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## A Critical Review of the White Paper on the Reform of the EC Competition Law Enforcement Rules

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## **Abstract**

This Essay discusses concerns raised by the core proposal in the Commission of European Communities' ("Commission") recently published White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the Treaty establishing the European Community ("White Paper"), namely the ending of the authorization and notification system.

# A CRITICAL REVIEW OF THE WHITE PAPER ON THE REFORM OF THE EC COMPETITION LAW ENFORCEMENT RULES

Mario Siragusa\*

## INTRODUCTION

This Essay discusses concerns raised by the core proposal in the Commission of European Communities' ("Commission") recently published White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the Treaty establishing the European Community ("White Paper"), namely the ending of the authorization and notification system.<sup>1</sup> It analyzes other proposed amendments to the Commission's investigative powers and to the system of penalties. It proposes further options for reform, such as combining the directly applicable exception system proposed by the White Paper with a system of voluntary notification and a mechanism for clear and flexible allocation of competence between the European Community ("EC" or "Com-

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1. White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, Commission Programme No. 99/027, O.J. C 132/1 (1999) [hereinafter White Paper]. See Treaty establishing the European Community, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 573 [hereinafter EC Treaty], *incorporating changes made by Treaty on European Union*, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719 [hereinafter TEU]. The Treaty on European Union ("TEU") amended the Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty], *as amended by Single European Act*, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA]. The Treaty establishing the European Community ("EC Treaty") was amended by the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Oct. 2, 1997, O.J. C 340/1 (1997) [hereinafter Treaty of Amsterdam]. These amendments were incorporated into the EC Treaty, and the articles of the EC Treaty were renumbered in the Consolidated version of the Treaty establishing the European Community, O.J. C 340/3 (1997), 37 I.L.M. 79 [hereinafter Consolidated EC Treaty], *incorporating changes made by Treaty of Amsterdam, supra*. Although the White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty ("White Paper") uses the old numbering of the EC Treaty, most quotations in the present text are updated to the new numbering resulting from the entry into force of the Treaty of Amsterdam. The White Paper, therefore, currently addresses Article 81 and 82, not 85 and 86, of the EC Treaty.

munity") and National Competition Authorities in the Member States (or "NCAs"). To a large extent, the proposal outlined below combines elements discussed by the European Commission (or "Commission") in the White Paper, but which are treated there as alternatives rather than as cumulative measures.

### I. EXECUTIVE SUMMARY

The Commission and the legal and business communities agree that the present system of implementing Articles 81 and 82 of the Treaty establishing the European Community ("EC Treaty") is unsatisfactory. Any reasonable reform that addresses the shortcomings of the current system is likely to find a warm welcome. The White Paper is a good step in this direction. It may, however, have the side effect of further reducing legal certainty for undertakings and threaten the consistent and uniform application of EC competition law. The following modified system should be considered for at least a transitional stage.

First, the Commission should introduce the proposed system of legal exception, but there should still be an option of notifying the Commission of important agreements. The Commission should decide whether to accept such notifications and their substantive merits within certain time limits. Second, notifications could be forwarded to NCAs for treatment under Article 81 if the notified agreements are mainly national in character, but instances where the Commission can do so should be well defined. A possibility of notifying on Form A/B directly to NCAs could also be created, but the Commission should be allowed to withdraw jurisdiction from an NCA in cases of community interest before the latter has adopted a decision. Third, national courts could be allowed to apply Article 81(3), but must stay proceedings if the agreement under dispute is notified to the Commission and the Commission or an NCA opens proceedings. Fourth, opinions of the Commission arrived at without in-depth investigation should be non-binding. If the Commission fails to adopt a decision or refer a case before the time limit, then this should have the effect of a comfort letter. NCA and Commission decisions arrived after in-depth investigation should be binding throughout the European Union (or "EU").

Next, if a complaint is filed under Articles 81 or 82, only one NCA should deal with the case. If the Commission or an

NCA opens a proceeding on its own initiative, then the other NCAs should be barred from dealing with the case. Finally, adequate rules should safeguard the rights of the defense, including proper notice and attendance of counsel for oral examinations of individuals, and exclusion of qualified in-house counsel from the obligation to testify.

## II. INTRODUCTION AND BACKGROUND

### A. *The Current Notification System and Its Shortcomings*

The main shortcomings of the current system of notification to the Commission are the following. First, as a result of the Commission's current wide application of Article 81(1),<sup>2</sup> even agreements that raise little or no risk of anti-competitive impact are deemed illegal and unenforceable if they have not been notified and exempted. An example of such a case is where there is no harm to consumer welfare in terms of price or output effects because they restrict only competition that could not have taken place in their absence, or restrict competition less than they increase it.<sup>3</sup>

Second, the automatic voiding of Article 81(2) agreements that breach Article 81(1) gives rise to complications when a national court is requested in private litigation to enforce an agreement that has been notified to the Commission, and may therefore later be exempted retrospectively to the time of the national litigation.<sup>4</sup> This situation discourages companies from undertak-

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2. According to the European Commission ("Commission"), almost any restriction of the commercial freedom of one or more of the parties to an agreement amounts to a restriction of competition prohibited by Article 81(1) of the EC Treaty. The possibility to apply a "rule of reason" approach and to narrow the application of Article 81(1) is not discussed further, although that issue should be seriously reconsidered as an approach to limit the Commission's "notification and exemption" workload.

3. See Christopher Bright, *Deregulation of EC Competition Policy: Rethinking Article 85(1)*, in 1994 *FORDHAM CORP. L. INST.* 505, 515 (Barry Hawk ed., 1995). This applies unless such agreements are tailored to fit squarely into one of the existing block exemption regulation "straitjackets." In addition, since an agreement is eligible for an exemption (or informal clearance) only if all the conditions in Article 81(3) are met, the low Article 81(1) jurisdictional threshold means that agreements that are benign in their impact on the competitive process, but do not fulfill the Article 81(3) test because they do not advance technical or economic progress, cannot be exempted. *Id.*; see also Mario Siragusa, *Future Competition Law*, 1997 Competition Workshop, Florence, June 13-14, 1997 (on file with the author).

4. See *Delimitis v. Henninger Bräu*, Case C-234/89, [1991] E.C.R. I-935, I-993, ¶¶ 50-54, [1992] 5 C.M.L.R. 210, 252; Commission Notice, O.J. C 39/6, ¶¶ 23, 30, 32

ing potentially beneficial projects that involve substantial investment.

Third, the notification and exemption process is unsatisfactory. The Commission monopolizes the application of Article 81(3) and is overwhelmed by the number of notifications filed every year. For companies, the procedure of notifying agreements is onerous and often takes several years to lead to any result. In most cases, the result obtained provides little legal certainty to undertakings as no formal decision is adopted, and the procedure closes with no more than a non-binding<sup>5</sup> comfort letter being issued.<sup>6</sup>

### B. *The Commission's Reform Package*

The last decade witnessed much debate on the need to reform the rules enforcing EC competition law. From this debate, it is clear that serious proposals for reform should achieve three fundamental objectives: (i) reduce the Commission's workload; (ii) increase legal certainty for business; and (iii) maintain consistency in the application of EC competition rules.

Recently, the Commission started modifying individual elements of the system and proposing changes to the overall structure. First, the revision of the Merger Regulation<sup>7</sup> that entered

(1993) ("Notice on Cooperation with National Courts"). If a national court is requested to enforce an agreement that has been notified to the Commission (or does not require notification pursuant to Article 4(2) of Regulation 17), then it may alternatively decide: (a) that Article 81(1) is inapplicable; (b) that the agreement infringes Article 81(1) and is not eligible for exemption; (c) to stay proceedings or adopt interim measures pursuant to domestic procedure, if there is a possibility that an exemption may be granted; or (d) to refer the matter to the Court of Justice (the "Court") under Article 234. *Id.*; see also *De Norre v. Brouwerij Concordia*, Case 47/76, [1977] E.C.R. 65, 83-84, [1977] 1 C.M.L.R. 378, 406 (submitting that national court determination that agreement will likely be exempted by Commission does not amount to granting exemption). The European Court of Justice ("Court"), however, did not adjudicate this issue. *De Norre*, [1977] E.C.R. at 83-84, [1977] 1 C.M.L.R. at 406.

5. *SA Lancôme and Cosparfrance Nederland BV v. Etos BV and Albert Heyn Supermart BV*, Case 99/79, [1980] E.C.R. 2511 (holding that comfort letter does not bind national courts, but only constitutes element of fact national courts and National Competition Authorities (or "NCA") may consider).

6. Terminating proceedings by issuing these letters means that the Commission's workload is not substantially reduced (even proceedings concluded by way of comfort letter require investigation, a legal review of the agreement, and an economic assessment of its effects on competition), and the notifying undertakings do not obtain a sufficient degree of legal certainty.

7. Council Regulation (EEC) No. 4064/89, O.J. L 395, at 1 (1989).

into force in January 1998 brought full function cooperative joint ventures, formerly reviewable under the Regulation 17<sup>8</sup> procedure, under the mandatory merger review regime. Second, the modification in June 1999 of Article 4(2) of Regulation 17 led to the inclusion of most vertical agreements in the list of agreements that do not require notification prior to exemption. These two steps alone have enabled the Commission, even in cases of late notification, to consider whether the agreement in question satisfies Article 81(3) and, if so, to adopt an exemption decision effective as of the date the agreement was entered.<sup>9</sup> Third, the Commission proposed a very broad vertical restraints block exemption to cover cases that might have previously been notified. The block exemption might also add to the number of agreements that companies wish to notify since the Commission wants to restrict it to companies with a market share of less than thirty percent. Finally in its White Paper, the Commission proposes a wide-range system of reforms. The core of the Commission's proposal is the ending of the exemption and notification system established by Regulation 17.<sup>10</sup> Under the proposed system, the Commission would lose its monopoly to apply Article 81(3). Parties to agreements, decisions, or concerted practices could invoke Article 81(3) before any NCA or national court.<sup>11</sup> In addition to the main reform, the White Paper proposes to strengthen the Commission's powers of inquiry, to increase the importance of complaints, and to bring the system of penalties under Regulation 17, unchanged since 1962, into line with the penalties under the Merger Regulation.

