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**FOREWORD**

The Robert Schuman Centre of the European University Institute in Florence, Italy, was established in September 1993, and is devoted to interdisciplinary research on European issues. The Centre is committed to the production of high quality publications in the form of books, articles and working papers. It holds seminars, workshops, round tables, conferences and lectures; coordinates research projects, often in conjunction with the European Commission and the European Parliament; and supports several working groups set up by the Institute’s researchers, Jean Monnet Fellows, and professors. Each year, the Robert Schuman Centre offers a number of post doctoral research grants. Under the Jean Monnet Chair, funded partially by the European Union, the Centre invites distinguished persons for brief periods from politics, business or academia, to speak on subjects within the Centre’s research programme. Through all of its activities, the Centre contributes to the academic debate, the diffusion of ideas, and the strengthening of cooperation networks in Europe and beyond.

The Centre aspires to become a focal point for research on European competition law. To this end, two eminent specialists in this area are currently on the Institute’s faculty: Giuliano Amato, the former Italian Prime Minister and current President of the Italian competition authority, and Claus Dieter Ehlermann, former Director General of the European Commission’s Legal Service and Competition Directorate. A number of the Institute’s researchers are currently preparing their PhD theses on competition law subjects under the supervision of Professors Amato and Ehlermann. The Schuman Centre has also made several studies for the European Commission on competition law matters. The workshop which was the basis for this volume was another effort in furtherance of the Centre’s interest in this area, as was the production of this volume. We hope that this will be the first of a series of annual workshops covering various issues of European competition law.

Prof. Yves Mény

*Director Robert Schuman Centre*
PANEL DISCUSSION

THE ROLE OF LEGAL COUNSEL

Participants:

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Mr. Fernando Pombo,
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Mr. James S. Venit,
Wilmer, Cutler & Pickering, Brussels, Belgium
The Role of Legal Counsel

- PROF. Goyder – Lawyers are the intermediaries who play a key role in making function the multi-faceted jigsaw that we’re discussing. Lawyers, whether acting in private firms or as in-house counsel, attempt to understand the complex rules at both Community and national level, then interpret them for their clients, the people who actually make the bricks, sell the records, build the Channel Tunnel, provide electricity and so on. They must cope with all the requirements of the competition rules. Thus, in a sense, lawyers are the workers in the mine, and as a result they see both the good and the bad side of the issues that we are discussing. Many problems arise even when it appears that a clear rule specifies Community versus Member State competence.

The lawyer must take the view and pursue the interest of his or her client. One day the lawyer may be attacking a monopolist, but the next day he or she may be representing a small undertaking attempting to break into the market of an incumbent monopolist. Thus, the lawyer must develop an ability to view the problem from various perspectives.

The influence over the long run of the intelligent and practised counsel is important in the confrontational area of Arts. 85 and 86, and even in the area of mergers, which are generally cleared, often following modification to the original plan. The lawyer must be able to tell the client that modification to the original plan will be needed to clear it without a second stage enquiry. Thus, in certain areas, counsel must work closely alongside administrators and not in confrontation with them.

In the US, the really able lawyers move easily from practice to administration, to teaching and back again around the circle. In contrast, in the UK, and I believe in most other European countries, once the lawyer is in one particular groove he or she traditionally stays there. In the competition field, this has now changed substantially. Many people around this table combine practice with academia and with administration. It’s quite rare to find a good competition academic who hasn’t some practical experience and vice versa. This implies that the influence of the lawyer is not limited to the word directly given as client advice, but also the conferences he or she attends, and the papers he or she gives at workshops like Fordham, which have such a big influence on practitioners and regulators.

This panel should address three issues: first, the actual role of the private practitioner in this area; second, the problems associated with differing requirements among Member States and with the Community; and third, what can be changed in the existing system and what kind of new system should be developed in the future, where things might work better for counsel and their clients.
MR. VENIT – I come at this question from the perspective of an EC competition lawyer who has been practising in Brussels for the last sixteen years. If I tried to divide the chapters of my experience, the adoption of the Merger Regulation would be the watershed between the old world, which was very formalistic, focused on clauses and legalistic arguments, and the new world, where economic analysis has come into play, and the priorities of the Commission, as an enforcement agency, have come more sharply into focus. Deregulation of air transport and telecommunications have also given a tremendous impulse to the enforcement priorities of the Commission.

