Chapter 8

THE LAICIZATION OF COMMUNITY LAW—SELF-HELP AND THE RULE OF REASON: HOW COMPETITION LAW IS AND COULD BE APPLIED

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1. INTRODUCTION

The practical functioning of the EEC competition rules is a topic which is very much in the air. Scholars, businessmen, practitioners, professional associations, Members of the European Parliament and national bodies like the House of Lords Select Committee on the European Communities, have all had their comments to make. Two particular themes have been recurrent: the fairness or otherwise of the procedures by which the Commission takes decisions, and whether there should be a "rule of reason" in Community competition law.1 We propose to submit

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1 There is an abundance of literature on both topics. See E. Jolivet, The Rule of Reason in Antitrust Law: American, German and Common Market Laws in Comparative Perspective (1967); more recently, see Korah, The Rise and Fall of Proportionality: The Need for a Rule of Reason in EEC Antitrust, 3 Nw. J. Int'l L. & Bus. 320 (1981); Schachter, The Role of Reason in European Competition Law, LIEI 1982/2, p. 1, and the articles cited in each of these. One of the most interesting compilations of practitioners' views on the effectiveness and fairness of Commission procedures is contained in the Report on Competition Practice, House of Lords Select Committee on the European Communities, 8th Report, 1981-82 Session.
that an even more fundamental issue merits attention: the lack of actual, predictable application and enforcement of the competition rules in everyday business life. We believe this is due in large part to certain features of the substantive and procedural framework within which competition law is analyzed, applied and enforced. The purpose of this article is to make a radical examination of how the system works from the point of view of enforcement on the one hand and compliance on the other.

It will be submitted that both enforcement and compliance are conducted in ways which are quite different from what was contemplated by the framers of the Treaty's competition provisions, the draftsmen of Regulation 17 and the officials who formulated the early doctrines and rules. Positions which were natural and appropriate when the competition rules were in their infancy are obstacles to progress now that they have achieved some degree of maturity. Those responsible for enforcement are reluctant to acknowledge certain perfectly wholesome developments in how competition law is observed. It will be argued that some changes should be made to reflect the way in which enforcement and compliance have actually—and quite properly—evolved. Still other changes would seem appropriate to make enforcement and compliance more effective, certain and predictable for all concerned.

It is useful at the outset to try to state in summary form the essence of the argument which we wish to make.

1. Early on, a fundamental choice, having both substantive and procedural aspects, was made as to the application of Article 85 of the Treaty, and in particular as to the respective roles of paragraphs (1) and (3) of that Article. The basic prohibition of Article 85(1) was interpreted in a literal, almost mathematical, manner. While it was recognized that much conduct caught by the broad sweep of paragraph (1) as thus interpreted was in fact acceptable, this conclusion was to be reached by applying paragraph (3). As a procedural matter, Regulation 17 provided that only the Commission could grant exemptions under paragraph (3). This required disclosing all doubtful matters to the Commission and obtaining its specific approval either in the form of a negative clearance or an exemption, or so arranging one's affairs as to come within the terms of a group exemption, thus obtaining an automatic exemption without the need to make any filing.

2. This solution assured maximum disclosure to the Commission of business practices as they actually existed, and a maximum role for the Commission in deciding whether these practices were acceptable and legal. Most agreements which posed potential problems under the competition rules had therefore to be examined and approved through the notification process. The Commission's preoccupation was understandable. The principles embodied in the competition rules were novel and almost revolutionary. They required fundamental changes in deeply ingrained habits of thought and patterns of economic conduct. The officials of the new competition Directorate-General did not trust businessmen, lawyers and judges to apply the rules correctly (or even, as the case might be, in good faith); they sought to keep a maximum of surveillance and control in their own hands. At the same time, it was thought that this solution offered legal security to businessmen—a factor which doubtless seemed especially important in a new system of law. By requesting and obtaining exemption, businessmen could be sure that they were on the right side of the competition rules.

This system contrasts with the solution applied in the U.S. under section 1 of the Sherman Act and the so called "rule of reason" which has been developed with respect to it. Antitrust problems are examined by businessmen, lawyers and judges without having to resort to the officials in the Antitrust Division of the Justice Department. A businessman who is party to an arrangement which involves anticompetitive and procompetitive features may thus decide for himself whether as a whole the arrangement can be called legal.²

² The debate about the desirability of a rule of reason in the EEC competition context has become rather distorted as often happens when a foreign legal term with both procedural and substantive implications is discussed. In the United States the rule of reason offers both the substantive merit of avoiding unnecessary rigidity in applying the antitrust rules, and the procedural merit that no official authorization is necessary. Commission spokesmen generally claim that in EEC law Article 85(3) is the mechanism whereby reasonable restrictions on competition can be authoritatively approved. In substantive law, this is of course correct.
3. As the system has evolved, it has increasingly come to be applied in a way which is quite different from the model envisaged by the fathers of Regulation 17.

There are far too many cases notified to the Commission for it to be able to handle any one individually. The notification process has, from a functional point of view, come to be used as a law-making tool rather than as a mechanism for approving individual cases. To a large extent, the Commission selects those notifications as to which it is interested in stating, clarifying or developing the law and reacts with decisions. The backlog of unanswered notifications is large: 5,715 in December 1982. The number of exemptions is small: 30 in ten years. The files containing about 2,000 notifications during the same ten year period were closed, some because the agreements had expired, some because one or another group exemption was available, and others following informal comments from the Commission. Clearly, notification does not work as a mechanism by which any party to an agreement caught by Article 85(1) can obtain an exemption under Article 85(3).

The number of published decisions taken by the Commission (perhaps 10 or 12 per year) does not represent its real level of activity. We certainly do not reproach the Commission for any lack of diligence: we shall be submitting that by taking certain measures it could rationalize and reduce its workload. While many notifications do not elicit any response at all, in some cases the Commission can be induced to issue informal assurance. These have little legal value in a formal sense but can be valuable in practice.

One reason for the backlog in handling notifications is the volume of complaints, which the Commission feels morally and institutionally bound to take up even where (one could say especially where) the alleged violation is an obvious one, raising no new points of law, such as an export ban. A complainant who goes to a national court for redress or protection faces many obstacles, and for most complainants the Commission is the sole realistic source of aid.

The system is evidently not functioning perfectly.

4. The Commission has taken a number of steps to alleviate the problems.

(a) In a number of instances it has shown itself willing to depart from its strict interpretation of paragraph (1). It has held that Article 85(1) does not apply to certain situations even though these do seem to involve clear (albeit understandable) restrictions of competition. The Commission is willing to approve these agreements without resort to paragraph (3), although this is logically inconsistent with its generally broad interpretation of paragraph (1). Agreements containing such features are therefore valid without any filing being required.

(b) Group exemptions dealing with two topics have been issued and another is under discussion. However, the political difficulties in finalizing and adopting group exemptions are formidable, since member states and their business communities tend to regard them not as waivers of the law but as compulsory codes of conduct. If there were more of them (e.g., if a group exemption in the patent licensing field were adopted) the volume of unprocessed notifications would be reduced, but it is not clear that it would be of manageable proportions. Moreover, compliance with the terms of a group exemption frequently entails a substantial loss of flexibility which may be regarded as undesirable. Those who wish to be sure of an exemption do not, however, have any realistic alternative, since specific exemptions are so rare as to be practically unobtainable.

However, businessmen are more interested in the procedural aspects. They wish to be able to discern the path to sanctity or abolition without passing through the burdensome process of confession.

(c) The issuance of notices has provided general guidelines which clarify the Commission’s thinking and give some degree of legal security to businessmen. Commission officials of varying degrees of seniority also make speeches to all kinds of audiences, indicating new policy trends and emphasizing familiar ones. Commission officials are remarkably accessible for discussion of particular problems with individual businessmen or lawyers.