The principal declared purposes of the White Paper re-

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

9. This revision would appear to bring the Commission's practice more in line with that of several Member States that consider vertical restraints significantly less dangerous for the structure of competition than horizontal restraints and therefore assess them as potential abuses, rather than under an authorization system. *See also* Competition Act (1998) (U.K.) (proposing Statutory Instrument exempting most vertical agreements from scope of Article 81(1) type prohibitions on anti-competitive agreements contained in Competition Act).

10. *See* White Paper, *supra* note 1, O.J. C 132/1, at 20, ¶ 75 (1999) (stating that one of main elements of proposed reform is "the ending of the system of notification and authorisation.").

11. Thus, in a way, the reform would end the split between Article 81(1) and (3), as it would no longer matter whether a market analysis is carried out under one or the other.

forms are: (i) reduction of the workload created by notifications in order to allow the Commission "to use its resources to combat cartels, particularly in concentrated markets and in markets which are being liberalised;"<sup>12</sup> and (ii) decentralization of the application of EC competition law. The relief of administrative constraints on undertakings is also mentioned as an objective of the reform,<sup>13</sup> but this seems more like a means of reducing the Commission's workload than an objective in itself. A final unspoken objective appears to be the desire to reduce DG IV's workload before the future enlargement of the European Union. There is a risk, however, that the reforms are at the expense of the objectives of legal certainty and consistency.

### III. *DISCUSSION OF THE COMMISSION'S PROPOSAL*

#### A. *Ending the Authorization System Is a Positive Step and Permitted by the Treaty*

Replacement of the authorization system by a system of legal exception is a positive step that should lead to increased legal certainty in "simple" cases. One of the advantages of the system proposed by the Commission is that the introduction of a system of legal exception is arguably possible without an EC Treaty amendment.<sup>14</sup> The present text of Article 81(3) was specifically drafted to permit both a system of prior authorization (as requested by Germany) and a system of legal exception (as proposed by France).<sup>15</sup>

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12. White Paper, *supra* note 1, O.J. C 132/1, at 15, ¶ 45 (1999).

13. *Id.*, O.J. C 132/1 at 14, ¶ 42 (1999).

14. *Id.*, O.J. C 132/1 at 4, ¶ 12 (1999). It 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 [81(3)] directly applicable without prior decision by the Commission. Article [81] as a whole would be applied by the Commission, national competition authorities and national courts, as is already the case for Articles [81(1) and 82].

*Id.*, O.J. C 132/1 at 4, ¶ 12 (1999).

15. See, e.g., Wouter P.J. Wils, *Notification, Clearance and Exemption in E.C. Competition Law: An Economic Analysis*, 24 EUR. L. REV. 139, 155 (1999); see also Arved Deringer, *Les Règles de la Concurrence au Sein de la C.E.E. (Analyse et Commentaire des Articles 85 à 94 du Traité)*, 7 REVUE DU MARCHÉ COMMUN 560 (1964) (providing good overview of history of Article 81 and of Franco-German compromise).



### B. *The Commission's Proposal Reduces Legal Certainty*

The Commission's discretion as to whether to deal with a case reduces legal certainty. As the White Paper recalls, the notification system set out by Regulation 17 sought to establish the conditions for providing business with adequate legal certainty.<sup>16</sup> Today, the Commission claims that a reform of the system established by Regulation 17 is necessary because that system induces companies to notify "systematically" their restrictive practices,<sup>17</sup> and "to block private action before national courts and national competition authorities."<sup>18</sup> To solve these problems, the White Paper proposes ending the notification system.<sup>19</sup>

The Commission claims that this will lead to legal certainty for the following two reasons. First, it argues that the history of applying Articles 81 and 82 has "clarified" the law.<sup>20</sup> This is true, however, only to a certain degree. There are still agreements containing restrictions that cannot easily be subsumed under any of the categories of restrictions on which the Commission or the courts have decided in the past. This problem is exacerbated by the fact that the Commission is, at the same time, proposing radical changes to the present system. These changes include the removal of block exemptions from firms with market power, so that precedents under the "old system" may end up being of limited value.<sup>21</sup> In addition, because of commercial and technical developments (such as the Internet), new categories of agreements and practices arise continuously, in respect to which there are no precedents. Second, the Commission tries to allay fears of legal uncertainty by referring to its intention to enact new block exemptions that cover a very wide range of agreements. While this is laudable in principle, the problem again is that the present draft block exemption on vertical restraints

16. White Paper, *supra* note 1, O.J. C 132/1, at 4-5, ¶ 14 (1999).

17. *Id.*, O.J. C 132/1, at 10, ¶ 24 (1999).

18. *Id.*, O.J. C 132/1, at 3, ¶ 6 (1999) of the executive summary.

19. Jonathan Faull, Speech at the Conference Organized by the EU Committee of American Chamber of Commerce in Brussels, European Competition Policy into the New Millennium (June 30, 1999) (on file with the author) (stating that White Paper's proposal does not intend to prevent companies notifying their agreement to Commission). However, under the new system, the Commission would be completely free to decide whether or not to accept and decide on a case. *Id.*

20. White Paper, *supra* note 1, O.J. C 132/1, at 15-16, ¶ 48 (1999).

21. NERA COMPETITION BRIEF, THE COMMISSION'S WHITE PAPER ON MODERNISATION: ECONOMIC ANALYSIS AND LEGAL CERTAINTY (July 1999) (on file with the author).

would apply only to companies that have a market share of less than thirty percent. Accordingly, companies with market power would again be unable to establish the legality of their agreements before they implemented them.

Undertakings currently notify the Commission solely for one reason. A look at the Commission's own statistics shows that undertakings typically notify neither systematically, nor for dilatory purposes, but to obtain legal certainty when the compatibility of their agreements with Article 81 is in doubt, and the risks resulting from legal uncertainty are high.

First, as the Commission states in its Competition Report, companies rarely use the centralized authorization system of Regulation 17 "to block private action before national courts and national competition authorities."<sup>22</sup> On the contrary, dilatory notifications "form a very small percentage of all notifications to the Commission."<sup>23</sup> This is shown by the fact that in 1998 the Commission encountered only three cases of dilatory notification, which is less than two percent of the notifications filed that year.<sup>24</sup>

Second, a look at the number of notifications shows that, if given a chance to do so, companies will not "systematically" notify all their restrictive practices.<sup>25</sup> Under the present system, a decision not to notify leads to a risk that the agreement may be declared void in national courts and that the undertakings that are party to it may be fined. Nevertheless, and despite the fact that the enormous breadth in the interpretation of Article 81(1) means that virtually any agreement between undertakings could be found to be covered by it, in the last decade only 210-230 agreements have been notified each year to the Commission. In-

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22. See White Paper, *supra* note 1, O.J. C 132/1, at 7, ¶ 6 of the executive summary (1999) (stating that this practice "has undermined efforts to promote decentralised application of EC competition rules" and that "the rigorous enforcement of competition law has suffered and efforts to decentralise the implementation of Community law have been thwarted.").

23. Commission Notice on Cooperation between National Competition Authorities and the Commission in Handling Cases Falling within the Scope of Article 85 or 86 of the Treaty, O.J. C 313/3, at 10, ¶ 55 (1997) [hereinafter Notice on Cooperation with NCAs].

24. EUROPEAN COMMUNITY COMPETITION POLICY, XXVIII<sup>TH</sup> REPORT ON COMPETITION POLICY, 1998 19, ¶ 30 (1999).

25. See Valentine Korah, *The White Paper* (on file with the author) (stating that "the Commission is wrong to say at para. 24 that firms notify systematically. Most of us have seldom advised notification of many agreements").

deed, in recent years more notifications have been filed annually under the Merger Regulation than on Form A/B.<sup>26</sup>

In our own experience as practitioners, agreements are normally notified only when they involve considerable investments and when clear guidance by Community case law or Commission practice is absent. Notifications are expensive and burdensome, and, even after lengthy proceedings, normally lead to no more than a comfort letter. Only in important cases do the advantages of notification—elimination of the risk of Commission fines and possible annulment or damages actions before National Courts—outweigh the burden and expense of completing Form A/B.

Under the system proposed by the Commission, companies that are genuinely concerned about the validity of their agreements could not be certain that these agreements would be examined authoritatively before implementation. They would face the danger that their practices are found to infringe Article 81 of the EC Treaty after many years of application, and that they would have to pay damages in court or even be fined—as the Commission proposes—up to ten percent of their turnover.

The White Paper does not seem to (and should not) exclude the possibility that the Commission could still decide on difficult cases that contain problems not previously decided upon if it becomes aware of them (in whatever way).<sup>27</sup> However,

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26. In 1998, the Commission received 235 notifications under the Merger Regulation. That is 19 more than were received under Regulation 17.

27. See White Paper, *supra* note 1, O.J. C 132/1, at 20, ¶ 75 (1999). It is unclear whether, when proposing “the ending of the notification and authorization system,” the White Paper envisages the abolition of any form of notification or only the ending of the notifications for exemption. *Id.*, O.J. C 132/1, at 20, ¶ 75 (1999); see also C.S. KERSE, E.C. ANTITRUST PROCEDURE 54 (1998). Technically speaking, the term “notification” is “generally used loosely to mean the process whereby copies of the agreement under cover of Form A/B are supplied to the Commission.” KERSE, *supra*, at 54. Regulation 17 covers the term as a request for exemption (Regulation 17, Article 4(1)), while the term “application” applies to a request for negative clearance (Regulation 17, Article 2). Accordingly, if the White Paper uses the term notification in its technical sense, applications for negative clearance would still be possible under the new system. A number of statements in the White Paper seem to leave open this possibility. In particular, the White Paper states that, although the Commission would no longer adopt exemption decisions, “it should nevertheless be able to adopt individual decisions that are not prohibition decisions.” White Paper, *supra* note 1, O.J. C 132/1, at 22, ¶ 88 (1999). However, these decisions “would be taken [only] . . . in exceptional cases,” where “a transaction raises a question that is new,” and it is “necessary to provide the market with guidance regarding the Commission’s approach to certain restrictions

for undertakings that are faced with significant financial exposure, the mere possibility of the Commission's intervention if the case is deemed sufficiently "novel" (or high profile) is simply not sufficient.<sup>28</sup> Companies need a minimum degree of legal certainty, which they can find only if there is a procedure through which they can trust that the Commission will consider the legality of their agreement, and do so within a reasonable time frame. Otherwise, uncertain whether they will be able to obtain a binding decision by the Commission, companies might be induced to give up their agreement or try to fit it into the straitjacket of existing case law or block exemptions. That cannot be the purpose of a system reform.