With respect to merger cases, I believe political influence has and will continue to play a role. The issues are just too important. Whether new institutions are needed to address that situation is a question that I am not prepared, at this stage to answer, but I am somewhat sceptical that institutions alone are going to address the problems. Indeed, they may introduce new problems by creating a very clear target for even more political influence than we now have.

Regarding decentralisation, the real issue is the scope of Art. 85(1), which must be considered before reaching the question of decentralisation. I believe the application of Art. 85(1) is overly broad. Placed in perspective in terms of economic interest, it is apparent that a kind of myopia has governed Art. 85(1). The solution is to rethink, in a systematic and sensible way, what the approach to Art. 85(1) should be. This is the most significant change that we can expect.

The other area is procedural. The Merger Regulation introduced deadlines for the first time. Deadlines tend to focus the mind. The consumer of competition law wants predictability and speed and also, ultimately, intelligence in the decisions. Without deadlines, speed certainly falls by the wayside. Predictability may also fall by the wayside, because too many extraneous issues may be considered. When a regulator has more time to think about certain types of problems, the result does not necessarily improve.

PROF. FORRESTER – The competition rules work in Europe in 1996 in a manner that one never would have expected in 1962. We have a single market, we have 15 Member States, in ten years time we will probably have 25 Member States. We have an astonishing, and I believe unique situation in the world, where a competition agency regularly overrides the state. Staggeringly high fines have been imposed upon national champions. It is not unusual for fines in cartel cases to go over 100 million ECU. We have seen revolutions in various fields, (most recently football) and a successful Merger Regulation. No scandals have arisen in the enforcement of the competition rules. The Commission could fairly be said to be the leading competition agency in the world’s leading trading block. It has resisted pressure from the Member States. This is quite an impressive catalogue of success, which justifies the running of a few risks.

Some problems exist, however. We have too much of certain things and too little of other things. We have too much power at the centre and too little decision making at the extremities, and that is a problem rooted both in theory and procedure. We should attack both in order to have a healthy competition law that will take us into the next century.

The Commission’s own activities prove that it can succeed. The Merger Regulation is the best example. It is clearly winning in the market for consumer satisfaction over the US version, in terms of paper wasted, predictability, lower frustration, and rapidity of outcome. Many of my colleagues have told me that they would rather go through a European merger procedure than an American one.

By contrast, Europe is slipping in the market for giving satisfaction in the analysis of vertical and horizontal restraints. A client came to see me in Brussels, trying to decide whether to notify. He said, ‘Well Mr. Forrester, there are these seven good procompetitive reasons why this restriction is not a restriction at all, it’s just perfectly normal, everyone in the industry deals on the basis of exclusivity, and therefore these clauses, they seem very reasonable, and I can go ahead and sign, can’t I?’ Well, not quite. Why not? Because Art. 85(1) was drafted a long time ago, by those who feared people like US lawyers and judges. It was interpreted by conservative Commission officials, who feared the worst, and perhaps in those days, they were right. Unfortunately, today they have not changed their approach to life.

This is a very familiar analogy to most of you, but let me repeat it here: Brussels is, in theological terms, a Catholic jurisdiction. That is to say, if you wish to find the way to salvation, you must go initially to the priests, tell your entire story, and the priest will be your intermediary, talking to the principal, and will give you an answer. But, you must confess everything, and if you don’t, you run enormous risks; you must confess fully, frankly, totally, completely, and you’ll feel better. The priest will have a problem, but, in due course, resolution will flow. But it should be possible for the businessman or the businesswoman to discern the Protestant way to absolution and to perfection on his or her own. He or she reads the texts, consults the lawyers and says, ‘this is fair, I shall do it on my own responsibility.’

If you have a situation where Art. 85(1) applies, you are confronted with the choice of whether to notify. We have a Community of 15 Member States, more than 300 million people, eleven national languages, and I suppose some tens of thousands of agreements which are signed every year, which may raise competition law problems. There is an enormous demand for legal certainty,
generated by these competition law problems, which is exacerbated by the Commission's idiosyncratic, unusual, distinctive interpretation of Art. 85(1).

How many decisions under Arts. 85 and 86 do you think the Commission normally takes in a given year? Last year, it was 7; the previous year it was 23, and that was the most productive year in Community history. An enormous discrepancy exists between the Commission's output and the need for legal certainty, for which the interpretation of Art. 85(1) espoused by the Commission creates a need. When reality and theory diverge, the result is a risk of unfairness, and lack of transparency.