(d) The staff of the Directorate-General for Competition has recently been expanded, and an attack on the backlog of notifications is making some progress.

(e) Informal comfort letters, confirming that Article 85(1) is not infringed, have become rather more formal and publicized under a new practice whereby brief details of the arrangement receiving the reassurance can be published.

(f) On the other hand, attempts to cope with the Commission’s excessive workload have been hindered by its internally cumbersome procedures, a difficulty which has if anything been exacerbated by the need to respond to criticisms regarding the fairness and exhaustiveness of its fact-gathering and dossier-generating capacities.

5. At least from a theoretical point of view, so long as exemption is legally necessary but unavailable in many if not most cases, the consequences appear to be rather serious. An agreement caught by paragraph (1) of Article 85 is void and unenforceable under paragraph (2) if it has not been exempted under paragraph (3). A system which purports to make so much depend on the issuance of exemptions which it is unable as a practical matter to deliver is open to rather harsh criticism. Far from creating legal certainty, it is a source of uncertainty. 6

6. The anomalies of the situation are evident to businessmen and their legal advisers, and certain practices have evolved by way of response to the problem. There has developed an alternative system of observance which is not without merit. Lawyers and businessmen may decide not to notify agreements, concluding instead that the agreements and the underlying conduct are consistent with Article 85, even if this is in part for reasons which traditionally would have been thought to come under paragraph (3) rather than paragraph (1). We will submit that this is a legitimate approach which shows no disrespect for the law and which, far from being condemned or deplored by the Commission, should, subject to certain conditions, be welcomed and encouraged. As regards legal certainty, such an approach entails the realistic acceptance of a substantial but tolerable level of uncertainty—a level with which many businessmen are perfectly willing to live. These practices tend to go in the direction of a system which is functionally somewhat like that of the “rule of reason” in the United States.

7. Another practice which is widespread—strikingly so when compared to, for example, the United States—is for businessmen simply to ignore the competition rules entirely. Many practitioners, and indeed many ordinary citizens, cannot be unaware that business decisions in the Community are often made without regard to the competition rules, sometimes in cases where the rules would punish the conduct being contemplated. Sometimes where the victims of an infraction might be able to invoke Articles 85 or 86 to assist them. The business community, which is the


Several Notice from the Commission on procedures concerning applications for negative clearance pursuant to Article 2 of Council Regulation No 17/82, O.J. Eur. Comm. (No. C 343) 4 (Dec. 31, 1982). Since this notice was completed, a similar notice has been published with respect to exemptions, O.J. Eur. Comm. (No. C 299) 6 (Nov. 2, 1983).

7 In practice, notification is not regarded as a means of obtaining an exemption. The motive for notifying is usually the immunity from fines which is conferred by notification, together perhaps with the belief that the notifying party may obtain an advantage in the event of national court litigation. The notifying party would generally prefer that the agreement remain in oblivion, rather than being taken up by the Commission as a candidate for exemption, as this process involves much time and discussion.
principal potential object and beneficiary of the law, uses it and is guided by it much less than it might. Those who scrupulously obey the rules are often at a disadvantage compared with those who do not. National courts are asked to consider competition law surprisingly seldom; for this reason and others, its application in national courts has not thus far been satisfactory.

8. It is submitted that the time is ripe for a number of changes. The characteristics of a mature, coherent and properly functioning system of competition law are that it permeates the consciousness of the economic and legal system, and is applied almost routinely by businessmen, lawyers and judges in their own responsibility. In such a system, the role of law enforcement officials like the Commission should be not to exercise a theoretically all-embracing but practically unworkable surveillance over an immense number of individual transactions and agreements, but rather to observe the scene as a whole, to formulate policy, and for the rest to concentrate necessarily limited resources on carefully selected targets where intervention is necessary and effective. National courts should be genuinely available for the resolution of competition law problems, whether raised by complainants or by others.

Among the steps which should be taken is a relaxation of the interpretation of paragraph (1) of Article 85 so as to broaden the number of cases where economic behavior can be said to comply with Article 85 without having to resort to the criteria or procedures of paragraph (3). This would correspond to reality. The concomitant reduction in the Commission’s ability to exercise universal surveillance over all questionable cases, far from being an unacceptable disadvantage, would be a healthy development. A number of procedural measures could increase the role of the national courts as a resource for the enforcement of the competition rules, and correspondingly free the Commission to concentrate its energies effectively; these would include a notice or a regulation acknowledging the existence of a right to damages for breaches of the competition rules, the establishment of a procedure whereby the Commission could take a position to offer observations as to an action pending before a national court, and perhaps even the granting to national judges of the right to issue exemptions in some cases.

We fully realize that these changes cannot be accomplished overnight, and that several of them would involve difficulties and some risks. However, we believe they do represent the general direction in which the competition rules should develop. We further submit that if steps are not taken for change, the present structural inconsistencies and tensions will get worse, to the detriment of Community law and policy.

II. THE EARLY CHOICES

As is well known, Article 85(1) of the Treaty of Rome prohibits agreements or concerted practices which appreciably affect trade between member states and have as their object or effect the prevention, restriction or distortion of competition within the Common Market. Article 85(2) renders such prohibited agreements void. Article 85(3) provides that an exemption may be granted to any agreement or concerted practice which is found to be, broadly speaking, in the public interest in that it satisfies two positive and two negative requirements. Article 86 prohibits abuses of a dominant position. There is no provision for an exemption from this prohibition. Article 86 has been invoked much more rarely by the enforcers of the competition rules than Article 85.

It is worthwhile to put oneself in the position of those who were charged with the implementation of these provisions. At the time they were adopted, the competition rules of the Treaty, like so many other of its provisions, were very radical. They called on the businessmen of the Community, their legal advisers, and the legal systems of the member states to assimilate and apply an entirely new system of legal rules for economic conduct. These rules called for fundamental, indeed revolutionary, changes in centuries old habits of thought and patterns of conduct. Cartels were very much a part of the way of life of a large segment of European industry, and dismantling them was a major preoccupation of the drafters of the Treaty. Competition on a Communi-
tions are met. It is by no means a foregone conclusion from the language of the Treaty itself that the Commission shall be solely competent to grant exemptions. Indeed, the transitional provisions in the Treaty envisaged that until implementing legislation was adopted, "the authorities in Member States" should rule on the application of Article 85(3). Conspicuous candidates to share in the task were—and are still more today—the national courts in the member states, and the national administrative authorities having jurisdiction over national competition rules.

To understand the nature of these choices, it is helpful to consider briefly the analogous problem presented by section 1 of the Sherman Antitrust Act of 1890. This provision declared illegal "every contract . . . in restraint of trade or commerce among the several States, or with foreign nations. . . ." Like Article 85(1), this prohibition is extremely broad, in that restraints which as a whole stimulated competition appeared to be prohibited just as much as restraints which were clearly obnoxious. It was established by the U.S. Supreme Court as early as 1911 that it was not every agreement in restraint of trade which violated the prohibition, but only those restraints which were "unreasonable" in that they "operated to the prejudice of the public interest by unduly restricting competition. . . ." The so-called rule of reason approach was most succinctly put in a recent case as follows:

Under this rule the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.

Not every kind of questionable arrangement can be so examined; certain types of conduct are deemed irredeemably bad or per se illegal. In the United States, the categories of conduct deemed to fall under the rule of reason and under the per se illegal label have fluctuated considerably from time to time, pro-competitive and socially beneficial factors being considered in

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8 The vacuum was not total, in the sense that Articles 88 and 89 of the Treaty of Rome called on the Commission, in cooperation with the authorities of the member states, "to ensure the application of the principles laid down in Articles 85 and 86" pending adoption of implementing regulations. These transitional provisions, which still apply in the air and sea transport sectors, have proved difficult to use effectively.

