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(Information)

COMMISSION

WHITE PAPER

ON MODERNISATION OF THE RULES IMPLEMENTING ARTICLES 85 AND 86 OF THE EC TREATY

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(Text with EEA relevance)

CONTENTS

EXECUTIVE SUMMARY

1. In the field of competition law applicable to undertakings, the EC Treaty sets out general rules applicable to restrictive practices (Article 85) and abuses of dominant position (Article 86). The Treaty empowers the Council to give effect to these provisions (Article 87).

2. In 1962, the Council adopted Regulation 17, the first Regulation implementing Articles 85 and 86. This Regulation laid down the system of supervision and enforcement procedures, which the Commission has applied for over 35 years without any significant change.

3. Regulation 17 created a system based on direct applicability of the prohibition rule of Article 85(1) and prior notification of restrictive practices for exemption under Article 85(3). While the Commission, national courts and national authorities can all apply Article 85(1), the power to grant exemptions under Article 85(3) was granted exclusively to the Commission. Regulation 17 thus established a centralised authorisation system for all restrictive practices requiring exemption.

4. This centralised authorisation system was necessary and proved very effective for the establishment of a 'culture of competition' in Europe. It should not be forgotten that in the early years competition policy was not widely known in many parts of the Community. At the time when the interpretation of Article 85(3) was still uncertain and when the Community's primary objective was the integration of national markets, centralised enforcement of the EC competition rules by the Commission was the only appropriate system. It enabled the Commission to establish the uniform application of Article 85 throughout the EC and to promote market integration by preventing companies from recreating barriers which Member States themselves had gradually eliminated. It created a body of rules which is now accepted by all Member States and by industry as fundamental for the proper functioning of the internal market. The importance of competition policy today is borne out by the fact that each Member State now has a national competition authority to enforce both national and (where empowered to do so) Community competition law.

5. However, this system, which has worked so well, is no longer appropriate for the Community of today with 15 Member States, 11 languages and over 350 million inhabitants. The reasons for this are to be found in the Regulation 17 system itself and in external factors relating to the development of the Community.

6. As to the reasons inherent in the Regulation 17 system, the centralised authorisation system based on prior notification and the Commission's exemption monopoly has led companies to notify large numbers of restrictive practices to Brussels. Since national competition authorities and courts have no power to apply Article 85(3), companies have used this centralised authorisation system not only to get legal security but also to block private action before national courts and national competition authorities. This has undermined efforts to promote decentralised application of EC competition rules. As a result, the rigorous enforcement of competition law has suffered and efforts to decentralise the implementation of Community law have been thwarted. In an ever more integrated Community market, this lack of rigorous enforcement and the failure to apply one common set of rules harms the interests of European industry.

7. The development of the Community since 1962 has been extraordinary. The Community of six Member States has become a Union of 15 and is likely to become even larger as applicant countries join. The internal market with all its imperfections is a reality and Economic and Monetary Union is under way.

8. The role of the Commission in this new environment has changed. At the beginning the focus of its activity was on establishing rules on restrictive practices interfering directly with the goal of market integration. As law and policy have been clarified, the burden of enforcement can now be shared more equitably with national courts and authorities, which have the advantage of proximity to citizens and the problems they face. The Commission has now come to concentrate more on ensuring effective competition by detecting and stopping cross-border cartels and maintaining competitive market structures. It has also risen to the challenges of merger control, liberalisation of hitherto monopolised markets and international cooperation.

9. The Commission can cope with all these developments only by focussing its attention on the most important cases and on those fields of activity where it can operate more efficiently than national bodies. To this end it has already adopted various measures such as the '*de minimis*' Notice for agreements of minor importance and block exemption regulations.

10. However, these measures are not sufficient to meet the new challenges outlined above. It is no longer possible to maintain a centralised enforcement system requiring a decision by the Commission for restrictive practices which fulfil the conditions of Article 85 (3). To make such an authorisation system work in the Community of today and tomorrow would require enormous resources and impose heavy costs on companies. It is essential to adapt the system so as to relieve companies from unnecessary bureaucracy, to allow the Commission to become more active in the pursuit of serious competition infringements and to increase and stimulate enforcement at national level. Our Community requires a more efficient and simpler system of control.

11. In the White Paper, the Commission discusses several options for reform. It proposes a system which meets the objectives of rigorous enforcement of competition law, effective decentralisation, simplification of procedures and uniform application of law and policy development throughout the EU.

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

13. This reform would allow the Commission to refocus its activities on the most serious infringements of Community law in cases with a Community interest. It would pave the way for decentralised application of the EC competition rules by national authorities and courts and eliminate unnecessary bureaucracy and compliance costs for industry. It would also stimulate the application of the EC competition rules by national authorities.

14. In the new system, the Commission would keep a leading role in determining EC competition policy. It would continue to adopt Regulations and Notices setting out the

principal rules of interpretation of Articles 85 and 86. The Commission would also continue to adopt prohibition decisions and positive decisions to set out guidance for the implementation of these provisions. It is also envisaged that production joint ventures involving sizeable investments would not be included in the new system, but submitted instead to the procedural rules of the Community merger regulation.

15. In this system of concurrent jurisdiction of the Commission, national authorities and national courts, it would be necessary to maintain certain measures enabling the Commission to ensure coherent application of the rules throughout the Community. In particular, it is proposed that the Commission maintain the power to remove a case from the jurisdiction of national competition authorities and to deal with a case itself if there is a risk of divergent policy. There should also be a clear obligation for national courts to avoid conflicts with Commission decisions. Additional measures are explained in the White Paper.

16. The Commission invites the Member States, all other institutions and interested parties to submit comments on the White Paper by 30 September 1999 to the address on the last page.

INTRODUCTION

1. The Commission has been responsible for the development of Community competition policy since the inception of the European Coal and Steel Community (ECSC) in 1952. The Europe of those days was very different from what it is today, as we approach the end of the century and the new millennium. After having taken its first tentative steps within the ECSC, the Commission began in earnest to implement competition policy after the adoption of Regulation No 17 in 1962, under the Treaty establishing the European Economic Community. The challenge was enormous: to create a completely new policy on a continental scale, without any direct point of reference in most of the then Member States, in order to meet two needs: the integration of national markets into a single economic area and the development of competition as the driving force of the economy.

2. Little by little, by means of decisions and notices and, later, regulations, the Commission established a competition policy covering the major aspects of economic life. The Court of Justice played its part to the full: sometimes upholding, sometimes annulling, but always contributing to a better understanding of the competition rules as they affected the everyday life of consumers and undertakings in the nascent common market.

3. The result of those first years of effort is remarkable: a comprehensive policy, abundant case-law, clearly established basic principles and well-defined details. Community policy provides solutions to the problems of the modern economy, whether in terms of action against the most harmful cartels or as regards technology licences or the distribution of goods and services. Over the years, Community policy has been supplemented by policies on merger control, liberalisation of monopoly sectors, international cooperation and an array of specific measures designed to cope with the new economic challenges.

4. Competition policy in 1999 is applied in a world which is very different to that known by the authors of the basic texts. Fifteen Member States, a single currency and a single market, a globalised economy, enlargement to include the countries of Central and Eastern Europe and Cyprus: no one could have predicted these developments in 1962. The changes in competition have been no less remarkable. The policy established by the Commission covers the entire range of economic activities, whilst the national competition policies set up in each Member State form part of a coherent whole with the Community system. The fact that it is now necessary to modernise that system does not detract from its merits: created from nothing, Community competition policy made it possible to lay the foundations of the single market and to dynamise the European economy. The task now is to adapt the system in order to face up to the challenges of the years ahead.

5. The first Regulation implementing Articles 85 and 86, Council Regulation No 17, was adopted over 35 years ago. It was designed for a Community of 170 million inhabitants and six Member States working in four different languages. It is still being applied, without having been substantially modified, in a Community of 380 million inhabitants and 15 Member States whose markets have already been extensively integrated. In addition, the internationalisation of the European economy has speeded up in recent years, so that competition policy is now for the most part conducted in a global context. Adjustments have of course been made to the existing legal framework, but they now appear to have reached their limits. The need for reform is all the more pressing as the

coming decade will present two major challenges for competition policy: economic and monetary union and the enlargement of the Community to include the countries of Central and Eastern Europe and Cyprus.

6. Economic and monetary union is certain to have major consequences for competition policy. It will first entail further economic integration and, in the long term, will strengthen the effects of the internal market by helping to remove the last economic barriers between Member States. It also will help to cut the overall costs of intra-Community trade by reducing transaction costs. Such factors will encourage undertakings to develop trade and thus increase competition throughout the Union. A single currency will also increase price transparency and thus highlight price differences still existing between Member States. Economic operators may, when faced with stronger competition, be tempted to take a protectionist attitude to avoid the constraints of adapting to the new conditions, thereby compensating for their lack of competitiveness in a new environment. Lastly, the fact that some Member States are, at least for the time being, not part of monetary union may encourage undertakings to partition markets.

7. The enlargement of the Community will also make it necessary to strengthen competition policy with regard to cartels and abuses of dominant positions. Dominant positions held by undertakings which inherited state monopolies are particularly numerous in the applicant countries, and such undertakings might to be tempted to abuse those positions so as to make up for their lack of economic competitiveness. The tradition of the planned economy is also a potential danger inasmuch as it encouraged agreements between 'competitors'. Any proposal to amend the competition rules of procedure must take account of the fact that those countries, with administrative structures that are still not very familiar with the concepts of market and free enterprise, will have to apply them as part of the 'acquis communautaire'. The enlargement will also have a mechanical effect in increasing the number of restrictive practices and abuses of dominant positions potentially subject to Community law. In a European Union with more than 20 Member States, the rules for implementing Articles 85 and 86 must be modernised if competition policy is to continue to operate efficiently.

8. The globalisation of the economy is another challenge for the competition authorities. Although this trend is theoretically beneficial to competition because of the opening-up and integration of markets on a scale going beyond the Community, it confronts the competition authorities with cartels or restrictive practices aimed at erecting artificial barriers between the major regions of the world market. This can happen when large undertakings set up vertical restrictions impeding access to their market, share markets among themselves or conclude anti-competitive contracts on a world scale. Such practices are generally complex in nature, require in-depth investigation and cooperation with other competition authorities and, if they go unpunished, are particularly harmful to the economy and consumers because of the vast geographical scale involved.

9. Given this new Community and global economic environment, the continued application of Regulation No 17 as drawn up in 1962, with its highly centralised system of prior authorisation, is no longer consistent with the effective supervision of competition. This White Paper sets out the Commission's views on the subject and is intended to elicit reactions from all interested parties, a prerequisite for the formal presentation of a proposal for a new regulation to the Council.

CHAPTER I

BACKGROUND

I. The establishment of a system for the implementation of Community competition law

10. The Chapter in the Spaak Report [1] concerning competition policy highlighted the need for the Treaty to prevent monopolies or monopolistic practices from impeding the fundamental aims of the common market [2]. The authors of the report defined the concept of a 'monopoly' as both a dominant position held by an undertaking and the concluding of agreements restricting competition. This approach was adopted by the Treaty of Rome, which prohibits undertakings from abusing a dominant position (Article 86) and from engaging in 'restrictive practices' (all agreements between undertakings, decisions by associations of undertakings and concerted practices). Such practices are void *ab initio* (Article 85). Article 85(1) and (2) provide that *'1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, … 2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.'*

11. Whilst the national delegations meeting in Messina were very much in favour of a system based on the prohibition principle, chiefly because of its dissuasive effect, the Treaty negotiators had considerable difficulty in defining the conditions in which the prohibition in Article 85(1) could be lifted. Two systems were feasible: an authorisation system or a directly applicable exception system. In an authorisation system, the prohibition imposed by law may be lifted only by an appropriately empowered public authority which, by constitutive decision, declares that it is lifted. Under the authorisation system, restrictive practices are void until they have been authorised by the competent authority. Under a directly applicable exception system, the prohibition on restrictive practices is not applicable to those which satisfy certain conditions defined by law. Taken as a whole, such conditions may be regarded as an exception to the prohibition principle. Restrictive practices which satisfy the conditions are therefore valid as soon as they have been concluded.