Three reforms are possible. First, it should be possible in a mature democracy, governed by law, for the Commission to take the risk to relax the interpretation of Art. 85(1) and say to business people, 'all right, at your own risk, go ahead.' This would eliminate the need to notify in many instances, which would reduce the amount of information available to the Commission. But, that may not be a bad thing for the competitive process. Today, what I advise the client who asks, 'why should I notify?' is, 'ah, Mr. client, you get the higher moral ground'. Says the client, 'what is higher moral ground, Prof. Forrester?', and I say, 'well, if ever there is an argument with the other side, you've submitted something to the European Commission. If the European Commission hasn't said anything, or hasn't said it's bad, you must be right and you will win the argument.' Says the client, 'I like higher moral ground, let us pursue higher moral ground.' I don't think the elimination of that would set back competition law very much.

A second possibility is to change what is deemed a 'decision'. The Commission produces a large number of short, brief, intelligible, useful so-called 'comfort letters'. Why not enlarge these a little bit and call them decisions, and publish them? This would increase the quantity of jurisprudence.

A third possibility is that the Commission share competence for interpreting and enforcing Art. 85(1) with others. The most striking gap in the current system is the relative absence of national courts in the enforcement process. It is extremely rare in my country, Scotland, for national courts to be confronted with competition law arguments. Not even one ECJ of damages has yet been awarded by a national court for breach of Arts. 85 or 86. I submit it is wrong for Mr. Van Miert to have said, two weeks ago, 'the time is not ripe to trust national judges'. National judges cope with all kinds of strange things, such as national tax law, which is far more unintelligible than Community competition law; with medical negligence, which is deeply subtle and difficult. Of course, they may get it wrong. So does the European Commission. But getting it wrong is better than not deciding at all. Perfection was the goal in the early days of the European Commission. Perfection is a worthy goal for a young institution. But, the Commission is no longer a young institution, it is a mature and successful institution and therefore adequacy, efficiency and productivity should be the goal. To quote John W. Davis in, Brown v. Board of Education, 'the best is often the enemy of the good.' If we had a less perfectionist attitude, a richer, more practical jurisprudence would exist, and we would see the law more predictably enforced.

I have three final comments. First, regulations should mean what they say, and it is undesirable to have such a gap between theory and reality in the enforcement of Art. 85(1). Second, specialist lawyers are pleased with the current complexity, mixing law and policy. But, the problem is with the non-specialist lawyers in Aarhus, Inverness, Palermo, who believe, 'if my client doesn't act that way, he may get fined, I must notify to save my client from risk.' Neither of those beliefs is correct.

Finally, the in-house lawyer in large corporations is on the frontline of enforcement. It is very regrettable that fourteen years ago, the European Commission and the European Court undercut the status of the in-house lawyer vis-à-vis the foreign lawyer, by holding in AM&S that an opinion by Barry Hawk or Eleanor Fox can be quoted in a decision of the European Court, but an opinion of Michel Waelbroeck cannot be. There is no reason why their opinions should be treated differently, and the Commission should make an effort to give a better status to the in-house lawyer.

> MR. PLOMPEN – Although I am employed by Philips, I will not speak here representing Philips, but as Chairman of the Competition working group within UNICE, the European Federation of Employers Federations. I deal not only with competition law, but also trade issues, export control issues, and fair competition issues, on the basis of tort.

In-house counsel must give general instruction to management, as to exactly what antitrust rules are aimed at, how they are enforced and why differences exist in the texts and practices. In an international corporation, it is difficult to explain to people from one nation that the way they have been conducting business is not allowed in another nation.

We must also answer questions of the European Commission, and sometimes of the courts; we prepare notifications for merger cases, joint venture cases, and arrangements under Art. 85. It is important to have clarity, transparency, and, to the extent possible, a one-stop-shop for mergers and major arrangements under Art. 85.

UNICE has issued a document addressing the modifications which should be made to the current system. It covers narrowing the scope of Art. 85(1), reexamination of the appreciability test, and broadening the scope of Reg. 17
Art. 4 as to its substance and procedure. It also addresses working arrangements between the European Commission and national authorities regarding application of Art. 85(3). UNICE does not favour decentralised application of Art. 85(3), but it does favour more cooperation among authorities. The XXIVth Report on Competition Policy stated that notification to the Commission should not be made to prevent a national authority from having competence to issue a prohibition. The Commission should specify when notification is required, which should be in far fewer cases than until now, and it should determine whether the agreement has a centre of gravity in a Member State. If so, then the Commission should seek the opinion of that Member State about the exemptability of the agreement. This opinion should be provided within a relatively short period of time, and the Commission should then determine whether it can accept that solution. The Commission could use Art. 9(3). If there is a difference of opinion, the Commission still could have the last word. This would promote unified application of Art. 85.