9 If one compares the Community with the equally populous but more economically integrated United States, there are 110 officials in the whole of DG IV (responsible for state aids, steel questions and other topics as well as the application of the competition rules in the private sector), compared to about 1,000 officials, including field officers, in the Antitrust Division of the Department of Justice and Federal Trade Commission.

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determining whether particular sorts of restrictions are caught by Section 1.\textsuperscript{12}

There is a voluminous jurisprudence on the subject. Businessmen and their legal advisers consider the question themselves in determining whether or not to embark on particular courses of action, and the courts apply the rule of reason in deciding whether or not to enjoin behavior or award damages. The rule does not depend formally or practically on the intervention of the Antitrust Division of the Justice Department.

Obviously the interpretative choice in the case of Article 85 of the Treaty is different. Article 85 has its paragraph (3), while section 1 of the Sherman Act has no corresponding provision. A second important difference between Article 85 and section 1 of the Sherman Act concerns the role in the enforcement process attributed to litigation between private parties. The Sherman Act provides both for the unenforceability of offending contractual provisions and for private treble damages actions where the law is violated. In the U.S. business context, where litigation is resorted to by corporations as a major instrument of their commercial policy, the rights conferred on potential litigants are very important in the scheme of enforcement policy. Article 85 provides that offending agreements are void, but it is silent as to the existence of damages for injured parties, although decisions in some of the member state courts have in principle recognized such a right. In the European context, where businessmen tended to regard resort to litigation as undesirable and even reprehensible unless unavoidable, the role of litigation between private parties as a means for the enforcement of competition rules was (at least when Regulation 17 was being drafted) necessarily much smaller than in the United States.

The temptation for the Commission was strong to adopt a clear and uncompromising approach. Reasonableness would be determined almost exclusively under paragraph (3). The Commission would be the sole custodian of paragraph (3). Businessmen and their legal advisers would not be allowed to develop loopholes in the law, or defences based on purported good faith in the application of an equivalent of the American rule of reason. This approach ensured a maximum of disclosure—an important consideration for an enforcement agency which needs both experience and a maximum selection of cases to serve as vehicles for making new law. Reflecting an undoubted (but rarely expressed) concern of some officials, it preserved the Community's competition rules from the potential ravages of what was feared to be the uninstructed and even hostile judiciaries of the member states. Finally, this approach seemed to hold out the prospect of giving legal certainty when it was asked for; a businessman who wanted to know where he stood could ask for and obtain an exemption.

III. THE EARLY SOLUTIONS AND SUBSEQUENT MITIGATIONS OF THEM

The elements of the solution adopted can be described quite briefly. The Commission opted for the broad and literal interpretation of paragraph (1) of Article 85. Regulation 17 explicitly provided that only the Commission could grant exemptions.\textsuperscript{13} In an attempt to alleviate the problem of dealing with the enormous number of notifications which the system calls upon it to process, the Commission has issued a number of notices and a smaller number of group exemptions. It also developed a case law which permitted certain types of restriction to escape the coverage of paragraph (1), albeit at the cost of some logical inconsistency. These elements will be examined one by one.

A. The Literal Interpretation of Article 85(1).

The approach taken by the Commission concerning the notion of restrictions of competition within the meaning of Article 85 is well known. An interesting formulation is the one used in the

\textsuperscript{12} Applying U.S. terminology in the Community context, one might think of an export ban as per se illegal and a joint venture in a sector with considerable barriers to entry as susceptible of a rule of reason analysis. Although in theory any restriction on competition can be examined under Article 85(3), the judgments of the Court and the decisions of the Commission indicate that exempting an export ban in a distribution agreement is practically inconceivable. The law on joint ventures is by contrast rather fluid.

\textsuperscript{13} Reg. 17/62, Article 9(1).
Commission’s argument to the Court of Justice in Grand-Courtes v. Joined Cases 56 and 58/64, as summarized in the rapport d’audience:

The decisive criterion for the coming into force of the prohibition mentioned in Article 85(1) consists of the finding that the agreement interferes with the freedom of action of the parties or with the position of third parties on the market not only in a theoretical but also in a perceptible manner. Of course this cannot mean exactly what it says, since any agreement by its very nature limits the freedom of action of the parties. In any event, it is clear that the Commission intended to cast the net of Article 85(1) very broadly, adding the rider about perceptibility or “appreciability” to exclude de minimis situations.

One can indeed sympathize with the Commission’s preoccupations in the early days of the Community in avoiding the creation of possible loopholes and opportunities for evasion. To draw a perhaps far-fetched analogy, it was the experience of the federal judiciary in the United States, when confronted with the problems of racial discrimination, that judgments were more liable to be evaded, ignored or defied if they contained dissents, qualifying language or anything equivocal.

This approach to Article 85(1) had enormous repercussions in fields like distribution, the licensing of industrial property rights, and cooperation between enterprises in such matters as research and development, specialization and joint ventures. A great range of conduct and contractual provisions which are normal,

15 It has been suggested by certain officials that the de minimus concept is the equivalent of a rule of reason in that theoretical restrictions without actual practical impact are held not to be caught by Article 85(1). We would respectfully disagree. In practice, the de minimus concept is not a reliable basis for concluding that the competition rules do not apply. In the case of Vaessen-Moesen, O.J. Eur. Comm. (No. L 19) 32 (Jan. 26, 1970), Comm. Mkt. Rept. (CCM) 70/107, the Commission took a formal decision against a small enterprise engaged in the rather confined trade of making casings for horsemeat sausages made only in Belgium. We feel a less economically significant field is hard to imagine, yet the Commission elected to pursue the matter to the length of a formal decision because the case presented a conveniently clear example of the tying of supplies to the grant of a license to use a patented technique.

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necessary and desirable were nominally thus prohibited. In particular, territorial exclusivity provisions in license or distribution agreements were caught by the prohibition.

B. The Issuance of Notices and Group Exemptions

It was recognized early by the Commission that the sheer number of cases required action beyond just considering individual notifications. In order to reduce the pressure, the Commission promulgated two Notices, generally called the Christmas Messages, in December 1962. One stated the Commission’s views regarding agency agreements, a topic which has become progressively less clear as the years have gone by, but which on the other hand now seems to attract little attention from the Commission. The other Notice dealt with patent licences and stated a number of principles which must now be regarded as unreliable and will doubtless be formally recalled when and if the group exemption concerning patent licences is promulgated. Subsequently, further Notices followed on Cooperation Agreements, Agreements of Minor Importance, and Sub-Contracting Agreements. In addition, the Commission promulgated the more detailed and legally effective group exemption for exclusive distribution arrangements, recently renewed with substantial alterations as two separate exemptions, and, also recently, the group exemption for specialization agreements.

17 The inconvenience of theoretically requiring notification in such a wide range of circumstances was, it was first thought, mitigated. According to Regulation 17, the incentives to modify a questionable agreement were unimpaired from the moment of a truthful notification, and provisionality was assumed. It was assumed that the latter suspended the nullity provided under Article 85(2) for agreements caught by Article 85(1). However, in Brusseler de Hesseit II, 1973 E.C.R. 77, Comm. Mkt. Rept. (CCM) 81/170 the European Court indicated, in effect, that notification did not suspend the applicability of Articles 85 or 86; and in the SAAB case, 1974 E.C.R. 51, Comm. Mkt. Rept. (CCM) 82/159 the Court confirmed that the pendency of a procedure before the Commission could not deprive parties of their rights to invoke Community law before national courts. The effect of these and other decisions has been to deprive the concept of provisionality of much meaning. See the discussion of the role of national courts and the difficulty of determining where a Commission procedure stands, almost exactly ten years ago in Forrester, Complement or Overlap? Jurisdiction of National and Community Bodies in Competition Matters after Sabreit, 1974 Common Mkt. L. Rev. 171.
The adoption of a group exemption is always preceded by intense debate. One reason that the drafting of group exemptions generates such controversy is that group exemptions are the only way of being secure if individual exemptions are in practice unavailable: hence the dialogue of the deaf between the Commission representatives on the one hand, who say they are exempting a vast category of arrangements but that others will need an express exemption and, on the other hand, industry representatives who behave as if those other categories are being proscribed.