12. Article 85(3) is the result of a compromise between the delegations favouring a directly applicable exception system and those favouring a prior authorisation system. Whilst those in favour of an authorisation system proposed wording along the lines of 'restrictive agreements may be declared valid', agreement was eventually reached on a negative wording: 'the provisions of paragraph 1 may, however, be declared inapplicable'. By opting for this negative approach, Article 85(3) allows the Community legislator the freedom to choose between an authorisation system and a directly applicable exception system.

13. Thus, the final choice of a system for controlling restrictive practices was left to the Community legislator: Article 87 entrusts the Council, acting on a proposal from the Commission and after consulting the European Parliament, with the task of laying down detailed rules for the application of Article 85(3), taking into account the need to ensure effective supervision, on the one hand, and to simplify administration to the greatest possible extent, on the other. In doing so, the Council may institute a system of prior authorisation or make Article 85(3) directly applicable, without the need for a prior administrative act.

14. Article 87(1) also gave the Council the power to adopt any appropriate regulations or directives to give effect to the principles set out in Articles 85 and 86. The Commission presented the Council with a proposal for a Regulation to that end on 28 October 1960 [3]. The short explanatory memorandum

(1) Report of the Heads of Delegation of the Governmental Committee set up by the Messina Conference and addressed to the Ministers for Foreign Affairs on 21 April 1956 (pp. 53-60).

(2) The report stated that the principles laid down in the Treaty should *'enable the European Commission to adopt general implementing regulations (…) aimed at the drawing-up of detailed rules concerning discrimination, organising the control of mergers and implementing a prohibition on restrictive agreements having the effect of sharing or exploiting markets, restricting production or technical progress'* (Spaak Report, op. cit., p. 56).

(3) Document IV/COM(60) 158 final, of 28 October 1960.

accompanying the proposal listed the three principal objectives that had guided its drafting: providing greater information to the supervisory authorities, ensuring a sufficiently uniform regime for the application of Article 85 in the six countries and establishing the conditions for providing businesses with adequate legal certainty. Given the prevailing circumstances at the beginning of the 1960s, it was not easy to achieve these three objectives.

15. First, ensuring that the competition authorities, both national and Community, were provided with the necessary information was a difficult matter at a time when the Commission services, and in particular the Directorate-General with responsibility for competition policy, were not sufficiently familiar with markets and the nature of restrictive practices. The victims of breaches of the competition rules gave little thought to lodging complaints with the Commission and only gradually was recourse had to Community law. In addition, the competition authorities of the Member States, where they existed, had been set up recently and had little experience in the field of competition. The case-law of the national courts was also very limited in the competition field.

16. Accordingly, in order to provide the Commission with information and businesses with legal certainty, Regulation No 17 set up an authorisation system which normally requires the Commission to be informed in advance, in the form of a notification. The Regulation does not make prior notification of restrictive practices compulsory, but undertakings which wish to benefit from Article 85(3) must notify their restrictive practices to the Commission (apart from restrictive practices exempted from notification under Article 4(2)). Decisions granting exemption are constitutive in nature and may be backdated to the date of notification but no earlier (Article 6(1) of Regulation No 17).

17. Secondly, the coherent development of the interpretation of Article 85(3) initially required a certain centralisation of control. This was achieved by giving the Commission sole power to declare that Article 85(1) is inapplicable to restrictive practices (Article 9(1) of Regulation No 17). This sole power was then strengthened by the mechanism which automatically removes the jurisdiction of the national authorities as soon as the Commission initiates procedures (Article 9(3) of Regulation No 17).

18. Thirdly, the legal certainty of businesses was weakened by the fact that Article 85(2) stipulates that prohibited restrictive practices are automatically void, as well as by the very general wording of Article 85, whose scope had not yet been defined by Community case-law, block exemption regulations and Commission decision-making practice. What is more, at that time, national laws, which either did not exist or were heterogeneous, were unable to guide undertakings or courts in their interpretation of Community law. Whilst neither Italy nor Luxembourg had any competition law, Belgium and the Netherlands had opted for a system of controlling abuses [4] which allowed illegal agreements to be penalised only from the date on which the infringement was recorded by the competition authority. Only German and French law were based, like Community law, on the prohibition principle, although German law had introduced an authorisation system for agreements between competitors (GWB (Restriction of Competition Act) of 27 July 1957), whilst French law had set up a system of directly applicable exception (French Order No 45-1483 of 30 June 1945).

II. Development of the role of the Commission

19. Since the 1960s, the role of the Commission and the number of cases have expanded considerably owing to the combined effects of market integration, the accession of new Member States, the adoption of cooperation agreements with third countries and the globalisation of the economy.

20. It should be recalled that the scope of Community competition law is based on the criterion of effect on trade between Member States. An inevitable result of the completion of the internal market and the progressive integration of national markets was an increase in the number of cases covered by Community law. In an integrated market, even restrictive practices between undertakings established in one and the same Member State may have a direct or indirect, actual or potential influence on intra-Community trade and may thus fall within the scope of Community law.

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[4] The Belgian Law of 20 May 1960 on protection against the abuse of economic power, and the Dutch Law of 28 June 1956.

21. The series of accessions of new Member States has had a mechanical effect on the geographical scope of the Commission's competence. Founded in 1957 by six countries, the Community currently has 15 members and will soon have more than 20. The enlargements did not bring any major changes to Regulation No 17. The accession of the United Kingdom, Ireland and Denmark ([5]) resulted simply in the incorporation of an Article 25 providing that the date of accession was the date of entry into force of the Regulation and that agreements, decisions and concerted practices which, as a result of the accession, were covered by Article 85, should be notified within a period of six months. When Greece ([6]), Spain and Portugal ([7]) acceded, it was simply stated that the rules applicable to previous accessions would also apply. The same rules were retained for the accessions of Austria, Sweden and Finland ([8]), except as regards agreements, decisions and concerted practices which, on the date of accession, were covered by the Agreement on the European Economic Area (the EEA Agreement) ([9]).

22. The Commission's geographical jurisdiction over competition was further expanded by the agreements concluded with third countries, either prior to accession, or simply as free trade agreements. The EEA Agreement contains rules based on Articles 85 and 86 and empowers the Commission to deal with a majority of the cases in which trade within the territory covered by the Agreement is affected.

23. Thus, while the Commission's role has expanded considerably since the 1960s, its means of action have not changed. Procedural rules that were designed for a Community of six Member States are still being applied, without any significant changes, to 15 Member States.

([5]) See documents concerning the accession to the European Communities of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland (OJ Special Edition L 73, 27.3.1972, p. 92).

([6]) See documents concerning the accession of the Hellenic Republic to the European Communities (OJ L 291, 19.11.1979, p. 93).

([7]) See documents concerning the accession of the Kingdom of Spain and the Portuguese Republic to the European Communities (OJ L 302, 15.11.1985, p. 165).

([8]) See documents concerning the accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the European Union (OJ C 241, 29.8.1994, p. 57).

([9]) OJ L 1, 3.1.1994, p. 1.

III. **Adjustments and their limits**

24. The authorisation system provided for in Regulation No 17 met the three main requirements identified at the time by the Commission (provision of information to competition authorities, uniform application of the competition rules in the Community and legal certainty for undertakings). It allowed a coherent corpus of rules to be developed and applied uniformly in the Community, thus contributing significantly to the completion of the internal market. Nevertheless, it is now showing signs of its limitations. The *ex ante* control mechanism inherent in the authorisation system set up by Regulation No 17 resulted in undertakings systematically notifying their restrictive practices to the Commission which, with limited administrative resources, was very soon faced with the impossibility of dealing by formal decision with the thousands of cases submitted. Under Regulation No 17, the adoption of an exemption decision requires, in addition to the appropriate investigative measures, the publication of a notice in the *Official Journal of the European Communities* in, at present, 11 languages (Article 19(3) of Regulation No 17) to allow other interested parties to submit their observations, consultation of the Advisory Committee on the draft decision, adoption by the Commission and publication of the decision in the *Official Journal of the European Communities* in the 11 languages.

25. The combination of the *ex ante* control system provided for in Regulation No 17, the Commission's limited administrative resources and the complexity of decision-making procedures meant that, as early as 1967, the Commission was faced with a mass of 37 450 cases that had accumulated since the entry into force of the Regulation four years earlier. It was thus essential to make certain adjustments to the system then in force in order to limit individual notifications, speed up the processing of applications for authorisation and, in certain cases, encourage complainants to turn to the national courts or authorities.

A. REDUCTION IN INDIVIDUAL NOTIFICATIONS

26. The Commission has taken a number of measures over the years to reduce notifications seeking negative clearance or exemption.

27. In its first formal decision under Article 85 ([10]), the Commission introduced the concept of appreciable effect on competition, which allowed more minor cases to be removed from the scope of Article 85(1). The concept was upheld by the Court of Justice in Völk v. Vervaeke ([11]). On the basis of that judgment, the Commission quantified the concept for guidance purposes in a notice on agreements of minor importance published in 1970 ([12]), the second paragraph of which states that *'in the Commission's opinion, agreements whose effects on trade between Member States or on competition are negligible do not fall under the prohibition on restrictive agreements.(…). Only those agreements are prohibited which have an appreciable impact on market conditions (…)'*. The notice, which was updated in 1977 ([13]), 1986 ([14]) and 1997 ([15]), helped to reduce the number of notifications of restrictive practices that were not harmful to competition.

28. The Commission started using general notices in 1962 in order to clarify the conditions under which certain restrictive practices would not normally have the object or effect of restricting competition and would not therefore be caught by Article 85(1). A notice on exclusive dealing contracts with commercial agents ([16]) was published in 1962, followed by a notice concerning agreements, decisions and concerted practices in the field of cooperation between enterprises ([17]) adopted in 1968. In addition, a notice concerning the assessment of certain subcontracting agreements in relation to Article 85(1) was adopted in 1978 ([18]). A notice concerning the assessment of cooperative joint ventures pursuant to Article 85 ([19]) was adopted in 1993. Intended to allow undertakings, if necessary with the help of their legal advisers, to determine themselves whether the restrictive practices to which they were parties were compatible with Community law, the notices to some extent helped to reduce the number of applications for negative clearance under Article 2 of Regulation No 17.

29. In an effort to reduce the number of individual applications for exemption, the Commission, empowered by the Council, adopted a series of block exemption regulations. Under Article 85(3), the provisions of Article 85(1) may be declared inapplicable to categories of agreements, decisions of associations of undertakings or concerted practices. The 'declaration of inapplicability' thus stems from the rules defining the characteristics which the restrictive agreements in question must have in order to be regarded, without prior assessment, as qualifying for exemption under Article 85(3). Article 87 of the Treaty provides that the Council shall adopt any appropriate regulations or directives to give effect to the principles set out in Articles 85 and 86. On that basis, the Council has to date adopted three enabling regulations, Regulation (EEC) No 19/65 ([20]), Regulation (EEC) No 2821/71 ([21]) and Regulation (EEC) No 1534/91 ([22]), which empower the Commission to declare the prohibition in Article 85(1) inapplicable to certain categories of agreements.