Companies' inability to obtain binding decisions reduces legal certainty. Under the system proposed in the White Paper, the Commission appears to reserve the right to take binding decisions if these are negative or if they impose conditions on the parties.<sup>29</sup> Positive decisions, which the Commission would take "to clarify the scope of application of Articles 81(1) and 81(3)

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in it." White Paper, *supra*. This condition currently applies to negative clearance decisions, which the Commission issues "only where an important problem of interpretation has to be solved," found in Form A/B, ¶ A.II.1, and recalls the criterion for allocation of competence adopted by the Notice on Cooperation with NCAs, O.J. 313/3, at 7, ¶¶ 33-34 (1997) ("Some cases considered by the Commission to be of particular Community interest will more often be dealt with by the Commission. . . . This category includes cases which raise a new point of law, that is to say, those which have not yet been the subject of a Commission decision or a judgment of the Court of Justice or Court of First Instance"). See also Alexander Schaub, *EC Competition System—Proposals for Reform*, in 1998 FORDHAM CORP. L. INST. 129, 148-152 (Barry Hawk ed., 1999) (stating that principal aim of reform should be "to substantially reduce the number of . . . notifications" by eliminating authorization system set up by Regulation 17).

28. See, e.g., Nathalie Jalabert-Doury, *Livre Blanc sur la Modernisation de l'Application des Articles 81 & 82*, RDAI/IBLJ, 505 n.505 (1999) (on file with the author). It states that:

si l'on peut comprendre que la Commission doit avoir vocation à traiter de questions différentes suivant les domaines concernés et la nouveauté de l'affaire, on ne saurait non plus admettre que l'éventualité de discriminations sur la base du caractère novateur ou non du dossier et une absence de prévisibilité et de contrôle sur la manière dont la Commission décide de l'attribution des dossiers.

*Id.*

29. See White Paper, *supra* note 1, O.J. C 132/1, at 23, ¶ 90 (1999) ("[i]n the new Regulation applying Articles [81] and [82] . . . the Commission intends to make provision for a new kind of individual decision, subject to the ordinary publication requirements, in which the Commission would take note of the commitments entered into by the parties and render them binding").

outside the block exemptions<sup>30</sup> or to “confirm the approach” set out in its notices and guidelines,<sup>31</sup> would be merely declaratory, and would have “the same legal effect as negative clearance decisions have at present.”<sup>32</sup> In other words, the Commission’s positive decisions would not be binding.<sup>33</sup> Accordingly, any NCA could take a different view and any national court could declare the same agreement void under Article 81(2)—a highly undesirable result not only from the point of view of legal certainty for the undertakings involved, but also because of the potential for inconsistency in the application of EC competition law. Such a result would also appear inconsistent with the fact that block exemptions will be binding on NCAs unless the whole or part of the NCAs’ territory constitutes a separate market.<sup>34</sup> It would appear illogical if an NCA could take a decision that differs from an individual Commission decision but not one that withdraws the protection of a block exemption.

In any event, when “a transaction raises a question that is new” it appears more reasonable that companies should receive some prior guidance that they are not violating competition law, instead of being left in uncertainty until a complainant decides to raise the issue. This applies particularly to agreements that could be found compatible with Article 81 if certain modifications were proposed or undertakings given. Companies should have the option of discussing their plans with the Commission and the right to obtain legal certainty that their agreement will be enforceable if they modify it to alleviate concern expressed by the Commission. For this reason, under the directly applicable exception system proposed here, undertakings would be free to notify their agreements and to obtain a Commission decision whenever they needed guidance on the applicability of Article 81(3).

Time limits are needed to avoid legal uncertainty. One of

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30. *Id.*, O.J. C 132/1, at 21, ¶ 78 (1999).

31. *Id.*, O.J. C 132/1, at 22, ¶ 86 (1999).

32. *Id.*, O.J. C 132/1, at 23, ¶ 89 (1999). It appears somewhat disingenuous for the Commission to claim that the practice of non-binding comfort letters has “won general acceptance.” *Id.*, O.J. C 132/1, at 12, ¶ 35 (1999). Companies are not generally satisfied with these decisions but face the reality that they simply have no other option.

33. Notice on Cooperation between National Courts and the Commission in Applying Articles 85 and 86 of the EEC Treaty, O.J. C 39/6, at 8, ¶ 20 (1993); see also KERSE, *supra* note 27, at 247.

34. White Paper, *supra* note 1, O.J. C 132/1, at 23, ¶ 95 (1999).

the main concerns companies currently raise about the Article 81 procedure is that there is no time limit on Commission decisions (or even on the issuance of a comfort letter), and that companies tend not to obtain any guidance for their agreement before several years have passed. In fact, many of our clients have been involved in notification procedures that have lasted several years.

### *C. Inconsistent Application of Community Law*

In its discussion of the risk of inconsistency in the application of the competition rules, the White Paper identifies two potential kinds of conflict: (i) where an NCA or national court takes a favorable view of an agreement that is prohibited by the Commission; and (ii) where the Commission takes a favorable view of an agreement, but a national court or NCA prohibits it. The White Paper's analysis seems to ignore the possibility of conflicts between national courts and NCAs in different Member States.<sup>35</sup> Yet this is the greatest risk associated with the Commission's proposals.

There exists inconsistency between the Commission and the Member States. With respect to coordination between the Commission and the Member States, the White Paper proposes a system of informal cooperation and coordination that would rely heavily on the reasonableness of all concerned.<sup>36</sup> As Commission decisions would be binding in only very few instances, and as NCA decisions would at most be binding within the territory of the respective Member State, contradictory decisions would likely occur. NCAs, which do not fall under the definition of "court or tribunal" within the meaning of Article 234 of the EC Treaty, could not ask Community courts for a preliminary ruling. If their decisions were appealed through several instances in national courts, then it might take many years until the appli-

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35. This is so unless the vague reference to the reinforced role of the Advisory Committee is meant to avoid conflicts between the decisions of different NCAs.

36. White Paper, *supra* note 1, O.J. C 132/1, at 26, ¶ 107 (1999). It is also not certain that the system would reduce the Commission's workload in cases that it deems comparatively insignificant. This means that not only every NCA that intends to apply Articles 81 or 82, but also every national court before which Article 81 or 82 is invoked, must inform the Commission, even in "clear" cases. The Commission's workload is unlikely to be reduced significantly. *Id.*, O.J. C 132/1, at 26, ¶ 107 (1999).

cation of Article 81 would then be tested by the court, if, indeed, it ever was tested.

There also exists an inconsistency among Member States. NCAs are not currently bound by the legal determinations of other NCAs. Accordingly, inconsistency may arise where NCAs in different Member States investigate the same (type of) agreement or practice and apply different legal interpretations of Article 81. The White Paper proposal is likely to increase the risk of discrepancies by permitting NCAs and national courts to apply Article 81(3). Even in cases where all NCAs investigating an agreement declare Article 81(3) applicable, they might ask for different undertakings.

Even after more than thirty years of application of Regulation 17, inconsistent application of Community law by the Member States is still a real danger. Many Member States have a very short history of competition law enforcement. At present only half of the NCAs are specifically empowered under their national laws to apply Articles 81 and 82.<sup>37</sup> Article 81(3), which the Commission has a monopoly to apply, leaves particularly wide areas of interpretation that may easily be influenced by political value judgments.<sup>38</sup> The expected enlargement of the Community is likely to add further potential for conflict between the interpretations of different NCAs.<sup>39</sup>

Inconsistency in the application of Article 81(3) could have serious effects, with consequences for the fundamental aims of European Community law. On the one hand, forum shopping is

37. See *Decentralised Application of EC Competition Law, Current Practice and Future Prospects*, Discussion Paper prepared for the meeting of the Working Group on Competition Law on October 8 and 9, 1998 in Berlin, 16 (on file with the author). These countries are Belgium, France, Germany, Greece, Italy, the Netherlands, Portugal, and Spain. *Id.* Denmark and Ireland do not consider specific empowerment to be necessary. *Id.*

38. John Temple Lang, *European Community Constitutional Law and the Enforcement of Community Antitrust Law*, 1993 *FORDHAM CORP. L. INST.* 525, 599 (Barry Hawk ed., 1994). In this connection, John Temple Lang raises the issue that "in some Member States the power to grant exemptions under Article 85(3) would be used for protectionist purposes." *Id.*

39. See White Paper, *supra* note 1, O.J. C 132/1, at 7, ¶ 7 (1999). Interestingly, the Commission refers to future enlargement only to the extent that this might lead to additional cases of cartels and abuses of dominant positions. *Id.*, O.J. C 132/1, at 7, ¶ 7 (1999). It would appear that the "tradition of the planned economy" would also create difficulties for NCAs in the new Member States to apply fully the *acquis communautaire*. *Id.*, O.J. C 132/1, at 7, ¶ 7 (1999).

likely to be encouraged, if not for notifications, which the Commission wants to abolish, then for complaints. This is particularly true if the rights of companies with interests contrary to those of the parties to the agreement, which presently are very different in different Member States, are not harmonized. Also, if an NCA tends to prohibit certain forms of agreement, then it will discourage undertakings from concluding this type of agreement relating to that Member State, encouraging a partitioning of the internal market. If the benefits of the Commission proposal are to be realized, then safeguards must be established to ensure that the newly competent bodies apply Article 81(3) consistently, and to avoid the adverse effects described above.