We do not suggest that the issuance of these notices and group exemptions is in any way regrettable. However, the notices do not confer immunity from Article 85(1) and the group exemptions, while convenient for some businessmen, may represent an uncomfortable Procrustean bed for others who prefer to structure their arrangements in a way different to that contemplated by the group exemption.

C. Offences Held Not To Be Sinful

An interesting way of reducing the pressure on the Commission to take individual decisions in response to notifications was to make exceptions in the case of particular categories of restrictions. The interest of these cases is not merely that they seem to show a certain logical inconsistency in the application of Article 85(1), but more importantly that they are in fact demonstrations of the operation of a principle which is close to a rule of reason, but applied under paragraph (1) rather than paragraph (3) of Article 85.

D. Restrictions on Post-Sale Competition by the Seller of a Business

Reuter was an inventor who sold his invention to BASF for exploitation. He promised not to compete with BASF for eight years after the sale. He changed his mind a few years later, began in business independently, was sued by BASF and invoked Community law as a defence. He made a complaint to the Commission in Brussels, which duly took a formal decision. The Commission found that a non-competition clause having a reasonable dura-

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tion would not infringe Article 85(1), but that eight years was too long. Although it did not make any specific finding of what would be reasonable in the particular circumstances, it indicated that the period of five years which had already elapsed was sufficient.¹⁸

In July 1981 the Commission intervened in a trademark matter which involved the sale by an American company of a division of its activities in Germany.¹⁹ It appears from the Commission press release (no decision was issued) that the seller subsequently wished to exploit the trademark after a period shorter than the one envisaged in the contract. The seller complained to the Commission which, without indicating exactly what length of time was appropriate, implied that five years would be reasonable. It is clear that the Commission analyzed the situation under Article 85(1).

When the seller of a business transfers it, the new owner may legitimately be nervous of competition afterwards. A company which purchases the assets and goodwill of an old, established firm may fear that customers may desert the business in favour of their old allegiance to the seller unless he unequivocally leaves the market place. It is not intended to suggest that such competitive restrictions are unreasonable; on the contrary, it is perfectly normal that the purchaser of a business wishes a certain reassurance that his purchase will not be rendered nugatory by competition from the seller. Nevertheless, it is very difficult to argue that there is not a restriction on competition involved. The Commission’s position in the cases where it has intervened appears to be that while a degree of limitation of competition is reasonable, too much is caught by the prohibition of Article 85(1).

E. Selective Distribution Systems

Distribution is one of the most sensitive areas of Community competition law because violations of the law in the field of

¹⁹ Tyler-Linde, in Eleventh Annual Report on Competition Policy 90. See also Sedanne Preclere, id. 21 95.
distribution generally go to the core of the functioning of the Common Market. The Commission has rightly assigned a high priority to the development of a body of rules regarding relations between supplier and reseller. This body is highly articulated and there are few circumstances in which the Commission will accept excuses for unwitting violations. Although the rules regarding what might be called classic distribution agreements for a consumer product are highly articulated and may be deduced by studying Regulations 67/67 or 1983/1983, the law regarding selective distribution systems is quite obscure by comparison. There are many products which cannot be sold over the counter. Some products are costly and must be installed or serviced by experts; some products are most effectively sold by trained salesmen; and as to some products, their manufacturers wish them to be put on the market in a particular, normally luxurious, setting.\textsuperscript{20}

The Commission has taken the view that selective distribution systems are not caught by Article 85(1) where the supplier merely sets qualitative objective criteria, which the manufacturers believe are the minimum necessary to ensure effective distribution of the goods, and which dealers who seek admission to the system are obliged to meet. Thus, the manufacturer may insist that his master distributor or wholesaler supply only those retail outlets which are technically equipped to market and service his products. The wholesaler may therefore refuse to supply a would-be retailer whose premises do not live up to the standards prescribed by the supplier. Once more, it is submitted that although it is perfectly reasonable for a manufacturer of a sophisticated product like a high quality watch or camera to be unenthusiastic about the possibility of his product being marketed by a street trader, the manufacturer’s prohibition on wholesalers making supplies available to street traders does appear to involve, technically speaking, a restriction on competition.\textsuperscript{21}

\textsuperscript{20} One would not look with the same enthusiasm on an expensive perfume, or an extravagantly expensive watch, if these items were available in large numbers at cut-price in the local supermarket—at least so runs the theory.

\textsuperscript{21} The judgment in AEC-Telefunken v. Commission, 107/82, judgment of October 25, 1983, seems to offer some support for this contention. The Court acknowledged that a reduction of price competition can promote competition as

\section*{IV. THE ACTUAL OPERATION OF THE SYSTEM TODAY}

\subsection*{A. Notification}

The Commission is overburdened by the volume of notifications which have been and continue to be submitted to it. It is generally understood that no more than a tiny minority of these notifications reach the stage of a formal decision granting an exemption, and not many of them elicit any indication of serious consideration from the Commission.

Many companies and lawyers continue to notify agreements whenever there is a possibility that they might infringe Article 85(1). This is consistent with the logic of the system, but also contributes to its unworkability. The reason for such notifications is factors other than price. "Selective distribution systems therefore constitute an element of competition in accordance with Article 85(1) as much as they pursue a legitimate objective, which is likely to enhance competition where competition is not felt solely in regard to price." (paragraph 33, unofficial translation). This formulation (feraud by the Court’s judgment in Metro Sib-Grosshandel GmbH & Co. v. Commission, 1977 ECR 1375, 1994 Comm. Mkt. Rep. (CCFH) ¶9032) suggests that certain limitations on competition, even if not de minimis, are acceptable and not caught by the prohibition of Article 85(1).\textsuperscript{22}

is usually that a truthful notification confers immunity from fines, and that if a contractual provision is ever challenged in litigation, by way of either a claim of unenforceability or a claim for damages, it is thought that a party to such an agreement is in a stronger position if the agreement has been notified. On those occasions when the competition rules are invoked before national courts, the argument that an agreement is acceptable because it has been notified is made not infrequently.

B. Complaints and Competition Law in National Courts

Many of the Commission's decisions are preceded by complaints. Some of these complaints concern novel and sophisticated questions, but the majority appear to concern obstacles to parallel trade. The Commission regards itself as honour-bound to investigate any serious complaint, and to pursue the matter if necessary to a formal decision. This policy is entirely understandable, but has some unfortunate consequences.

Complainants come to the Commission because they know it will take them seriously. Correspondingly, complaints have certain attractions for the Commission. The making of a complaint permits the Commission to shorten the procedures otherwise necessary to open a case; there is also a perfectly legitimate populist appeal in being seen to intervene on behalf of the small man faced with unfair treatment. More importantly, the Commission realizes that often complainants have realistically no other source of redress. However, complaints further reduce the Commission's resources available for new projects, for long-term planning or for dealing with notifications.