30. There are currently five block exemption regulations for vertical and technology transfer agreements, adopted by the Commission on the basis of Regulation (EEC) No 19/65:

— Regulation (EEC) No 1983/83 of 22 June 1983 on the application of Article 85(3) to categories of exclusive distribution agreements ([23]),

— Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article 85(3) to categories of exclusive purchasing agreements ([24]),

— Regulation (EC) No 1475/95 of 28 June 1995 on the application of Article 85(3) to certain categories of motor vehicle distribution and servicing agreements ([25]),

([10]) Commission Decision 64/344/EEC of 1 June 1964 concerning a request for negative clearance pursuant to Article 2 of Regulation No 17 (Grosfillex-Fillistorf Case) (OJ L 64, 10.6.1964, p. 1426).
([11]) Case 5/69 Franz Völk v. SPRL Ets Vervaecke [1969] ECR 295, paragraph 7.
([12]) OJ C 64, 2.6.1970, p. 1.
([13]) Commission notice of 19 December 1977 (OJ C 313, 29.12.1977, p. 3).
([14]) OJ C 231, 12.9.1986, p. 2.
([15]) OJ C 372, 9.12.1997, p. 13.
([16]) OJ 139, 24.12.1962, p. 3921.
([17]) OJ C 75, 29.7.1968, p. 3, corrected by OJ C 84, 28.8.1968, p. 14.
([18]) OJ C 1, 3.1.1979, p. 2.
([19]) OJ C 43, 16.2.1993, p. 2.
([20]) OJ 36, 6.3.1965, p. 533.
([21]) Council Regulation (EEC) No 2821/71 (OJ L 285, 29.12.1971), as amended by Regulation (EEC) No 2473/72 (OJ L 191, 29.12.1972).
([22]) Council Regulation (EEC) No 1534/91 (OJ L 143, 7.6.1991, p. 1).
([23]) OJ L 173, 30.6.1983, as amended by Commission Regulation (EC) No 1582/97 (OJ L 214, 6.8.1997, p. 2).
([24]) OJ L 173, 30.6.1983, as amended by Commission Regulation (EC) No 1582/97 (OJ L 214, 6.8.1997, p. 2).
([25]) OJ L 145, 29.6.1995, p. 25.

— Regulation (EEC) No 4087/88 of 30 November 1988 on the application of Article 85(3) to categories of franchise agreements ([26]),

— Regulation (EC) No 240/96 of 31 January 1996 on the application of Article 85(3) to certain categories of technology transfer agreements ([27]).

In connection with its review of policy concerning vertical restraints, the Commission presented the Council with a proposal for a Regulation amending Regulation (EEC) No 19/65 in order to give the Commission the necessary powers to adopt a block exemption regulation covering all vertical agreements ([28]).

31. Under the powers conferred by the Council by virtue of Regulation (EEC) No 2821/71, the Commission adopted two block exemption regulations for horizontal agreements:

— Regulation (EEC) No 417/85 of 19 December 1984 on the application of Article 85(3) to categories of specialisation agreements ([29]),

— Regulation (EEC) No 418/85 of 19 December 1984 on the application of Article 85(3) to categories of research and development agreements ([30]).

32. Lastly, Regulation (EEC) No 1534/91 empowered the Commission to adopt a block exemption regulation specifically for the insurance industry: Regulation (EEC) No 3932/92 of 21 December 1992 on the application of Article 85(3) to certain categories of agreements, decisions and concerted practices in the insurance sector ([31]).

([26]) OJ L 359, 28.12.1988, p. 46.
([27]) OJ L 31, 9.2.1996, p. 2.
([28]) OJ C 365, 26.11.1998, p. 27.
([29]) OJ L 53, 22.2.1985, p. 1, as amended by Commission Regulation (EC) No 2236/97 (OJ L 306, 11.11.1997, p. 12).
([30]) OJ L 53, 22.2.1985, p. 1, as amended by Commission Regulation (EC) No 2236/97 (OJ L 306, 11.11.1997, p. 12).
([31]) OJ L 398, 31.12.1992, p. 7.

33. These block exemption regulations produced a considerable reduction in the number of individual applications for exemption.

B. QUICKER PROCESSING OF INDIVIDUAL NOTIFICATIONS

34. As stated above, the adoption of formal decisions by the Commission involves particularly cumbersome procedures which very rapidly proved difficult to apply to all the cases submitted for assessment to the Commission. Accordingly, in order to speed up the processing of applications for authorisation, since the early 70s the Commission services have used the technique of 'comfort' letters. These letters informed undertakings that, according to the information in the Commission's possession, the notified agreement either did not meet the conditions for the application of Article 85(1) (negative clearance letter) or qualified for exemption (exemption letter). They are signed by a director of the Directorate-General for Competition. They help to speed up the processing of cases considerably as they generally eliminate the publication requirement provided for in Articles 19 and 21 of Regulation No 17 and the formal consultation of the Advisory Committee, as well as reducing the amount of translation required. The use of such letters developed very rapidly, and they currently total some 150—200 a year. Today, over 90% of notifications are closed informally (comfort letter or simply filed without further action ([32])).

35. The comfort letter system has worked very well and won general acceptance, but it has two major drawbacks. First, the requirement that administrative acts must in principle be published and transparent is not met by comfort letters as they are only rarely preceded by the publication of a notice in the *Official Journal of the European Communities* enabling interested parties to put forward their comments in accordance with Article 19(3) of Regulation No 17. Secondly, the Court of Justice defined their legal value in a judgment delivered on 10 July 1980 ([33]), holding that they constitute neither a decision granting negative clearance nor a decision in application of Article 85(3) of the Treaty and that they do not have the effect of binding the national courts before which the restrictive practices in question are alleged to be

([32]) A large number of cases are filed each year without a decision: they may concern complaints or notifications withdrawn or no longer relevant.
([33]) Case 99/79 SA Lancôme and Cosparfrance Nederland BV v. Etos BV and Albert Heyn Supermarkt BV [1980] ECR 2511.

incompatible with Article 85. They constitute an element of fact which the national courts and authorities may take into account.

C. ENCOURAGING THE DECENTRALISED PROCESSING OF COMPLAINTS

36. Article 9(1) of Regulation No 17 gives the Commission sole power only to declare Article 85(1) inapplicable pursuant to Article 85(3). The national courts and the competent authorities of the Member States may apply Article 85(1) and Article 86 of the Treaty and, in particular, rule on applications based on Community law. The Commission has frequently expressed its wish for more decentralised application by both national authorities and national courts.

37. The Court of Justice had already ruled in 1974 in BRT ([34]) that, as the prohibitions of Articles 85 and 86 tend by their very nature to produce direct effects in relations between individuals, the Articles create rights directly in respect of the individuals concerned which the national courts must safeguard. Ten years before adopting the notice on cooperation with the national courts ([35]), the Commission in its 1983 Competition Report ([36]) stressed the role which national legal channels could play in establishing infringements of the Community competition rules. In most of its subsequent Reports, the Commission expressed regret at the slow progress in this respect ([37]). In addition, in Delimitis ([38]), the Court confirmed that a national court could directly apply Article 85(1) if it was beyond doubt that Article 85(3) was not applicable to the case in question. The Court also acknowledged that a national court has the power *'to adopt interim measures pursuant to its national rules of procedure'* ([39]) and to carry out a positive assessment as to the application of Article 85(3). Lastly, it stated hat, in order to limit the risk of national courts taking decisions which conflict with those adopted or planned by the Commission, national courts could apply to the Commission to obtain the information they require, provided that the Commission was in a position to provide it. Following that judgment, the Commission adopted the above-mentioned notice on cooperation between itself and national courts in 1993. The notice clarifies the general legal framework and sets out the practical measures for increasing the involvement of national courts in the application of Articles 85 and 86. In particular, it defines the conditions in which the courts may apply to the Commission to seek information of a procedural, legal or factual nature.

38. In the same vein, the notice on cooperation between the Commission and national authorities ([40]), published in 1997, sets out guidelines for the allocation of cases between the national authorities and the Commission and invites undertakings to make greater use of the national competition authorities to obtain enforcement of Articles 85(1) and 86. The chief aim of the notice is to reduce the number of complaints addressed to the Commission if they can be dealt with effectively by the national authorities.

39. The two above-mentioned notices concerning decentralisation have now reached their limits within the existing legal framework. Complainants remain reluctant to apply to the national courts or competition authorities when they consider they have been harmed by an infringement of Community law. Undertakings involved in national proceedings are still able to notify their restrictive practices to the Commission in order to thwart the actions of the body to which the matter has been referred. As already noted above, as soon as the Commission initiates procedures, the competition authorities automatically lose their jurisdiction (Article 9(3)) and the courts can stay proceedings until the Commission has taken a decision. Aware of this problem, the Commission referred, in point 57 of the notice on cooperation with competition authorities, to notifications chiefly aimed

([34]) Case 127/73 BRT 1 [1974] ECR 51.
([35]) Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty (OJ C 39, 13.2.1993, p. 6).
([36]) 1983 Competition Report, point 217.
([37]) See in particular the 1985 Competition Report, point 38, the 1986 Competition Report, point 40, the 1987 Competition Report, point 55 and the 1991 Competition Report, point 69.
([38]) Case C-234/89 Stergios Delimitis v. Henninger Bräu AG [1991] ECR I-935.
([39]) Ibid., paragraph 52, footnote 38.
([40]) Commission notice on cooperation between the national competition authorities and the Commission in handling cases falling within the scope of Articles 85 or 86 of the EC Treaty (OJ C 313, 15.10.1997, p. 3).

at suspending national proceedings, stating that it considered it was justified in not examining them as a matter of priority. However, it must be said that the mechanisms for cooperation with national authorities have not to date encountered the success expected, owing to the Commission's monopoly for the application of Article 85(3) of the Treaty.

CONCLUSION

40. The Commission has therefore managed to stem the flood of notifications, but at the cost of focusing less on the most serious restrictions of competition which, generally, are never notified. In addition, the Commission is not able to close all of the cases which it handles by formal decision, to the detriment of undertakings' legal certainty. It is clear from the foregoing that the measures taken have reached their limits and that more radical reforms must be considered. The need is all the more pressing as the closer integration of national markets aggravates the effects of restrictions of competition, compelling the Commission to take stronger measures against the most harmful restrictive practices. In a Union with over 20 Member States, it will no longer be possible to retain a centralised prior authorisation system in Brussels, involving the individual assessment of thousands of cases. Such a system would be cumbersome, inefficient and impose excessive burdens on economic operators.

CHAPTER II

THE NEED FOR REFORM

I. The objectives

41. Article 87(2)(a) stipulates that the regulations or directives adopted to give effect to Articles 85 and 86 shall be designed to ensure compliance with the prohibitions laid down in Article 85(1) and in Article 86 by making provision for fines and periodic penalty payments. Article 87(2)(b) provides that the rules for the application of Article 85(3) must take into account the need to ensure effective supervision, on the one hand, and to simplify administration to the greatest possible extent, on the other. The need to ensure a balance between effectiveness of policy and simplification of control must therefore be the guiding principle in choosing between the various options for reform.

42. The Commission considers that, in seeking such a balance and in order to accomplish its institutional mission, it must have a procedural framework that enables it, in the first place, to refocus its activities on combating the most serious restrictions of competition and, secondly, to allow decentralised application of the Community competition rules while at the same time maintaining consistency in competition policy throughout the Community. Lastly, the Commission considers that the procedural framework should ease the administrative constraints on undertakings while at the same time providing them with sufficient legal certainty.

A. ENSURING EFFECTIVE SUPERVISION

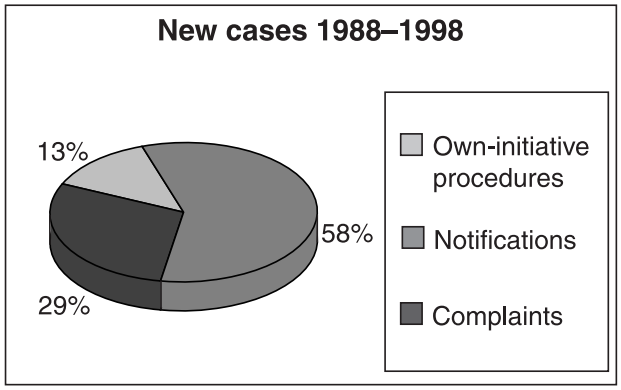
1. *Refocusing the Commission's implementation of Article 85*

43. In an opinion delivered in 1961 ([41]), the Economic and Social Committee pointed to the risks inherent in the obligatory notification and authorisation system set out in the Commission proposal for a Regulation. In its opinion of 28 March 1961, the Economic and Social Committee observed that, although some might see the authorisation system as a means of obtaining better knowledge of the existence of agreements that were harmful to competition, such a system risked diverting *the Commission from its true mission by overloading it with administrative work that would prevent it from carrying out a serious, in-depth examination of agreements between undertakings and of their real effects* ([42]).