With regard to national courts, under the present system where the Commission is already seized of a matter, the national court has a duty under Article 10 to avoid inconsistent decisions and can suspend proceedings before it requests information from the Commission. Also, under the Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters ("Brussels Convention") if cases involving the same cause of action between the same parties are brought in the courts of different Contracting States, the courts seized after the first must stay their proceedings under Article 21 of the Brussels Convention.<sup>40</sup> Article 22 of the Brussels Convention, however, confers discretion on national courts to stay proceedings pending the outcome of hearings in related matters in another country.<sup>41</sup> Thus, the *lis pendens* rule would not necessarily prevent contradictory findings relating to the same agreement if, for example, different complainants are involved. It certainly does not preclude inconsistent approaches with respect to the same types of agreements and practices.

Thus, if there is no longer a possibility for companies to notify agreements because they fear that they might otherwise face simultaneous litigation in a number of countries (because, *e.g.*, different competitors might sue), then an overall increase in judicial cost and time would occur and the danger of conflicting judgments in different Member States would arise.<sup>42</sup>

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40. See Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, O.J. C 189/1 (1990), 29 I.L.M. 1413, 1423, art. 21.

41. See *id.*, 29 I.L.M. at 1423-24, art. 22.

42. The only case in which inconsistent rulings would be prevented would be if the first case had an Article 234 reference, since any subsequent ruling by any national



IV. *PROPOSAL FOR A REVISED SYSTEM*A. *Outline of the System*

The Commission should introduce the proposed system of legal exception. There is little doubt that the current centralized authorization system—which imposes an obligation to notify each time a company wishes to invoke Article 81(3)—creates a large workload both for the Commission and for undertakings. The fact that non-notified agreements are treated as void under Article 81(2) as soon as they come within the scope of Article 81(1) has been a significant source of legal uncertainty for undertakings. The Commission's proposal to introduce a system whereby Article 81(3) can be applied by any NCA and national court must therefore be welcomed. This proposal does not necessarily imply, however, that companies should also be deprived of the possibility of notifying agreements when they need to obtain some guidance from the Commission or an NCA as to the compatibility of their agreement with Article 81.

There must, however, still be an option of notifying agreements to the Commission. There will continue to be cases in which undertakings have a legitimate interest in obtaining legal certainty about their agreements if they do not fall into any of the clear categories defined by block exemptions or Commission decisions and require significant investments or are expected to attract strong complaints. Companies must have the option of notifying these agreements and the Commission should be obliged to deal with them in a reasonable time frame. In the case of production of joint ventures, the Commission itself recognizes that an agreement that is the basis for significant investments may require that there be an option to notify to have its validity examined *ex ante*.<sup>43</sup>

Moreover, the Commission must decide on notified agreements within certain time limits. The experience under the Merger Regulation has shown that one month suffices to carry out a thorough investigation that permits a decision on whether serious doubts as to the compatibility of a proposed agreement with EC law exists or whether the agreement raises no such

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court would have to conform to the ruling given. National courts are, however, unlikely to refer to the court in the majority of cases.

43. White Paper, *supra* note 1, O.J. C 132/1, at 21, ¶ 79 (1999).

doubts. There does not appear to be any reason why the Commission should not be able to perform a similar assessment of Article 81 cases within a comparably short time.<sup>44</sup> The same applies with respect to the in-depth investigation that the Merger Task Force performs within four months. Considering DG IV's current backlog of cases, these time limits could be slightly increased for Article 81 cases.

Accordingly, after notification, the Commission would have a fixed time limit (*e.g.*, two months) to decide on exercising one of several options, namely: (i) dealing with the case itself by issuing an opinion similar in form to a comfort letter; (ii) deciding to open an in-depth investigation; or (iii) referring the case to one of the NCAs for an in-depth investigation.<sup>45</sup> If the Commission decides to open an in-depth investigation, then this would lead to a decision declaring the agreement compatible or incompatible with Article 81 within a specified period (*e.g.*, six months). If the Commission does not adopt a decision before expiry of the first two month period, then this should, at the most, have the effect that comfort letters have at present. The Commission should also be entitled to terminate the "second phase" early if a short investigation reveals that the agreement in question does not violate Article 81 after all. In this case, one could think of simplifying the procedure for adopting a decision.

Notifications would be forwarded to Member States for treatment under Article 81 if the notified agreements are national in character. Any application of Community law by NCAs would need to be made permissible by national law.<sup>46</sup> This

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44. Frank Montag, *The Case for a Reform of Regulation 17/62: Problems and Possible Solutions from a Practitioner's Point of View*, 1998 *FORDHAM CORP. L. INST.* 157 (Barry Hawk ed., 1999).

45. See *IBM v. Commission*, Case 60/81, [1981] E.C.R. 2639, 2653, ¶ 18, [1981] 3 C.M.L.R. 635, 660 (stating that by depriving NCAs of jurisdiction under Article 9(3) of Regulation 17, Commission's statement of objections had not adversely affected IBM's position because purpose of Article 9(3) is to protect undertaking concerned from parallel proceedings brought by NCAs). The decisions under (ii) and (iii) would not be subject to review as they are mere preparatory acts. *Id.*

46. See John Temple Lang, *General Report on the Application of Community Competition Law on Enterprises by National Courts and National Authorities*, June 18, 1998 (on file with the author). At the present time, only eight NCAs have the express power under national law to apply Articles 81(1) and 82. While arguably there may be no need for express empowering legislation, there would still be a need for implementing legislation. *Id.*

would also be required under the Commission's proposal.

If a case is passed to an NCA that is better placed to deal with it, then the NCA to which the case is forwarded would need to receive all documents that were submitted to the Commission and would be able to use them directly as evidence.<sup>47</sup> This would require a modification of Article 20 of Regulation 17, and would lead to a reversal of the *Spanish Banks* decision.<sup>48</sup> The utmost importance would need to be attributed to introducing safeguards ensuring that the information is kept confidential, and does not go beyond the Commission and the NCA assigned to the case. It should also be noted that at present, procedural rules in the Member States are very different, so that evidence collected by one NCA could well be inadmissible under the rules of another.<sup>49</sup>

Instances in which the Commission can send notifications to the Member States must be well-defined. In a system of concurrent jurisdictions, the most effective means of preventing the risk of multiple proceedings and conflicting decisions is the creation of rules on allocation of competence.<sup>50</sup> These rules should be flexible, but nevertheless avoid legal uncertainty. With respect to the application of Articles 81(1) and 82, the Commission and the Member States appear to agree that NCAs should concern themselves only with cases that are mainly national in character. National competence is easy to determine for agreements between undertakings from one Member State, and which, although they do not relate to imports or exports between Member States, may affect intra-Community trade. Even if those elements are not present, agreements, however, may have a national character justifying a transfer of the notification to an NCA.<sup>51</sup>

The Commission specifically rejects certain rules that might be used in allocating competence between itself and NCAs. It considers the "center of gravity" theory too vague. It also consid-

47. White Paper, *supra* note 1, O.J. C 132/1, at 24, ¶ 96 (1999).

48. Dirección General de Defensa de la Competencia v. Asociación Española de Banca Privada (AEB) and Others, Case C-67/91, [1992] E.C.R. I-4785, [1991-1993 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 96, 597.

49. *But see* Jalabert-Doury, *supra* note 28, at 497.

50. *See* Pierre-Vincent Bos, *Towards a Clear Distribution of Competence Between EC and National Competition Authorities*, 16 EUR. COM. L.R. 410 (1995).

51. *Decentralised Application of EC Competition Law*, *supra* note 37, at 27.

ers that the turnover thresholds in the Merger Regulation cannot serve as an example for cases under Article 81 because under the Merger Regulation they are applied to establish both the scope of application of Community law and the exclusive competence of the Commission.<sup>52</sup> This wholesale rejection of turnover thresholds merits comment.<sup>53</sup> For example, the turnover thresholds under Article 1(2) of the Merger Regulation must be read in conjunction with the two-thirds rule, and the thresholds under Article 1(3) specifically require that undertakings have turnover of a certain significance in at least three Member States. A two-thirds (or three-quarters) rule, possibly combined with an absolute turnover threshold, should be discussed, as this solution would have the distinct advantages of simplicity and predictability.

A possibility could be created of notifying on Form A/B directly to NCAs. An alternative to a Commission monopoly on accepting notifications and then forwarding them to NCAs appropriately, would be to permit undertakings to notify their agreements on Form A/B directly to an NCA. If this possibility were created, a time limit would need to be imposed on NCAs to decide whether to: (i) open proceedings; (ii) refer the case to the Commission if the case raises a new issue or if the Commission would be best placed to deal with the application because the effects of the agreement will be felt in more than one Member State; (iii) refer the case to another NCA, if the latter is best placed to deal with the case;<sup>54</sup> or (iv) adopt a non-binding decision because the agreement does not raise serious competition concern.

In any case, the NCA would need to send a copy of the notification to the Commission immediately after receipt to enable the Commission to withdraw the case from the NCA.<sup>55</sup> Following a notification, only one NCA should be entitled to decide on

52. See White Paper, *supra* note 1, O.J. C 132/1, at 18, ¶¶ 61-62 (1999).

53. In fact, for purposes of attributing jurisdiction over a case in which neither of the parties is an EU national or has an establishment in the EU, meeting the turnover threshold creates a presumption that the transaction creates a sufficient effect in the Community.

54. Adequate remedies could be introduced to resolve conflicts of jurisdiction that could arise when an NCA, to which the file is passed, expressly refuses to deal with it. It could happen that the NCA, to which the file is passed, might decide to send the file back to the first NCA.

55. Cooperation will be discussed below.

a certain agreement, decision, or concerted practice. Of course, this solution might require Member State legislation not only permitting application of Articles 81 and 82 by NCAs but also providing for notification mechanisms under these provisions.

To ensure uniform application of EC law, the Commission would be allowed to withdraw jurisdiction from an NCA at any time before the latter has adopted a decision. This could occur in situations where the NCA "is liable to find that there has been no infringement of Articles 81 or 82 or of its national competition law,"<sup>56</sup> as well as where the NCA is liable to find that an infringement has arisen although Article 81(3) should clearly apply.

