Role of Legal Counsel*, in ROBERT SCHUMAN CENTRE ANNUAL ON EUROPEAN COMPETITION LAW 373 (Claus Dieter Ehlermann & Laraine L. Laudati eds. 1997).

Competition Review.¹² He accurately observes that whereas subordinate sceptics such as Luther intellectually launched the Reformation, the Popes (Karel and Alexander) are leading the competition reformation.

It was argued by some commentators and all officials pronouncing in public that it was too soon to take risks by allocating power to grant exemptions to national courts, as national judges were unskilled in economics. There would be errors and inconsistencies. Grave and turbulent risks might result unless decision making was concentrated at the center. There was a debate between what might be called the elitist priestly view (beware of tainting the sacred spring, perfection is best, confusion is to be avoided, national judges will make a mess of it), and the reformist view (if national courts could cope with medical negligence, tax legislation, and many other complex issues, they should be able to do a good job in a competition matter; and they should also be able to constitute the enforcement resource needed to ensure the effective respect for competition law in the Member States).

Because there were too many cumbersome procedures, there were too few decisions. Each decision, therefore, became very important, its drafters aiming for perfection. As a result, difficult decisions were delayed or never taken for fear of being wrong. For example, carrying the case from start to finish in one matter consumed less than nine months, the administrative speed record (*WEA Filipacchi*),¹³ but in another matter might take 28 years (*Ford Agricultural*: original notification in 1964, final decision in 1992). The Commission took only a few decisions a year, from fifteen in 1984, to ten in 1989, to eight in 1993. To be fair, the figures for 1997 and 1998 were higher. And of these decisions, very, very few were formal exemptions. These strange institutional facts gave an advantage to those with Brussels-based lawyers who were experts in the hidden procedures of the Commission.¹⁴

Good though the times may have been for Brussels-based

12. Barry Hawk, *EU 'modernisation': A Latter-day Reformation*, *GLOBAL COMP. REV.*, Aug./Sept. 1999, at 12.

13. *WEA Filipacchi Music*, 72/480/CEE, O.J. L 303/52 (1972).

14. Barry Hawk stated that "Many Scribes strongly urge undertakings to confess and seek absolution This advice is not wholly unconnected to the Scribes' economic interests."

practitioners, the system rendered poor service to small and medium-sized enterprises in distant cities. They and their lawyers read the words and believed they should be taken literally. Understandably, there was excessive caution on the part of non-expert lawyers who advised their clients to notify for fear of fines, when, in truth, there was no prospect of fines being imposed.

B. *Why Is Change Happening Now?*

Having made some familiar moans about how EC competition law did not work well procedurally, I must then make a firm and unequivocal recognition that may seem inconsistent with what I have just been saying. The thirty-five year period from 1963 to 1998 has unquestionably been one of success. Europe's competition rules have been a great success, despite the quirky procedural features just described. The broad lines of principles have been laid out, as well as some fine lines. They are being exported to Latin America, Central and Eastern Europe, South Africa, and elsewhere. New Member State competition laws echo the very words of Articles 81 and 82, as in Germany and the United Kingdom, for example. The Commission has encountered success in forcing Member States to obey the competition rules when granting State aids or when operating public services, a world first. Huge fines have been imposed on national industrial champions. Member State lobbying in favor of leniency for those engaged in cartels has almost stopped. Judicial review has been quite effective, although at times too passive. The Commission has won most of its court cases, but has had a number of wholesome defeats. There has never been the slightest scandal.

Political factors of course favored that success. It is widely accepted today that competition is a Good Thing and competition law an essential part of it. The Member States have accepted not only that competition is a necessary principle in legislating and regulating for an economy, but have also accepted that the Commission shall have the power to enforce it on a supranational basis. The Western European economic model has been accepted in Central and Eastern Europe. Indeed, the EC has been called both a magnet and a model for those countries during their emergence from the period of Communist govern-

ment.¹⁵

There are a number of historical events whose alleged historical origins have become so familiar that in retrospect, it is surprising that the actors at the time were unaware of the evolution of events. For example, at its regular meeting a few days after the assassination at Sarajevo in the summer of 1914, the British Cabinet devoted no attention to the matter and Foreign Office Ministers and officials dispersed for holidays with no inkling that war was imminent. In the case of EC competition law, retrospection will probably identify a number of explanations of why reform has happened now. The success of the 1992 program was one reason for the reform. The Commission's commitment to using (or abusing) the competition rules as a means of achieving economic integration could therefore be moderated. The new political agenda from 1980 onwards, first in the United Kingdom after Margaret Thatcher became Prime Minister, was gradually accepted throughout Western Europe and offered reformist inspiration to Eastern Europe. Competition became part of the normal vocabulary of political and economic discourse around the world. Within the Commission, the statistics on applying Articles 81 and 82 got worse as time went by, and they were bound to get still worse as new Member States arrived and as national courts became more receptive to competition law arguments but remained unable to grant exemptions. By contrast, the Merger Regulation was a great success. Contrary to the fears of many practitioners, the Commission showed that it was able to deliver on time and with clarity scores of decisions in a wide variety of industries to the general satisfaction of the business community. Consequently, it was clear that the institution could deal with deadlines and emerge with credit. As to personalities and personnel, we observed the departure into contented consultancy of the Prussians¹⁶ and the arrival in eminence of young Turks, now led by a Director General who at his arrival was not an expert in competition law (and was therefore

15. One of the most recent examples is the Lithuanian block exemption regulation, which was modeled on the Commission's vertical restraints proposal.

16. In conventional parlance, Prussians were the senior, generally German officials who contributed enormously to the development of the law from the earliest years, one of whom famously said to a young colleague unwholesomely interested in reform: *Man muss sauber denken*—one should think clean thoughts.

free of hard-wired and immutable assumptions), and a Commissioner with a taste for bold and visible deeds.

C. *The New Enforcement World*

Competition lawyers in Brussels have enjoyed thirty years of specializing in the arcane trade of examining the personal and professional factors relevant to whether a competition law drama might erupt. The task will become more difficult as a result of the reforms proposed by the Commission's White Paper on the modernization of the rules implementing Articles 81 and 82 of the EC Treaty¹⁷ ("White Paper"). The variables will have increased. According to the Commission, EC competition law is currently relatively predictable.¹⁸ This is true, reflecting thirty years of experience plus established Commission and court case law. Above all, the enforcement equation is straightforward because there is only one main enforcement actor, namely the Commission. When considering an agreement or practice that has competition law implications, predicting what the Commission's reaction will be is usually the only enforcement prediction. Even if the matter ultimately is raised in a national court, the final outcome will often reflect¹⁹ the Commission's view, rather than that of a national competition authority.

We have a certain expectation about how most agreements and practices will be treated (or not treated, as the case may be) by DG IV. A possible obstacle to cross-border trade or a highly visible exclusive deal may give rise to great excitement and a filing under the Merger Regulation will certainly be handled energetically and rapidly, but many categories of transactions are not likely to give rise to much reaction beyond a comfort letter. In most cases, that is a welcome and comfortable analysis.

The White Paper proposes to change all this. There will be more actors, new roles for existing actors, and new relationships between existing and new actors. National courts and authori-

17. White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, European Commission, COM (99) 101 Final (Apr. 1999); O.J. C 132/1 (1999) [hereinafter White Paper].

18. *See id.* § 48 ("[A]fter 35 years of application, the law has been clarified and thus become more predictable for undertakings.").

19. The view may be conveyed in the form of a comfort letter, administrative correspondence to one party or the other, or even hearsay pleading by counsel (for example, *I met Mr. DG IV and he told me I was right*).

ties, empowered for the first time to apply Article 81 as a whole, will handle restrictions of competition. There will be more minds to read. The future of the crucial procedure of notification is doubtful. So there cannot fail to be an increase in unpredictability, certainly in the first few years.

II. NEW ROLES AND RESPONSIBILITIES

A. *The Commission*

The White Paper reassures us at paragraph 83 that the Commission "has a special role to play in the application of Community law and in ensuring the consistent application of the competition rules."²⁰ The Commission will have to learn when guidance to Member State national courts and competition authorities is essential and when intervention is either too time-consuming to be useful or constitutes more interference than assistance.

The White Paper at paragraph 70 notes that switching to a directly applicable exception system with *ex post* control is now possible because the

legislative framework in the competition policy area has been considerably strengthened, and the reforms currently under way on vertical restrictions and horizontal cooperation agreements will help to simplify and clarify it further . . . Furthermore, the national authorities and courts, undertakings and their legal advisors have progressively gained a better knowledge of Community competition law.²¹

I consider that the draft Vertical Restraints Regulation,²² which the White Paper describes as one of a "new generation" of block exemptions²³ by no means confers all the legal certainty that its drafters contend. I contend, in the next section, that the Vertical Restraints Regulation recalls the past age of enforcement philosophy, namely carefully calibrated concessions in the form of a block exemption, strict limits to the concessions, thresholds, and

20. White Paper, *supra* note 17, § 83.

21. *Id.* § 70.

22. Proposed Commission Regulation on the application of Article 81(3) of the EC Treaty to categories of vertical agreements and concerted practices, O.J. C 270/7 (1999) [hereinafter Proposed Regulation]. The final text was adopted on December 22, 1999, O.J. L 336/21 (1999).

23. White Paper, *supra* note 17, § 71.

in a variety of situations where the liberalization will not apply. There will remain great areas of uncertainty. It is unclear whether future guidance from the Commission will reflect heretical boldness or—as one may fear—nervousness that regulatory concessions may be abused in unforeseeable circumstances. The Vertical Restraints Regulation has established market share criteria to limit the categories of companies that can benefit, even though I believe the Commission has never once withdrawn the benefit of a regulation because a company had too high a market share.

Commission guidance takes various forms: decisions, notices, block exemptions, regulations, comfort letters, and the Annual Report. Notices, decisions, and block exemptions are to continue, but there is no mention in the White Paper of the future of comfort letters.²⁴ Will they continue? Do we need them, since they are not binding on national courts anyway? Is the Commission expecting to receive no inquiries warranting written confirmation less formal than a decision? The White Paper does not seem to exclude comfort letters. Decisions, however, tend to be substantive pieces of groundbreaking law rather than short informative additions to existing case law, which could be conveyed in the form of a comfort letter. Many comfort letters, in my respectful opinion, are either bland statements of the uncontroversial, or a terse record that the latest reluctant concession by the company has been enough to allow the Commission to close the file. Guidance, however, is always helpful and if the Commission can be persuaded to make them public in some form (anonymous ruling letters?) so much the better.

B. Notices, Guidelines, and Block Exemptions

Other than decisions, the White Paper notes that the Commission “would continue to adopt Regulations and Notices setting out the principal rules of interpretation of Articles 81 and 82” in order to “keep a leading role in determining EC competi-

24. Paragraph 35 of the White Paper on the modernization of the rules implementing Articles 85 and 86 of the EC Treaty (“White Paper”) discusses the disadvantages of comfort letters but does not explain if they are to continue. Many commentators accurately point out that comfort letters are procedurally anomalous in that they do not grant an exemption. I know of no case, however, where a national court has chosen to ignore the Commission’s conclusions as expressed in a comfort letter and reach its own different conclusions.

tion policy" as well as "guidelines to explain its policy and provide guidance for the application of the Community competition rules by national authorities."²⁵ Whereas notices and guidelines

might not be binding on national authorities, they would make a valuable contribution to the consistent application of Community law, because in its decisions in individual cases the Commission would confirm the approach they set out. Provided those individual decisions were upheld by the Court, then notices and guidelines would come to form part of the rules that must be applied by national authorities.²⁶

How ready will the Commission be to trust the good sense of the laity whom it is allowing to reach their own conclusions? Will we see micro-management in a string of catechetic pronouncements? Probably not, if for no other reason than that the promulgation of any rule by the Commission is always preceded by anxious consultation and inquiry over months and even years. National courts and authorities will ask for assistance when they need it. I do not expect the Commission will try to limit their discretion by strings of policy rulings. Allowing Article 81(3) to "leave home" was inevitable if the growth of competition law was not to be stifled. In the future, a wide number of influences will shape EC competition law. Member States may see issues differently. But this is an opportunity for EC competition law to be enriched rather than jeopardized. The Commission will be performing its role most usefully if it concentrates on the major matters on which it has expressed a desire to focus, as well as on uncertainties that are specifically put to it by national courts and administrations.