44. The Economic and Social Committee's warning did indeed prove to be correct. A look at the recent statistics on the Commission's work shows that the

([41]) Opinion of 28 March 1961 on the first Regulation implementing Articles 85 and 86 of the Treaty.
([42]) Emphasis added.

number of notifications makes it very difficult to pursue a proactive policy of combating restrictive practices. In the period 1988—98, own-initiative procedures ([43]) accounted for only 13 % of new cases registered, with the Commission gradually having been reduced to a reactive role in handling the large number of notifications and complaints it receives. Similarly, formal Commission decisions account on average for only 6 % of cases closed.



45. There is today an obvious need to refocus the Commission's implementation of Article 85, allowing it to use its resources to combat cartels, particularly in concentrated markets and in markets which are being liberalised. Instead of having to adopt a reactive stance in the face of the large number of notifications it has to handle, the Commission should be able to be proactive and to pursue own-initiative procedures against restrictive practices and abuses of dominant positions that seriously restrict competition and threaten market integration.

2. *Decentralising the application of the competition rules*

46. In an enlarged Community with more than 20 Member States, centralised detection of, and action against, infringements of the competition rules will be increasingly inefficient and inappropriate. Application of the rules will have to be decentralised more to the Member States' competition authorities and to the national courts. The competition authorities are well placed to take effective action in certain types of case: they are normally well acquainted with local markets and national operators, some of them have an infrastructure covering the whole of the relevant country and can carry out investigations rapidly, and most of them have the human ([44]) and legal resources needed to take action against infringements whose centre of gravity is in their territory. Lastly, they are closer to complainants, who will more readily turn to a national authority than to the Commission. Where complainants invoke provisions both of Community law and of national law, the national competition authorities, like the national courts, can apply the two sets of rules. The national courts for their part are in a better position than the Commission to accede to certain requests by complainants: they can act rapidly through interlocutory proceedings and, unlike the Commission, can grant damages to those who have been the victims of infringements.

47. Modernisation of the procedural rules should, therefore, allow decentralised application of Community law by removing the obstacle posed at present by the Commission's sole power to apply Article 85(3). Community law could then be implemented by the body that was able to do so most effectively. However, any such move must not compromise uniform interpretation of Community law or result in a number of national authorities being able to adopt contradictory decisions in one and the same case.

B. SIMPLIFYING ADMINISTRATION

1. *No need for an authorisation system*

48. A system of prohibition of restrictive practices does not need to have an authorisation system in order to work properly. Other systems exist which, like Community law, are based on the principle that restrictive practices are prohibited, but which do not have a system involving notification and authorisation. A prohibition system does not mean that all restrictive practices must be presumed to be illegal, but rather only those that restrict competition to an appreciable extent and do not satisfy the conditions for exemption. It is not therefore necessary for undertakings to have their restrictive practices validated by an administrative authority. The

([43]) These are proceedings instigated by the Commission on its own initiative where it wishes to investigate and take action against infringements.

([44]) In 1998, there were around 1 222 officials responsible for investigating cases involving mergers, restrictive practices and abuses of dominant positions in the Member States as opposed to 153 in the Commission. These figures must be treated with the greatest caution and are merely indicative, since comparisons between one Member State and another are very difficult to make.
Figures taken from the XVIIIth FIDE Congress, Stockholm, 3-6 June 1998, National Application of Community Competition Law, general report by J. Temple Lang, page 265 (for the detailed figures by Member State, see the report).

prohibition rule laid down in Article 85 can also be met by *ex post* control in which action would be taken only against restrictive practices that infringe Article 85 as a whole. This is all the more relevant since, after 35 years of application, the law has been clarified and thus become more predictable for undertakings. At all events, it is inconceivable that, in an enlarged European Union, undertakings should have to notify, and the Commission examine, thousands of restrictive practices.

49. Lastly, the current division between paragraph 1 and paragraph 3 in implementing Article 85 is artificial and runs counter to the integral nature of Article 85, which requires economic analysis of the overall impact of restrictive practices ([45]).

2. ***Easing the constraints on undertakings while at the same time providing them with a sufficient degree of legal certainty***

50. While in 1962 it was necessary to ensure that the Commission was informed through a system of notification, the situation is now very different and provides less justification for the constraints imposed by notification. The legal environment is one of the factors determining the competitiveness of undertakings, and their competitiveness must be fostered as much as possible. At present, in pursuing their industrial and business strategies, undertakings must take account of the need to notify their restrictive practices to the Commission in order to obtain assurance that they do not infringe the competition rules. This requirement generates major costs, particularly for medium-sized undertakings. One of the objectives in modernising the competition rules must therefore be to avoid impeding cooperation between undertakings, where such cooperation does not pose any threat to competition, by freeing them from the constraints imposed by the current notification system.

51. Undertakings also at present enjoy a satisfactory level of legal certainty thanks to the set of clear rules that have been developed and refined through more than 30 years of Commission decision-making practice and Court of Justice case-law and by the many different kinds of general instruments that have been adopted (block exemption regulations, notices and guidelines). Any reform must endeavour to ensure that a reasonable level of legal certainty is maintained for undertakings. This means, on the one hand, that the rules must be defined as clearly as possible so that undertakings can assess their restrictive practices themselves and, on the other, that consistency of application by the various bodies responsible (Commission, national competition authorities and courts) is ensured by appropriate preventive and corrective mechanisms.

II. The options

52. The options available for reforming the system of control of restrictive practices must be assessed in the light of the requirements of effective supervision and simplification of administration. The reform options considered must also be such as to ensure consistency and uniformity in the application of the competition rules and to maintain a reasonable level of legal certainty for undertakings.

53. In a system under which restrictive practices are prohibited, the legislator is confronted with a fundamental choice: adoption of an authorisation system or one of directly applicable exception. Authorisation systems are based on the principle that the prohibition on restrictive practices (in Community law, Article 85(1)) can be lifted only by an act of a public authority empowered to do so, its authorisation decision being constitutive. Where the prohibition on restrictive practices is sanctioned by their being void, logic dictates that such practices are void until such time as the authority has authorised them. In directly applicable exception systems, by contrast, the prohibition on restrictive practices does not apply to those which meet certain criteria specified by law. Such criteria taken as a whole represent an exception to the principle of prohibition.

54. The reasons which led to the adoption of an authorisation system in Community law in 1962 have been explained above. Today, changes in the circumstances in which the Commission acts lead one to ask whether it is necessary to change the system. Various suggestions have been made in recent years by interested parties: some suggestions maintain the authorisation system approach and try to make it more efficient and less time-consuming, while others

([45]) Case 13/61 Kledingverkoopbedrijf de Geus en Uitdenbogerd v. Robert Bosch GmbH and Others [1962] ECR 89, and Case 59/77 Etablissements A. de Bloos SPRL v. Société en Commandite par Actions Bouyer [1977] ECR 2359.

pursue a more far-reaching reform through the adoption of a directly applicable exception system.

A. IMPROVING THE AUTHORISATION SYSTEM

55. A number of suggestions have been made for improving the operation of the present system, whose main disadvantages are, first, the fact that the Commission cannot focus its resources on dealing with the most serious restrictions of competition, secondly, the fact that it is difficult for the Commission to deal with the cases referred to it within reasonable deadlines by means of formal decisions that provide satisfactory legal certainty for undertakings and, thirdly, the obstacles to decentralised application of the Community competition rules by national courts and competent authorities in the Member States.

1. *Interpretation of Article 85*

56. One option that is sometimes put forward is to change the interpretation of Article 85 so as to include analysis of the harmful and beneficial effects of an agreement in the assessment under Article 85(1). Application of the exemption provided for in Article 85(3) would then be restricted to those cases in which the need to ensure consistency between competition policy and other Community policies took precedence over the results of the competition analysis. It would in a way mean interpreting Article 85(1) as incorporating a 'rule of reason' ([46]). Such a system would ease the notification constraints imposed on undertakings, since they would not be required to notify agreements in order to obtain negative clearance.

57. The Commission has already adopted this approach to a limited extent and has carried out an assessment of the pro- and anti-competitive aspects of some restrictive practices under Article 85(1). This approach has been endorsed by the Court of Justice ([47]). However, the structure of Article 85 is such as to prevent greater use being made of this approach: if more systematic use were made under Article 85(1) of an analysis of the pro- and anti-competitive aspects of a restrictive agreement, Article 85(3) would be cast aside, whereas any such change could be made only through revision of the Treaty. It would at the very least be paradoxical to cast aside Article 85(3) when that provision in fact contains all the elements of a 'rule of reason'. It would moreover be dangerous if modernisation of the competition rules were to be based on developments in decision-making practice, subject to such developments being upheld by the Community Courts. Any such approach would mean that modernisation was contingent upon the cases submitted to the Commission and could take many years. Lastly, this option would run the risk of diverting Article 85(3) from its purpose, which is to provide a legal framework for the economic assessment of restrictive practices and not to allow application of the competition rules to be set aside because of political considerations.

2. *Decentralisation of the application of Article 85(3)*

58. One of the causes of the Commission's difficulty in focusing its action on cases involving a real Community interest lies in its monopoly on the application of Article 85(3). It has accordingly sometimes been suggested that Article 9(1) of Regulation No 17 should be abolished, so as to change the current attribution of powers and enable national competition authorities to fully apply Article 85 by adopting constitutive exemption decisions. There are several variants of this option depending on the power-sharing criteria applied.

59. The first variant of this option involves sharing the power to apply Article 85(3) and allocating cases between the Commission and national competition authorities on the basis of their centre of gravity ('Schwerpunkttheorie') ([48]). The criteria for determining the centre of gravity of a case would be not only the effects of the agreement or practice, but also the need to safeguard competition effectively. Some cases of Community relevance would be reserved to the Commission: these would include cases that raised a new legal issue and cases involving application of Article 90 of the Treaty.

([46]) Approach in which the authorities or courts responsible for competition law balance the pro-competitive aspects of an agreement against its anti-competitive aspects in deciding whether to prohibit it.

([47]) See, for example, Case 258/78 L.C. Nungesser KG and Kurt Eisele v. Commission of the European Communities [1982] ECR 2015, and Case 161/84 Pronuptia de Paris GmbH v. Pronuptia de Paris Irmgard Schillgalis [1986] ECR 353.

([48]) This variant was set out in a working document of the Bundeskartellamt: Arbeitsunterlage für die Sitzung des Arbeitskreises Kartellrecht am 8. und 9. Oktober 1998: 'Praxis und Perspektiven der dezentralen Anwendung des EG-Wettbewerbsrechts' (http://www.bundeskartellamt.de).

60. This option does not reduce the total number of notifications, but merely redistributes the total number of current and future cases between the Commission and the national competition authorities. It does not make it possible to increase action against the most serious infringements of the competition rules, which are almost never notified. Its effectiveness is further limited by the fact that notifications liable to be handled by the national competition authorities are few in number: the decisions of a national authority are enforceable only within its own territory, which means that cases involving several countries cannot be handled in this way.

61. In addition, the proposed criterion for allocating cases is not sufficiently precise to allow notifications to be allocated along clear lines. The centre-of-gravity concept is well suited to the allocation of complaints between competition authorities, but would be difficult to apply in allocating notifications. Furthermore, any such system would continue to impede the application of Community law by national courts, since it would not remove the blocking effect of any system involving authorisation by an administrative authority, whether national or Community.

62. The second variant would involve allocating responsibilities between the Commission and national competition authorities on the basis of turnover thresholds, along the lines of Regulation (EEC) No 4064/89 ([49]). Below the thresholds, the competition authorities would be able to apply either their own national law, as in the case of mergers, or Community law. Whereas the thresholds provided for in Regulation (EEC) No 4064/89 establish both the scope of application of Community law and the exclusive competence of the Commission, the thresholds to be used for the purposes of applying Article 85 would be confined to defining competences, with the criterion for the application of Community law being the effect on trade between Member States. If the national authorities were to apply national law, there would be a risk of forum shopping and the renationalisation of competition policy ([50]). Such a situation would be detrimental to undertakings. If the national authorities were to apply Community law and had the power to adopt constitutive exemption decisions, there would be a major risk to the uniform application of Community law, particularly in the event of multiple notifications being submitted to different national authorities. This option would mean that all national competition authorities would have to introduce notification systems, though the establishment of such systems could prove particularly difficult for the new Member States, whose administrative structures might not be up to such a task.