Moreover, and paradoxically, the very availability of help from the Commission in Brussels tends to reinforce the undeveloped state of competition law in national courts. The position of a complainant seeking to involve Article 85 in a national court is far from easy. Such issues as provisional validity, the legal consequences of notifying and receiving no response from the Commission, the availability of damages, primary in enforcement and so on are complex and unfamiliar to national judges. Even if they are at ease with such questions, they may well hesitate to request preliminary rulings from the European Court under Article 177 simply because it is so difficult to get the parties to agree on how to frame the issues. Drafting pleadings which invoke the direct effect of Article 85 (and a fortiori, Article 86) calls for considerable imagination and caution. Defending such pleadings against arguments that they lack legal basis can be difficult. Competition law is not seen to be applied in daily life as are other parts of Community law. Agricultural and customs regulations are drafted in Brussels and applied in a perfectly routine fashion by national officials. The relevant EEC rules are known, and regularly invoked. The rules on social security and residence rights for citizens of another member state may not be known precisely, but the existence of a right of some kind is known and invoked. Competition law is in essence more abstract and more difficult to define precisely, yet even those who most evidently have a right under it (such as dealers on whom an export ban is imposed) are deterred from pursuing their cases at home, because it is so difficult there, and because it is so easy in Brussels. It would be unfair of the Commission to turn them away, but accepting them perpetuates the problem in the national courts, as well as involving Commission staff in proving cases which may not advance the law.

The Commission's insistence on retaining intellectual control of the assessment of the validity of agreements tends further to perpetuate the phenomenon of over-centralization in Brussels. Practitioners may feel they are encouraged to notify and leave the thinking to the experts. It is understood, indeed, that a significant percentage of notifications with the Commission are unnecessary in the sense that the agreement either fits squarely within a group exemption, or does not realistically involve any restriction of competition. In the case of complaints, it is certainly cheaper and easier to complain in Brussels and leave matters to the Commission.
C. Compliance

Another defect in the system, which is perhaps more serious, concerns the degree of compliance in the Community with the Community's competition rules. Wholesale disregard for the rules—including simple and clear rules like the prohibitions on price fixing and export bans—is not uncommon in the Community in a way that would be unthinkable in the United States. Not only does much business planning pay no heed to EEC ramifications, but some business conduct is pursued in the knowledge that it violates EEC rules and in the hope that it will not be caught. Such conduct is more open and unabashed than in the United States, where consciousness of the appalling (and by no means unlikely) consequences of antitrust violations is well established.\footnote{It is worth remembering that in the United States private actions for damages often follow after a well-publicized conviction by the federal authorities. The roles of government authorities and of private litigation in law enforcement are thus complementary. See the impressive list of authorities confirming the effectiveness of private litigation as an engine of enforcement cited in Temple Lang, EEC Competition Actions in Member State Courts—Claims For Damages, Declarations and Injunctions for Breach of Community Antitrust Law, Chapter 7 supra.} Horizontal understandings between competitors in the EEC, and what sound like rather egregious restrictions on market freedom, can be read about in the press or even encountered as a consumer in daily life. Companies which seriously seek to observe the law are aware that their competitors may not be doing so.

D. Summary

The system theoretically requires resort to the notification procedure to ensure the legality of conduct, but very few notifications are, so far as the outside world can see, acted upon; the resources of the Commission in the enforcement field are limited, and the circumscribed powers at its disposal do not lend themselves to the efficient and accurate discovery of the truth; the large potential resource which is the national court systems in the member states is not used to any significant extent; noncompliance is too common; and the system by its terms purports not to permit businessmen and their legal advisers to reach their own conclusions regarding the legitimacy of matters caught by Article 85(1).

These points are all, we should submit, inter-related. However, listing them in this way draws a picture which is too bleak, and might imply that competition law has no significance in the Community. This would be quite wrong. The system does work, albeit in a way that is quite different from what was planned, despite the difficulties of the notification system. Moreover, with some changes, it could be made to work considerably better, we would hope in a way that provided a remedy to the criticisms listed above.

V. A RULE OF SELF-SUFFICIENCY (OR OF REASON) IN PRACTICE

Let us take the case of a large, sophisticated but conscientious company. It engages in a multitude of complex business arrangements in several countries, including distribution, licensing, joint ventures and other activities. On their face many of these arrangements are probably caught by Article 85(1), but can be structured so that they would probably qualify for an exemption if the necessary notification were made and a formal decision were issued by the Commission. Some of these arrangements might be structured so as to qualify under the terms of a group exemption (such as the group exemption for exclusive distribution arrangements, or even the draft group exemption for patent licences), but in many cases the company would prefer, for business reasons, not to make the changes that would be required to achieve this.

It is the company's policy to comply with legal requirements, including the rules on antitrust or competition, wherever it operates, and to be known to do so. The company is also naturally reluctant, for obvious reasons of self-interest, to incur significant risks; in those situations where there is a real possibility that a party with whom it has concluded a contract will seek to use Article 85(2) to escape its contractual obligations, or where the company may realistically be exposed to a threat of other claims
under Article 85, it will be very sensitive to these possibilities. It regards incurring any significant risk of being fined by the Commission as unacceptable. Even if no fine were imposed, and it were “merely” condemned as having violated Article 85(1), the company would be seriously troubled about appearing to be a bad corporate citizen.

On the other hand, it has a normal dislike of making elaborate disclosures to regulatory agencies of the type required by a notification to the Commission. It views with considerable reservations the possibility of the lengthy exchange with the Commission which would be involved if, following a notification, the Commission picked up the matter and decided to issue a decision. The commitment of resources, in terms of management time, energy and money involved in obtaining a Commission decision granting an exemption can be quite substantial, as much as in the case of a major litigation. (This is understandable if one considers that each formal exemption represents for the Commission a major piece of new rulemaking). Answering questions and furnishing additional information may lead into other areas which the company would prefer to leave alone. The notice of intention to take a favourable decision and the published decision itself may involve an unacceptable degree of publicity, or at least to a degree the company would, if possible, prefer to avoid.

Let us assume that the company is embarking on a transaction which, it is told by its legal advisers, is caught by Article 85(1) but probably would, under the decided cases and what is known of the Commission’s attitude, qualify for exemption. Let us assume that it has purged the agreement of clauses which would clearly be condemned.

What should be done about notification?

The texts of Article 85 and Regulation 17 appear on their face to give a clear answer. The proposed transaction is “prohibited” and “void.” It is, at least in theory, subject to the imposition of fines by the Commission. It may be attacked as unenforceable by other parties in a litigation before a national court. More remotely, it may even be the subject of a claim for damages. Only if the agreement is notified can this dire constellation of evil results be avoided.

The reality of the matter is quite different. Of course, for any company to engage in a substantial transaction which is legally characterizable as “prohibited” and “void” gives grounds for serious hesitation. On the other hand, if the situation is analyzed in terms of what will or may happen, rather than merely of the application of these labels, the conclusion may change.

First, it is not mere casuistry to assert that it is apparent from the operation of the competition rules that they are not intended to prevent behaviour which would, if notified, be exempted, simply because it has not been notified. This is clear from the enforcement policy of the Commission, and the way in which it imposes fines. So far as we are aware, the Commission has not imposed, and almost certainly never would impose, fines for behaviour which was not notified but would have qualified for exemption if it had been notified. To the contrary, it is customary for the Commission, when it does impose fines, not merely to observe that the sanctioned behaviour was not notified, but to state the reasons why it would not have been entitled to exemption if it had been notified. It is clear that prohibition and fine alike apply because of the objectionable character of the behaviour, not because it was not notified. If the avoidance of fines is to be a genuine reason for notifying, it will usually be in those situations where there is a doubt about the position the Commission may take as a matter of substantive law.25

Second, considerations of the possibility of litigation before a member state court do not necessarily favour notification. There is the practical consideration that, as already noted, the assertion of claims under paragraphs (1) and (2) of Article 85 is still quite rare. Claims are presumably rarer still in the case of conduct which could have been notified, could still be notified if need be,

25 In the early days, a company might have been inclined to notify for fear of fines simply because many substantive questions were unresolved. Today, the risk that the Commission may take a wholly unexpected position is at least for a sophisticated company much less; the body of competition law decisions is quite full and carefully annotated by commentators.
and if notified probably would qualify for exemption. The question of what would happen if such conduct were the subject of a claim or litigation must nevertheless be faced. What might a national court be expected to do, and how much difference would it make that the agreement had not been notified? It must be said that it seems fairly clear that a party claiming entitlement to exemption on the merits would not be able to do so in the absence of notification. Where such a situation may arise, failure to have notified will constitute a definite disadvantage, although it may be possible to remedy the situation by notifying the agreement when the need has clearly arisen. If notification has been effected, even if only in contemplation of the litigation, the national court should take it into account, either by suspending proceedings pending issuance of a decision by the Commission, or perhaps by considering the availability of the exemption itself.