C. *Decisions*

The Commission anticipates issuing three types of decisions under the proposed system: negative, positive, and conditional. At paragraph 87, the White Paper notes that:

Commission policy on competition would continue to be reflected in prohibition decisions in individual cases, and these would be of great importance as precedents . . . [thus] the number of individual prohibition decisions can be expected

25. White Paper, *supra* note 17, § 14.

26. *Id.* § 86.

to increase substantially.²⁷

This seems to suggest that the Commission will take more condemnation decisions, impose more fines, and take more proscriptive action. Increased enforcement activity against cartels, for example, would not be opposed by anyone, but it is not clear where the extra resources will be found. The Commission's current decision-making processes are too protracted, too slow, and too procedurally burdensome. Because the machinery is so cumbersome, officials have been obliged to seek mechanisms other than formal decisions to close cases. It is not suggested that there will be radical changes to facilitate the taking of shorter, simpler, and quicker decisions. The Commission proposes the abolition of notifications on Form A/B seeking negative clearance or exemption, but it seems unlikely that the amount of time represented by the handling of notifications would be so substantial that if notifications disappeared then more cartel decisions would be taken.

At paragraph 88, the Commission says that it would not adopt exemption decisions under Article 81(3) as it does now (for the reasons set forth above, I contend it hardly ever adopts them now), but "should be able to adopt individual decisions that are not prohibition decisions."²⁸ The Commission appears to mean that it will adopt clearance decisions. Indeed

[I]t may be necessary to provide the market with guidance regarding the Commission's approach to certain restrictions in it. Positive decisions of this kind would therefore be taken in exceptional cases, on grounds of general interest.²⁹

These decisions are described as having a "declaratory nature" with the same legal effect as negative clearance decisions which state that Article 81(1) does not apply at all to a particular agreement—in the 1990s—negative clearance decisions, have been almost unknown. A third, new kind of individual decision rendering commitments by firms legally binding is also suggested in the White Paper, although it is not suggested that national courts or authorities should have the ability to apply such a measure. I have no objection to the proposed categorization. I think regularity and quantity of output should be given more

27. *Id.* § 87.

28. *Id.* § 88.

29. *Id.*

importance. The Commission should not be afraid to issue more frequent, shorter decisions, from whose aggregation an overall understanding of its policy will be easier. Decisions enrich and develop the law. The weakness of the past system has been that for reasons of excessive procedural complexity and limited administrative resources, there have been too few decisions. Yet, the Merger Regulation shows that with realistic deadlines, a steady flow of intelligently reasoned decisions can emerge. I strongly submit that the adoption of internal deadlines for the taking of decisions under Articles 81 and 82 would greatly help productivity and efficacy.

D. Notification

The discussion above leads to the query whether, despite the fact that the Commission presents its White Paper as heralding the end of the notification system,³⁰ some sort of notification will still continue. We noted back in 1984 that in most cases, notifications are made in order to obtain or to retain a commercial advantage rather than out of a sense of legal obligation: "Many companies will notify only in the rarest circumstances, to avoid the reproach of being negligent or willful infringers. A few will notify as a matter of routine, wishing to be thought of as good citizens rather than stonewallers."³¹ I note that Dr. Alexander Schaub was recently reported as saying that the notification system was "useless" as true problems were discovered via complaints.³²

The Commission proposes at paragraph 79 of the White Paper that prior authorization (and hence notification) via the Merger Regulation should continue to apply for partial-function production joint ventures (to which a minimum level of assets contributed and no block exemption applied) because of the difficulties in unraveling this type of operation after the event

30. *Id.* § 12. This Article states that

The proposed reform involves the abolition of the notification and exemption system and its replacement by a Council Regulation which would render the exemption rule of Article 85(3) directly applicable without prior decision by the Commission. Article 85 as a whole would be applied by the Commission, national competition authorities and national courts, as is already the case for Article 85(1) and 86.

Id.

31. Forrester & Norall, *supra* note 1.

32. See Bull. Quotidien Eur. No. 7557, Sept. 23, 1999 at 10 (Agence Europe).

and if a competition authority challenges it. There will surely be other categories of transactions in which the stakes are so high, the investment required so great, or the difficulties of unraveling the transaction afterwards so large, that the parties will be reluctant to enter the transaction without confidence that their arrangements are legal, especially in a period of change when the relative roles of Articles 81(1) and (3) are being considered. The Commission proposes at paragraph 88 of the White Paper to adopt decisions where transactions raise "new questions." Is it only intending to consider such issues when it spots them itself, when it receives an inquiry from a national court or authority, or when it receives a complaint from a third party? It would seem illogical or at least inflexible to take the position that a formal decision would be impossible unless a deal were challenged. The White Paper, however, does not make clear if it intends to exclude the filing of such notifications.

Much creative energy today is devoted to analyzing the procedural consequences of notifying an agreement. *Against notification* is the fact that the company is describing details of its business to a prosecutor, thus arming the prosecutor with elements that might be used in a hostile manner. *In favor of notification* is immunity from fines (usually a theoretical concern but occasionally a real one) and the appearance of propriety conferred by a voluntary confession. Indeed, the process is abused in the sense that many notifications are filed in order to gain what I have called the higher moral ground in case of a future dispute between the parties to the agreement. The notifying party often fears that the other party to the agreement may have second thoughts years later about the commercial benefits of the deal, and may invoke EC competition law to argue that the agreement was void under Article 81(2). It may be difficult to be confident of the outcome. Therefore, the filing of a notification is a useful prophylactic against tardy bad faith enthusiasm for the competition rules. The notifying party will be able to convey to its contracting partner that since a notification was filed and the Commission has not reacted, the transaction must therefore be acceptable.

The vice in the scenario I have described is not the filing of the notification but the probability of inaction by way of reaction and the misleading implication attached to the absence of reaction by the Commission's services. Deadlines would cure the

problem. An answer could be forthcoming inside, for example, four months, stating either that the matter does not need attention because the Commission's posture is spelled out in existing policy instruments (exemption regulations or notices), or that the transaction appears acceptable. Alternatively, perhaps more time is necessary to pronounce. There would be no opportunity to misrepresent silence as a blessing, and there would be an opportunity to give guidance to genuine inquiries. Perhaps a small fee could be charged upon the receipt of the notification. If notifications disappear altogether, then enterprises will need to trust that: (1) clear yet inadvertent infringements of the rules by small companies would not lead to fines; (2) complaints about freely entered transactions by those who wish to wriggle out of them will be examined skeptically; and (3) unofficial advice will be available informally from staff and is reliable.

Director General Schaub says that because notifications are filed, they are actionable. They clog the in-boxes of officials whose energies the Director General would like to devote elsewhere. They do not reveal real problems, which usually come to the Commission's attention via complaints. I am surprised that handling a relatively small number of notifications annually should constitute such a grave burden, especially if some of them would present issues to be addressed by national competition agencies, in which case they would not call for DG IV attention. I am also surprised that any enforcement agency would turn its back on a voluntary but widely-followed procedure whereby approval is sought for complex or difficult transactions. If such an enforcement agency merely wished to discourage the needless filing of notifications where the doubts are trivial, reflecting an excess of caution on the lawyers' part, then this would be understandable.

I note that Dieter Wolf, from the viewpoint of a Bundeskartellamt ("BKA") enforcer, favors notifications as allowing the competition authorities to play a useful role in shaping the notified agreement by either requiring modifications or imposing time limits. It seems to me that a well-functioning notification system confers benefits on both the competition authority and the private party.

The problem in Brussels, I submit, is not the concept of a notification system, but the fact that the existing system does not function rationally. Too many notifications are called for by the

current interpretation of Article 81(1). Too many trivial matters are therefore notified, out of needless fear of being fined. Some notifications are recommended with a view to earning fees for their drafting. The exemption procedure is ridiculously burdensome as a response to a simple request for guidance. Last, silence by the Commission is falsely represented as proving official approval. Deadlines would cure many of these problems. Moreover, it should be noted that if we are designing a new regulatory map, nothing requires that the Commission itself handle every notification. It could send notifications for consideration to an appropriate national authority, or it could send the notification back as raising no significant competition law issue. Alternatively, it could respond within two or four months, depending on the difficulty of the matter. I do not think that such a regime would be "useless." I therefore agree with Mario Siragusa's remarks about legal certainty, which lead me to observe that complainants would seem to be in a better position (answer within four months) than would-be notifying parties (no answer at all, it would seem).

E. National Competition Authorities

How will national competition authorities apply Article 81(3) and withdraw block exemptions in their own territories? Will their approach to EC competition law differ from that of the Commission? Will they all finally be empowered to apply Article 81 completely? A number of commentators have expressed the view that national competition authorities would be better than national courts at applying and enforcing competition law. Claus Dieter Ehlermann noted that they would be "more able than the judiciary to collect and appreciate the complex facts which are required to apply Article 81 and 82, provided they are adequately equipped with legal instruments and human resources."³³

The last clause is crucial: compare Belgium (miserably under-resourced, regularly criticized by the courts and in the shadow of the Commission) with the United Kingdom (new agency, new statute, new appellate structure, lots of resources, widely supported by the local bar). In paragraph 46 of the

33. Claus Dieter Ehlermann, *Implementation of EC Competition Law by National Anti-trust Authorities*, 17 EUR. COMP. L. REV. 88 (1996).

White Paper, the Commission states that, "competition authorities . . . are normally well acquainted with local markets and national operators . . . and can carry out investigations rapidly and most of them have the human and legal resources needed to take action against infringements whose centre of gravity is in their territory."³⁴

It may be disputed whether national courts are less able than national competition authorities to deal with the economic content of a competition case. I think the real emphasis, however, should be on human and legal resources. Power devolved from Brussels will dissipate if there is no legislative and human infrastructure to enable national competition authorities to perform their new role.

It will be interesting to observe the experience of, for example, the BKA in the new enforcement architecture. If the reforms occur soon, then the BKA will have to contend with not only a shortage of personnel but also, having moved on October 1 from Berlin to Bonn (against the stream of government departments) an enormous change of personnel resulting from the fact that two-thirds of its staff will stay in Berlin, most transferring to the Bundeswirtschaftsministerium.³⁵ Will the BKA's new personnel be more or less ready to apply new rules than officials accustomed to not applying Article 81(3)? This is only one example, but changes in domestic politics, location, and budgets may have an unpredictable effect on the passivity or activity with which national authorities apply Article 81. But at least the BKA is explicitly empowered to apply Article 81(1). The Autorità Garante della Concorrenza e del Mercato in Italy has since 1997 been empowered to use the procedure, which was set up in 1990 for the enforcement of Italian competition law to enforce Articles 81 and 82. Before this law was passed, the authority did not have the power necessary to enforce EC law. There is an Organization of Economic Cooperation and Development ("OECD") recommendation on cooperation between antitrust authorities, but it seems not to have been used as a vehicle in Italy.

I am aware of at least one case in which a national competition agency in Spain has imposed a fine for breach of the EC

34. White Paper, *supra* note 17, § 46.

35. See *Handelsblatt*, Sept. 24-25, 1999, at 5.

competition rules, rather than national rules. The White Paper proposes that those Member States in which national competition authorities clearly do not enjoy the power to enforce EC law should be obliged to accord those authorities the power to apply Article 81(3). It does not clarify whether the replacement for Regulation 17 will impose that obligation.³⁶

F. National Courts

National courts will have an important role in the new era,³⁷ particularly in those Member States where national authorities are weak or have not yet been empowered to apply EC competition law. I did not agree that national courts were not to be trusted to apply EC law competently in the field of competition; and confidence will grow as competition principles and common sense draw closer together. It will be, however, highly desirable for the Commission to maintain and expand its existing practice of offering assistance to national courts who need either information about where a procedure stands or guidance on what issues should be deemed relevant. Fear of appearing to take sides has made the Commission's response time to national inquiries too slow and, as a result, unhelpful. This must change in the new environment.