Opinions of the Commission arrived at without an in-depth investigation should be non-binding. Opinions would not be binding on NCAs or national courts although they should be taken into account by both whenever they must decide on the validity of the agreement in question.<sup>57</sup> They would also not be subject to review by EC courts because of their preparatory character.<sup>58</sup> The same applies to decisions to refer the case to one of the NCAs. If the Commission does not adopt a decision before expiry of the time limit, then this should have the effect that comfort letters have at present.

On the other hand, Commission decisions arrived at after an in-depth investigation must be binding. Legal certainty requires that in all cases where the Commission has engaged in an in-depth investigation, a decision must be taken that is binding throughout the Community and appealable in court.

While as a result of the proposed reform package the number of notifications will be reduced significantly so that the Commission should be able to cope with them within the deadlines mentioned above, a number of amendments to the present decision making process might reduce the administrative bur-

56. Notice on Cooperation with NCAs, O.J. C 313/3, at 11, ¶ 62 (1997).

57. *See id.*, O.J. C 313/3, at 6, ¶ 21 (1997). Thus, if the Commission had issued an exemption comfort letter, then it would expect NCAs to consult with it before they decided to adopt a different decision. *Id.*, O.J. C 313/3, at 6, ¶ 21 (1997).

58. *See IBM*, [1981] E.C.R. at 2653-54, ¶¶ 18, 21, [1981] 3 C.M.L.R. at 660-61 (stating that, by depriving NCAs of jurisdiction under Article 9(3) of Regulation 17, Commission's statement of objections had not adversely affected IBM's position because purpose of Article 9(3) is to protect undertaking concerned from parallel proceedings brought by NCAs).

den on the Commission. The Commission could contemplate some of the procedures that it discusses (and rejects as insufficient) in the White Paper, such as reducing the number of languages in which Notices pursuant to Article 19(3) of Regulation 17 are published and simplifying Advisory Committee consultations.<sup>59</sup> In addition, by analogy to the approach in first phase decisions under the Merger Regulation, the Commission could delegate its power to adopt decisions to the Competition Commissioner. This should only apply in clear-cut cases (*e.g.*, where the Commission begins an in-depth investigation but closes the case in less than three months).<sup>60</sup>

NCA decisions following a referral from the Commission and arrived at after an in-depth investigation must be binding throughout the EU. NCA decisions applying EC law should have binding effect in all Member States. This is essential to provide legal certainty to companies and ensure harmonious development of EC law in the Member States.

Decisions by NCAs under Article 81 could be made binding in different Member States in several ways. The simplest option is a system where Member State decisions are submitted to the Commission in draft form and adopted as Commission decisions unless the Commission intervenes and takes over the case.<sup>61</sup> Another option, somewhat more difficult to implement, is to provide for mutual recognition of these cases under a multilateral treaty, comparable with the Brussels Convention, or a Regulation.<sup>62</sup>

If a decision by an NCA becomes a decision by the Commission through the Commission's (express or implied) endorse-

59. White Paper, *supra* note 1, O.J. C 132/1, at 18-19, ¶ 66 (1999).

60. *But see* Montag, *supra* note 44, at 177-78.

61. *But see* Mario Siragusa, *The Lowering of the Thresholds: An Opportunity To Harmonise Merger Control*, 14 EUR. COM. L.R. 139, 140 (1993).

62. *See Decentralised Application of EC Competition Law, supra* note 37, at 43. The *Bundeskartellamt* considers that neither step may be required because a mere amendment of Regulation 17 would be sufficient. *Id.* In this connection a comparison is drawn with Article 9(8) of the Merger Regulation and the arguments of a number of German commentators that suggest that any decision by an NCA that is the consequence of a referral under this provision automatically has Community effect. Langen Bunte Kart, *Merger Regulation Article 9*, ¶ 19. This issue, however, has not yet been decided authoritatively and might provoke significant debate. If there were no specific endorsement by the Commission, then Member States might well object that they have given up parts of their sovereignty on behalf of the Community and not on behalf of other Member States.

ment, then this also means that recourse to the Court of First Instance and the European Court of Justice is available.<sup>63</sup> This guarantees harmonious development of EC competition law. It also permits NCAs to gain greater experience with such law, which is a good preparation for further decentralization at a later stage.

Cooperation among NCAs and between NCAs and the Commission must be strengthened. Under a decentralized system, cooperation among NCAs and between NCAs and the Commission is essential not only to decide which NCA is best placed for a case, but also to allow the NCAs to investigate effectively when information of the territory of different Member States is necessary. A reinforced role for the Advisory Committee could help ensure adequate distribution among the NCAs of cases involving application of EC competition law. Once one NCA is designated, all other NCAs would be obliged to collaborate with it on the basis of rules similar to those laid down by Articles 11 and 13 of Regulation 17.<sup>64</sup>

National courts can apply Article 81(3) but must stay proceedings if the agreement under dispute is reported to the Commission. For national courts, the legal exemption system means that they will automatically be entitled to apply Article 81 in its entirety. This also means that, in the absence of a binding decision on the agreement, they must examine the agreement under the competitive conditions existing at the time of the judgment. While national courts could not pronounce an agreement valid only for a limited period of time after the judgment, they could conclude that an agreement fulfilled the criteria of Article 81(3) in the past, but that it no longer does.

In determining the legality of an agreement, national courts would be bound by Commission decisions taken after an in-depth investigation (even if they were taken by a Member State on behalf of the Commission) and by existing block exemptions.

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63. If an NCA decision is considered to be a delegated decision of the Commission, then the remedy would be an action under Article 230, which would be more direct and efficient.

64. Under Article 11 of Regulation 17, the Commission can obtain all necessary information from governments, NCAs, and directly from undertakings and associations of undertakings. Under Article 13 of Regulation 17, NCAs may be requested by the Commission to assist its officials in an investigation in their territories, or even to undertake an investigation themselves on the Commission's behalf.

If, during the proceedings, one of the parties to the agreement under scrutiny decided to notify the agreement to the Commission, then the case would be stayed for that period. While this might delay court proceedings, it would save on litigation time and cost if another dispute arose in front of another national court in the same or different Member State. Also, to the extent that the Commission's decision was subject to time limits, any delay would be insubstantial.

If a complaint is filed under Articles 81 or 82, then only one NCA should deal with the case. The easiest way to avoid double procedures is to permit only the Commission to accept complaints under Articles 81 or 82, or to, at least, use the Commission as a clearing house distributing cases that are filed with one of the NCAs. The Commission should determine within a two month time frame after receipt of a complaint whether to: (i) reject the complaint as obviously unfounded; (ii) refer it to an authority better suited to deal with the complaint under the rules for attributing cases; or (iii) enter into an investigation of the complaint. In scenarios (ii) and (iii), the relevant authority should have six months from the time the information is materially complete to decide on the complaint. The rules on attributing cases to the authority best equipped to deal with a case could be the same as those to be established for notifications.

One alternative is to permit complaints under Articles 81 and 82 to be filed with each NCA. The NCA then must take decisions corresponding to those outlined for the Commission within a period of two months. The NCA receiving the complaint must inform the Commission and the other NCAs of the complaint. The NCA that first received the complaint would make the decision on which is the most appropriate authority. The other NCAs would be restrained from taking any decision on the case. This system requires a high degree of coordination, which, in the age of the Internet, might be feasible, assuming the NCAs established a freely accessible database into which they would enter any new cases upon receipt.

The end result of the system should be that only one NCA would make a decision, which would become binding in all Member States under the system described above for decisions following notification.<sup>65</sup> If the Commission or an NCA initiates a

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65. See Notice on Cooperation with NCAs, O.J. C 313/3, at 4, ¶ 10 (1997). The



proceeding, then the other NCAs should be barred from dealing with the case. The rules dealing with complaint procedures, particularly those dealing with the appropriate authority's decision to investigate a case, should apply to their own initiative proceedings *mutatis mutandis*.

The Merger Regulation could be applied to partial function joint ventures such as production joint ventures. In line with the White Paper proposal, partial-function production joint ventures could be treated under the Merger Regulation.<sup>66</sup> If this rule is implemented, for reasons of legal certainty, then consideration must also be given to applying the Merger Regulation to other types of partial function joint ventures that require investments above a certain threshold.

Of course, treatment of joint ventures under the Merger Regulation would be less necessary if the regime enforcing Article 81 could provide sufficient legal certainty within a reasonable time frame. At the same time, there does not seem to be any reason why, as the White Paper argues, these notifications must necessarily be made compulsory. If undertakings decide not to notify agreements that involve significant investments—with the consequence that they later have to undo the transaction if it is found to violate Article 81—then they do so at their own risk.<sup>67</sup>

### B. *Effects of the Proposed System*

The proposed system would abolish *a priori* illegality, mandatory notification, and exemption monopoly of Commission. The abolition of the authorization system would remove the stigma of illegality of numerous agreements that raise little or no risk of anti-competitive impact and enable companies to avoid the excessive compliance costs of the present system.

The new system would also reduce the Commission's caseload. Before the Commission began to introduce measures

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Commission itself states that “[f]or cases falling within the scope of Community law . . . checks should wherever possible be carried out by a single authority (either a Member State’s competition authority or the Commission). Control by a single authority offers advantages for business.” *Id.*, O.J. C 313/3

66. White Paper, *supra* note 1, O.J. C 132/1, at 19, ¶ 79 (1999).

67. Moreover, while notifications to DG IV should be reduced to permit the staff to focus on the most serious infringements of Articles 81 and 82, the reform should not cause the staff of the Merger Task Force, which is providing a much valued service to undertakings, to become overwhelmed by additional notifications.

to reduce its caseload, only approximately 200 cases were notified per year. If no far-reaching reforms were introduced, then the number of notifications that could be expected in the future would already be smaller than in the past. This is because full function cooperative joint ventures are treated under the Merger Regulation, and because the reform of Article 4(2) of Regulation 17 removes the incentive from companies to notify agreements containing vertical restraints for the purpose of avoiding fines (or negative national court decisions) in cases where the restrictions clearly fall under Article 81(3). Estimates indicate that the combined effect of both measures should be a reduction in "simple" notifications of approximately twenty five percent. The new vertical restraints block exemption will, hopefully, further diminish uncertainty and lead to a reduction in notifications.