([49]) Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ L 395, 30.12.1989, p. 1; corrected version OJ L 257, 21.9.1990, p. 13), as amended by Council Regulation (EC) No 1310/97 (OJ L 180, 9.7.1997, p. 1).

([50]) See the opinion of the European Parliament on the 1996 Competition Report.

3. *Broadening the scope of application of Article 4(2) of Regulation No 17*

63. Article 4(2) of Regulation No 17 waives the prior notification requirement for a number of types of agreement. Consequently, Article 6(1), under which the date on which an exemption decision takes effect may not be earlier than the date of notification, does not apply to them. The purpose of this provision is to reduce the number of notifications involving restrictive practices whose main impact is in a single Member State.

64. One option might be to extend further the exception to the notification requirement provided for in Article 4(2) of Regulation No 17. The advantage of such a change for the undertakings concerned would be that, even in the event of late notification, the Commission could assess whether the restrictive practices satisfied the conditions of Article 85(3) and, if so, could adopt an exemption decision that would be effective from the date on which the agreement was concluded. Thus, undertakings' legal certainty would be enhanced as this would prevent agreements falling within the scope of Article 85(1) which have not been notified from being automatically void, as is the case under the present system. This type of change would not entail any relaxation in Commission supervision, since Article 4(2) does not prevent it from prohibiting restrictive practices covered by Article 85(1) that do not meet the tests of Article 85(3).

65. Nevertheless, this option is not wholly satisfactory: it limits the Commission's scope for refocusing its activities on the most serious restrictions of competition, since it maintains the Commission's monopoly on granting exemption and thus poses an obstacle to decentralisation.

4. *Procedural simplification*

66. One of the reasons for the Commission's difficulties in handling cases by formal decision

pursuant to Regulation No 17 is the complexity of the procedures laid down in that Regulation. Simplification of these procedures is sometimes proposed, in order to allow the Commission to deal with cases rapidly and provide undertakings with legal certainty. The simplifications discussed include abolishing the requirement of translation into all Community languages, both in the case of Article 19(3) notices and in the case of decisions, and the simplification of Advisory Committee consultation procedures. Whatever the simplifications envisaged and regardless of how they should be viewed, they will not reduce the number of cases notified and will not therefore enable the Commission to focus on the most serious restrictions of competition, which are notified only in exceptional circumstances. This option would indeed have a perverse effect in that all notifications would be dealt with by decision, and undertakings would therefore be encouraged to notify.

67. A variant of this option would be the general application of opposition procedures. A number of block exemption regulations currently provide for non-opposition procedures, under which agreements involving restrictions that are neither expressly exempted by the regulation nor expressly prohibited may be notified to the Commission ([51]). If the Commission does not oppose exemption within a period of six months, the agreement is exempt. It has been proposed that this system should be applied generally to all restrictive practices.

68. This option, however, has major disadvantages. As already emphasised in the Green Paper on vertical restraints in EC competition policy ([52]), the general application of such a procedure would have an extremely centralising effect, creating a powerful incentive for undertakings to notify their restrictive practices to the Commission. It would not therefore allow decentralised application of the competition rules. In addition, the Commission does not have the necessary resources to handle large numbers of cases under non-opposition procedures, and notification costs would remain high for undertakings. This option would not therefore allow the Commission to refocus its work on combating the most serious restrictions of competition.

([51]) These are Commission Regulation (EEC) No 4087/88 of 30 November 1988 on the application of Article 85(3) of the Treaty to categories of franchise agreements (OJ L 359, 28.12.1988, p. 46), Commission Regulation (EEC) No 417/85 of 19 December 1984 on the application of Article 85(3) of the Treaty to categories of specialisation agreements (OJ L 53, 22.2.1985, p. 1) and Commission Regulation (EEC) No 418/85 of 19 December 1984 on the application of Article 85(3) of the Treaty to categories of research and development agreements (OJ L 53, 22.2.1985, p. 5).

([52]) Document COM(96) 721 final, of 22 January 1997.

B. SWITCHING TO A DIRECTLY APPLICABLE EXCEPTION SYSTEM

69. Within the framework of the prohibition system provided for in the Treaty, there exists another option for reform, which would be to adopt a directly applicable exception system allowing *ex post* supervision of restrictive practices. The switch to such a system can be achieved by a Council Regulation, based on Article 87 of the Treaty, which would stipulate that all national authorities or courts before which the applicability of Article 85(1) of the Treaty was invoked would also consider the applicability of Article 85(3). Article 85 would then become a unitary norm comprising a rule establishing the principle of prohibition, unless certain conditions are met. The whole of Article 85 would then become a directly applicable provision which individuals could invoke in court or before any authority empowered to deal with such matters. This interpretation would have the effect of making restrictive practices which are prohibited by Article 85(1), but which meet the tests of Article 85(3) lawful as from the time they were concluded, without the need for any prior decision. Similarly, restrictive practices that restricted competition would be unlawful once the conditions of Article 85(3) are no longer fulfilled. This new framework would mean that restrictive practices would no longer have to be notified in order to be validated. The arrangements for implementing Article 85 as a whole would then be identical to those for Article 85(1) and Article 86.

70. The adoption of such a system in Community law is now possible because of the changes and developments that have occurred in Community competition law since 1962. The legislative framework in the competition policy area has been considerably strengthened, and the reforms currently under way on vertical restrictions and horizontal cooperation agreements will help to simplify and clarify it further. While there were legitimate doubts in 1960 as to the scope of the conditions for exemption under Article 85, the Commission's decision-making practice, the case-law of the Court of Justice and the Court of First Instance and the various block exemption regulations and general notices have made the conditions governing exemption much clearer. Furthermore, the national authorities and courts, undertakings and their legal advisers have progressively gained a better knowledge of Community competition law. These changes now

make it possible to overcome obstacles which, at the time when Regulation No 17 was adopted, prevented the establishment of a system of *ex post* control and stemmed essentially from uncertainties as to the precise scope of the exemption conditions provided for in Article 85(3).

71. The reforms currently under way in the area of vertical restrictions and horizontal cooperation agreements will help to simplify the legislative framework and to define more precisely the scope of application of Article 85(1) and (3). The simplification results from the Commission's intention to adopt a new type of block exemption regulation that will no longer be based on an approach that restricts exemption to certain specific agreements and clauses identified in the regulation. The new type of exemption will provide general exemption for all agreements and all clauses in a given category, subject only to a list of prohibited restrictions ('blacklisted clauses') and specific conditions of application, on the one hand, and a restriction of the benefit of general exemption through a market-share threshold criterion, on the other. This exemption arrangement will provide legal certainty for a wider category of agreements and will restore greater freedom of contract to undertakings, while at the same time continuing to safeguard competition effectively as regards agreements concluded between undertakings holding significant market power. The new generation of regulations will thus help to simplify the applicable rules for most undertakings. Notices will also be issued to clarify the conditions governing the application of Article 85 to cases not covered by the block exemption regulations.

72. Adopting a directly applicable exception system and *ex post* control could help to meet the challenges facing competition policy in the coming decades. Under such a system, any administrative authority or court endowed with the necessary powers could carry out a full assessment of restrictive practices referred to it, examining both their restrictive effects under Article 85(1) and any economic benefits under Article 85(3). Adopting a directly applicable exception system would thus mean removing the sole power conferred on the Commission by Article 9(1) of Regulation No 17 as regards the application of Article 85(3). This would facilitate decentralised application of the competition rules. A directly applicable exception system would also remove the bureaucratic constraint of notification for undertakings, since authorisation would no longer be required to make restrictive practices that meet the tests of Article 85(3) legally enforceable. Freed from the burden of having to process notifications, the Commission for its part could concentrate on taking action against the most serious infringements.

73. Under a system of directly applicable exception, application of Article 85 would be similar to that for Article 86, which the Commission, the national authorities and the courts already apply in parallel and concurrently.

CHAPTER III

MODERNISATION OF THE COMPETITION RULES

74. The Commission believes, then, that a directly applicable exception system is the option most likely to achieve the stated objectives of refocusing the Commission's activity, decentralising the application of the competition rules, and easing the administrative burden on undertakings.

75. The reform proposed in this White Paper, namely the introduction of such a directly applicable exception system, has three main elements: the ending of the system of notification and authorisation, decentralised application of the competition rules, and intensified *ex post* control. The approach taken to the application of Article 85 will continue to be rigorously economic.

I. The ending of the notification and authorisation system

76. The notification system established by Regulation No 17 has enabled the Commission to build up a coherent body of precedent cases, and to ensure that the competition rules are applied consistently throughout the Member States of the Community. But it has several disadvantages that make it questionable today. The requirement that

undertakings wishing to invoke Article 85(3) must notify their restrictive practices to the Commission acts as a curb on their commercial strategy and represents a considerable cost. The drafting of notifications, and collection of the necessary information, imposes a heavy burden of work and expense on undertakings, whether they carry out the task in-house or entrust it to outside legal advisers. In a directly applicable exception system they would be freed from this obligation to notify, and their position would be strengthened if they had to seek the enforcement of their restrictive practices in the courts, as they would now be able to plead that their restrictive practices were covered by Article 85(3).

77. The notification system proved useful as long as the interpretation of Article 85 and in particular of paragraph 3 was uncertain; but it no longer makes it possible to detect the most serious infringements of the competition rules, and thus to ensure 'effective supervision' within the meaning of Article 87. As evidence of this, it is only extremely rarely that notifications lead to prohibition decisions ([53]), and the Commission has made only exceptional use of Article 15(6) of Regulation No 17, which empowers it to withdraw notifying undertakings' immunity from fines. In a system of *ex post* control, undertakings would have to make their own assessment of the compatibility of their restrictive practices with Community law, in the light of the legislation in force and the case-law; this would certainly lighten the administrative burden weighing on them, but it would also require them to take on added responsibility.

78. In the new enforcement system, undertakings' legal certainty will remain at a globally satisfactory level, and in certain respects will even be strengthened. Thus, instead of depending on the Commission adopting an exemption decision, undertakings will be able to obtain immediate execution of their contracts before national courts, with effect from the date of their conclusion, provided that the conditions of Article 85(3) are satisfied. There is no presumption that restrictive practices are void under Article 85: the prohibition contained in this provision is applicable only when the conditions of prohibition are met. After 40 years of implementation, these conditions have been largely clarified by case-law and decision-making practice and are known to undertakings. In addition, the Commission intends to adopt block exemption regulations with a wider scope of application. The use of market share thresholds will allow the Commission to eliminate the straight-jacket effect of the current regulations and to cover the vast majority of agreements, and in particular those concluded by small and medium-sized undertakings. The Commission will adopt guidelines and individual decisions to clarify the scope of application of Articles 85(1) and 85(3) outside the block exemptions. In its handling of individual cases, the Commission will adopt a more economic approach to the application of Article 85(1), which will limit the scope of its application to undertakings with a certain degree of market power. Moreover, the application of Community competition law by national authorities and courts will be strengthened. This will accelerate the convergence of national laws and Community law, and thus simplify undertakings' determination of commercial strategy. Finally, preventive and corrective mechanisms will exist in order to ensure consistent and uniform application of Community law by national authorities and courts.

79. The directly applicable exception system ought to apply to all the restrictive practices currently covered by Article 85. However, it would appear desirable to maintain the prior authorisation requirement for partial-function production joint ventures. Operations of this kind generally require substantial investment and far-reaching integration of operations, which makes it difficult to unravel them afterwards at the behest of a competition authority. For this particular category of transaction, therefore, effective supervision would probably be better served by a system of compulsory prior notification.

80. In order to avoid imposing unnecessary constraints on undertakings, only production joint ventures to which a certain minimum level of assets was to be contributed would be subject to prior control, and then always provided that no block exemption applied.