Candidate Member State's courts will also need assistance. The help currently provided by Member States to applicant Member States³⁸ is a start, but with little experience in applying

36. White Paper, *supra* note 17, §§ 92, 94.

37. Note, after all, that the Court has said that national courts are responsible for ensuring that Community law is applied and respected in the national legal system. *Zwartfeld*, Case 2/88, [1990] E.C.R. I-3365, [1990] 3 C.M.L.R. 457. The Court of First Instance in *Tetra Pak* referred to national courts as "Community Courts of general jurisdiction" when they handle competition matters covered by the EC Treaty. *Tetra Pak Ransing v. Commission*, Case T-51/89, [1990] E.C.R. II-309, 364, [1990] 4 C.M.L.R. 47. It would be unrealistic to hope that the claim for compensation by (say) the patient who received a blood transfusion contaminated by hepatitis virus would be handled according to similar procedures within a similar time-frame and with similar levels of damages throughout Europe. That said, we would hope that the results in two similar cases would be generally similar. I accept as inevitable, though undesirable, that the results in two competition cases allegedly presenting identical issues may be different. This is a genuine drawback of the proposed reforms. It may cause dismay to a European enterprise that has prevailed throughout the EU if it loses in what it regards as an unimportant corner of Europe because the constitutionally or economically relevant facts came out in court badly.

38. In 1998, officials from the Lithuanian, Polish, and Slovakian competition authorities visited the U.K. competition authorities as part of the technical assistance pro-

the basic EC competition rules, national courts from new Member States will face a difficult task in applying the full Article 81 scheme. There is a high probability of discrepancies, as feared by Eric Mohr Mersing in his paper calling for steps to guarantee a "common competition culture." Some discrepancies are inevitable and not in themselves undesirable, since they reflect social, political, and economic features of different countries. Systematic confusion and disorder, however, are to be avoided.

III. *NEW RELATIONSHIPS*

The attractiveness of having Europe's premier competition enforcement body examine a matter without court costs, coupled with the chance of reviewing the fruits of that examination before the Court of First Instance, makes Brussels a much more attractive place to launch a competition campaign than any other city.³⁹ In addition, the fact that the Commission's intervention means that national competition authorities automatically lose their jurisdiction,⁴⁰ and national courts can stay national proceedings until the Commission has taken a decision, gives complainants little incentive to go to their national courts and authorities.⁴¹ The Commission remains stimulated by complaints, and its receptivity to them ensures their arrival. A constructive relationship between the Commission and national courts and authorities, emphasizing on complementarity and mutual assistance, will help.

A. *Coordination Between National Authorities*

Present day cooperation between national competition authorities works well with mergers but is surprisingly limited with respect to cartels and anti-competitive practices. There are plenty of senior courtesy visits. For example, the U.K. Director General of Fair Trading holds biannual round-table talks with the President of the BKA. Regular visits also occur by senior member of the Office of Fair Trading (or "OFT") to other EU national competition authorities. In 1998, the Director General

grams designed to prepare their countries for eventual accession to the European Union.

39. Forrester, *supra* note 10.

40. Regulation No. 17/62, *supra* note 5.

41. White Paper, *supra* note 17, § 39.

visited the Netherlands and Sweden. In 1997, he held talks with the Director General of the French competition authority. Staff-exchange programs and secondments occur each year between the Office of Fair Trading, the BKA, and France's Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes, to enable officials to meet their counterparts and exchange experiences and views on topics of mutual interest. More sporadic visits occur between the United Kingdom and other Member States. In 1997, for example, a Portuguese official visited the OFT under the Commission's Karolus Exchange Programme, which is aimed at improving communication and cooperation between Member States' authorities. Doubtless there are other contacts and not just at a senior level.

It seems plain, however, that there is nothing approaching the level of interstate cooperation that has been achieved in the United States. Specifically, the U.S. National Association of Attorneys General ("NAAG"), established in 1997, has no counterpart in Europe. Two examples of major multi-state actions undertaken by State Attorney Generals in the antitrust field are the antitrust suit filed in May 1998 by twenty States and the District of Columbia against Microsoft for alleged abuse on the market for Internet browsers, and the January 1997 settlement agreement with American Online ("AOL"), the online computer service provider, under which AOL agreed to pay refunds and other concessions to subscribers who had difficulty accessing its services. The NAAG holds a meeting concerning management issues for all Attorney Generals each December and convenes for two full membership meetings each spring and summer. It organizes federal-state workshops, sponsors seminars and conferences, publishes reports and monographs on a wide range of topics, and serves as a liaison with the federal government, and assists State Attorneys with appellate advocacy. The NAAG thus provides a forum for states to discuss common issues, coordinate, and assist in investigations and enforcement of antitrust prohibitions. Its Multi-state Antitrust Task Force, a permanent subcommittee of the Antitrust Committee of NAAG, coordinates multi-state investigations and litigation.⁴² If EU national compe-

42. Kevin J. O'Connor, *Working Paper V, Panel on Decentralisation of Enforcement of Community Law*, in ANNUAL ON EUROPEAN COMPETITION LAW (Claus Dieter Ehlermann & Laraine L. Laudati eds. 1997).

tion authorities had a similar permanent body through which to coordinate actions, share costs, facilitate investigations, and assist in enforcement, transnational enforcement would have arrived. Regional cases that encompass several Member States could be addressed effectively by national cooperation. Unfortunately, I believe that this is very rare today. As Dieter Wolf recently said to the European Parliament, what really needs to be intensified is cooperation between national competition authorities and the Commission.⁴³

B. *Cooperation Between the Commission and National Authorities*

At paragraph 91 of the White Paper, the Commission notes that cooperation between the Commission and national competition authorities have

hitherto been on a pragmatic footing, and limited by the Commission's exclusive right to apply Article 81(3) . . . the time has come to make better use of the complementarity that exists between the national authorities and the Commission, and to facilitate the application of the rules by a network of authorities operating on common principles and in close collaboration.⁴⁴

The Commission emphasizes flexibility and speed in cooperation.⁴⁵ In order to enable the exchange of (sometimes) confidential information, it proposes an amendment to Article 21 of Regulation 17 that currently prevents national competition authorities from utilizing information supplied by the Commission as evidence.⁴⁶ The Commission is proposing that national authorities would be able to investigate cases either in response to complaints or on their own initiative, but for the sake of consistency the White Paper proposes that competition authorities should be obliged under the amended Regulation 17 to inform the Commission of the pendency of cases involving Articles 81 and 82. Before the termination of such cases and whenever the authorities intend to withdraw the benefit of a block exemption, they should also give notice to the Commission of any proceedings under national competition law that may have implications

43. Bull. Quotidien Eur., *supra* note 32, at 9.

44. White Paper, *supra* note 17, § 91.

45. *Id.* § 104.

46. *Id.* § 96.

for Community proceedings. The Commission is also proposing that it should have power to remove a case out from national jurisdiction by a mechanism equivalent to Article 9(3) of Regulation 17.⁴⁷

One could be forgiven for thinking that the Commission seems to be preparing for the worst by giving itself specific powers to reclaim cases from national handling. The Commission may also be hoping for the best by relying on the inclusion in the revised version of Regulation 17 of "a clear obligation for national courts to avoid conflicts with Commission decisions," as well as the obligation on Member States to ensure fulfillment of treaty obligations imposed by Article 10 (formerly Article 5) of the EC Treaty.⁴⁸ In addition, the Commission is proposing to upscale the Advisory Committee on Restrictive Practices and Dominant Positions to discuss cases irrespective of jurisdiction.⁴⁹ Could this bringing together of Member State authorities and the Commission emulate the cooperation that exists between federal and state authorities on antitrust matters in the United States?⁵⁰

The 1997 notice on cooperation between the Commission and national authorities⁵¹ currently allocates cases between authorities and the Commission by various criteria favoring decentralization where the effects are felt mainly in or closely linked to the territory, even if the practice or agreement theoretically affects trade between Member States, or Commission handling (cases of particular Community interest, involving undertakings with special or exclusive rights, or raising a new point of law, but not simply because of their size). This would need to change to the extent that national authorities will be able to apply Article 81(3) and "withdraw the effect of the block exemption on their own territory if that territory or part of it constituted a separate

47. *Id.* § 105.

48. Consolidated EC Treaty, *supra* note 3, art. 10, O.J. C 340/3, at 45-46 (1997), 37 I.L.M. at 11 (ex Article 5).

49. White Paper, *supra* note 17, § 106.

50. The Executive Working Group for Antitrust ("EWG") in the United States brings together representatives from the U.S. Department of Justice, the Federal Trade Commission, and state Attorney Generals to "coordinate overlapping state and federal enforcement in order to avoid a duplication of efforts." The EWG meets three times a year and subgroups deal with more specific problems as necessary.

51. Commission Notice, O.J. C 313/3 (1997).

market."⁵² The criteria will presumably provide a basis for the Commission to choose which cases it will remove from the national authority's jurisdiction.

These inter-institutional communings appear rational and efficient. However, even if they work absolutely perfectly, and experience teaches us that perfection is rare, it seems certain that business consumers of competition law in Europe will be faced with many more uncertainties. Up until the present time, if the matter would affect several Member States, then the policy, case law, and personnel of DG IV would be the main factors in deciding on the legality (and therefore viability) of the transaction. If a controversy arose before a national court (or a competition authority, though then the analysis would be rather different), then a major element in concluding that controversy would be determining the applicable rules of EC law as discernible from the decisions of the Commission and the courts. But now, each court and each competition agency is being encouraged to reach its own conclusions without necessarily deference to the experts in Brussels. In the early days, we may expect courts to seek guidance from the Commission (explored further below), but it cannot be likely that this will be routine: it will entail delay. Indeed, it may seem inappropriate unless the Commission has already been involved, or it may seem constitutionally as an unwelcome involvement of an external agency. Furthermore, there are no assurances that the Commission's answers would settle the difficulties identified by the judge.

This means, therefore, that a Europe-wide distribution scheme, involving a duty for re-sellers or franchisees to make certain expenditures or accept certain contractual burdens, could be deemed legal in competition terms in Germany but illegal in France and Portugal. Groups of, for example, car dealers in one country might successfully challenge terms, whereas their counterparts in another country might lose. The exclusive sale of the rights to broadcast sporting events, either a championship occurring over a few days or a series of events such as one or several seasons of soccer games, might seem restrictive in Italy but reasonable in the United Kingdom.

52. White Paper, *supra* note 17, § 95.

C. Coordination Between the Commission and National Courts

National courts that apply Community competition law have two special sources of guidance, the Commission and the European Court of Justice ("Court"). The Commission appears to consider⁵³ that since it can always intervene to prohibit an agreement "subject only to the principle of *res judicata* that applies to the dispute between the parties themselves," the risk of fragmentation and diversity of outcome can be reduced. I must say that I doubt the Commission could avoid that risk without expending huge amounts of time, monitoring national cases so closely that it has insufficient resources to pursue the big problems it wishes to concentrate.

The Commission notes⁵⁴ that cooperation mechanisms will need to be erected between the Commission and national courts so that the Commission is aware of proceedings and problems in interpretation. It can intervene (subject to leave) as *amicus curiae* in national proceedings, and ensure that the current Notice on cooperation between the Commission and national courts⁵⁵ be incorporated into Regulation 17 so that national courts can (more easily) ask the Commission for information in the course of proceedings. The 1996 Report on Competition Policy discusses the application of the 1993 Notice and notes that, in 1995 and 1996, the Commission answered seven questions put by national courts pursuant to the Notice. Two questions were answered from French courts, three from Spain, one from a German court, and one from a Belgian court.⁵⁶ The 1997 Report additionally gives information on three further sets of questions to which the Commission responded in 1996 (but which were not noted in the 1996 Report).⁵⁷

The Commission points out that there have been few problems in the parallel application of Article 81(1) since 1962.⁵⁸ This is technically true but in no way reassuring. In past years, parallel application involved a few cases in which a na-

53. *Id.* § 102.

54. *Id.* § 107.

55. Commission Notice, O.J. C 39/6 (1993).

56. COMMISSION OF THE EUROPEAN COMMUNITIES, XXVITH REPORT ON COMPETITION POLICY, at 338-40 (1996).

57. COMMISSION OF THE EUROPEAN COMMUNITIES, XXVIIITH REPORT ON COMPETITION POLICY, at 350-51 (1997).

58. White Paper, *supra* note 17, § 102.

tional court was analyzing a matter also being examined by the Commission. The Commission's views were generally deemed determinative if expressed, and there were not many cases. In the future, the Commission will be only one voice (and wishes to see its stature diminish as enforcement is decentralized) and the cases will be more frequent.