Finally, in-house counsel are discriminated against vis-à-vis outside counsel in Europe, because their advice is not treated as privileged. In the US, the advice of in-house counsel is deemed privileged. It is unfortunate that the European Commission is blocking itself from better application of the antitrust rules in Europe.

MR. POMBO — I am a competition lawyer from Spain. Outside counsel should not be eliminated completely from the legal scene. We are very specialised and may facilitate matters. Confidentiality is not a problem for outside counsel, because the attorney-client privilege applies. Outside counsel also have the right to complete confidentiality of information in the files, including business secrets.

Regarding harmonisation of Eastern European countries' business laws, the Member States of the EU are still far from being harmonised. It is difficult to determine the level of harmonisation which the Eastern European countries should strive to achieve. Private practitioners giving advice to these countries, faced with the problems of implementing the same competition law in differing legal systems, offer invaluable experience.

Finally, regarding the rights of defence, much uncertainty exists in the present situation. The more uncertain and subject to discretion is the competition law, the more difficult it will be properly to defend the rights of the client. Simplifying and expediting procedures, particularly with respect to de minimis cases, would greatly improve the current situation. From the point of view of rights of the defence, it is important to guard against leaks.

DR. CANENBLEY — I believe that what is really lacking is a consensus of what competition policy is and should be in Europe. In contrast, in the US, such a consensus on competition policy and on the division of powers between the federal and state enforcement authorities exists. We must first build such a consensus on policy in Europe. Thereafter, it will be easier to arrive at the right structure and division of powers for enforcement authorities.

Competition laws have been enacted in each of the EU Member States. The existence of more laws increases the potential for conflict. For instance, the notion of merger under German law differs from that under EC law, particularly with respect to control and minority participation. In particular, German merger law covers minority participation, while European law requires control to constitute a merger. When European Merger Control was introduced in 1990, Germany extended the notion of merger to include 'significant competitive influence' on another undertaking. As a result, a case involving a minority participation and meeting the EC merger regulation turnover threshold, but not satisfying its definition of merger due to absence of control, would have to be cleared by the Bundeskartellamt. Thereafter, if a participation were to increase to a majority, the EC merger regulation's definition of merger would then be satisfied, and Commission clearance would be needed. Such a two-step procedure makes little sense, where the transaction could be prohibited in the first step by the national authority. If the second step were done at the beginning, the national authority would have no power to prohibit.

As to convergence, under the most recent decision of the German Supreme Court, the geographic market can never be broader than Germany under German Merger Control law. In contrast, under EC law, geographic market definition is based on a straight economic analysis. This presents a problem under German law, because the higher the market shares, the stronger the presumptions of market dominance. This differs from EC law, where high market shares do not trigger a presumption for market dominance.

Finally, it is possible to receive fast clearance under German competition law in cases also covered by Art. 85. This results from the different notion of merger under EC law and German law, the latter not differentiating between cooperative and concentrative joint ventures. Under German law the acquisition of a 25% interest in any company, whether or not active on the market, must be notified to the Bundeskartellamt. If you notify a cooperative joint venture to Berlin, you may ask the authority not only to clear the transaction under the Merger Control rules, but also to give an opinion regarding German cartel law and even Art. 85. This is very helpful in a straightforward case, and may influence the decision not to notify such a transaction to Brussels. The national proceeding in Germany is far more transparent and predictable than in Brussels.
One may talk to the people who decide the case, and a decision may be rendered within 24 hours.

Thus, I request that the Commission consider the proposition that, if a case is notified to the Bundeskartellamt and the FCO grants a 'negative clearance' under Art. 85, it need not be notified to the Commission. This would help reduce the burden on the Commission as well, even if the exclusive power to grant exemptions remains with the commission.

Observations and Comments

> **PROF. GYDER** — Query whether development of a European bar as a separate entity would be helpful.

> **DR. CANEBLEY** — It would be helpful to organise the private bar among various Member States, and this has recently been done in Brussels. Moreover, the private bar has had an ongoing discussion with the Commission; there is Committee C of the International Bar Association, and in Germany there is a bar association of competition lawyers which does not limit its activities to German law. It is most important, however, to have outside counsel of the highest quality in this area, whether or not they are members of a European bar association.