81. It does not seem expedient to create a special procedure to deal with this one category of transaction. The procedures established by the Merger Regulation (EEC) No 4064/89 allow rapid and effective prior control. The Commission accordingly envisages extending the scope of that Regulation (EEC) No 4064/89 to include partial-function joint production ventures, which would be subjected both to the dominance test, under Article 2(3) of the Regulation, and to the Article 85 test, under Article 2(4).

([53]) In more than 35 years of application of Regulation No 17 there have been only 9 decisions in which a notified agreement was prohibited without a complaint having been lodged against it.

II. Decentralised application of the competition rules

82. The Regulation No 17 system is based on centralised application of Article 85(3): Article 9(1) of the Regulation states that the Commission is to have sole power to exempt restrictive practices. Under a directly applicable exception system this allocation of responsibilities would be changed, and competition authorities and courts would likewise have jurisdiction to consider the compatibility of restrictive practices coming before them with Article 85 as a whole.

A. A NEW DIVISION OF RESPONSIBILITIES

1. *Competition policy to be determined by the Commission*

83. Decentralisation must not be allowed to result in inconsistent application of Community competition law. Competition policy will thus continue to be determined at Community level, both by means of the adoption of legislative texts and individual decisions. The Commission, as guardian of the Treaties and guarantor of the Community interest subject to the supervision of the Court of Justice, has a special role to play in the application of Community law and in ensuring the consistent application of the competition rules.

84. In a directly applicable exception system, the legislative framework is of primary importance. The application of the rules must be sufficiently reliable and consistent to allow businesses to assess whether their restrictive practices are lawful. The Commission would keep the sole right to propose legislative texts, in whatever form — regulations, notices, guidelines etc. — and would act whenever necessary in order to ensure consistency and uniformity in the application of the competition rules.

85. Block exemptions are the first of these legislative texts. Given the importance of legislation in the new directly applicable exception system, legal certainty for undertakings demands that an agreement exempted by a block exemption should not then be held contrary to national law. This can be achieved by invoking Article 87(2)(e): a Community regulation should be enacted to prevent national legislation from prohibiting or varying the effects of agreements exempted by Community regulation. Some Member States have already entered this principle in their own legislation. For example, the Belgian Law No 91/2790 of 5 August 1991 provides that Community exemptions are a bar to action by the Belgian authorities, and that agreements so exempted need not be notified under domestic law. Danish law excludes restrictive practices covered by a Community exemption regulation from the scope of the prohibition that it lays down. Spanish and UK laws make similar provision.

86. The Commission also intends to draw up more notices and guidelines to explain its policy and provide guidance for the application of the Community competition rules by national authorities. These instruments are particularly well suited to the interpretation of rules of an economic nature, because they make it easier to take account of the range of criteria that are relevant to an examination under the competition rules. They might not be binding on national authorities, but they would make a valuable contribution to the consistent application of Community law, because in its decisions in individual cases the Commission would confirm the approach they set out. Provided those individual decisions were upheld by the Court of Justice, then, notices and guidelines would come to form part of the rules that must be applied by national authorities.

87. In a directly applicable exception system, Commission policy on competition would continue to be reflected in prohibition decisions in individual cases, and these would be of great importance as precedents. As the Commission would be concentrating its attention on the most serious restrictions, the number of individual prohibition decisions can be expected to increase substantially.

88. It is true that the Commission would no longer adopt exemption decisions under Article 85(3) as it does now, but it should nevertheless be able to adopt individual decisions that are not prohibition decisions. Where a transaction raises a question that is new, it may be necessary to provide the market with guidance regarding the Commission's approach to certain restrictions in it. Positive decisions of this kind would therefore be taken in exceptional cases, on grounds of general interest.

89. These positive decisions would confine themselves to a finding that an agreement is compatible with Article 85 as a whole, whether because it falls outside Article 85(1), or because it satisfies the tests of Article 85(3). They would be of a declaratory nature, and would have the same legal effect as negative clearance decisions have at present.

90. In the course of procedures that might otherwise end with a prohibition, it can happen that the undertakings concerned propose to give the Commission undertakings that would overcome the objections raised against their agreement. It is useful that the Commission should be able to make such commitments binding, both in order to oblige the undertakings to comply with them and to enable the parties and others to rely on them before their national courts. In the new Regulation applying Articles 85 and 86, therefore, 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. Such a decision would allow the procedure to be terminated while ensuring that the commitments were respected. As a corollary to this change, a clause would be included in the system of penalties in the Regulation providing for fines and periodic penalty payments in the event of failure on the part of undertakings to meet such commitments.

2. *National authorities to play an enhanced role in the application of the competition rules*

91. The actions of competition authorities, at both national and Community level, are guided by considerations of public policy in the economic sphere: unlike the national courts, they do not set out to decide disputes between parties, but rather to guarantee the maintenance of a system ensuring that competition is not distorted. Cooperation between the Commission and the national competition authorities has hitherto been on a pragmatic footing, and has been limited by the Commission's exclusive right to apply Article 85(3). After 35 years of application of the Community competition rules, the time has come to make better use of the complementarity that exists between the national authorities and the Commission, and to facilitate the application of the rules by a network of authorities operating on common principles and in close collaboration.

92. If such a network is to work properly, however, measures of three kinds will be needed: (a) the Commission must give up its monopoly of exemption; (b) the national authorities must be empowered to withdraw the benefit of a Community block exemption regulation; and (c) an authority considering a case, whether at Community or national level, must be in a position to pass a file on it to another authority, including any confidential information that might be used in procedures for infringement of the Community competition rules.

93. In a directly applicable exception system the national authorities would themselves be able to assess whether or not a restrictive practice meets the conditions of Article 85(3), and would no longer have to refer the question to the Commission. They could investigate cases of application of Community law, in response to complaints or on their own initiative, without fear that the parties to a restrictive practice might invoke a notification pending before the Commission.

94. To allow the role of the national authorities to be strengthened in this way, Regulation No 17 would have to be amended to remove the monopoly of exemption and to make it quite clear that any authority considering a case of application of Article 85 must consider whether the tests for exemption are satisfied. If this reform is really to improve the application of the competition rules, the seven Member States that have not yet done so will have to empower their competition authorities to apply Community law.

95. As a logical consequence of the abandonment of the Commission's monopoly of exemption, the national authorities would have to be able to withdraw the benefit of a block exemption on their own territory if that territory or part of it constituted a separate market. The authorities of the Member States are particularly well placed to assess whether, in a particular case provided for in the block exemption, there are in their territory agreements covered by the Regulation which do not satisfy the tests of Article 85(3), and which consequently do not qualify for exemption. This possibility has already been provided for in the Commission's communication on vertical restraints ([54]), and could be generalised in the new Regulation applying Articles 85 and 86.

([54]) OJ C 365, 26.11.1998, p. 3.

96. A national competition authority may encounter difficulties when it seeks to act on a complaint requiring investigation in several Member States. Cases may also come before the Commission whose effects are essentially concentrated in a single Member State. The most effective solution in such situations would be for the authority considering the case to pass it on to the authority best placed to deal with it. This implies that the authority to whom the documents in the case are forwarded must be able to use them directly as evidence. Article 20 of Regulation No 17 currently prevents the national competition authorities from using as evidence information supplied by the Commission ([55]).

97. If the Commission finds that the effects of a disputed practice are felt primarily in one Member State, therefore, it should be entitled under the new Regulation to send the whole of the file, including any confidential information, to the competent authority in that Member State, so that that authority can continue the investigation making direct use in evidence of the information supplied. Conversely, if after investigation a national authority comes to the conclusion that a case has a Community dimension and requires action by the Commission, it should be able to forward its file to the Commission, on the model of what can already be done by the EFTA Surveillance Authority ([56]). The only limitation that must be retained is that imposed by the terms of the original mandate: whatever the authority that made the earlier enquiries, the information could be used only for the purpose for which it was originally collected and for the application of Articles 85 and 86 or of national competition law as the case might be.

98. This extension of the use of information should be counterbalanced by the incorporation in the new Regulation of the principle that separate penalties could not be imposed by a national authority and by the Commission, and that separate commitments would not have to be entered into to satisfy objections raised by the two levels.

([55]) Case C-67/91 Asociación Española de Banca Privada and Others [1992] ECR I-4820, at paragraphs 37 et seq.

([56]) Protocol 23 concerning the cooperation between the surveillance authorities (Article 58 of the Agreement on the European Economic Area), OJ L 1, 3.1.1994, p. 186.

3. *The national courts to play an enhanced role in the application of the competition rules*

99. National courts are close to European citizens, and since the inception of the Treaty they have had a specific role in safeguarding the rights of individuals within their jurisdiction which are conferred directly by Community law ([57]). The Court of Justice has accepted that the national courts are vital to the effective application of Community law, including competition law. They apply Article 85 in proceedings of three kinds: contractual liability proceedings (disputes between parties to an agreement), non-contractual liability proceedings (disputes between a third party and one or more parties to the agreement), and applications for injunctions.

100. Because of the exclusive right to exempt that is conferred on the Commission by Regulation No 17, national courts cannot themselves apply Article 85(3) so as to exempt an agreement. And because the courts have no jurisdiction to apply Article 85(3), undertakings can, in practice, bring court proceedings to a halt by lodging a notification with the Commission. This phenomenon is a major obstacle to more extensive application of the competition rules by national courts. In a directly applicable exception system, undertakings would be able to invoke the direct applicability of Article 85(3) as an argument in their defence before the courts. This new ground of defence would allow them to obtain immediate civil enforcement of those of their restrictive practices which satisfy the conditions of Article 85(3). Their legal certainty would thus be strengthened. Complainants, on the other hand, would be able to obtain damages more quickly where they are victims of illegal agreements. Except where an appeal was lodged, the judgments of national courts would have the force of res judicata. These judgments are recognised by the courts of all Member States under the Brussels ([58]) and Lugano ([59]) Judgments Conventions.

([57]) Judgment of the Court of Justice in Case 26/62 Van Gend & Loos [1963] ECR 1, and BRT v. SABAM, see footnote 34.

([58]) Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ L 299, 31.12.1972, p. 32); last amended by the 1997 Accession Convention (OJ C 15, 15.1.1997, p. 1).

([59]) Convention on jurisdiction and the enforcement of judgments in civil and commercial matters concluded in Lugano on 16 September 1988 (OJ L 319, 25.11.1988, p. 9).

B. CONSISTENT AND UNIFORM APPLICATION OF THE COMPETITION RULES

1. *Risk of inconsistencies and principles for their resolution*

101. Decentralised application of the competition rules and abandonment of the prior authorisation system must not be allowed to stand in the way of the maintenance of conditions of competition that are consistent throughout the Community. The principle of the primacy of Community law prevents the application of national law from undermining the full and uniform application of Community law and the effectiveness of measures implementing it ([60]). But where Community law is being applied by several bodies at once (Commission, national authorities and national courts), there are potential conflicts of two kinds:

(1) A national authority or court may take a favourable approach to a restrictive practice prohibited by the Commission (by rejecting a complaint on the ground that the agreement is not caught by Article 85(1) or that it satisfies the tests of Article 85(3), or by a judgment ordering its enforcement);

(2) An authority may prohibit a restrictive practice, or a court may refuse to enforce it, despite a positive approach taken by the Commission (rejection of a complaint against it or a positive decision).