If a system of legal exception were introduced, then there would be significantly fewer cases in which companies would feel a need to notify their agreements to the Commission. As national courts could apply Article 81(3), there would no longer be an incentive to notify undertakings whose agreements were likely to be found exemptable under Article 81(3). While the introduction of time limits for the Commission might increase a company's incentive to file notifications, this would not apply to "easy cases" because companies would know the Commission would close such cases with non-binding opinions.

Under the proposed system, there would also be little incentive to engage in dilatory notifications. If a case did not raise any new or difficult question of law, then all that would be won by notifying in the course of an ongoing litigation would be two months, until a non-binding Commission decision was taken. If a case is complicated, then the harmonious development of Community law requires that there be no conflicting decisions in different Member States, and that a procedure is implemented that leads to a Commission decision binding in all Member States that would settle the case and prevent further litigation concerning the same agreement. The incentive for companies, whose agreements contain truly questionable provisions to notify while a national court proceeding is pending, would be limited in practice. They might prefer to obtain a negative decision in one national court in order to draw the Commission's

attention to their agreement and to risk paying fines amounting to ten percent of their turnover.

The proposed system would also establish legal certainty for undertakings legitimately concerned about the validity of their agreements. A notification system under which companies are ensured that the Commission will investigate their agreements creates the necessary legal certainty that is needed if companies are to make significant investments.

Time limits introduced by the Commission will further increase legal certainty. The White Paper acknowledges a need for time limits with regard to complainants. It states that complainants "need to know quickly whether the Commission will be taking up their complaint." The Commission therefore proposes the introduction of a time limit of four months, by the end of which the complainant will need to be informed whether the Commission will carry out an investigation or reject the complaint.<sup>68</sup> In the case of notifications, time limits serve the same purpose. To ensure legal certainty, notifying undertakings need to know within a certain period whether the Commission will initiate proceedings, refer the case to the NCA best positioned to handle the application, or issue a non-binding decision because the agreement does not raise serious competition concern.

Finally, an important element of legal certainty is a company's ability to rely on the decision of one authority—the Commission, or, as the case may be, an NCA—and be able to trust that no other authority will foster a different opinion. In cases that do not raise any new legal question, this purpose can be served with non-binding opinions that will be duly considered in national courts and by NCAs. In cases that raise difficult new questions, a binding and appealable decision is required. The new system would also create partial decentralization with a limited risk of inconsistent case law. The proposed system would lead to national court and NCA application of Article 81 in its entirety. This, alone, should encourage NCAs to apply Community rather than national competition rules (including outside the scope of notifications).

Once national laws are adjusted, NCAs and national courts that have yet to apply EC competition law will begin doing so. As decisions by NCAs under EC law would be treated like EC deci-

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68. White Paper, *supra* note 1, O.J. C 132/1, at 28-29, ¶ 120 (1999).

sions, there would be simple and, compared with national systems, fast ways to appeal them to the Court of First Instance and obtain certainty about open legal questions.<sup>69</sup> NCAs would gain experience in the application of EC law, which could prepare them for further-reaching decentralization in the future, while avoiding inconsistencies to a large extent.

The proposed system would also eliminate or diminish problems of enforcing cross-border decisions. If the Commission adopts an NCA decision through the Commission's express or implied endorsement, then this also means that it could be enforced in the national courts of all Member States and that no other NCA could investigate the agreement. In addition, the system would provide a combination of different well-established procedures. The proposal outlined above is based on elements of existing procedures, in particular the Merger Regulation, which should increase its acceptance in the Member States and in the business community. Moreover, it would also provide benefits for competition enforcement and for undertakings in the European Community. The proposal would not only unite a decrease in the Commission's notification-related workload with an increase in legal certainty and decentralization, but should also be welcomed by companies that would have a choice to invest in obtaining greater legal certainty or to accept the risks of procedures before national courts.

#### V. *THE COMPLEMENTARY REFORMS PROPOSED BY THE COMMISSION*

The Commission's proposal to increase its investigative powers raises serious concerns from the point of view of the protection of individuals' and companies' fundamental rights, including their rights of defense and the policy on in-house counsel legal privilege. The White Paper contains no proposals dealing with these issues.

##### A. *Increased Investigative Powers for the Commission*

The White Paper makes several proposals for strengthening the Commission's investigative powers. First, it proposes that, in

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69. As noted, if an NCA decision is considered a delegated Commission decision, then the remedy would be an action under Article 230, which would be more direct and efficient.

the course of an investigation under Article 14(3) of Regulation 17, Commission officials should be able to ask the undertakings' representatives or staff any question that is justified by and related to the purpose of the investigation. Minuted statements of answers given in response to such questioning would be included in the case-file and used as evidence in the proceedings. Second, the Commission would prefer that the current system of national authorization of Commission investigations, under Article 14(3) of Regulation 17, is centralized under the jurisdiction of one of the EC courts. Finally, the Commission proposes that it should be empowered to summon, *sua sponte*, anyone who can likely provide helpful information to its inquiries, and to take minuted statements. These proposals dramatically increase the fact-finding powers of the Commission without limiting the extent to which those questioned might be required to answer certain questions or the use to which the evidence might be put.

### 1. The Commission's Proposals for Oral Questioning of Company Officials Are Disproportionate and Unnecessary

The proposed system would broaden the scope of the Commission's current fact-gathering powers.<sup>70</sup> There are currently two means by which the Commission can obtain information from an undertaking when conducting an investigation under Regulation 17. First, under Article 11 of Regulation 17, the Commission can address a Request for Information to any undertaking. Typically, the Request for Information is addressed to the undertaking in writing and responded to in writing.<sup>71</sup> Second, the Commission may conduct investigations or "dawn raids" under Article 14 of Regulation 17, involving the attendance by Commission officials at the premises of an undertaking. Commission officials may examine business records, take copies of documents, demand immediate oral explanations from the employees, and enter the premises of an undertaking. The only present Commission power to direct oral questioning at officials of undertakings is the power to ask for an immediate oral expla-

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70. See generally KERSE, *supra* note 27, chap. 3.

71. The undertaking is not obliged to respond to the Commission's request in the first instance since, to compel an undertaking to answer, the Commission is required to adopt a decision under Article 11(5) of Regulation 17.

nation pursuant to Article 14(1)(c) of Regulation 17, in the course of a dawn raid.

Presently, the Commission's powers of oral inquiry are quite limited. It has never been made expressly clear by the European Court of Justice whether the power to ask oral questions under Article 14(1)(c) of Regulation 17 is restricted to requesting explanations of the books and other business records that the Commission is examining in the course of its investigations. The better view, as confirmed by the Commission's established practice, is that Commission officials are not generally permitted to interview company officials.<sup>72</sup> Rather, any questioning should be limited to specific and concrete questions arising from the actual or related documents under examination. The reason for this limitation reflects the fact that the Commission's powers under Articles 11 and 14 of Regulation 17 are not co-extensive. While Article 11 foresees that undertakings may be afforded a reasonable period of time (typically two to four weeks) in which to respond to a request for information (perhaps after taking legal advice), the Commission's powers under Article 14(1)(c) envisage immediate and spontaneous answers to questioning that occurs over a very short period. As a matter of law, therefore, any proposed extension to the power to request oral explanations under Article 14(1)(c) should not be used to undermine the clear safeguards contained in Article 11. This is implicitly accepted by the Commission in its guidelines for *Dealing with the Commission*: "[T]he power [Article 14(1)(c)] should not be used to pressure the officials of a firm into making oral admissions that they would not wish to make if they had the time for reflection afforded to them by a written request under Article 11."

In proposing greater powers of oral inquiry, the White Paper ignores certain fundamental considerations. First, the Commission fails to put forward any good reasons for departing from the clear division of powers reflected in Articles 11 and 14(1)(c) of Regulation 17. The fact that the Commission would prefer greater investigative powers is not, of itself, decisive. Second, the White Paper contains no reference to safeguards for those reply-

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72. See *National Panasonic (UK) Ltd. v. Commission*, Case 136/79, [1980] E.C.R. 2033, [1980] 3 C.M.L.R. 169 (view expressed by Advocate General Warner); see also *KERSE*, *supra* note 27, at 124-25. The Commission seems to have accepted this in its pleadings in the case. *KERSE*, *supra*, at 125.

ing to oral questioning, and no right to obtain legal advice both for the company and for the person involved, in stark contrast to the current safeguards under Article 11 and the Commission's established practice under Article 14(1)(c). Third, any extension of the powers of oral inquiry is likely to prove counter-productive.

There are good legal and common sense reasons why undertakings should be afforded time to reflect on certain investigative questions. These include the right to obtain legal advice and the need to ensure that answers are complete, correct, and not misleading. Accelerating this timetable and inducing or compelling a premature response are likely to create as many problems for the Commission as they are seeking to solve.<sup>73</sup> The proposed powers would far exceed powers granted under national laws. The proposed increase in Commission investigative powers, particularly with regard to the power to take minuted statements, would exceed considerably the present powers of most NCAs.

The most recent confirmation of Member State thinking in this respect is the Competition Act 1998 ("Act"), which radically overhauls the majority of U.K. competition law and represents the culmination of a long-standing and widespread review by successive U.K. governments of antitrust enforcement policy and powers in the EU and elsewhere. Under the Act, the power to provide oral explanation is expressly linked to and limited to the documents produced in response to a specific request for document production by an investigating official of the Director General for Fair Trading ("DGFT"). In addition, any person required to give an oral explanation of a document produced in response to a written request under Sections 26-27 of the Act may be accompanied by a legal advisor.<sup>74</sup> Although the DGFT may require a person to produce specified documents or infor-

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73. Undertakings might seek to challenge the Commission's minutes of oral statements with their own version, repudiate employees' authority to make statements attributed to them, or try to correct the statements made.

74. The Competition Commission established under the Act is, *inter alia*, the appellate body for certain decisions of the Director General for Fair Trading ("DGFT"). In this respect, it may be likened to the Court of First Instance as the first route of appeal in direct challenges to Commission decisions in antitrust matters. As these appeals will be adversarial in nature, the Competition Commission, acting in its appellate function, will be able to question individuals orally. The detailed procedural rules for such examination have yet to be finalized.

mation that is related to any matter relevant to the investigation, or to explain what happened to that document or where it is, the Act only allows for such information to be provided in writing. Individuals answering questions are entitled to assert legal professional privilege (which in the United Kingdom covers in-house counsel communications as well as those from outside lawyers) and the right not to incriminate oneself.