> **MR. POMBO** — It is critical to establish a system of proof of communication between the legal advisor and enforcement authorities, in order to improve transparency. This may be easier to accomplish through a body organised to communicate with the European Commission or the national authorities.

> **PROF. EHLEMMANN** — National groupings of practising lawyers have been organised. The one I know best is the Studienvereinigung Kartellrecht, because it is the oldest and most active. It has many meetings in Brussels and Berlin with enforcement authorities. I believe it is important for non-German speakers also to organise themselves. The Commission would benefit from dialogue with a transnational competition law association. Traditionally, the Commission refuses to talk to strictly national associations. It is the establishment of a network which is so fundamental for the Community. In view of my earlier professional experience, both in the Legal Service and in DG IV, I would consider this to be very, very valuable.

> **MR. ADDY** — Having a bar association as an interlocutor with the administration is useful, but it is not the panacea that one may think. The Canadian Bar Association’s section on competition law is relatively young. It has been very useful to the administration in dealing with issues of process. No plaintiffs' bar exists in Canada. The defence bar is unable to put on a public policy hat, because it is obliged to represent its clients' interests. Thus, it would not advocate the institution of private actions in Canada. This underlying agenda of the bar association members must be borne in mind. The private bar association is a useful vehicle, but it should not be the only interface relied upon by authorities for input from the public.

> **PROF. FORRESTOR** — I believe the Commission is commendably accessible and open. Many opportunities exist for Commission officials and the private bar to discuss issues. However, I believe there is a great lack of such communication at the periphery of the Community. I propose that DG IV should send a delegate to the national capitals of the Member States, whose purpose would be promptly to answer questions from local lawyers regarding application of Arts. 85 and 86 in their jurisdiction. At present, a local lawyer far from Brussels, who must rely on books, is not in a good position to advise clients skillfully.

> **MR. VENIT** — In Brussels, there is no "plaintiffs" bar or "defendants" bar. In addition, the Commission is a professional bureaucracy: there is no revolving door with the result that lawyers do not move from the Commission to private practice, and then back to the Commission as Directors General. This has advantages and disadvantages. One disadvantage is that Commission officials do not have an intimate, first-hand understanding of how the private sector works. We should reflect on what might be done to correct that deficit. I believe US antitrust law has profited significantly, as concerns its sophistication from the revolving door.

> **MR. TURETSKY** — The private bar's input has been tremendously valuable to US enforcement authorities. I believe many members of the private bar rise above the interests of any single client and give advice that is in the interest of the antitrust laws.

Regarding mergers, the threshold for notification in the US is US $ 15 million for size of transaction. Size of parties is also considered. It is surprising that the discrepancy is small between the percentage of transactions challenged at the low and high end of the thresholds.
US judges have narrowed the area for disagreement on the meaning of the antitrust laws. This has contributed to the creation of a consensus. It has also facilitated development of bipartisanship, which has been increasing over the years. The DOJ is involved in competition advocacy in regulatory settings, such as the FCC. A high degree of consistency exists between Democratic and Republican administrations.

Finally, the national authorities, the EU Member States and DG IV have been remarkably consistent in strength of enforcement. The DOJ greatly values cooperation with them, notwithstanding the tremendous difference in outlook of the various nations. One major difference is government ownership of industries, and the privatisation process in Europe, which does not exist in the US.

- Mr. Venit – A gap exists between the central level and the national level. This gap could be filled by private enforcement. Too much responsibility has been accepted at the centre because there was no alternative. Private enforcement can provide that alternative. This doesn’t necessarily mean enforcement of national competition law at national level; rather, it could be enforcement of Community competition law in a national court or a “federal” European court. For instance, if the suit were filed in Germany, but the practice at issue involved Germany, France and Spain, the court could base its decision on an overall assessment of the Community market, not just on the effects in Germany. Development of Community law has been hampered, and an excessive burden has been placed on the Commission’s resources, as a result of the absence of private enforcement. The reason for this has to do with procedural questions, and the absence of procedural rules and incentives that favour private enforcement.

- Mr. Rill – One of the richest traditions in the US is the bipartisan nature of antitrust enforcement.

Internationalisation of effort has increased for private practitioners, particularly in the area of competition. This responds to global competition, which has been developing to a dramatic degree. Private practitioners dealing with merger activities are, fifty percent of the time, dealing with their trans-border implications. Although a non-US lawyer would be lead counsel before the DOJ or FTC only rarely, and a US lawyer would be lead counsel before DG IV only rarely, nonetheless, the private sector must have greater coordination on global competition issues.