D. *References for Preliminary Rulings*

More references are likely to go to the Court as a result of national courts applying Article 81(3) themselves. The Court is adept at giving helpful answers to judicial inquiries within about fourteen to eighteen months, and its prestige ensures that every possible argument is made to it in full. I question how the Court will cope with a new source of numerous references.

As the Court confirmed in the case of *Delimitis*,⁵⁹ a national court can always seek information from the Commission on the state of any competition procedure that the Commission may have set in motion, on any possible ruling on notified agreements, or on legal and economic information that the Commission can supply. Since the Commission's response time seems to me (but the evidence is not clear) slower than making a reference, it appears quite possible that national courts may be inclined to stay proceedings and submit a reference for a preliminary ruling to the Court. Indeed, the Court in *Delimitis* noted that "a stay of proceedings or the adoption of interim measures should also be envisaged where there is a risk of conflicting decisions in the context of the application of Article 85(1) and 86."⁶⁰

An increase in preliminary ruling requests might help the coherence of Community law, but at the cost of delay and judicial dislocation and, as the European courts recently noted in a paper submitted to the European Parliament for discussion, there is a "dangerous trend towards a structural imbalance" in the number of cases coming before them (more than half of which are references for a preliminary ruling).⁶¹ They will soon be unable to cope. The courts note that while

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

60. *Id.*

61. European Parliament, Directorate-General for Committees and Delegations, Notice to Members No. 9/99, DOC_EN/CM/378/378160 (May 28, 1999).

national courts . . . should be encouraged to apply Community law themselves, and not to resort too hastily to the solution afforded by a reference to the Court, the fact remains that the uniform application of Community law frequently depends on the answer to a question of interpretation raised before a national court not having to wait the outcome of appeal proceedings but being given by the Court at the outset, so that the case-law can become established at an early stage in the Member States of the Union.⁶²

However, the anticipated increase in caseload from non-competition sources in the next few years means that the Commission makes itself an excellent source of information for national courts, rather than the court.

The White Paper acknowledges that the end of the notification system will give businesses more responsibility. In paragraph 77, it states:

In a system of *ex post* control, undertakings would have to make their own assessment of the compatibility of their restrictive practices with Community law, in the light of the legislation in force and the case-law; this would certainly lighten the administrative burden weighing on them, but it would also require them to take on added responsibility.

In a sense this conclusion is fair, while also being rather disingenuous in that it assumes companies have in the past filed notifications every time they encountered problems. Of course, it makes sense for a company to be guided primarily by its own legal advisors' analysis of the business situation. It was ridiculous to pretend that every exclusive agreement or every agreement containing a territorial scope of action was at risk of prohibition, voidness, and nullity unless it had received the blessing of DG IV. In actual practice, companies elected not to seek such blessing and not to draft contracts as if it were indispensable. So the new regime will make theory and reality correspond. This situation is welcoming. It is not clear to me, however, that a company will be subject to a lesser "administrative burden" in the future than in the past by relying on its lawyer's opinion when relying on a notification. The legal environment will certainly become more complex, in that Article 81(1) and Article 81(3), the key consti-

62. *Id.* at 25.

tutional texts, will in the future be read concurrently, whereas up until now they have been read and applied separately.

I note that:

- the number of fora before which legal controversies are likely to arise has risen, arguably thirty fold. Thus, forum shopping will be inevitable and indispensable;
- the number of actors whose views may be relevant to the disposition of an EC-wide competition problem will have risen to thirty-one;
- it will be difficult except in flagship cases to get one central definitive ruling in Brussels, which will preempt controversies elsewhere.

Indeed, many commentators have advanced the argument that once the dust has settled and patterns of procedural substantive approach have emerged, the world will be better "having a multitude of actors, both those with incentives to bring actions under a single body of law and those responsible to decide cases, results in an evolution of the best law."⁶³

Getting to the greener pastures of the best law will require navigating some turbulent straits and obscure valleys.

IV. *THE PUTATIVE REFORM: VERTICAL RESTRAINTS*

My comments on the proposed regulation on vertical restraints⁶⁴ can be rather brief because they relate to philosophy rather than detail. One of the criticisms made of the system of block exemptions was that the exemption texts became in effect a code of conduct for industry. The restrictions they permitted constituted the outer limits of acceptability in a contract. The lawyer or the client would simply adopt the terms of the block exemption unthinkingly, instead of considering whether an appreciable restriction of competition was present. In my view, the most detailed block exemption regulations went further than desirable or necessary in prescribing how parties should arrange their relationships. Why should it be necessary for licensed know-how to be recorded in writing in order for the license to be eligible for an exemption? Why should an agreement of fifty-seven months' duration be exempt under Article 81(3), but not one of sixty-three months? Why should a block exemption about

63. Forrester, *supra* note 11, at xi.

64. Forrester, *supra* note 22.

the marketing of cars include a list of social protections for dealers? In the 1970s and 1980s, such a level of prescriptiveness was little resented, maybe because the legal principles were new, and perhaps also because it was widely believed that the exemption and notification system worked in accordance with theory. In any event, future exemption regulations ought to be less detailed, and their drafters should realize that chaos will not be unleashed if companies are given leeway in drafting their contracts. The laity must be trusted to behave properly without the perpetual supervision of sin-preoccupied clerics. A restrictive agreement, which is prohibited and irredeemable under Article 81(3), will not squeak through to validity because of an inadvertently generous block exemption. Also, a basically wholesome agreement should not become void or arguably void because it contains a few words that do not fit the block exemption.

One of the merits of Regulation 67/67⁶⁵ and its successor Regulation 1983/1983 was that everyone could remember the three permitted restrictions on selling activities outside the exclusive distributor's territory.⁶⁶ There were no subtle concepts. A layman could read, understand, and implement the terms necessary to benefit from the block exemption. It was a great success. The Commission is especially to be commended for the simplicity of a document dealing with the extremely sensitive subject of cross-border trade.

By contrast, I respectfully submit that the vertical restraint proposal could have been drafted in the bad old days of prescriptiveness. The benefit of the block exemption will neither apply where market shares (which market?) of buyer or seller or buyer and seller (combined?) exceed thirty percent, nor where an indefinite, indirect non-compete obligation is present, and so on. That does not mean that in particular cases these tests will necessarily be unreasonable or unfair. The Danish hail insurers example shows how slippery a criterion high market share is. About ninety percent of Danish insurers who offered farmers insurance against hail created a pool of damage inspectors and established common criteria for evaluating dam-

65. Regulation 67/67, 57 J.O. 849 (1967).

66. There were once advertisements in London Underground stations that advised businessmen who did not know the terms of Regulation 17/62 to read the Financial Times.

age caused to crops by hail. The Danish market for hail insurance was worth about DKR30 million (roughly US\$4.3 million). The relevant geographic market for hail insurance for farmers was considered to be national. The agreement between the insurers, which was notified to the Commission on Form A/B, was clearly restrictive of competition, since it prevented the insurers from competing on non-price issues such as assessment of damages and competence in evaluating damage on the spot. The agreement was considered to have a possible effect on intra-Community trade. The *de minimis* notice was clearly not applicable, since the parties had an over ninety percent market share. Nevertheless, the Commission gave clearance on the basis that the agreement had no Community interest because the relevant market itself was too small. A copy of the comfort letter was sent to the Danish competition authority.

I readily agree that it is beneficial for the regulation to apply to services as well as goods. The text has been drafted, however, on the assumption that business decisions and contract drafting are dominated by competition law considerations, and that agreements will follow precisely the tramlines laid down by block exemption regulations. In my view, the vertical restraints draft regulation extends the network of tramlines but is essentially conservative (with a few exceptions such as the provisions on selective distribution systems). The detailed exposition in Article 3 of the blacklisted situations where the benefit of the block exemption will be lost does not seem easier to understand or much different from the familiar trio of permitted restrictions upon the reseller. Speaking more broadly, it seems difficult to reconcile the sweeping radicalism of the proposals on modernization with the timid, technical, and grudging concessions⁶⁷ of the ver-

67. Point 10 in the proposed guidelines accompanying the block exemption proposal makes the stunningly bland statement that

the Commission considers that, subject to cumulative effect and hardcore restrictions, agreements between small and medium-sized undertakings as defined in the Annex to Commission Recommendation 96/280/EC, O.J. L 107/4 (1996) are rarely capable of appreciably affecting trade between Member States or of appreciably restricting competition within the common market as long as these undertakings do not hold a dominant position in a substantial part of the common market.

Proposed Guidelines on Vertical Restraints, O.J. C 270/12 (1999). There are so many qualifications in this sentence that it could have been lifted from an over-cautious lawyer's opinion.

tical restraints proposal.

Pursuing the tramlines analogy, while the latter involves the laying of new tracks to reach a destination not far from that served by the present tracks, the former proposes ripping up the tracks altogether. Alarming though the prospect may be both to passengers and regulators, the bold approach is the wiser one.

V. HUMAN RIGHTS AND EXTENDED POWERS OF INVESTIGATION

In this section, the surprising conclusion that I reach is that the proposed changes in Commission powers of inquiry are inconsistent with the most recent case law of the European Court of Human Rights (or "ECHR"), and that a fundamental review is required of the apparently genuine and fundamental incompatibility between the Human Rights Convention and how competition law investigations are conducted, as well as how competition decisions are made. In short, Article 6 of the Human Rights Convention prohibits the questions that are incriminating but which must nevertheless be answered on pain of a fine;⁶⁸ and the procedure by that Commission decisions in competition cases are reviewed seems likewise not to constitute the action of an independent and impartial tribunal, as required by Article 6.

A. *The Commission's Extended Investigation Powers*

One important element proposed in the White Paper is the restating and reinforcing of the Commission's investigative powers. The changes address the right to ask questions related to the investigation, and the right to summon persons to the Commission's premises to answer questions. In the White Paper the Commission describes and justifies what it wishes as follows:

During investigations, the right of authorised Commission officials to ask questions of an undertaking's representatives or staff which are not directly related to documents found on the premises has sometimes been questioned. In addition, the system of administrative penalties for supplying incorrect information is silent on this point.

It is therefore proposed that Article 14 of Regulation 17 be amended to make it quite clear that in the course of an investigation the authorised Commission officials are empow-

68. Regulation 17/62, *supra* note 5, arts. 15(1)(c), 16(1)(d).

ered to ask the undertaking's representatives or staff any questions that are justified by and related to the purpose of the investigation, and to demand a full and precise answer. A further provision could be introduced under which the authorised officials would be empowered to draw up official minutes of the answers given in the course of the investigation. These minutes would be included in the file, and could be used at later stages of the procedure. As a corollary to this new provision, the answers given in the course of investigations would be brought within the scope of the penalties for supplying incorrect information⁶⁹ . . .

In order to increase the effectiveness of its enquiries the Commission should also be empowered to summon to its own premises any person likely to be able to provide information that might be helpful to its enquiries, and to take minuted statements. This possibility could be used with respect to the undertakings that are the subject of the procedure: it would serve to complement Article 14 by allowing persons to be questioned who were not present at the time of the investigation. It could also be used with respect to complainants and third parties.⁷⁰

Indeed, the Commission points out that “[m]ost of the national systems of competition law give the authorities power to summon persons likely to be able to give information relevant to the investigation. This is the case for example in Belgium, France and Germany.”

B. The European Court of Justice's and the Commission's Interpretation of the Commission's Investigation Powers

Article 14 of Regulation 17/62 grants the Commission the power to

undertake all necessary investigations into undertakings and associations of undertakings. To this end the officials authorised by the Commission are empowered:

- (a) to examine books and other business records;
- (b) to take copies of or extracts from the books and business records;
- (c) to ask for oral explanations on the spot;

69. White Paper, *supra* note 17, §§ 112, 113.

70. *Id.* § 114.

to enter any premises of land and means of transport of undertakings.