In any event, this risk is one which many companies are willing to accept. Although the risk of nullity under Article 85(2) may sound dramatic, and appear to involve a serious risk of legal uncertainty, a businessman may feel that absolute formal validity of the kind required by notaries and mortgagees is not indispensable. The businessman may feel that the situation is sufficiently predictable not to require legal certainty; indeed, the businessman who decides he wishes to have legal certainty and makes a notification has no guarantee that his notification will elicit a response from the Commission.

Of course, in some cases there may be particular circumstances which argue in favour of notification by the company in question. A highly visible multinational engaging in highly visible conduct may feel more inclined to notify. This may be especially true if there is a large number of potentially hostile parties who may be minded to complain to the Commission or threaten litigation, or if the company has had well publicized brushes with the Commission in the past. In certain types of transactions combining heavy investment with substantial potential for later conflict between the parties, some companies have a preference to remove a potential element of unforeseeability deriving from failure to notify; this is sometimes true, for example, in the case of joint ventures. There are also special circumstances like those in the Perjune cases, where French suppliers wished to assert the compatibility of their selective distribution system with EEC competition rules as a defence against a national prosecution in France under legislation prohibiting refusals to deal.

However, all the factors listed in the previous paragraph having been noted, in many cases companies may and do conclude that on balance, after engaging in their own careful analysis of the agreement under paragraphs (1) and (3) of Article 85, they prefer not to notify, and are willing to accept the limited degree of risk this may entail.

It is not suggested that a decision to notify is unwise or pointless. On the contrary, the availability of the mechanism is a valuable source of reassurance, especially for enterprises that have decided they wish to run no risk of being accused of concealing an antitrust violation. Small and medium-sized enterprises, especially those located in regions far from Brussels either literally or figuratively, can easily and painlessly respond to the Commission’s standing invitation to seek approval of agreements which may be problematical. This mechanism is an admirable one, and it is no part of our thesis to suggest its elimination.

However, it is submitted that valuable though the availability of notification can be in some cases, in other cases it is regarded—for good reasons—as an option not to be taken up.

There is another consideration which should commend itself to the Commission. A scrupulous analysis of the law and the facts, conducted in good faith by the company’s management and legal advisers, leading to a decision not to notify, is perfectly legitimate and implies no disrespect for Community law. Following such an analysis, the draft contract may be revised, exclusivity provisions may be abandoned, no-challenge clauses eliminated, and so on. The approach of the company which puts its own house in order, realizes that certain aspects of its arrangements do involve a technical restriction of competition within the meaning of Article 85, but feels that the situation is as a whole defensible even

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though it is not notified, may be preferable to the approach of the company which notifies in the hope that the Commission will never have time to examine the filing.

The Commission may look at this argument with concern. The intensity of the debate over whether Europe has or should have a rule of reason is not principally about the meaning of the language of Article 85(1). It fundamentally concerns who shall interpret and apply the competition rules. By arguing against a rule of reason, the Commission is seeking to maximize the number of cases about which it receives detailed information through the notification process. However, the Commission is physically unable to deal with its present caseload. The Commission should actively be exploring ways of reducing the percentage of cases in which it is called upon to pronounce, even if this entails some reduction in the volume of information available to it through the notification process.

VI. THE WAY FORWARD

The core of our argument is that it would be desirable if the EEC competition rules could evolve away from the twin principles of the substantive primacy of Article 85(3) and the procedural insistence on the necessity of obtaining an exemption from the Commission. We believe that this process has already begun. This is reflected, among other things, by the practice of responsible and conscientious businessmen and lawyers. Far from being censured, this process should be recognized and encouraged. It will be conducive to the increased awareness and realistic application of the competition rules by those to whom they are supposed to apply.

The objectives to be achieved may be summarized as follows:

(1) The role of the Commission should be less universal and more specialized. It should retain all its present powers, but should use them more sparingly. It should have primary responsibility for formulating policy, for expanding the law by prosecuting important cases, for advising on the correct interpretation

and application of the law, and for drafting notices and regulations.

(2) The Commission should not be the sole realistic interlocutor for victims of manifest infringements. In order to be free from the burden of, for instance, prosecuting every export ban of which it hears, it should take steps to make the path of redress elsewhere (that is, in national courts) easier for complainants. Competition law consists of more than enhancing parallel trade. The Commission's jurisprudence should, for instance, have more examples of prosecutions of horizontal cartels. Finding other avenues for complaints would help this objective.

(3) The Commission should view more favourably a competition analysis based on Article 85(1) rather than under Article 85(3). This would inject flexibility and realism, and would not involve any actual relinquishing of power.

(4) The Commission should actively seek to increase the availability of the national courts as a realistic forum for the application of the competition rules. Possible methods of achieving this are discussed below.

(5) These changes will not happen overnight, and there will need to be an acceptance that their ultimate benefit may briefly be obscured by some erratic results in the short term.

A. The Interpretation of Article 85(1)

The Commission itself and the European Court of Justice have already pointed the way forward. As noted above, the substantive positions adopted by the Commission to the effect that reasonable restrictions on competition following sale of a business, qualitative restrictions in selective distribution systems, and so on, are usually expressed as if they were arrived at deductively by way of an examination of the intrinsic nature of the restrictions. However, it is submitted that what is really involved in these cases is a recognition by the Commission that such restrictions are acceptable on policy grounds. It would be a healthy development if the nature of the reasoning were acknowledged more for what
it is, and if the number of instances in which it is applied were expanded, even if this involves stepping on ground which has been traditionally reserved to Article 85(3).

The decisions of the Court of Justice in the *Maize Seed* and *Coditel* cases provide valuable statements of principle pointing in the same direction. In determining whether there was a restriction of competition within the meaning of Article 85(1), these cases looked to the economic nature and consequences of the conduct involved. In *Maize Seed* the Court concluded that certain territorial exclusivity provisions in patent licences favour the introduction and exploitation of new technologies. Licensees would not be willing to take the necessary risks if they were not assured of this degree of exclusivity. The Court used this analysis, which the Commission has traditionally accepted but relegated to Article 85(3), to reach the conclusion that these provisions were not caught by Article 85(1). The Court's decision draws a clear distinction between "open" exclusivity provisions—which bind the licensor not to license other licensees in the territory and not to sell directly there himself—and "closed" exclusivity provisions, involving prohibitions imposed on licensees in other territories and on purchasers from the licensor. The latter were caught by Article 85(1) and would be ineligible for exemption under Article 85(3). A rule of reason type of analysis (one could equally call it a pragmatic approach) is thus applied by the Court to make careful distinctions between various types of provisions. The inference is clear that this is a type of analysis which is essential to the functioning of the competition rules, and which can and should be applied by courts in member states, and by businessmen and their legal advisers.