The NAFTA agreement has lead to a tripartite bar association committee, which must make recommendations to NAFTA concerning convergence of competition policies. The American, Canadian, and Mexican Bar Associations are considering trade and competition convergence. Moreover, the Business Advisory Committee and the Competition Law and Policy Committee of the OECD have become dramatically more active in the last few years. Two problems exist, however: insufficient participation of knowledgeable competition lawyers, even in the industrialised states; and insufficient interchange of ideas among those interested in global competition issues and the enforcement agencies.

I believe it is very difficult for the private bar fully to advise clients of the implications of certain conduct under competition law, without more transparency. This is a problem that exists in all countries, including the US. It may not be terribly difficult for private practitioners around this table to predict what an agency is going to do. However, the word is not disseminated broadly enough, and when confronted with competition issues, private practitioners have little confidence in advising as to what action the enforcement agencies are likely to take in a given case. The agencies should explain what they have done, and the rationale for their actions. The Commission is far ahead of the US in that area, because at least it issues reports explaining why a merger wasn’t challenged. We have almost none of that in the US.

To conclude, I believe transparency is an issue which the private bar should work on with the agencies.

- Dr. Canenbly – I want to revert to the importance of the private bar’s contact with the authorities. The objective of the Studienvereinigung Kartellerecht is to be a forum where outside lawyers meet with the judiciary and the executive. I think it is very important that we have this dialogue and meet with each other outside the realm of specific cases. This allows the private bar to voice problems of clients, which cannot be disclosed in individual cases.

However, it is important to limit the number of participants. I recall the antitrust luncheon in Brussels, created at the end of the 1960’s, where twelve people were meeting and having a very efficient dialogue. Now, between 80-100 very young lawyers attend this affair. The appropriate structure should limit the number of participants.

- Judge Wood – It is important to have a panel addressing the role of legal counsel for two reasons. First, they are people who are going through the procedures that the competition agencies have established, and thus, the only ones in a position to assess how well those procedures are working from the point of view of those subjected to them. Second, the defence bar, which represents those who may have violated the law, is usually better organised.
than the plaintiffs' bar, if the latter exists at all. Thus, we rarely hear from those who are the principal beneficiaries of the law, the consumers in society. I believe that in our efforts to get guidance as to what the substantive rules ought to be, it is important for enforcement agencies to bear in mind that they may not be hearing the full story from the defence bar, and that they should seek further information before any decisions about substantive law are made.

DR. PAIS-ANTUNES – In recent years, the problem of cases being blocked at Community level has become more serious. More time is needed to render decisions in cases, sometimes four, five and even six years. This is important to the future evolution of a system of protection of competition, and to relations between legal counsel and competition authorities. I have been on both sides of the fence, because I was in the Commission, at the Court of Justice, and I am currently working with a national authority.

The role of the lawyer is very different, depending on whether he or she represents the plaintiff or defendant. Often, the lawyer contributes to prolonging the procedures. When representing the plaintiff, the lawyer's interest is to proceed expeditiously. This was apparent before the Court of First Instance. Perhaps we should utilise these competition lunches in Brussels to improve relations between competition counsel and authorities.
A. Lawyers Will Adapt to Whatever Regulatory Structure Exists

This conference is devoted to considering possible reform of the system by which EC competition law is interpreted, applied and enforced. If there were to be a new regime, how it would function in practice would significantly depend on how the legal profession used it and on the judicial context in which it was placed. If reality and theory diverge, lawyers will note this and advise their clients accordingly. If a legal opportunity emerges, lawyers will exploit it. For example, in the UK, we can observe a surge in the use of judicial review as a means of challenging government action, and in several countries policy choices are often made by using legal processes rather than political ones.

While the lawyer is under a duty to advise his client prudently, to assist his client in obeying the law, and to refuse to assist his client in breaching the law, the lawyer behaves in response to his legal environment. He does not establish that environment’s features. Lawyers will live with, adapt to and exploit in their clients’ favour whatever opportunities the law offers. I do not suggest lawyers are parasitical, lacking in scruples or uninterested in law reform, being merely reactive to the regulatory world around them. Large enterprises will find competent counsel, and counsel will help the enterprise to adapt intelligently and realistically to whatever the legal or regulatory environment may be. Therefore, we should not expect reform because lawyers favour it, but because those in control of the regulatory environment accept it.