Article 14(3) imposes on the undertakings the duty to "submit to investigations ordered by decision of the Commission." Article 15(1)(c) empowers the Commission to "impose on undertakings . . . fines of from 100 to 5000 [euros] . . . where, intentionally or negligently . . . they produce the required books or other business records in incomplete form . . . or refuse to submit to an investigation." In the latter case, the Commission may also require undertakings to pay periodic penalty payments of 50 to 1000 euros per day in order to compel an undertaking to submit to an investigation.⁷¹ Ever since the entry into force of Regulation 17/62, these powers have received a very wide interpretation by the Commission, in parallel to a shift in the nature of on the spot investigations, from something like a tense audit at arm's length to the open-ended rummage that is, at least sometimes, the current pattern.

In the White Paper, the Commission "make[s] it quite clear" that its power already extends to "any questions that are justified by and related to the purpose of the investigation, and to demand[ing] a full and precise answer."⁷² The Commission views the explanation in the White Paper as nothing more than a clarification. The situation, however, is not quite as clear as that. With regard to Article 14(1)(c) of Regulation 17/62, some commentators took the early view that requests for explanations must relate to the documents being examined.⁷³ The Commission evidently does not consider its powers to ask questions as thus circumscribed. It holds its power to ask questions that must be answered on pain of fines as much broader. The matter was raised before the Court in *National Panasonic (U.K.) Ltd. v. Commission*,⁷⁴ in evaluating the relationship between Article 11 of Regulation 17/62, which gives the Commission the power to re-

71. *Id.* art. 16(1)(c).

72. *Id.*

73. Arved Deringer, *The Distribution of Powers in the Enforcement of the Rules of Competition Under the Rome Treaty*, 1 COMMON MKT. L. REV. 30 (1963); I. Van Bael, *EEC Antitrust Enforcement and Adjudication as Seen by Defence Counsel*, 7 REVUE SUISSE DU DROIT INTERNATIONAL DE LA CONCURRENCE 1, 15 (1979).

74. *National Panasonic (U.K.) Ltd. v. Commission*, Case 136/79, [1980] E.C.R. 2033, [1980] 3 C.M.L.R. 169.

quest information, and Article 14. The Commission's position was described in the case report as follows:

It is not true to say that the Commission may obtain information by requiring explanations on the spot at the time of an investigation by means of a decision under Article 14 and thus avoid the safeguards of the procedure under Article 11. In fact officials of the Commission undertaking an investigation are empowered to require explanations of specific concrete questions arising out of the books and business records which they examine, which has nothing to do with the power to ask general questions requiring careful consideration and perhaps the gathering of information by the firm.⁷⁵

This appears to contradict what the Commission now says about its own powers in the White Paper, namely that Article 14 should be amended "to make it clear that . . . the authorised Commission officials are empowered to ask . . . any questions that are justified by and related to the purpose of the investigation, and to demand a full and precise answer."

Advocate General Warner, confirming what the Commission had said, indicated that Article 14(1)(c) was restricted to explanations relating to the books and records under examination and their contents. The Court's judgement did not treat the issue directly. However, in relation to the distinction between Article 11 and 14, the Court stated:

The fact that the officials authorised by the Commission, in carrying out an investigation, have the power to request during that investigation information on specific questions arising from the books and business records which they examine is not sufficient to conclude that an investigation is identical to a procedure intended only to obtain information within the meaning of Article 11 of the regulation.

C. *The So-Called Duty of Active Cooperation*

In *Fabbrica Pisana*, the Commission described what it conceived to be the duty of the company under investigation:

The argument that *Fabbrica Pisana* had satisfactorily fulfilled its obligations by generally putting all its files at the investigator's disposal must be rejected, since the obligation on undertakings to supply all documents required by Commission in-

75. *Id.*

spectors must be understood to mean not merely giving access to all files but actually producing the specific documents required. Nor can the argument that the Commission's inspectors did not examine the business records of the administration department be accepted, as none of the undertaking's representatives had told them that the documents requested were, or might be, kept in that department and where there was otherwise no reason to suppose that documents of that nature might be found there.⁷⁶

It cannot be the law that the Commission can order the target company to produce incriminating documents that the company itself must choose. Correspondingly, it cannot be the law that the company can discharge its duty under Regulation 17/62 by merely showing the Commission the contents of its filing room. As the Court has acknowledged on several occasions, it is in principle for the Commission, and not the undertaking or third party, to decide whether a document must be produced.⁷⁷

The well recognized principle that the Commission cannot search for information by asking general or open-ended questions must also apply to the Commission's powers of interrogation. The Commission itself recognizes that the power to obtain explanations must be read in the light of Article 11. The Commission has accepted that "the power should not be used to pressure the officials of a firm into making oral admissions which they would not make if they had the time for reflection afforded them by a written request under Article 11."⁷⁸

These two concessions are important. Questions the Commission may ask must be both specific and capable of being answered in the circumstances of an investigation.⁷⁹ It is also relevant that the responsibility established by Regulation 17/62 rests with the undertaking; only the undertaking may be liable to

76. Commission Decision No. 80/334/EEC, O.J. L 75/30, 32 (1980) (Fabbrica Pisana).

77. See generally *Australian Mining & Smelting Europe Ltd. v. Commission*, Case 155/79, [1982] E.C.R. 1616, 1617-18, [1982] 2 C.M.L.R. 264; *Hoechst AG v. Commission*, Joined Cases 46/87 & 227/88, [1989] E.C.R. 2819, 2927, ¶ 31, [1991] 4 C.M.L.R. 410; *Orkem v. Commission*, Case 374/87, [1989] E.C.R. 3283, 3347-48, ¶ 15, [1991] 4 C.M.L.R. 502.

78. OFFICE FOR OFFICIAL PUBLICATIONS OF THE EUROPEAN COMMUNITIES, DEALING WITH THE COMMISSION: NOTIFICATIONS, COMPLAINTS, INSPECTIONS AND FACT-FINDING POWERS UNDER ARTICLES 81 AND 82 OF THE EC TREATY 40 (1997).

79. See C.S. KERSE, *E.C. ANTITRUST PROCEDURE* 142 (4th ed. 1998).

finances or periodic penalty payments under Articles 15 and 16. It would therefore seem to be up to the undertaking to determine how it intends to fulfill any obligations it may have under Regulation 17/62. The company should thus be free to select a representative to provide the necessary information. On the other hand, it would seem "sensible that oral explanations of any document should be given by the person who wrote it, received it, performed the activity ordered or described in it, or engaged in discussions about its formation, execution or purpose."⁸⁰ Putting it differently, it seems functionally appropriate that questions should be addressed to the author or actor identified as knowledgeable, but constitutionally it is for the company to name the person who will reply. Currently the Commission names those whom its officials wish to question pursuant to Article 14. So far as we know, the Commission has never condemned a company that has refused to present a specific person to answer questions under Article 14. Arguably, the Commission cannot choose or nominate any particular person to reply to its enquiries or requests for explanations under Article 14. As the Commission put it in *Fabbrica Pisana*, cited above:

It is not for the Commission's inspectors to assess or dispute the competence or extent of knowledge of the representatives of the undertaking they are investigating. The undertakings named in the investigation authorisations are alone responsible for designating their representatives.

This assertion does not seem to match contemporary practice. Note also that in the long excerpt from the White Paper at the start of this section, the Commission contemplates questions to "representatives" (that is, persons designated by the company) and "staff" (who may be other employees determined by the Commission who are not designated by the company to reply to questions). It seems, therefore, that the Commission lacks the power to question whomever it may consider useful. But this does not necessarily excuse the undertaking from putting forward whatever employee can best respond to the inspector's question as the companies are under an obligation to cooperate actively.

To speak less abstractly, it is not clear from the legal authorities whether a specific person who has guilty knowledge may be

80. *Id.* at 143.

questioned by inspectors, on pain of fines upon his employer if he is not produced. It is also clear that the Commission's theories as advanced in the White Paper are not identical to those advanced in court cases and its own brochure. This tension between theoretical power and practical necessity gives rise to genuinely difficult questions that have rarely been examined thoroughly. There is another related and even more fundamental problem that will now be discussed.

D. *Effectiveness of the Investigation and the Protection of Human Rights*

While the proposed extended powers of the Commission may seem a reasonable and necessary reinforcement of what must be implicit in any regime for effective antitrust enforcement, it is difficult to reconcile them with the Human Rights Convention. In short, how may we reconcile the proposed rules with the recent case law of the human rights institutions in Strasbourg on the duty to give due process rights to companies under investigation, rights commensurate with those given to those accused of crimes including the right not to incriminate themselves?⁸¹ Related to this issue is the natural reluctance of the Commission and the European courts to see the Commission's power to make dawn raids and issue Article 11 letters diminished by having to respect the Human Rights Convention.

Note that in the United States, corporations do not benefit from the constitutionally granted immunities that for private citizens constitute parallels to those granted in the Human Rights Convention. It is therefore necessary to have a regime that permits effective fact gathering by the Commission but which recognizes and respects the principles of the Human Rights Convention.

E. *The Relationship Between the Human Rights Convention and EU Law*

So let us review the relationship between the Human Rights Convention and EC law, beginning at the beginning because this convention is not familiar terrain for a U.S. antitrust audience.

81. See Helmuth Schröter, *L'interdépendance entre les pouvoirs de la Comm'n et les garanties procédurales dont bénéficient les individus*, in UN RÔLE POUR LA DÉFENSE DANS LES PROCÉDURES COMMUNAUTAIRES DE CONCURRENCE (Bruylant 1997).

In the preamble of the Single European Act, the Member States affirm that they are

[d]etermined to work together to promote democracy on the basis of the fundamental rights recognised in the Constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice.⁸²

These words may sound curiously exotic to an audience accustomed to economic analysis of markets but, as we will see, the Human Rights Convention has become a surprisingly potent document. The Member States thus recognized the substance of the fundamental rights contained in the Human Rights Convention. They did not, however, accept a direct obligation of the EC to respect the wording or the form these rights are given in national constitutions or in the Human Rights Convention. The obligation extends to these rights as they may be defined and elaborated by the Court. The Court was therefore free to interpret the fundamental rights contained in the Human Rights Convention in the context of EC law, rather than being bound by the interpretation given to it by the organs responsible for the Human Rights Convention, the Human Rights Commission, and the European Court of Justice.⁸³ The possibility existed that Member States might have to respect their Human Rights Convention obligations arising from the Human Rights Convention itself in a different manner than they would respect EC obligations as interpreted by the Court in discharge of the Community's indirect duty to respect the Human Rights Convention.⁸⁴

Article F(2) of the Treaty of European Union went one step further in recognizing that "[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms . . . and as they result from the constitutional traditions common to

82. Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741.

83. The recent institutional reorganization of the Human Rights Institutions in Strasbourg lies beyond the scope of this Essay.

84. This was demonstrated in the *Niemietz* case (*Niemietz v. Germany*, No. 251-B Eur. Ct. H.R. at 33-34 (1992)), where the Commission and the Court of Human Rights disagreed with the Court's interpretation of Article 8 of the Human Rights Convention in its *Hoechst* judgment. *Hoechst AG v. Comm'n*, Joined Cases 46/87 & 227/88, [1989] E.C.R. 2819, [1991] 4 C.M.L.R. 410.

the Member States as general principles of Community law.”⁸⁵ Thus, fundamental rights are still general principles. Henceforth they must be respected “as guaranteed by” the Human Rights Convention. This should mean that the fundamental rights guaranteed by the EC are to be interpreted in line with those guaranteed by the Human Rights Convention (and as interpreted by the Strasbourg organs).

The court in Luxembourg consistently has held that fundamental rights form an integral part of the general principles of law whose observance it ensures. Accordingly, it will strike down any measure adopted by a EC institution that is incompatible with such fundamental rights.⁸⁶ As we shall see, the problem lies not in honoring the principle of fundamental rights, as no one can be opposed to fundamental rights. The problem lies in defining what conduct is protected by those rights. More specifically, do those rights permit a company to refuse to answer an unwelcome question from a competition agency and avoid being punished for its refusal? In my view, recent precedents from the courts in Strasbourg and Luxembourg diverge on this issue. In *Nold*,⁸⁷ the Court observed at paragraph 13 that,

international treaties for the protection of human rights on which the Member States have collaborated, or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.