102. It should be pointed out, first of all, that parallel application of Article 85(1) and Article 86 has existed since 1962, and has given rise to very few problems. The principles for resolution of conflicts are as follows:

(1) The Court of Justice held in Delimitis ([61]) that once the Commission has initiated procedures, and *a fortiori* when it has adopted a decision no longer open to appeal or which has been confirmed on appeal, the national courts are bound to avoid conflicting decisions, if necessary by suspending the proceedings before them to ask the Commission for information, or by making a reference for a preliminary ruling under Article 177 of the Treaty; the same principle can by analogy be applied to national competition authorities, although the avenue of a reference under Article 177 is not open to them;

(2) When a national authority has adopted a positive decision which is either no longer open to appeal or which has been confirmed on appeal, or a court has delivered a positive judgment (for example rejection of a complaint on the ground that a restrictive practice satisfies the tests of Article 85(3)) which is either no longer open to appeal or has been confirmed on appeal, the Commission can always intervene to prohibit the agreement, subject only to the principle of res judicata that applies to the dispute between the parties themselves, which has been decided once and for all by the national court;

(3) Where an authority or a national court takes a negative decision in respect of a restrictive practice, the Commission believes that it should not normally seek to intervene otherwise than as an intervener on a reference for a preliminary ruling under Article 177, if any such reference is made;

(4) For as long as a decision of a national authority or court is still open to appeal or the decision on appeal is pending, the Commission may at any time adopt a contrary decision. In that case the principle that conflicting decisions must be avoided will apply to the appeal body.

103. If conflicts should arise between the different bodies applying Community competition law, these principles should allow them to be resolved. It may also be necessary to strengthen the principle that the application of national or Community law by national courts or authorities should be consistent with the application of Community competition law by the Commission, subject to the supervision of the Court of Justice. But it would nevertheless be advisable to establish mechanisms to avoid such conflicts in the first place.

2. *Information and cooperation mechanisms*

104. To ensure the consistent application of the rules, and the preservation of the unity of competition policy, there are two main instruments that already exist in Community law: these are Article 169 and Article 177 of the Treaty. Article 169 empowers the Commission to refer to the Court of Justice cases of infringement of Community law by Member States, while Article 177 requires courts of last instance to refer questions of interpretation of Community law to the Court of Justice for a preliminary ruling. These two procedures are certainly effective, but they can be

([60]) See Case 14/68 Walt Wilhelm [1969] ECR 1.
([61]) See footnote 38.

a very slow way of maintaining or restoring consistency in competition policy, which calls for day-to-day cooperation between competent authorities. There is a need for flexible and rapid mechanisms for the exchange of information and cooperation between competition authorities, courts and the Commission.

105. As regards competition authorities, it is proposed that the amended Regulation No 17 should include an obligation to inform the Commission of cases in which Articles 85 and 86 are applied by the competition authorities of the Member States; this would correspond to the obligation imposed on the Commission by Article 10 of the present Regulation ([62]). The Commission would have to be informed of the initiation of procedures and before their termination. The Commission would also have to be informed if an authority planned to withdraw the benefit of a block exemption. Information of this kind together with any correspondence that might take place with the national authorities should ensure that the consistency of competition policy can be preserved without requiring machinery to impose solutions to conflicts in the application of Community law. But the Commission would still have the possibility of taking a case out of the jurisdiction of the national competition authorities, by means of a mechanism equivalent to that in Article 9(3) of the present Regulation No 17. To ensure consistency between proceedings under Community law and proceedings under domestic law, the national authorities would also be required to inform the Commission, on their own initiative or at the Commission's request, of any proceedings they were conducting under national law that might have implications for Community proceedings.

106. The proper functioning of the network between the Commission and the Member States clearly implies a reinforcement of the role of the Advisory Committee on Restrictive Practices and Dominant Positions. It would become a full-scale forum in which important cases would be discussed irrespective of the competition authority dealing with them. It would continue to be consulted on legislation drafted by the Commission and on draft Commission decisions in the same way as today, but the Commission, acting on its own initiative or at the request of a Member State, could also be empowered to ask the Committee for its opinion on cases of application of Community law by national authorities.

([62]) German law already provides that the Commission is to be informed of cases of application of Community law so as to enable it to state a view: see paragraph 50(3) of the Restriction of Competition Act (Gesetz gegen Wettbewerbsbeschränkungen — 'GWB'), as amended by the Sixth Amendment, which entered into force on 1 January 1999.

In the context of pre-accession strategy, the Commission will devote particular attention to the development of competition in the candidate countries and will provide their competition authorities with increased assistance.

107. As regards national courts, in order to maintain consistency of interpretation when the application of the rules is decentralised, and to lend support to the national courts in the exercise of their functions, mechanisms would have to be set up for cooperation between the Commission and the courts. It is vital, first of all, that the Commission should be aware of proceedings in which Articles 85 and 86 are invoked before the courts, so that it is made aware of any problems of textual interpretation or lacunae in the legislative framework. It is therefore proposed that the regulation should require courts to supply such information. A similar obligation already exists in German law, for example ([63]). The Commission should also be allowed, subject to the leave of the court, to intervene in judicial proceedings that come to its attention as a result of information supplied in this way. Allowing it to intervene as *amicus curiae* would be an effective way of helping to maintain consistency in the application of the law. It is consequently proposed that a specific provision to this effect should be included in the regulation. It is also proposed that the amended Regulation No 17 should incorporate the rules now set out in the Commission notice on cooperation between the Commission and national courts, which provides that in the course of proceedings before them courts may address themselves to the Commission to ask for information of a procedural, legal or economic nature. Moreover, in certain Member States, there exist cooperation mechanisms between national courts hearing a competition law question and national competition authorities (for example, the possibility for the Bundeskartellamt to intervene in Germany, or for the Conseil de la Concurrence to give expert testimony in France).

III. **Intensified *ex post* control**

108. As an indispensable corollary to the introduction of a directly applicable exception system, there would have to be a reinforcement of *ex post* control to ensure that the competition rules were being respected. Under the proposed reform the

([63]) Paragraph 96 of the Restriction of Competition Act, read in conjunction with paragraph 90, requires courts to inform the Bundeskartellamt of cases in which Community law is applied.

Commission's powers of enquiry would be strengthened, it would be made easier to lodge complaints, and the system of penalties would be reorganised.

A. STRENGTHENING THE COMMISSION'S POWERS OF ENQUIRY

109. If the Commission is to be able to act effectively against undisclosed restrictions of competition, it is not enough that it should be able to concentrate its resources on investigating cases arising out of complaints or taken up on its own initiative: it is also important that its powers of enquiry should be increased.

110. When the Commission wishes to carry out investigations under Article 14(3), the national authorities assisting it must, in most Member States ([64]), secure authorisation from a judge in order to overcome any opposition on the part of the undertaking ([65]). Where there are several undertakings involved, investigations most often have to be conducted in several Member States, and authorisation has therefore to be sought from several judges, whose role is confined to satisfying themselves that the decision ordering the investigation is authentic and that the investigation envisaged is not arbitrary or excessive ([66]).

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

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

113. It is therefore proposed that Article 14 of Regulation 17 should be amended to make it quite clear that in the course of an investigation the authorised Commission officials are empowered to ask the undertaking's representatives or staff any questions that are justified by and related to the purpose of the investigation, and to demand a full and precise answer. A further provision could be introduced under which the authorised officials would be empowered to draw up official minutes of the answers given in the course of the investigation. These minutes would be included in the file, and could be used at later stages of the procedure. As a corollary to this new provision, the answers given in the course of investigations would be brought within the scope of the penalties for supplying incorrect information.

114. In order to increase the effectiveness of its enquiries the Commission should also be empowered to summon to its own premises any person likely to be able to provide information that might be helpful to its enquiries, and to take minuted statements ([67]). This possibility could be used with respect to the undertakings that are the subject of the procedure: it would serve to complement Article 14 by allowing persons to be questioned who were not present at the time of the investigation. It could also be used with respect to complainants and third parties.

([64]) Belgium, Denmark, France, Germany, Greece, Ireland, Luxembourg, Portugal, Spain and the United Kingdom.

([65]) This situation is in line with the judgment in Hoechst, which leaves it to national law to define the procedures guaranteeing that the rights of the undertakings concerned are respected (Judgment of the Court of Justice in Joined Cases 46/87 and 227/88 Hoechst v. Commission [1989] ECR 2859).

([66]) Hoechst, see footnote 65, at paragraph 35 of the judgment.

([67]) Most of the national systems of competition law give the authorities power to summon persons likely to be able to give information relevant to the investigation. This is the case for example in Belgium, France and Germany.

115. In a directly applicable exception system the detection of infringements would rely largely on surveillance of the market. Inquiries into sectors of the economy provide a tool which has been very little used since 1962, but which will take on greater importance in the new context. The present provision should accordingly be maintained.

116. Experience has shown that requests for information addressed by the Commission to undertakings under Article 11 do not raise any major difficulty. The principle that undertakings are bound to reply has repeatedly been upheld by the Court of Justice, which has allowed an exception only in the case of directly incriminating questions ([68]). The procedures for the imposition of penalties in the event of incorrect or incomplete information are effective. The only point that needs to be considered here concerns Article 11(4), which provides that the information requested is to be supplied by 'the owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or of associations having no legal personality, the persons authorized to represent them by law or by their constitution'. This wording prevents lawyers from replying to requests for information from the Commission on their clients' behalf, even though it may very often be the same lawyers who actually draft the answers given. It is therefore proposed that the wording of Article 11 should be amended to allow properly authorised lawyers to reply on behalf of their clients if their clients so desire.

B. THE INCREASED IMPORTANCE OF COMPLAINTS IN THE NEW SYSTEM

117. Formal complaints currently account for almost 30% of new cases dealt with by the Commission, and most own-initiative procedures begin with information sent to the Commission informally. Information supplied in this way is a very valuable means of detecting infringements of the competition rules. It must therefore be ensured that any person, natural or legal, who identifies a competitive practice that might *prima facie* be caught by Article 85 or 86, and who can show a legitimate interest, should continue to be entitled to lodge a complaint with the Commission.

118. As the Commission concentrates its activities on the most serious restrictions of competition, complaints will take on even greater importance than at present. The new system ought therefore to facilitate the lodging of complaints. A series of measures could be taken to help to encourage the victims of infringements to approach the Commission. In particular, the Commission could publish an explanatory notice on complaints; time limits could be introduced for their handling; the procedure for rejecting complaints could be simplified; and rules could be laid down regarding interim measures.

119. The Commission should improve the information available to potential complainants regarding its likely course of action. The case-law accepts that the Commission is entitled to lay down priorities governing the action it takes against infringements, on the basis of the concept of sufficient Community interest ([69]). It now seems advisable to publish a notice clarifying this concept, so that complainants can more easily determine whether they would be better advised to address their complaint to the national or to the Community authority. This notice could thus guide complainants' choice of the forum in which to pursue their complaint. The notice should also indicate what the complainant can hope for from the Commission, namely a cease-and-desist order, valid erga omnes, but no award of damages. The notice could help complainants to draft their complaints by indicating the sort of information the Commission usually needs in order to establish that an infringement has been committed. Finally, it should draw attention to the Commission's severity in imposing fines on undertakings that have taken reprisals against complainants.

120. At present the Commission's only obligation is to consider complaints within a reasonable timeframe. But complainants who believe they are the victims of an infringement of the Community competition rules need to know quickly whether the Commission will be taking up their complaint, that is to say whether it will be carrying out investigations or sending requests for information in order to establish whether the alleged practices exist, or whether it intends to reject the complaint on the grounds that the complainant

([68]) Case 374/87 Orkem v. Commission [1989] ECR 3283.

([69]) Case T-24/90 Automec v. Commission [1992] ECR II-2223.

has no legitimate interest or that the complaint is unfounded or lacks a Community interest. If there is in fact no Community interest, it is imperative that the complainant should be able to turn quickly to the national competition authority or law court that may be able to deal with the matter. It is proposed that a time limit of four months should be introduced, by the end of which the Commission would be required to inform the complainant of the action it proposed to take on the complaint. If it did not propose to take up the complaint, the Commission would write to the complainant stating why it did not intend to proceed. That letter could be challenged before the Court of First Instance. If it took the view that the case should be investigated further, the Commission would inform the complainant accordingly, again within four months, without prejudice to the subsequent procedure. If after more detailed enquiries, which cannot exceed a reasonable timeframe ([70]), the Commission concluded that it could not proceed further with the complaint, it would write to the complainant stating its reasons. This letter would also be open to challenge before the Court of First Instance.