B. Successes and Weaknesses

The European Community has accomplished a great deal: the Single Market is almost a reality; the 1992 Programme has largely succeeded. There are thirteen Member States, the last accession having been smoothly accomplished, and

further accessions are expected. Within ten years, there will be perhaps twenty-five Member States. The EC competition law model, rather than the US model, is being exported to the east, and even to MERCOSUR in Latin America.

Moreover, the European Commission has attained an enviable position as an antitrust enforcer: it is only rarely paralysed by Member State opposition; its supervision of such sensitive matters as state aids is not contested; and it has imposed very large fines on companies which, at an earlier time, would have been national champions protected by their Member State.

Although its officials may be accused of being doctrinaire, overly rigid or unpredictable, they have never been accused of corruption or other impropriety. The Commission has been given the power to prohibit major mergers, and has done so. These are remarkable achievements. I believe the Commission is the leading competition agency in the world's leading trade bloc.

And yet, all is not well. Too much power exists at the centre and too little enforcement at the periphery. Too few decisions are rendered. Serious problems are rooted both in substantive legal theory and in enforcement procedure. Solving these problems would involve risks, but the successes already referred to justify taking those risks.

C. The Challenge

Thirty-four years ago, the drafters and interpreters of Reg. 17, the rule by which the competition articles of the EEC Treaty were to be applied, faced some fundamental choices. Should Art. 85(1) be deemed to prohibit all agreements, even if procompetitive in their overall effect, on the ground that they contained restrictions on the parties' freedom of action? The affirmative, conservative answer was understandable for new officials enforcing a new law, with no confidence in the sympathies of lawyers, judges, national officials or companies. The structure of Art. 85 is founded on a basic prohibition which has traditionally been broadly interpreted, relieved by the availability of an exemption.

To adopt an ecclesiastical metaphor, the tending of the cult in Brussels is entrusted to the clergy of DG IV. They encourage the laity to seek advice, but the advice they render is only informal. In order to be legally certain, the company must confess: completely, frankly, and in writing. Confession is a necessary step on the road to absolution. Having received the confession, the priests will consider it. This is a lengthy process, because each decision is not merely the answer to an individual notification, but a sign to all the faithful. The field is complex, the issues subtle, the procedures tortuous, the facts not always clear, and the moral and economic merits may be very debatable. A published absolution (or should it be an indulgence?) is an important but rare event, reserved usually for the propounding of a new theory. Most notifications do not generate a public response. When a dispute arises outside Brussels, the competent judge is likely to be perplexed: does the unanswered filing of a notification mean the Commission has given tacit approval? Each side claims that it knows what the priests are thinking, and any manifestation of activity by the Commission is seized as proof of the Commission's sympathy, or is discredited as mere preliminary musings. Yet even if the national judge feels he has clearly understood the issues and faithfully believes that Art. 85(1) applies but that the Commission would grant an exemption if requested, he may not do so. Only the high priests can take this step. This exacerbates the problem of too much power at the centre: Brussels is cheaper, and maybe more personal. It also seems more authoritative than the national courts, which should be the natural fora to relieve pressure on the Commission.

The capacity of the priests in Brussels to deal with all the problems which in theory are their responsibility is clearly insufficient. How insufficient, and alternative theories and alternative procedures, are discussed below.

D. Reality and Theory in Enforcing Art. 85(1) Largely Diverge

For a practising lawyer, the most remarkable feature of the enforcement of competition rules in Brussels is the extent to which actual functioning does not correspond to the applicable texts (other than for major mergers).

The job of a competition authority may be to punish anticompetitive practices or to regulate procompetitively. The Commission is meant to do each, both verifying whether past practices violate the law and either condemning or condoning them, and prescribing rules for future practices in order to promote effective competition and market integration. Although the Commission is performing its legislative/regulatory function well, its enforcement/sanctioning mechanism is in serious difficulty. The best example is perhaps the notification system. The ostensible function of notifications, reassurance for the doubtful who require legal certainty, is no longer the most common reason for notification. Instead, notifications are usually filed to secure the moral high ground in case of a dispute between the contracting parties. However, my own experience suggests that comfort letters are emerging more frequently than in past years, so the Commission may have breathed life back into the notification system.
Regarding the Merger Regulation, the theory, and the reality, is that major mergers require the blessing of the Commission, which must be requested promptly, and which must appear within a precisely defined short period. Experience has shown weaknesses in the regime: where merging parties wish to modify the agreement after they have heard the Commission’s criticism but before the Commission’s decision becomes immutable, extremely tight deadlines must be met. But these failings are marginal. The Merger Regulation functions well, with substance and procedure complementing each other. Lawyers are satisfied with it (and statistically most of us have a 100% success rate).