In *Johnston*,⁸⁸ the Court emphasized the role reserved for the Human Rights Convention in the development of EC law:

As the European Parliament, Council and Commission recognized in their Joint Declaration of 5th April 1977 and as the

85. Treaty on European Union, Feb. 7, 1992, O.J. C 224/1, art. F(2) (1992), [1992] 1 C.M.L.R. 719 [hereinafter TEU] (amending Treaty establishing the European Economic Community), Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty], as amended by SEA, *supra* note 82. The TEU was amended by the Treaty of Amsterdam amending the Treaty on European Union, the Treaty 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 TEU, and the articles of TEU were renumbered in the Consolidated version of the Treaty on European Union, O.J. C 340/2 (1997), 37 I.L.M. 67 [hereinafter Consolidated TEU], incorporating changes made by Treaty of Amsterdam, *supra*.

86. *Internationale Handelsgesellschaft mbH. v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, Case 11/70, [1970] E.C.R. 1125, [1972] C.M.L.R. 255.

87. *Nold v. Commission*, Case 4/73, [1974] E.C.R. 491, [1974] 14 C.M.L.R. 338.

88. *Johnston v. Chief Constable of the Royal Ulster Constabulary*, Case 222/84, [1986] E.C.R. 1651, [1990] 2 C.M.L.R. 833.

Court has recognized in its decisions, the principles on which that Convention is based must be taken into consideration in Community law.⁸⁹

The institutions of the European Communities were not strictly speaking, parties to the Human Rights Convention.⁹⁰ Acts of national institutions of the Member States in implementation or enforcement of EC acts, however, are reviewable under the Human Rights Convention.⁹¹

Twenty years ago in *CFDT v. European Commission*, the Commission of Human Rights held an application against the EC to be inadmissible *ratione personae* because the EC was not a party to the Human Rights Convention, and further rejected a submission that the EC Member States—who are all party to the Human Rights Convention—were jointly and severally liable for the acts of the Community. The European Commission for Human Rights offered reassurance to the party before it about respect for human rights:

[T]he legal system of the European Communities not only secures fundamental rights but also provides for control of their observance. It is true that the constituent treaties of the EC did not contain a catalogue of such rights. However, the Parliament, the Council and the Commission of the European Communities have stressed in a Joint Declaration the importance they attach to the protection of fundamental

89. *Id.* at 1682, § 18.

90. See *CFDT v. EC*, App. No. 8030/77, 13 Eur. Comm'n H.R. Dec. & Rep. 231 (1978); *Re the Accession of the Community to the European Human Rights Convention*, Opinion 2/94, [1996] E.C.R. I-1759, [1996] 2 C.M.L.R. 265, pursuant to Article 228(6) of the EC Treaty (*Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms*) [1996] E.C.R. I-1759.

91. In its decision in *M. & Co.*, the Human Rights Commission refused to uphold an application against Germany for breach of Article 6 of the Human Rights Convention by enforcing a decision of the Court. The Commission held the application to be inadmissible, following its decision in *CFDT*:

A transfer of powers does not necessarily exclude a state's responsibility under the Convention with regard to the exercise of transferred powers. Otherwise the guarantees of the Convention could wantonly be limited or excluded and thus be deprived of their peremptory character. . . [the] transfer of powers to an international organisation is not incompatible with the Convention provided that within that organisation fundamental rights receive an equivalent protection.

M. & Co. v. Germany, Application 13258/87, 64 Eur. Comm'n Hum. Rts. Decision & Rep. 138 (1990). The Commission concluded that the Community guarantees sufficient protection and declared the application inadmissible. *M. & Co.*, *supra*.

rights, as derived in particular from the constitution of Member States and the European Convention for the Protection of Human Rights . . . In addition, the Court of the European Communities has developed a case law according to which it is called upon to control Community acts on the basis of fundamental rights, including those enshrined in the European Convention on Human Rights.

Subsequently, the Court in *Elliniki Radiophona Tileorassi v. Dimotiki Etairi Pliroforissis and Sotirios Kouvelas*⁹² emphasized the position of the European Commission of Human Rights. At paragraph 41 it observed that "the Court draws inspiration from . . . guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories . . . The ECHR has special significance in that respect."⁹³

Advocate General Darmon has recognized the importance of preserving such respect by ensuring parity between the levels of protection provided by EC law and under the Human Rights Convention. In *Al Jubail Fertilizer*,⁹⁴ he stated:

If the European Commission of Human Rights declares inadmissible applications directed against national decisions enacted pursuant to a Community act . . . the main reason is that, through its successive judgments the Court [of Justice] has established the principle that it reviews the Community institutions' observance of fundamental rights.⁹⁵

Equally, Advocate General Bo Vesterdorf in *Rhône-Poulenc SA*,⁹⁶ while reviewing a number of human rights arguments, stated: "It is vitally important that the Court should seek to bring about a state of legal affairs not capable of any justified criticism with reference to the European Convention."

We may therefore conclude that abundant authority supports the broad principle that the EC institutions, EC competition legislation, and its enforcement must respect the principles

92. *Elliniki Radiophona Tileorassi v. Dimotiki Etairi Pliroforissis and Sotirios Kouvelas*, Case C-260/89, [1991] E.C.R. I-2925, [1991] 4 C.M.L.R. 540.

93. *Id.* ¶ 41.

94. *Al Jubail Fertilizer Co and Saudi Arabian Fertilizer Co. v. Council*, Case C-49/88, 1991 E.C.R. I-3187, [1991] 3 C.M.L.R. 377.

95. *Id.* ¶ 31.

96. *Opinion of Advocate General Vesterdorf, Rhône-Poulenc SA v. E.C. Comm'n*, Case T-1/89, [1991] E.C.R. II-867, 881, § 19.

of the Human Rights Convention. Let us now examine the concrete application of that principle.

VI. *ARTICLE 6 HUMAN RIGHTS CONVENTION AND THE COMMISSION'S EXTENDED INVESTIGATION POWERS*

Companies in competition proceedings will desire a level of security that does not fall below that guaranteed by Article 6 of the Human Rights Convention, granting the right to a fair hearing. Article 6 of the Human Rights Convention provides *inter alia* that:

- (1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law . . .
- (2) Everyone charged with a criminal offense shall be presumed innocent until proved guilty according to law.⁹⁷

In the following, we will briefly examine whether the Commission is to be considered a tribunal for the purposes of Article 6 of the Human Rights Convention, whether an undertaking investigated for infringement of Articles 81 or 82 of the EC Treaty is facing a "criminal charge," and whether such an undertaking is entitled to a "fair and public hearing within reasonable time by an independent and impartial tribunal." This leads us to the key question of whether the Commission, in light of its proposed extended investigation powers, must respect the privilege against self-incrimination.

A. *Is the Commission a "Tribunal" for the Purposes of the Human Rights Convention?*

In *Fedetab*,⁹⁸ the Court held that the Commission was bound to respect the procedural guarantees provided by EC law and had done so, but that it could not be "classed as a tribunal within the meaning of Article 6" of the Human Rights Convention. In *Musique Diffusion*⁹⁹ and *Shell*,¹⁰⁰ the Court confirmed its position.

97. Human Rights Convention, *supra* note 2.

98. *Heintz van Landewyck Sàrl and Others v. Commission*, Joined Cases 209-215, 218/78, [1980] E.C.R. 3125, 3248, § 81, [1981] 3 C.M.L.R. 134.

99. *Musique Diffusion v. Commission*, Case 100/80, [1983] E.C.R. 1825, 1930, [1983] 3 C.M.L.R. 221.

This conclusion is based on the premise that it is the nature of the decision-making body that determines whether Article 6 applies. As the European Court of Human Rights has confirmed on many occasions, however, it is the nature of the decision itself which is decisive. The *Fedetab* and other cases, therefore, are plainly wrong or no longer persuasive. They cannot be reconciled with subsequent decisions of the ECHR.

1. The 'Criminal Charge'

As we shall see, the problem posed for competition agencies in Europe by the language of Article 6 of the Human Rights Convention is that there is overwhelming recent authority to the effect that competition cases are "criminal," and that the rights of the accused in a criminal case include the right to be silent.¹⁰¹ The European Court of Human Rights has given what Eurospeak calls an "autonomous meaning" to the word "criminal" under the Human Rights Convention. There have been a number of cases in Strasbourg concerning the meaning of "criminal." Generally, governments have argued that a particular procedure imposing some sort of sanction on an individual is not really criminal, and generally they have lost. Public authorities may not deny citizens the protection of the Human Rights Convention merely by describing the legal framework as administrative and not criminal. For example, the European Court of Human Rights held that "criminal" has an autonomous meaning for the purposes of Article 6(1) of the Human Rights Convention in the *Engel*¹⁰² case. A rule may appear criminal, irrespective of the term by which it is characterized in national law. The nature of the offense and the severity of the possible punishment would be more reliable indicators. *Engel*, a conscript who seems to have been a trade union organizer for his fellow sufferers,¹⁰³ had been penalized by his commanding officer for offenses against military discipline. He had appealed as far as the Supreme Military Court. The European Court of Human Rights held that the proceedings against him fell within the scope of

100. *Shell International Chemical Company v. Commission*, Case T-11/89, [1992] E.C.R. II-757, 781.

101. G. DANNECKER & J. FISCHER-FRITSCH, *DAS EG-KARTELLRECHT IN DER BUßGELDPRAXIS* (Carl Heymanns Verlag, ed., 1989).

102. *Engel and Others v. Netherlands*, A22 Eur. Ct. H.R. (ser. A) at 81-82 (1976).

103. Literally a barrack room lawyer, it would seem.

Article 6 of the Human Rights Convention. It also found an infringement of Article 6 due to the fact that hearings of the Supreme Military Court were held in secret.

In its famous *Ozturk*¹⁰⁴ judgment, the European Court of Human Rights clarified further the notion of a "criminal charge" for the purposes of Article 6(1). The court confirmed the approach it had taken in *Engel* so that although an act was not formally classed as criminal, it could be considered as such if it had the punitive and deterrent aspects characteristic of response to a criminal offense. The court observed that:

if the Contracting States were able at their discretion, by classifying an offense as 'regulatory' instead of criminal, to exclude the operation of the fundamental clauses of Articles 6 and 7, the application of these clauses would be subordinated to their sovereign will . . . [and] . . . according to the ordinary meaning of the terms, there generally come within the ambit of the criminal law offenses that make their perpetrator liable to penalties intended, inter alia, to be deterrent and usually consisting of fines and of measures depriving the person of his liberty.¹⁰⁵

Mr. Ozturk (or, more precisely, his insurers), had to pay a small amount of money (about DM60) after causing a traffic accident. The court held that his rights under Article 6 of the Human Rights Convention had been infringed.

B. How the European Court of Justice Interpreted Ozturk

The Court logically concluded that fines for breaches of the competition rules, particularly when they became large in the 1980s, would be criminal in nature. This accords with common sense: large fines deter and they punish. In *Lutz*,¹⁰⁶ the Court stated that it was sufficient if the offenses were criminal in nature as defined by the Human Rights Convention, or if the potential penalty was so severe as to bring the offense into the "criminal sphere."

Advocate General Darmon in *Orkem* considered that the wide definition of the concept of a person accused of a criminal offense adopted by the European Court of Human Rights in *Oz-*

104. *Ozturk v. Federal Republic of Germany*, A73 Eur. Ct. H.R. (ser. A) (1984).

105. *Id.* § 53.

106. *Lutz, Englert and Nölkenbockhoff*, A123 Eur. Ct. H.R. (ser. A) (1987).

turk meant that those accused of competition infringements might be subject to different rules.¹⁰⁷ Subsequent cases before the European Commission of Human Rights (or "Human Rights Commission"), however, proved that there was indeed a problem, even in competition cases.

First, in *Stenuit*, the Human Rights Commission found that a French Ministerial decision to impose a fine on a company for alleged anti-competitive behavior in relation to a rigged bid for a public tender amounted to the determination of a criminal charge within the sense of Article 6(1) of the Human Rights Convention.¹⁰⁸ The Human Rights Commission considered that since the aim of the relevant law was to maintain free competition on the French market, "[t]he Order thus affected the general interests of society normally protected by criminal law." Moreover, the size of the potential fine, up to a maximum of five percent of an undertaking's annual turnover, was established that the penalty in question was meant to have a deterrent effect. This was only half the penalty that may be imposed under Regulation 17/62.

Second, in *Bendenoun*, the European Court of Human Rights ruled that the large financial penalties imposed by the French tax and customs authorities for tax evasion were "criminal" in nature.¹⁰⁹ The relevant provisions of French law applied to all citizens and had a deterrent and punitive purpose. Furthermore, failure to pay the substantial surcharges imposed could lead to imprisonment.