Similarly in France, company officials can only be required to explain certain matters contained in documents seized. They may, under certain circumstances, refuse to answer such questions. This applies irrespective of whether the explanations are demanded in the context of an informal *enquête simple* or the more formalized *enquête lourde*.<sup>75</sup>

In Germany, witness questioning requires a warrant that informs witnesses of the topic of questioning. While the law does not specify how long in advance the warrant must be served, it is generally recognized that, at least in a procedure that may lead to the imposition of fines, witnesses must have sufficient time to prepare for their testimony and to consult with a lawyer. Commentators consider that this also applies in the simple administrative proceeding.<sup>76</sup> Thus, *ad hoc* questioning is not permissible.

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75. See Arrêt France Loisirs, BOCCRF No. 13 (June 1, 1990) (on file with the author). In France there are two principal types of investigations, which are carried out by the investigators of the *Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes* and by the *rapporteurs* of the *Conseil de la Concurrence*, respectively. These are (i) the informal *enquête simple*, and (ii) the more formalized *enquête lourde*. The *enquêtes simples* are informal in the sense that investigating officials remain in a conference room without the right of access to other part of the premises. Investigating officials can ask for documents and orally question company officials "on the spot" regarding such documents. Documents can, however, be withheld and employees being questioned can, within certain limits, refuse to answer questions, in particular those questions that (i) do not seem to be manifestly connected with the object of the inquiry, and (ii) are directly incriminating. In practice, the investigating authorities do not object to legal advice being taken. The *enquête lourde* is authorized by a judge of the *Tribunal de Grand Instance*. In addition to the powers afforded by an *enquête simple*, a fully-authorized *enquête lourde* allows the investigating officials to seize specified documents whether the undertaking subject to the investigation consents to such seizure or not. Importantly, however, the investigating officials' powers of oral inquiry under the *enquête lourde* procedure are identical to those under the *enquête simple* procedure. In a 1990 judgment, the Paris Court of Appeal confirmed that undertakings are not, in an antitrust investigation under French law, obliged to answer potentially incriminating questions.

76. Also, a number of procedural safeguards protect the fundamental rights of individuals, e.g., having to incriminate themselves or close relatives.



In Italy, the scope of the questioning by the competition authority is similarly limited to requesting an undertaking to supply information in its possession and to exhibit any documents. In the course of the investigation, the officials can only ask for clarifications. The powers of the Italian authorities are governed by strict procedural warranties. The information collected in the course of the investigation may be used only for the purposes of the investigation.

It is therefore clear that the Commission's proposed increase in investigative powers would exceed those applicable in the above Member States in several respects: (i) oral questioning is not generally permitted; (ii) to the extent that it is allowed at all, it is confined to explanations of the specific documents under investigation; (iii) those questioned can generally refuse to answer certain questions, in particular where answering would expose them to a risk of self-incrimination; and (iv) legal advisors may, in many cases, attend such questioning or at least be consulted in advance.

The Commission proposal would violate the procedural rights of undertakings being investigated. The above examples of procedural rules governing competition investigations in the Member States reflect general principles of law—of which fundamental rights form an integral part—that also apply to Community institutions.<sup>77</sup> The rights of the defense are a fundamental principle. The European Court of Justice has determined that, although it can lead to the imposition of fines, the procedure under Regulation 17 is an administrative procedure.<sup>78</sup> However, this does not mean that the Commission can ignore the rights of the defense in undertakings under investigation.<sup>79</sup> On the contrary, the European Court of Justice has explicitly stated:

In interpreting Article 14 of Regulation 17, regard must be had in particular to the rights of the defense, a principle

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77. See Consolidated version of the Treaty on European Union, art. 6(2), O.J. C 340/2, at 153 (1997), 37 I.L.M. 67 [hereinafter Consolidated TEU], incorporating changes made by Treaty of Amsterdam, *supra* note 1; see also *NV Nederlandsche Banden-Industrie Michelin v. Commission*, Case 322/81, [1983] E.C.R. 3461, 3498, ¶ 7, [1985] 1 C.M.L.R. 282, 318.

78. See, e.g., *Buchler & Co. v. Commission*, Case 44/69, [1970] E.C.R. 733, 753, ¶ 20, [1967-1970 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8084.

79. See, e.g., *SA Cimenteries CBR v. Commission*, Joined Cases T-10/92, T-12/92, T-15/92, [1992] E.C.R. 2667, ¶ 39; *SA Musique Diffusion Française v. Commission*, Joined Cases 100-103/80, [1983] E.C.R. 1825, ¶ 7, [1983] 3 C.M.L.R. 221, 315.

whose fundamental nature has been stressed on numerous occasions in the Court's decisions.<sup>80</sup>

According to the European Court of Justice's consistent practice, the rights of the defense must be observed in administrative procedures, which may lead to economic sanctions. The observance of the rights of the defense extends to preliminary inquiry procedures. In *Hoechst*, the European Court of Justice ruled that it is necessary to prevent the rights of the defense from being irremediably impaired during the preliminary inquiry procedures, and in particular, during investigations that may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings for which they may be liable. Further expanding this line of reasoning, the European Court of Justice declared in a subsequent case regarding Article 11 of Regulation 17 that even though the Commission is entitled to compel an undertaking to provide and disclose all necessary information, it may not, by means of a decision calling for information, undermine the rights of the defense. The European Court of Justice concluded:

Thus, the Commission may not compel an undertaking to provide it with the answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove.<sup>81</sup>

As a consequence, on the spot questioning of company officials could not be permitted, and certainly not without the presence of legal counsel. Certain limitations on the Commission's powers of investigation are implied by the need to safeguard the rights of the defense. In an on the spot interview, the rights of defense of the company and the person involved could easily be irremediably impaired. An on the spot interview would lack the requisite procedural safeguards regarding witness interviews by denying the interviewed individual sufficient and appropriate notice to consider his or her response. Such an interview could also contravene the European Convention on Human Rights ("European Convention"), to be respected by the EU through

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80. See *Hoechst AG v. Commission*, Joined Cases 46/87 & 227/88, [1989] E.C.R. 2859, 2923, ¶ 14, [1991] 4 C.M.L.R. 410, 465; *Michelin*, [1983] E.C.R. at 3498, ¶ 7, [1985] 1 C.M.L.R. at 318.

81. *Orkem v. Commission*, Case 374/87, [1989] E.C.R. 3283, 3351, ¶ 35, [1991] 4 C.M.L.R. 502.

Article 6 of the Treaty on European Union and numerous European Court of Justice decisions.<sup>82</sup> Although the Court has ruled that the European Convention does not uphold the right not to give evidence against oneself in the context of infringements of competition law,<sup>83</sup> it would apply to the individual, and the European Convention may in general be relied upon by undertakings subject to an investigation relating to competition law. The proposed on the spot interviews would run counter to the European Convention, not necessarily because they would force an interviewed individual to provide self-incriminating evidence, but because the appropriate rights of the defense under general principles of law regarding the witness interviews would be wholly denied.

If witnesses are summoned to the Commission, at least the following provisions should apply: (i) the summons must indicate the topic of the questioning and be sent sufficiently early to permit preparation and consultation with counsel; (ii) the right against self-incrimination should be enshrined specifically in any provision for the questioning and taking of evidence from company officials; (iii) both counsel of the undertaking and counsel for the person being examined should be allowed to attend and advise the witness; and (iv) advice given by in-house counsel should be excluded from the scope of any such questioning.

In addition, minutes should be taken and a designated company official, present at the taking of minutes, should be required to certify that the recorded minutes are indeed a true

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82. See, e.g., *Stauder v. Ulm*, Case 29/69, [1969] E.C.R. 419, [1970] 9 C.M.L.R. 112; *Hauer v. Land Rheinland-Pfalz*, Case 44/79, [1979] E.C.R. 3727, [1980] 3 C.M.L.R. 42.

83. The Court's decision in *Orkem* may have been superseded by subsequent developments. In denying the right of non self-incrimination in relation to infringements of competition law, the Court argued that a comparative analysis of national law did not indicate the existence of this principle in relation to infringements in the economic sphere, in particular to competition law. As demonstrated above, however, national laws are evolving. In fact, the Act contains an express provision to guarantee this right. The Court moreover argued that neither the wording nor the decisions of Article 6 of the Convention indicate that it upholds the right not to give evidence against oneself. See also *Funke v. France*, [1993] 1 C.M.L.R. 897 (holding that Mr. Funke could not be required by customs officials to produce bank statements that could incriminate him); *Saunders v. United Kingdom*, 23 Eur. H.R. Rep. 313 (1997). These decisions cast severe doubts over the continuing validity of this statement. Both pillars of the Court's assessment in *Orkem* have, therefore, become tenuous at the very least.

and accurate reflection of what was said.<sup>84</sup>

## 2. Centralization of Authorization for Dawn Raids Would Require a Treaty Amendment

In an attempt to strengthen the Commission's investigative powers under Article 14(3) of Regulation 17, and, in particular, to make simultaneous dawn raids in several Member States more efficient, the Commission proposes to do away with the requirement, under the law of most Member States, that opposition by the undertaking concerned can only be overcome by authorization from a national judge. In the Commission's words, "the element of judicial review could be centralized and entrusted to one of the Community courts."<sup>85</sup>

The Commission's proposal raises serious concerns from a constitutional law perspective in that it relates to areas in which the Member States have not yet transferred their sovereignty to the EC. *De lege lata*, there is no legal basis under the EC law for the authorization of a Community court to issue warrants in the context of investigations under Article 14 of Regulation 17. The issuance of such warrants touches on a number of fundamental rights, including the right of the sanctity of premises and the right not to incriminate oneself. These fundamental rights are protected in virtually all Member States by constitutional law and enjoy specific procedural protection, of which the need to obtain warrants issued by national courts is just one example.