121. The present procedure is rendered cumbersome by the obligation under Regulation (EC) No 2842/98 ([71]) to send the complainant a letter setting out the Commission's provisional view, to consider the complainant's comments, and to adopt a formal decision. This is a demanding procedure, and takes up a considerable proportion of the Commission's resources. Decisions rejecting complaints accounted for over half of the formal decisions adopted by the Commission in recent years. The introduction of a four-month time limit should therefore be accompanied by a simplification of the procedure for rejecting complaints, and in particular more flexible arrangements for hearing the complainant and the undertaking(s) complained against.

122. A complaint will very often be accompanied by an application for interim measures aimed at putting an immediate end to the infringement at issue. Although Regulation No 17 does not expressly empower the Commission to adopt interim measures, the case-law accepts that it may do so where it finds *prima facie* that there is an infringement, that the matter is urgent, and that there is danger of serious and irreparable damage ([72]). It would appear necessary now to spell out in Regulation No 17 not merely the circumstances in which interim measures may be granted, but also the procedure for their adoption, and the duration of their validity. The present practice has proven to be efficient.

C. PENALTIES

123. Article 15(2) of Regulation No 17 provides that the Commission may impose fines of up to 10% of the turnover in the preceding business year of each of the undertakings taking part in an infringement of Article 85(1) or Article 86. The Commission's policy on fines has gradually been clarified in its decisions, in the guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty ([73]), and in the notice on the non-imposition or reduction of fines in cartel cases ([74]). The 10% ceiling has proved appropriate, and it is not proposed that it should be changed. But the introduction of a system of directly applicable exception would require the removal of the immunity from fines conferred by notification, as notification would have disappeared. The prohibition on restrictive practices would thereby be rendered more effective, and its dissuasive effect would be increased.

124. Procedural fines do need amendment. Regulation No 17 currently provides for a fine of EUR 100 to EUR 1 000 where an undertaking supplies incorrect information or produces books and records in incomplete form during an investigation. These figures have remained unchanged since 1962, and are

([70]) Cases T-213/95 T-18/96, SCK and FNK v. Commission [1997] ECR II-1739. Case C-185/95 Baustahlgewebe GmbH v. Commission, not yet published.

([71]) Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty (OJ L 354, 30.12.1998, p. 18).

([72]) Order of the Court of 17 January 1980 in Case 792/79R Camera Care v. Commission [1980] ECR 119.

([73]) OJ C 9, 14.1.1998, p. 3.

([74]) OJ C 207, 18.7.1996, p. 4.

too small today to have any real dissuasive effect. It is proposed that they should be aligned on the Merger Regulation (EEC) No 4064/89, where the corresponding provisions provide for fines of EUR 1 000 to EUR 50 000 in such cases ([75]).

125. The same applies to the levels of periodic penalty payments that may be imposed on an undertaking that does not supply information requested by decision, or refuses to submit to an investigation ordered under Article 14(3). The corresponding provisions in the Merger Regulation provide for periodic penalty payments of up to EUR 25 000 per day. The new regulation applying Articles 85 and 86 could set the same figure.

126. The Merger Regulation makes provision for a second category of periodic penalty payment, to be imposed on undertakings that fail to comply with an obligation imposed by decision (Article 15(2)). These payments may not exceed EUR 100 000 per day. There is a similarity between the imposition of obligations on undertakings in connection with the authorisation of a concentration and the decisions accepting commitments that it is proposed to introduce. On the model of the Merger Regulation, therefore, a second category of periodic penalty payments could be established.

127. When fines are imposed on associations of undertakings, the turnover to be considered is the turnover of the undertakings that are members of the association. But Article 15 of Regulation No 17 does not provide that the members are to be liable jointly and severally, and this can prevent collection of the fine ([76]).

128. It is therefore proposed that the new regulation implementing Articles 85 and 86 of the Treaty should state that where an association of undertakings is responsible for an infringement the undertakings that were members of that association at the time the infringement was committed are to be liable jointly and severally for payment of the fine. To protect the members' rights of defence, they would have to be informed of the initiation of the proceedings and a statement of objections would have to be notified to them by publication in the *Official Journal of the European Communities*. If necessary the association could supply fuller information to members who requested it.

([75]) Council Regulation (EEC) No 4064/89, see above.

([76]) The problem has arisen for example in connection with Joined Cases T-213/95 and T-18/96 SCK and FNK v. Commission [1997] II-1739.

IV. Transition to the directly applicable exception system

129. When the new regulation applying Articles 85 and 86 enters into force there will be notifications still pending before the Commission that were lodged by undertakings with a view to obtaining exemption under Article 85(3). In the new system Article 85 would be directly applicable in its entirety, and the lawfulness of restrictive practices would no longer depend on whether or not the Commission had taken a decision. Notifications still pending would no longer serve any purpose. In the time between the publication of this White Paper and the entry into force of the new regulation, the Commission will continue to work on exemptions at the same pace and in accordance with the same procedures as at present.

V. Sectoral Rules

130. In the case of agriculture, Article 42 of the Treaty states that 'the provisions of the Chapter relating to rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the Council'. Articles 85 to 90 of the Treaty were made applicable to agriculture in 1962 by Council Regulation No 26 ([77]). Article 1 of that Regulation states that Articles 85 to 90 of the Treaty and the measures taken to implement them, including Regulation No 17, are to apply to production of and trade in agricultural products. The reference in Article 1 of Regulation No 26 to the measures implementing Articles 85 and 86 means that amendments to Regulation No 17 will automatically apply to agriculture. The specific exceptions foreseen in Article 2 of Regulation No 26 will not be affected and the Commission will retain the sole power to apply them.

([77]) OJ 30, 20.4.1962, p. 993/62.

131. The competition rules applying to transport are identical to those applicable to other industries ([78]), and restrictions of competition and markets are defined in the same way. There is therefore no reason why the transport regulations ([79]) should not undergo the same reform as Regulation No 17, and the same changes should accordingly be made.

132. However, Regulations (EEC) No 1017/68 (transport by rail, road and inland waterway), (EEC) No 4056/86 (maritime transport) and (EEC) No 3975/87 (air transport) also contain further provisions which are not found in Regulation No 17. These concern block exemptions on the one hand ([80]), and special procedural rules on the other ([81]). The main procedural differences can be summarised as follows:

(1) The Commission can grant exemption without notification, following a complaint, for example, or on its own initiative.

(2) Regulation (EEC) No 1017/68 includes a clause on crisis cartels.

(3) Neither the land transport regulation nor the sea transport regulation makes any specific provision for negative clearance.

(4) All of the transport regulations provide for opposition procedures. When an application for exemption is received, a summary is published in the *Official Journal of the European Communities*, and interested parties are asked to comment. If the Commission does not object to the notified agreement within 90 days of publication of the summary, the agreement is deemed to be exempt.

(5) Regulation (EEC) No 3975/87 makes special arrangements for some interim measures.

(6) Regulation (EEC) No 4056/86 is legally based on two Treaty provisions, Articles 84(2) and 87, and has a clause dealing specifically with conflicts of law with non-Community countries. Regulation (EEC) 1017/68 is based on Articles 75 and 87.

(7) Under Regulation (EEC) No 1017/68, the Commission may not adopt a decision within 20 days of the meeting of the Advisory Committee. This is to allow Member States to ask for a meeting of the Council to consider a question of principle. In that event the Commission must in its decision take into account the policy guidelines that emerge from the meeting.

(8) Tramp vessel services and international air services between the Community and non-member countries continue to be subject to the transitional arrangements in Article 89.

133. There can be no doubt that the differences between the procedures laid down by the transport regulations and Regulation No 17 reflect the political concerns that presided at the time of their adoption. The land transport regulation, Regulation (EEC) No 1017/68, was the first regulation applying the competition rules to transport, and was adopted before the Court of Justice had expressly confirmed that the competition rules did apply to transport. Since the various transport regulations were adopted, considerable progress has been made in the liberalisation of air and rail transport, and sea transport has been liberalised for a long time. The concerns specific to these sectors have largely disappeared.

134. The application of the procedural rules in the amended Regulation No 17 to transport will

([78]) Case 167/73 Commission v. France [1974] ECR 359, at paragraph 32; Joined Cases 209 to 213/84 Ministère Public v. Asjes [1986] ECR 1425 (the Nouvelles Frontières case), at paragraphs 42 to 45; and Case 66/86 Ahmed Saeed and Others v. Zentrale zur Bekämpfung unlauteren Wettbewerbs [1989] 803, at paragraphs 32 and 33.

([79]) Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway (OJ L 175, 23.7.1968, p. 1); Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport (OJ L 378, 31.12.1986, p. 4); and Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector (OJ L 374, 31.12.1987, p. 1).

([80]) See Articles 4, 6, 9 and 14 of Regulation (EEC) No 1017/68 and Articles 1, 3, 4, 5, 6 and 8 of Regulation (EEC) No 4056/86.

([81]) See Articles 17 and 18 of Regulation (EEC) No 1017/68 and Article 9 of Regulation (EEC) No 4056/86.

automatically remove the first five differences noted above. For the remainder it is proposed that the following action be taken:

(1) The dual legal bases of Regulations (EEC) No 1017/68 and (EEC) No 4056/86 have never been invoked, and there is no reason to preserve them.

(2) The provision allowing the Council to intervene in individual cases following the meeting of the Advisory Committee has never been invoked, and should be removed, which would be in line with Council Decision 87/373/EEC of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission.

(3) The regulation that would replace Regulation No 17 should make it quite clear that it does not apply to tramp vessel services and international air services between the Community and non-member countries.

135. When the ECSC Treaty expires, in July 2002, the restrictive practices currently subject to Article 65 of the ECSC Treaty will also come within the scope of the regulation applying Articles 85 and 86 of the EC Treaty.

CONCLUSION

136. Competition policy has an important part to play in the process of economic integration called for by the founding Treaties: and the place occupied by the 'Rules on Competition' in the part of the Treaty dealing with 'Community policies' is no coincidence. The importance given to secondary legislation in the founding Treaty shows that the drafters of the Treaty were well aware of the need to adapt the rules governing the application of competition policy to changes and developments in economic life, business and the geographic dimension of Europe. Now that Regulation No 17 has been in operation for more than 35 years there are a large number of provisions implementing the competition rules that are manifestly no longer suited to business as it has now become, nor to the imperatives of an enlarged Community facing the prospect of further accessions and whose national markets are already extensively integrated.

137. The considerations that led to the adoption of a centralised authorisation system no longer carry the same weight today: both Community and national competition authorities are now familiar with the operation of a system of competition law which has been refined by the Commission's decisions, the case law of the Court and legislative texts. The prospect of the completion of economic and monetary union, and further enlargement, also demands the reform of a system that was designed for a Community of six Member States.

138. This White Paper sets out the Commission's thinking, and describes the system it believes is best suited to the Union at the dawn of the twenty-first century. The system has three main elements: the abolition of the system of notification and authorisation to be replaced by a directly applicable exception system; the development of decentralised application of the competition rules; and intensified *ex post* control. The Commission is convinced that only a radical reform of the present system along the lines set out here can ensure the effective application of the competition rules throughout the Community, while easing the administrative burden on undertakings as far as possible, and at the same time providing them with a satisfactory level of legal certainty.

139. This reform will require far-reaching amendment not only of Regulation No 17, but also of the transport regulations and of measures adopted in implementation thereof. It should also be accompanied by a reinforcement of the legislative framework, which has already begun with the amendment of the rules governing vertical restraints, and is to continue with a study of horizontal cooperation agreements.

140. The White Paper is intended as a point of departure of a wide-ranging debate between the Commission, the Member States and all interested parties. The Commission would welcome observations on any aspect of the reform proposed and on the options outlined in this document.

141. Observations on the White Paper should be sent by 30 September 1999:

— **By post, to the following address:**

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European Commission
White Paper on Modernisation
C 150
Rue de la Loi/Wetstraat 200
B-1049 Brussels

— **By electronic mail, to the following address:**

modernisation@dg4.cec.be

142. This White Paper is also available on the World Wide Web, in all the official languages of the Community, at the following address:
http://europa.eu.int/comm/dg04/entente/other.htm
#dgiv_pdf_wb_modernisation