This has been confirmed in a recent case, *Kadubec v. Slovakia*, where the applicant had been convicted of a minor offense (he was alleged to have disturbed boarders at a spa in Slovakia, perhaps after drinking too much of the local waters) which was not classified as a criminal offense under the domestic laws of Slovakia.¹¹⁰ The Slovakian government argued that since the offense was addressed by sanctions that were preventive and educational in nature and would not be recorded in the individual's criminal record, it did not amount to a "criminal charge"

107. *Orkem v. Commission*, Case 374/87, [1989] E.C.R. 3283 (C.J.).

108. *Société Stenuit v. France*, 232-A Eur. Ct. H.R. (ser. A) (1992) [hereinafter *Société*].

109. *Bendenoun v. France*, 284 Eur. Ct. H.R. (ser. A) (1994) [hereinafter *Bendenoun*].

110. *Kadubec v. Slovakia*, Eur. Ct. H.R. (Rec. 1998-VI) (1998).

within the meaning of Article 6(1) of the Human Rights Convention. The European Court of Human Rights, however, did not agree. It offered three criteria by which the nature of an offense could be determined: the domestic legal system's classification of the offense, which was indicative but not conclusive; second, the nature of the offense; and, lastly, "the nature and degree of severity of the penalty that the person concerned risked incurring."¹¹¹ The court found that:

The general character of the legal provision infringed by the applicant, together with the deterrent and punitive purpose of the penalty imposed on him, suffice to show that the offense was, in terms of Article 6 of the Convention, criminal in nature.¹¹²

These cases taken together made it difficult to avoid the conclusion that the imposition of a fine under EC competition law was a criminal charge under the autonomous definition adopted by the European Court of Human Rights for the purposes of Article 6 of the Human Rights Convention. The action affects the general interests of society (*Stenuit*)¹¹³ and is of general applicability (*Bendenoun*).¹¹⁴ The fines are huge. Even though Regulation 17/62 states that penalties imposed under it are administrative rather than criminal, a fine of the order of ECU100,000,000¹¹⁵ seems plainly penal in nature. This is even clearer when the need to deter is actually invoked in the Commission's decision to justify increasing the fine heavily (for example, an increase of 250% in ABB's case).¹¹⁶ The need for deterrence is also mentioned in the Commission's Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No. 17/62 and Article 65(5) of the European Coal and Steel Community Treaty.¹¹⁷

Following the *Stenuit* case, the judges in the European

111. *Id.* § 50.

112. *Id.* § 52.

113. *Société*, *supra* note 108.

114. *Bendenoun*, *supra* note 109.

115. As in the 1998 Volkswagen decision. O.J. L 124/60 (1998).

116. Paragraph 169 of Decision 99/60/EC fining ABB ECU 70 million stated that the "need for deterrence requires that the minimum fine of ECU 20 million envisaged for a very serious infringement should be weighted by 2.5 to give a starting point of ECU 50 million." Pre-insulated Pipe Cartel, O.J. L 24/1, at 63 (1999).

117. Guidelines on the method of setting fines imposed pursuant Article 15(2) of Regulation No. 17 and Article 65(5) of the ECSC Treaty, O.J. C 9/3 (1998).

courts in Luxembourg accepted that competition cases were indeed of a penal or quasi-penal nature. In particular, Advocate General Vesterdorf, in his Opinion in the *Polypropylene* case, noted “[i]n this connection considerable importance must be attached to the fact that competition cases of this kind are in reality of a penal nature, which naturally suggests that a high standard of proof is required.”¹¹⁸ He went on to state:

In view of the fact—in my view confirmed to some extent by the judgment of the Court of Human Rights in the *Ozturk* case—that the fines which may be imposed on undertakings pursuant to Article 15 of Regulation No 17/62 do in fact, notwithstanding what is stated in Article 15(4), have a criminal law character, it is vitally important that the Court should seek to bring about a state of legal affairs not susceptible of any justified criticism with reference to the European Convention for the Protection of Human Rights. At all events, within the framework formed by the existing body of rules and the judgments handed down hitherto it must therefore be sought to ensure that legal protection within the Community meets the standard otherwise regarded as reasonable in Europe.¹¹⁹

To similar effect, we may note that Advocate General Darmon in *Woodpulp*,¹²⁰ comparing the adoption of a measure of general effect to that of a Commission decision in competition proceedings, said “[a] Commission decision in the field of competition is another matter entirely, particularly where it orders a trader to pay a fine and is therefore *manifestly of a penal nature*.”¹²¹

C. *The Privilege Against Self-Incrimination*

The *Ozturk*¹²² case had obvious relevance for EC competi-

118. Rhône-Poulenc SA and Others v. Commission, Joined Cases T-1 to 4/89, 6 to 15/89, [1991] E.C.R. II-867.

119. *Id.* at 881-86.

120. Ahlstrom Osakeyhtiö and Others v. Commission of the European Communities, Joined Cases C-89/81, 104/81, 114/81, 116/81, 117/81 & 125-129/81, [1993] E.C.R. I-1307, [1993] 4 C.M.L.R. 407.

121. *Id.* ¶ 1551, § 451, [1993] 4 C.M.L.R. at 407 (emphasis added); see also Julian Joshua, *Proof in Contested EEC Competition Cases: A Comparison with the Rules of Evidence in Common Law*, 12/5 EUR. L. REV. 315 (1987) (written by DG IV official who has prosecuted many cartels).

122. *Ozturk v. Federal Republic of Germany* A73 Eur. Ct. H.R. (ser. A) (1984).

tion law. Regulation 17/62 says that fines imposed pursuant to its provisions are administrative, and the Commission has consistently denied that criminal rights should be extended to targets in competition cases. The *Orkem* and *Solvay*¹²³ cases offered an opportunity to consider the implications. More precisely, those cases raised the question of whether there was something akin to the privilege against self-incrimination in responding to decisions requesting information under Article 11 of Regulation 17/62. The companies argued that the decisions in question improperly sought to force them to incriminate themselves. The Court noted that the terms of Regulation 17/62 recognize no such right, but instead called for active cooperation from the party investigated. Examining the question from the point of view of fundamental rights, the Court found that while the legal systems of the Member States generally recognize a right for a physical person in a penal procedure not to testify against himself, they do not recognize such a right for legal persons (companies) accused of infringing economic law and competition law in particular. It reached similar conclusions with regard to the Human Rights Convention, and the International Convention on Civil and Political Rights.

Thus the Court denied that the companies enjoyed Human Rights Convention privileges. They fared, however, better when it came to defendant rights.

Whilst the Commission is entitled . . . to compel an undertaking to provide all necessary information concerning such facts as may be known to it and to disclose to it, if necessary, such documents relating thereto as are in its possession, even if the latter may be used to establish, against it or another undertaking, the existence of anti-competitive conduct, it may not, by means of a decision calling for information, undermine the rights of defence of the undertaking concerned. Thus, the Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove.¹²⁴

Based on these criteria, the Court approved requests for factual information concerning meetings, the identity of the partici-

123. *Orkem v. Commission*, Case 374/87, [1989] E.C.R. 3283, [1991] 4 C.M.L.R. 502; *Solvay v. Comm'n*, Case 27/88, [1989] E.C.R. I-3355.

124. *Id.*

pants, and the documents relating thereto. Questions relating to initiatives on prices were approved to the extent that they related to the subject and modalities of these initiatives, but disapproved to the extent that they related to their objectives. A question, which aimed to obtain details on "every step or concerted measure which may have been envisaged or adopted to support initiatives," was deemed to be of a nature that obliged the applicant to admit guilt.

D. *Is There a Right to Silence in Competition Cases?*

This leads us to the implications for the Commission's fact gathering procedures of the applicability of Article 6 of the Human Rights Convention to competition cases. In particular, do parties under investigation for competition law infringements enjoy a right of silence? The Court considered this issue in *Orkem*:

As far as Article 6 of the European Convention is concerned, although it may be relied upon by an undertaking subject to an investigation relating to competition law, it must be observed that neither the wording of that article nor the decisions of the European Court of Human Rights indicate that it upholds the right not to give evidence against oneself.¹²⁵

Advocate General Darmon was also skeptical, stating at paragraph 133 of his Opinion that "[h]aving regard to the Decisions so far adopted by the judicial authorities operating under the Convention, the opinion that any of the paragraphs of Article 6 upholds the right not to give evidence against oneself is confined to the sphere of academic legal literature."

These doubts notwithstanding, the landmark decision of the European Court of Human Rights on self-incrimination was handed down in *Funke v. France*.¹²⁶ Mr. Funke was suspected by the French fiscal authorities of having assets abroad. A request for information was made. If he refused to reply, then he could be fined under France's extremely severe customs laws (still applicable today, and still ferocious). If he answered accurately, then he would be admitting to infringements of these laws and exposing himself to a penalty. The court held that Article 6 (1) of the Human Rights Convention protects: "the right of anyone

125. *Id.*

126. *Funke v. France*, 256-A Eur. Ct. H.R. (ser. A) (1993).

'charged with a criminal offense,' within the autonomous meaning of this expression in Article 6, to remain silent and not to contribute to incriminating himself."¹²⁷

This case has subsequently been confirmed by the court's decisions in *Murray v. United Kingdom*¹²⁸ and *Saunders v. United Kingdom*.¹²⁹ The latter case arose out of the Guinness' takeover of Distillers, and concerned the U.K. laws that compelled Mr. Saunders to answer questions, which later formed the basis for his prosecution for illegal share dealings. The court held that "[t]he Court recalls that, although not specifically mentioned in Article 6 of the Convention, the right to silence and the right not to incriminate oneself are generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6."¹³⁰

In *Saunders* the European Court of Human Rights also rejected the argument advanced by the U.K. Government that the difficulty of gathering evidence in such cases as white-collar fraud should allow a departure from the principles of fairness governing an investigation. The court made clear, at paragraph 74, that "the general requirements of fairness contained in Article 6, including the right not to incriminate oneself, apply to criminal proceedings in respect of all types of criminal offense without distinction from the most simple to the most complex."¹³¹

E. *The Response of the Luxembourg Courts: No Infringement*

In the *PVC*¹³² case this summer, the European Court of First Instance was required to take a position on the human rights implications of these cases. It heard arguments on *Funke* and *Saunders* (prior to the judgment of the European Court of Human Rights in that case) and was invited to reassess its judgment in *Orkem*. The applicants argued that information had been obtained under duress within the meaning of the case law

127. *Id.* ¶ 44.

128. *Murray v. United Kingdom*, Eur. Ct. H.R. (Rec. 1996-I, No. 1) (1996).

129. *Saunders v. United Kingdom*, Eur. Ct. H.R. (Rec. 1996-VI, No. 24) (1996).

130. *Id.*

131. *Id.*

132. *Limburgse Vinyl Maatschappij NV and Others v. Comm'n*, Joined Cases T-305-7/94, 313-16/94, 318/94, §§ 444, 447-49 (CFI Apr. 20, 1999) (not yet reported).

of the European Court of Human Rights. The European Court of Human Rights answered this contention as follows:

Regulation 17 does not give an undertaking under investigation any right to refuse to comply with an investigative measure on the ground that evidence that it had infringed the rules on competition might thereby be obtained. On the contrary, it places the undertaking under a duty of active co-operation, which means that it must be prepared to make any information relating to the object of the inquiry available to the Commission However, in order to ensure the effectiveness of Article 11(2) and (5) of Regulation No 17, the Commission is entitled to compel an undertaking to provide all necessary information concerning such facts as may be known to it and to disclose to it, if necessary, such documents relating thereto as are in its possession, even if the latter may be used to establish, against it or another undertaking, the existence of anti-competitive conduct[.]

The recognition of an absolute right of silence, as argued for by the applicants, would go beyond what is necessary to preserve the defense rights of undertakings and would constitute an unjustified hindrance to the Commission in the accomplishment of its task.