Contrary to what seems to be suggested in the White Paper, the Member States have not transferred their sovereignty in this regard to the Community, and it would require an amendment of the Treaty for them to do so. The intended reform would give the Commission the power to execute EC law, which is contrary to the existing principle that the enforcement of EC law lies within the competence of the Member States. Under the principle of limited transfer of powers and subsidiarity, the Community cannot act as legislator in order to gain genuine executive powers. The Community has never had the competence to enforce its own decisions. A comparison highlights the point: the Commission can impose a fine on an undertaking but the Euro-

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84. Proper court reporters should be available to avoid the current long delays in access to minutes of hearings.

85. White Paper, *supra* note 1, O.J. C 132/1, at 27, ¶ 111 (1999).

pean Court of Justice cannot enforce the fine by ordering the freezing of the accounts of that undertaking if it refuses to pay. The motivation to ensure the effective enforcement of EC competition law in each Member State cannot be regarded as sufficient to justify a transfer of powers outside the foreseen provisions of a Treaty amendment.

In particular, Article 83 in its current form does not provide a legal basis for implementing the Commission's proposal. Article 83 empowers the Community to adopt procedural rules ensuring the proper and efficient implementation of Articles 81 and 82. Legislative acts, adopted under this provision, do not, however, supersede the procedural rules that exist in the Member States, but can only complement such national rules in a way that does not interfere with the Member States' sovereignty. This is confirmed by the Court's judgment in *Hoechst*, where the Court explains the function of the Member States' procedural rules in the Community system of antitrust investigation as follows:

[I]t is for each Member State to determine the conditions under which the national authorities will afford assistance to the Commission's officials . . . . It follows that . . . the appropriate procedural rules designed to ensure respect for undertakings' rights are those laid down by national law. Consequently, if the Commission intends, with the assistance of the national authorities, to carry out an investigation other than with the cooperation of the undertakings concerned, it is required to respect the relevant procedural guarantees laid down by national law.<sup>86</sup>

35 [I]t is within the powers of the national body, after satisfying itself that the decision ordering the investigation is authentic, to consider whether the measures of constraint envisaged are arbitrary or excessive having regard to the subject-matter of the investigation and to ensure that the rules of national law are complied with in the application of those measures.<sup>87</sup>

In the same case, Advocate General Mischo put his finger on the basic problem that the Commission's proposal would face. While he clearly prefers a centralized procedure like the one proposed in the White Paper, he acknowledges that "the

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86. *Id.* at 2928.

87. *Id.*

only solution which would not be open to criticism would obviously be to supplement the EEC Treaty itself.”

In sum, it is clear that implementation of the Commission's proposal would require an amendment of the Treaty to the effect that the Member States transfer to the EC their sovereignty with respect to antitrust investigations under Articles 81 and 82. In light of the fundamental rights issues involved, however, the Member States' willingness to agree to such an amendment is difficult to imagine.<sup>88</sup>

### B. *Recognition of In-house Counsel Legal Privilege*

The Commission takes the position that EC law currently recognizes privilege only for lawyers admitted to a European bar and who are not employed by their clients.<sup>89</sup> Under both the White Paper and the proposal outlined above, the role of legal advisors would greatly gain in importance as companies would not be able to notify any agreements (or would notify fewer agreements than before) and thus rely more heavily on the advice of legal counsel. At the same time, if no privilege were recognized for in-house counsel, under the White Paper the Commission would be able to depose in-house counsel, or even to ask spontaneous questions on the subject of the advice given.<sup>90</sup> This

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88. In addition, a Treaty amendment of this type would have to provide for sufficient safeguards protecting the fundamental rights of the individuals involved in the investigation.

89. *AM&S Europe Limited v. Commission*, Case 155/79, [1982] E.C.R. 1575, 1646-47, [1982] 2 C.M.L.R. 264, 300-01; *see also* *R Carlsen v. Council of the European Union*, Case T-610/97, [1998] E.C.R. II-489 (holding that communications of Commission's Legal Service were entitled to be kept from public scrutiny because confidentiality was necessary for "the protection of the public interest in the stability of Community law and the proper functioning of the institutions") (emphasis added). According to the President of the Court of First Instance, opinions of the Legal Service are documents primarily intended to provide the institution called upon to adopt a measure with an opinion on legal issues. *Id.* He also noted that "[i]f documents of that nature were divulged, the discussions and exchange of views within the institutions as to the legality and scope of the legal measure to be adopted would be made public. As a result, the Council might lose all interest in requesting the legal services for written opinions." *Id.* Although the President sought to distinguish the arguments for Legal Service privilege from those in favor of recognizing in-house counsel privilege, it is submitted that the reasoning contained in the judgment is not convincing: company officials lose precisely the same interest in requesting advice from their in-house lawyers as the Community institutions would have lost in requesting advice from the Legal Service but for the Court's recognition of privilege for Legal Service opinions. *Id.*

90. White Paper, *supra* note 1, O.J. C 132/1, at 27, ¶ 113, 114 (1999).

cannot be in the interest of encouraging companies' compliance with EC competition law. Therefore, any future review of Regulation 17 must include the recognition of legal privilege for in-house counsel. In the course of the last round of revisions, the European Parliament had already proposed the following amendment:

Communications between a client and outside or in-house counsel containing or seeking legal advice shall be privileged, provided that the legal counsel is properly qualified and complies with adequate rules of professional ethics and discipline which are laid down and enforced in the general interest by the professional associations to which the legal counsel belongs.<sup>91</sup>

While the Council did not adopt this proposal,<sup>92</sup> the arguments for in-house counsel privilege being recognized by EC law are compelling. As it currently stands, in-house counsel are currently no less "independent" than external counsel. In *AM & S*, the Court explained the independent role of outside counsel as follows:

the requirement as to the position and status as an independent lawyer, which must be fulfilled by the legal adviser from whom the written communications which may be protected emanate, is based on a conception of the lawyer's role as collaborating in the administration of justice by the courts and as being required to provide, in full independence, and in the overriding interests of that cause, such legal assistance as the client needs. The counterpart of that protection lies in the rules of professional ethics and discipline which are laid down and enforced in the general interest by institutions endowed with the requisite powers for that purpose.

This suggests that in-house counsel, as employees, are economically dependent on their company clients, must follow their client's instructions, must subject themselves to supervision, and owe their employer a duty of loyalty that overrides the duty to co-

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91. Proposal for a Council Regulation (EC) Amending Regulation No 17: First Regulation Implementing Articles 85 and 86 of the Treaty, COM (98) 546 Final 98/0288 (CNS) (Sept. 1998); *see also* Maurits Dolmans, *Sauce for the Goose is Sauce for the Gander*, 4 *EUROPEAN COUNSEL* 1, 7, 8.

92. Council Regulation (EC) No. 1216/1999 of 10 June 1999 amending Regulation No 17: First Regulation Implementing Articles 81 and 82 of the Treaty, O.J. L 148/5 (1999).

operate in the administration of justice. In advising on competition compliance, however, in-house counsel's position is analogous to that of external counsel, in particular where the former is admitted to a European bar or otherwise governed by rules of professional conduct and ethics. The duty of loyalty that an employee owes to its employer cannot encompass the right knowingly to participate in illegal activities, to withhold information from the courts or authorities such as the Commission when disclosure is required, or to frustrate the administration of justice. Firms set up legal departments for the very purpose of advising management and to ensure full compliance with the law. The key to "full independence" does not lie, therefore, in the status of employed or self-employed lawyer, but in the rights and obligations, as a professional, to act ethically as defined by the rules of professional ethics and discipline.

Recognition of in-house privilege would promote more effective competition compliance. Like outside counsel privilege, in-house counsel privilege contributes to the maintenance of the rule of law, including EC competition law. Compliance with the rule of law requires effective communications between management and in-house or outside counsel. The failure to recognize in-house counsel privilege and the risk that in-house counsel may be deposed, hampers the ability of in-house counsel to give effective and proper advice. This limits the conduct of the business.

First, counsel can give proper advice only if he or she is aware of all relevant facts. Unfortunately, in practice, management cannot be expected to inform counsel of all relevant facts in potentially sensitive matters if it suspects that counsel will then have to turn over the full contents of its legal advice to an investigatory authority. Second, a law department can give advice only if it can prepare and retain internal notes reflecting legal research—which may well reflect an initial analysis and conclusion that is different from the final advice—and cannot be expected to prepare its advice with sufficient care if such notes or preliminary conclusions would have to be disclosed or discussed during oral examination of counsel. Third, clear advice is normally possible only if counsel can write it down, and not just convey it orally. Without in-house counsel privilege, legal advice may be incorrect, misunderstood, or not recorded for future reference. This creates the risk of incorrectness and incompleteness. All



these problems would, of course, be exacerbated if the Commission could depose in-house counsel regarding the advice given.

In sum, in-house counsel's role in ensuring respect of the law is as great as that of external counsel. Because of their proximity to the company's day-to-day administration, in-house counsel are also better suited to ensure compliance. In these circumstances, their need for privilege may exceed that of outside counsel.

As a number of Member States recognize in-house counsel privilege, certain of the White Paper's proposals risk inconsistent enforcement of the competition rules. The White Paper contains proposals enabling NCAs to refer certain investigations to the Commission. Specifically, it provides that: (i) an NCA considering a case, whether at EC or national level, must be in a position to pass on a file to another NCA (including any confidential information) that might be used in procedures for infringement of the EC competition rules<sup>93</sup> and (ii) where the effects of a practice are felt primarily in one Member State, the Commission may send a case-file, including any confidential information, to the competent NCA for it to continue the investigation with the evidence supplied.

The only limitation in this regard is that the information could only be used for the purpose for which it was originally collected, regardless of which NCA made the earlier inquiries (*i.e.*, for the application of Articles 81 and 82 or of national competition law).<sup>94</sup> As certain Member States recognize in-house counsel privilege, these proposals are likely to present several difficulties and result in the inconsistent application and enforcement of the competition rules and rules concerning the rights of defense.

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93. White Paper, *supra* note 1, O.J. C 132/1, at 23, ¶ 92 (1999).

94. *Id.*, O.J. C 132/1 at 24, ¶ 97 (1999).