It should also be added that the textual difficulties which might be thought to stand in the way of this type of approach to the interpretation of Article 85 are less severe than they might seem when viewed in the context of interpretative positions developed recently by the Court of Justice in relation to other articles of the

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B. Exemptions Should Still Be Available

Such developments would by no means empty Article 85(3) of its meaning or function, or deprive the Commission of its vital role in applying it. As to some categories of restrictions, the analysis of their competitive effects can better be reconciled with Article 85(3) and the criteria which it contains than with a rule of reason analysis under Article 85(1)—for example, certain kinds of major joint ventures. Ideally, it would be desirable if ways could be found for national courts to have a greater role, in cooperation with and guided by the Commission, in considering the eligibility for exemption of such agreements.

Moreover, the flexibility offered by Article 85(3) can be a valuable asset. For example, for reasons of trade policy, the Commission might wish to encourage a certain kind of cooperation in a given industry. In exceptional circumstances, it might be desirable to allow a "crisis cartel." The availability of Article 85(3) does not mean that the established order will regularly be overturned; it does mean that there is and should be a substantial latitude to be used in appropriate cases. The absence of a comparable provision in the Sherman Act may indeed be regarded as a weakness viewed in this light.

C. Community Law in National Courts

The procedural consequences of notification and of failure to notify need to be addressed realistically. This is particularly important in relation to the possible role of the member state courts. The uncertain legal effects of notification or non-notification discourage them from taking initiatives in considering the application of Article 85, especially paragraph (3). National courts are in fact encouraged to think of competition law as Brussels-based because approval of controversial agreements, or condemnation for that matter, seems to be the sole prerogative of the Commission.

The other major problem is the relative unfamiliarity of the national courts with substantive EEC competition law, and, given this unfamiliarity, the difficulty of identifying what are relevant factual issues. The availability of Article 177 is not an adequate solution to this problem. A national court may well hesitate to make a referral to Luxembourg before all the facts have been clarified and the issues made ripe for the European Court. Much time and effort could be saved if guidance of an authoritative nature were readily available from the Commission for national courts. Such guidance should clarify both the procedural questions relating to the effect (or absence of effect) of notification and the substantive issues of what the law is.

Proceedings before a national court may well consist of debating what the Commission's attitude to a particular clause might be (rather than what the law is), or what it means that a notification has been made and has provoked no decision. It would therefore be useful if the Commission were given the chance to intervene. One could imagine a number of ways in which the Commission could do this. It could take a formal decision disposing of the matter, and, pending that decision, request the national court to suspend proceedings. Alternatively, the Commission could elect to have its say by giving observations in writing without purporting to recommend the actual outcome of the case. In such observances it could indicate what it believed to be the basic legal principles which should apply, note the facts which it would be critical to establish, and mention the leading Court and Commission precedents. Use of this alternative would have the advantage of encouraging national courts to apply competition law, thus reducing the centrifugal phenomenon already mentioned. Finally, the Commission could elect to remain silent, relinquishing responsibility to decide the dispute to the national court.

By what sort of legal instrument could these procedures be put in place?

One could imagine a regulation on the application of the competition rules in national courts which would provide, among other things, that when a question regarding the application of Article 85(3) was raised in a national court, the court could refer the matter to the Commission under something akin to the so-called opposition procedure provided in Regulation 1017/68 in the land transport sector, and in the draft procedural regulations
for the air and maritime transport sectors. 31 (Under the opposition procedure in these texts, a notified agreement is deemed to be exempt if the Commission fails to react to the notification within a specified period.) It could be provided that a party wishing to invoke the new regulation in national litigation could, in order to do so, be obliged at that time to notify the matter to the Commission or, if the matter had already been notified, to provide any additional information which the Commission might request. As suggested above, the Commission could respond to the request for its intervention in various ways: it could issue a formal decision, or give some general indications similar to those which the Court of Justice gives in references under Article 177, or could allow the national court to decide. One would hope that the Commission would adopt the first or third courses rather infrequently, and that it would if possible confine itself to giving prompt, clear guidance to the national court about Community law, while leaving the decision up to the national judge.

Even if the political burden of shepherding such a novel regulation through to adoption is too daunting for the Commission,


Three further draft regulations have been circulated by the Commission since the text of this article was completed. One is a new draft of the group exemption for patent licensing, another is a new draft of the group exemption for cooperation in research and development, and a third deals with the distribution of motor cars. The first two contain opposition procedures under which, with respect to certain types of restrictions, a notified agreement is deemed to be exempt if, within a certain number of months following notification, the Commission has not challenged the agreement. Such a procedure would provide a useful option for a company contemplating a major step and requiring legal certainty that EEC law will not thwart it, where the agreement contains provisions which do not fall within the strict terms of the group exemption, and the company is willing to make a notification in order to obtain such certainty. Nevertheless, it is doubtful that the availability of an opposition procedure, either in the context of these regulations, or if adopted more generally, would solve the problems discussed in this article. Moreover, the inherent defects of the notification system would be unresolved: the dominance of the Commission in competition matters would be reinforced, notification would be even more of a discouragement to national courts to take up litigations involving the notified agreement, and the possibility of abusive notifications (those agreements which are manifestly not entitled to exemption but which are notified in the hope of obtaining it inadvertently) could become a distinct risk. Finally, the Commission’s internal procedures and its backlog of cases would probably not permit it to handle notifications quickly. One may imagine that the Commission would be tempted in practice to challenge any provision as to which it had the slightest doubt.

a first and less formal step would be to issue a notice expressing the Commission’s willingness to advise in the event of national litigations. Such indications could be obtained on proof of pendency of an action and the application of one or both parties. The Commission’s response could consist of a memorandum about the principal facts or of an indication that the case is being actively examined with a view to Commission intervention. This would be a valuable improvement over the present situation, where each side claims to have the more accurate reading of the auspices in Brussels, and the national court is naturally inclined to refrain from deciding. It is understood that in one or two exceptional instances, the Commission has already informally assisted national courts before which competition law cases were being argued. This is a most welcome and interesting development, and one which should be encouraged. Above all, the availability of the service should be made known.

It has been suggested that expanding the role of national courts and even giving them the power to apply Article 85(3) would be undesirable as it could lead to differences and discrepancies. Of course there would be discrepancies, but a healthy and expanding legal order with some aberrations which need to be corrected by higher authority is a better servant of the Community and the economic order to which the Treaty’s framers aspired than a perfect but often unrepositories legal system. This is especially so if the system’s application is not predictable and if it is mostly applied by the Commission in a few flagship cases which are selected rather haphazardly. We submit that Community law would flourish in the unfamiliar pastures of the member state courts.

The other major procedural initiative, ideally to be accomplished through a regulation, although a notice would be an acceptable alternative, would be confirmation of the existence of a right of damages for breach of Articles 85 or 86, which right could be asserted in national courts. Such confirmation, coupled

with the increased use of the damages remedy which might be expected to flow from it, would provide a major incentive for compliance. There are of course a number of indications that a right to damages already exists without the need for any regulation or notice. However, there is considerable debate on the subject. For the reasons already given, a clear and authoritative statement from Brussels, both recognizing the existence of a right and in effect encouraging its exercise out of Brussels, would be desirable.

Eliminating the notion of competition law as being a plant which can grow healthily only when tended by experts in Brussels will not be rapidly accomplished. Moreover, the ultimate benefits may be put in doubt by some eccentric decisions. The extraordinary development of the law in only twenty years has been in part due to the purity of its sources, and tampering with that purity must be contemplated cautiously. However, it is submitted that there is a need for action, and that other kinds of action (doubling the staff of DG IV A and B, streamlining DG IV procedures, issuing more group exemptions) seem either politically improbable, or unlikely to relieve the situation, or both. There are good reasons for the existing system, but it must change, and the Commission should pursue such changes.