The Commission may not, however, by a decision to request information, undermine the undertaking's defense rights. Thus it may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove.¹³³

The *PVC* judgment, which merely reiterates the *Orkem* jurisprudence, sits uneasily with the European Court of Human Rights' judgment in *Saunders*. I respectfully submit that it is difficult to reconcile the Strasbourg finding that an individual cannot be compelled to furnish factual data, which may be the basis for charging him with economic crime, with the Luxembourg finding that it is acceptable to compel the handing over of documents and responses to concrete questions, which do not demand a confession but do demand incriminating evidence. It is clear that the judges of the Court of First Instance understood the problem, but I respectfully submit that their conclusion is not completely satisfying. The inconvenience of conceding a

133. *Id.* §§ 444, 447-49.

right ought not, *a priori*, to justify denying that right if it exists. The denial of an absolute right to silence is likely to be reexamined in the future cases. In particular, the right of the Commission to ask direct questions to individuals working for companies under investigation, will need to be reexamined.¹³⁴

There are obviously serious difficulties that will confront the Commission's services if indeed its policies for gathering evidence are not lawful, but alternative procedures could be imagined which would broadly achieve the same functional goal. It should be noted that there is nothing improper about asking questions. It is the fine threatened if no answer is given which vitiates the fairness of the procedure. I submit that it is appropriate to think seriously about the problem of incompatibility with the Human Rights Convention before Regulation 17/62 is redrafted.

Since I have devoted so much space to the subject of one aspect of Article 6 of the Human Rights Convention, I take the liberty of adding some further thoughts about other Human Rights Convention issues associated with competition cases.

VII. *DOES THE PROCEDURE BEFORE THE COMMISSION COMPLY WITH ARTICLE 6? IS THE COMMISSION AN INDEPENDENT AND IMPARTIAL TRIBUNAL?*

It is useful to examine separately the various elements, which are required by Article 6 with respect to the "determination" of a "criminal charge." The elements are a "fair and public hearing" by an "independent and impartial tribunal established by law."

A. *Public Hearing*

Commission proceedings are largely written, but there is provision for oral hearings and any defendant may request one. Therefore the requirement of a hearing is met. The hearing, however, is not held in public.¹³⁵ As long as the hearings before the Commission are not public, the procedure before the Com-

134. *Pellisier and Sassi v. France*, App. No. 25444/94, _ Eur. Comm'n H.R. Dec. & Rep. _ (Mar. 25, 1999) (concerning offense of criminal bankruptcy on issue of evidence and proof).

135. *See* Commission Regulation No. 99/63, art. 9(3), O.J. L 127/2268 (1963) [hereinafter Regulation 99/63].

mission is not public. I am not much troubled by this phenomenon, as most companies would be reluctant to attend a public hearing, and the mischief of secret trials seems therefore to be absent.

B. *The Right to an Adversarial Trial*

Although there is no set procedure laid down in the Regulations, the oral hearings are regularly organized as follows:

- (a) the Hearing Officer opens the hearing and invites the case-handler to summarize briefly the facts and principal arguments of the Commission;
- (b) the party being heard is then given the opportunity to speak on the subject matter of the case;
- (c) the representatives of the Member States are invited by the Hearing Officer to put any questions they may have to the party, and the party may reply;
- (d) questions may be put by the Hearing Officer and other members of the Commission's staff who are present, and the party may reply;
- (e) before closing the oral hearing, the Hearing Officer may invite the party to make any final or concluding remarks or observations.

Where a complainant is present, the procedure may take on "something of an adversarial character, the complainant being given an opportunity to put forward his argument before stage (b) and to reply to the points made by the party at the appropriate time."¹³⁶ In *AKZO Chemie v. Commission*,¹³⁷ Advocate General Otto Lenz, however, pointed out that the presence of a complainant did not make the proceedings adversarial in character: The complainant is limited to a role that corresponds to the position, under criminal proceedings, of a person who reports the matter to the authorities.

The purpose of the hearings before the Commission is to enable the accused undertaking to be heard.¹³⁸ The accused

136. KERSE, *supra* note 79, at 194.

137. *Azko Chemie v. Comm'n*, Case 53/81, [1986] E.C.R. 1965, [1987] 1 C.M.L.R. 231.

138. Regulation 17/62, *supra* note 5, art. 19(2); Regulation 99/63, *supra* note 131, art. 9, O.J. L 127/2268 (1963).

may disagree with the Commission's case, but is not entitled to demand answers (they may sometimes be offered). Usually parties' arguments are noted rather than debated. The Commission hearing, rather than being adversarial, is a somewhat unilateral hearing by one party of the other's arguments. Whatever we may think of the hearings (and I consider they could usefully be more interactive and involve actual bilateral debate), they are not a hearing by an independent tribunal. Although the accused company is given access to the non-confidential documents held by the Commission, these documents may conceal the name of a complainant. The absence of a defendant's right to examine the Commission's witnesses may be even more significant if the Commission is granted the right to summon persons to its premises and ask employees questions. As the parties at the hearing currently cannot examine the witnesses who have tendered the evidence that the Commission relies upon, there may be a failure to respect the principle of "equality of arms." In general, it is not clear to me that the procedures at the administrative level inside the Commission prior to the imposition of a fine satisfy the requirement of a "fair and public hearing . . . by an independent tribunal established by law."

After the hearing, the case is passed for an opinion to the Advisory Committee on Restrictive Practices and Monopolies, whose delegates represent the Member States' interests.¹³⁹ In the context of this procedure, the Hearing Officer has the right to address the Commissioner responsible for competition matters. The opinion of the Committee and any communication between the Hearing Officer and Commissioner do not involve the participation of the accused undertaking. Neither the opinion nor the communication by the Hearing Officer is revealed to the accused party. Again it seems plain that this is not in any sense a fair or public hearing before a tribunal. It does not help the procedure's validity under Article 6 which states that the documents in question are never or almost never made available to the accused.

C. *Fair Hearing by an Independent and Impartial Tribunal*

The European Court of Human Rights has held that the "independent" and "impartial" requirements have to be read to-

139. See Regulation 99/63, *supra* note 132, art. 10, O.J. L 127/2268 (1963).

gether. In *Demicoli v. Malta*,¹⁴⁰ the applicant was charged with contempt of the Maltese House of Representatives by satirizing two of its members. Pursuant to Maltese law, he was tried and convicted before the House of Representatives, from which there was no appeal. The court held that the fact that the two satirized members brought the complaint and participated in the decision was sufficient to negate the independence and impartiality of the Maltese House of Representatives in this procedure. The court explained:

a tribunal is characterised in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner. . . . It must also satisfy a series of further requirements—independence, in particular of the Executive; impartiality; duration of its members' terms of office; guarantees afforded by its procedure—several of which appear in the text of Article 6 (1) itself.

In the *Shell* case (*Polypropylene*),¹⁴¹ the European Court of First Instance held that the fact that the same official was responsible for bringing the case and drafting the Decision did not involve a breach of the rights of the defense under EC law. This is difficult to reconcile with the decision of the European Court of Human Rights in *Pfeifer and Plankl v. Austria*,¹⁴² where the court held that the participation of an examining magistrate in a hearing on the substantive issues in a criminal trial cast doubt on the impartiality of the tribunal.

In EC competition proceedings, the caseworker handles the case from investigation through to the drafting of the decision. Many hands will contribute to the drafting process, but the caseworker will normally be the principal drafter. By the time the hearing or the adoption of the decision draws near, the caseworker and his or her colleagues at service level will already be confident that there is a serious enough breach of Articles 81 or 82 to warrant a decision imposing a fine. It is practically impossible for the case-handler to be impartial: he or she is a prosecutor. That in itself is not surprising, but it is relevant to con-

140. *Demicoli v. Malta*, 210 Eur. Ct. H.R. (ser. A) (1991).

141. *Shell International Chemical Company v. Comm'n*, Case T-11/89, [1990] E.C.R. II-637, 781.

142. *Pfeifer and Plankl v. Austria*, 227 Eur. Ct. H.R. (ser. A) (1992).

sider whether the decision in itself is tainted by being associated with the caseworker as prosecutor. The actual decision is rendered by the College of Commissioners, a political organ. The members of the Commission are political appointees. They are not independent of the executive: they are the executives. They are not, either generally or when taking a competition decision, similar to a tribunal, which independently renders a neutral conclusion on the basis of the evidence and arguments. A competition decision is the endorsement of months and years of effort devoted by skilled and resourceful officials who are the civil service subordinates of the Commissioners taking the decision. I was never much impressed by the argument in the 1970s that the Commission was prosecutor, judge, and jury, as that reproach seemed largely irrelevant to the actual situation of DG IV. It seems to me, however, that the imposition of a fine of ECU102,000,000 on a company by a political body whose representative then describes to the press its reasons for imposing the fine in what may fairly be called triumphalist terms does not clearly constitute the "determination of . . . any [criminal] charge . . . by an independent and impartial tribunal."

This is not to accuse individual officials, junior or senior, or individual Commissioners, of being unfair or acting unfairly. I make no such assertion. I, however, am struck by the apparent discrepancies between the requirements of the Human Rights Convention and actual practice.

D. *Can the Possibility of Appeal to the European Courts Remedy a Breach of Article 6?*

In *Stenuit*, it was argued that while the administrative procedure itself was not compatible with Article 6, the possibility of an appeal to the Conseil d'Etat remedied this defect. The Human Rights Commission, however, noted that the French Court had refused to examine the factual basis for the imposition of a fine by a Minister, and concluded that the defendant's case "was in fact never heard by a tribunal having full jurisdiction which could have determined the criminal charge against it." The incompatibility of the "administrative" procedure with Article 6 could therefore not be rectified by the possibility of an inadequate judicial review. This implies that one solution to the problem described above could be the comprehensive review of the

decision by a European court that is independent and impartial. Judicial review is of course available, but it is not obvious to me that its current form would completely solve the difficulty. The Court does not itself take the decision or set the fine. Its role is not to decide whether the underlying infringement did actually occur, but whether the decision imposing the fine was lawful. It is a court for the review of the law, not a *de novo* review of whether the accused was guilty. The classic formulation is that the Court limits its review to verifying whether the relevant procedural rules have been complied, whether the statement of the reasons for the decision is adequate, whether the facts have been accurately stated, and whether there has been any manifest error of appraisal or a misuse of powers. It is not the role of the Court to retry the determinations made by the Commission. If these determinations had been purely administrative, then there would be no problem under Article 6. But since the decision was in nature criminal, and since the penalty may have been very severe, I feel that the question of compatibility with Article 6 remains unanswered. If the original decision constitutes the determination of a criminal charge without the involvement of an independent and impartial tribunal, then a review of the legality of that decision by an independent and impartial tribunal does not, or at least does not obviously, eliminate the incompatibility with Article 6.¹⁴³

CONCLUSION

The Commission itself, it seems, recognizes the need to make a good balance between effectiveness of competition law investigations and the rights of the defense, once its investigative powers are extended:

There are several ways to ensure that the investigations are simultaneous and consistent, and to strengthen the guaran-

143. For an interesting discussion of whether the withholding of incriminating information by a company suspected of a competition law infringement can in turn obstruct national enforcement proceedings, see G. Cumming, *Otto v. Post Bank and the Privilege against Self-incrimination in Enforcement Proceedings of EC Articles 85 and 86 before the English Courts*, 16/7 EUR. COMP. L. REV. 400 (1995) (concluding that "as such, the European Comm'n is henceforth prevented from using any directly incriminating information which emanates from interrogatories employed in national proceedings. This prohibition on using relevant and available information might be said to constitute a form of secondary privilege").

tees offered to undertakings under investigation. The element of judicial review could be centralised, and entrusted to one of the Community courts. This method of safeguarding the rights of undertakings under investigation would have the advantage of greatly simplifying investigation procedures, and resolving once and for all the problems of inconsistency and lack of simultaneity. Another possibility would be to harmonise and simplify the procedural law in the Member States, so as to ensure that in any Member States where orders were needed they could be obtained rapidly and simultaneously. This second option is a great deal more complex, and would require far-reaching amendment of judicial procedural law in certain Member States.¹⁴⁴

I readily concede that the foregoing section reaches a surprising conclusion: I was indeed myself surprised to reach it. It, however, seems prudent to review these matters now, before reforms are made, so as to ensure the future compatibility of the enforcement mechanism established by EC law with the requirements of the Human Rights Convention. I submit that before the proposed reforms are made, some fundamental stocktaking is appropriate.

144. White Paper, *supra* note 17, § 111.