VII. CONCLUSION

We believe that as the competition rules move from their infancy toward a greater degree of maturity, the objective as regards the practical modalities of their operation should be a system in which businessmen and their legal advisers, the member state courts and the Commission all participate. Businessmen and their legal advisers should be trusted and encouraged to play a greater role in the evaluation of the legality of their conduct; they should be sanctioned appropriately when they abuse this trust. Member state courts, a great untapped resource in the application of the competition rules, should be encouraged to play a greater role. The Community has grown, and its legal system

53 See Temple Lang, supra note 22 and the authorities cited therewith.

with it. The Commission has exceptional talents but limited resources. The time has come when some risks can be taken.

VIII. POSTSCRIPT

The text of this article was finalized on September 30, 1985. Since publication will actually occur some months later, we have been given the privilege of responding to certain comments by those who have seen the text in manuscript, and of expanding on some of our suggestions in greater detail. It is also appropriate to consider whether what we have said must be modified in light of the relative burst of activity on the part of DG IV during the last quarter of 1983.

A. Comfort Letters

In the Official Journal of November 2, 19834 the Commission announced that it will adopt the practice of closing its file on particular matters by issuing so-called comfort letters in cases where an exemption would be appropriate, and publishing notice of this in the Official Journal. It has been the Commission’s practice for many years in appropriate cases to issue comfort letters instead of formal negative clearance decisions as a means of avoiding administrative delays or to avoid taking a formal legal position which could be inconvenient in future cases. Such letters were often referred to as “light negative clearances” and were discussed in the Perfume cases. A new practice of publishing a summary of agreements for which such treatment was proposed was announced in 1982. The extension of the practice of sending informal letters in order to cover exemption situations is natural and to be welcomed. More parties get a higher degree of security, the readers of the Official Journal get some insights (albeit incomplete) into the Commission’s thinking, and the administrative burden on the Commission’s staff is reduced. However, we would submit that this development does not deprive our arguments of their force. There is no likelihood that, even

53 See note 24 supra.
56 See note 6 supra.
using the new mechanism regularly, all the claimants of exemptions could be satisfied. Indeed, many might be reluctant to use it precisely because of the publication requirement.

B. Recent Commission Decisions and Proposals

It appears that something of a surge in competition law activity has occurred in the last four months of 1983. A number of decisions, concerning, among other things, distribution, licensing, cooperation agreements and horizontal price fixing cartels, have emerged, as well as several settlements without a formal decision, and several pieces of draft legislation. Nevertheless, we feel that the basic structural problem remains: the Commission is the procedural filter through which in theory all questionable agreements must pass. Since only by an exemption may a “prohibited” agreement obtain validity, and according to Commission theory huge numbers of agreements are nominally prohibited. Yet the Commission output of formal decisions is less than 20 per year. Even if the figure were 40 or 60, many more agreements would remain theoretically in limbo. The emergence of a draft group exemption concerning research and development agreements, and another concerning the retailing of motor cars, as well as yet another draft of the group exemption on patent licensing, suggests the Commission favours codes of conduct as a means of resolving some commonly encountered legal problems. We do not deny the utility of group exemptions, but submit that they involve a loss of flexibility which is unfortunate.

C. The Position of Community Law in National Courts

There are some encouraging indications that competition law is being more readily invoked in national courts, and the June 1983 decision of the House of Lords in Garden Cottage Foods v. Milk Marketing Board[^32] (described in detail in Temple Lang’s paper[^33]) has of course given a considerable boost to those who would wish to invoke Community law in the English courts. On the other hand, the fact that the Garden Cottage case had to go to

[^33]: See chapter 7 supra.
vous judge do? He probably does not have the power to ask the Commission where matters stand; judges are generally dependent on the submission to them of material by the parties. In any event, there is presently no mechanism by which the Commission could respond even if asked. The judge is thus faced with a plaintiff who says he is being damaged by an illegal agreement, and a defendant who says the prime mover in all matters of EEC law is the Commission, which has implicitly authorized the agreement which was duly applied by the defendant in refusing to supply the plaintiff. Of course, the plaintiff may make the journey to Brussels and may be given encouragement or a rejection by the Commission. But this does not help the national judge; one party says a notification has been made and silence means consent, while the other party says that he has spoken to an official, who felt that there may be a violation. The natural reaction for the national judge is to defer judgment, leaving it once more to an overburdened Commission to determine the facts and take a position.

It is understood that at an early stage in the development of the Community, the Commission had a policy of refraining from intervening before national courts. There was a natural preference that national courts should either come to their own conclusions, or should seek a preliminary ruling from the European Court, whose authority had yet to be established. One may imagine that there was also a reluctance, inspired by political considerations, to avoid the potential conflicts with individual member states which might arise, especially in litigations where the state was a party in the litigation. It is reasonable to question whether all of these considerations remain valid today, at least as regards competition cases. National judges in almost every member state are aware of Article 177 and have shown themselves willing to use it in appropriate cases. Member states are rarely directly involved as parties in competition litigations, although it must be acknowledged that they are often sensitive about the issues or the outcome. The primacy of the European Court in matters of Community law is acknowledged and the relative powers and duties of the Commission and the Court are recognized. Nevertheless, it is much more difficult for a judge to frame a reference to Luxembourg in a competition case than in, for example, a case concerning customs classification, the 1968 Brussels Convention, social security or agricultural regulations. In a competition case, the judge may be unsure not just of what the facts are, but of what facts to look for. More importantly, he does not know whether the prime enforcement agency is neutral about the dispute or favours one side or the other, and he does not know whether by proceeding to issue a judgment he may risk trespassing on preempted ground.

A practical suggestion which would take account of the sensibilities of member states, the proper distribution of functions between the various national and Community bodies involved, and would require no modification to either the Treaty or Regulation 17, would be as follows. The Commission would announce a new practice. According to this practice, when a national judge indicates, on the application of either party or both parties to a national litigation, that he will consider a memorandum concerning the Commission’s attitude to a particular case before him which involves an issue of Community competition law, the Commission will, within six weeks, furnish such a memorandum. This would state whether a notification relevant to the litigation had been filed, and if so whether the Commission anticipated making an early response to the notification. It would further briefly record the Commission’s view of the basic law (export bans, joint ventures, price fixing, cooperation between competitors, abuses or whatever), acknowledging always the European Court’s prime authority on legal matters. It would note the critical facts which, in the opinion of the Commission, the national judge should elicit. Finally, it should record that the Commission has no objection to the national court’s pursuit of the litigation, or it should formally request the national court to defer consideration of the case, as the Commission proposes in the near future to take a formal decision which will either dispose of the litigious issue or will make its disposition easy. The memorandum ought to stress that the Commission is merely expressing a preliminary view on the basis of the facts available, and to record that it is up to the national court to decide the matter on its own responsibility. The memorandum would not (and could not) bind the national court,
either as to how to approach the law or as to whether to defer judgment or proceed with the case. Obviously, however, the text would carry considerable weight, and it would be necessary for the Commission to express itself cautiously to be fair to all concerned.

We should emphasize that the national judge would not be requesting the Commission to conduct any investigation, and indeed the principal basis for the Commission's analysis would be the pleadings and other documents before the court. Obviously, if the Commission had received a notification or a complaint relevant to the national case, or had received from any other source information under circumstances which compel the Commission to respect the provisions of professional secrecy under Article 20 of Regulation 17, difficult questions would arise. It would be necessary for the Commission to take account of its obligations of confidentiality in formulating any observations. We do not underestimate the seriousness of this difficulty, but submit that at the very least an authoritative indication of whether the Commission wishes the national action to proceed would be valuable. A way might also be found for the Commission to identify relevant issues, and to advise the national court on the relevant legal principles, without violating its obligations of secrecy. The current situation, involving the absence of any mechanism or procedure by which the Court and the Commission can make contact with each other, is not satisfactory.