1. Deadlines and Speed

Can we draw universally valid lessons from the merger experience? Why cannot Art. 85 and 86 cases be closed within one month for most cases and four months for complex ones? Merger filings furnish comprehensive information from a willing company to a few officials who have no other tasks; most filings are not very controversial. Thus, the challenge of achieving compliance with tight deadlines is not terribly daunting in merger cases. However, the Merger Regulation experience reveals that the Commission can produce good, short, workmanlike decisions, within precise deadlines. Thus, a framework establishing predictable and rigidly-respected deadlines can be a businesslike structure, rather than a constraint.

2. Too Few Formal Decisions

The system must render more decisions more rapidly. A more predictable framework is needed for cases brought under Arts. 85 and 86. In a Community of fifteen Member States, with over 350 million people speaking eleven languages, covering the greater part of the European continent, the Commission is responsible for applying the competition rules to any agreement which affects trade and restricts competition between Member States. A steady stream of decisions should address the problems identified by the Commission’s staff, or brought to its attention through notifications and complaints (by those who favour the cheapness and informality of the Commission by preference to the courts). Under the present structure the Commission has primary responsibility for enforcing Arts. 85 and 86. In 1995, it produced a total of less than ten decisions.

I do not criticize the diligence, honour or skills of the institution or its staff. DG IV is always called upon to do more with less (too few staff; too many notifications and complaints; much use of the competition rules as ancillary weapons in commercial disputes having little to do with the competition rules; frequent poker games in which the Commission is tempted/urged/seduced/chivvied by companies to commit itself to a ‘decision’ which, win or lose, good or bad, someone will use in court; success in administering the Merger Regulation in manpower terms is bought at the expense of the traditional competition rules; and, naturally, hierarchical and horizontal consultative procedures appropriate to canon lawyers in the Vatican but wholly too burdensome for a modern trust-busting authority).

Many of the problems confronting the Commission over how to apply Arts. 85 and 86 are genuinely difficult. But the Commission must make choices. The egg must be laid, the risk must be taken, the knot must be undone, or cut, or left alone.

The job of the lawyer is to advise and help his client make intelligent decisions in light of applicable law. How lawyers operate is less problematic than the quality of the legal environment in which they operate. Enforcement of EC competition law in a federal antitrust system would be more successful if a number of reforms were made.

E. Possible Reforms: More But Less Perfect Decisions

A greater number of decisions of adequate quality is preferable to a tiny number of perfect decisions. The Commission’s cumbersome procedures and intellectual conservatism make it easier to prevent a controversial Commission decision from being taken than to achieve the taking of a decision. The jurisprudence of the institution will be enhanced by more decisions and by more legal clarification. The Commission is no longer an infant institution whose public reputation has yet to be established.

The Commission is considerably more cautious about changing its position than the European Courts, whose changes have sometimes been surprisingly abrupt. In several recent cases, the Court reversed itself quite dramatically: Café Hag,1 Ideal Standard and Keck.2 When will the Commission purge

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1 CNL-Sucal v. Hag, 1990 ECR 1-3711.
itself of the arcane subtleties of selective distribution systems? Why should it be procompetitive for a manufacturer to stipulate that only competent resellers will be supplied, but anticompetitive to specify criteria (such as size of stock or equipment or premises) which could establish a numerical limit to the number of such resellers? Changes of policy, confessions of error and even the occasional reversals do not damage the credibility of an institution or a service, provided they are convincingly acknowledged and justified. A decision constitutes precedent, and may be controversial. Thus, reversals will not be taken lightly. However, even if difficult, such decisions must be taken, and may require further change in the future.

Having represented the Commission in a hotly controversial case (Magill) which ended, to the surprise of many, in success for the Commission, I venture a shocking question: is it very terrible to lose in Luxembourg? Would our American colleagues say that if a prosecuting authority wins ten cases out of ten, either judicial review is insufficiently rigorous or the authority is overly cautious? Must the Legal Service always take the position that it is the sole guardian of the conscience of the Commission? DG IV officials can make mistakes, but the consequence of always pursuing perfectly crafted, legally conservative, unappealable decisions is the appearance of administrative inaction. Thus, I personally recommend reform.

It is easy to criticise and suggest that reform is desirable, but difficult to propose a realistic alternative. DG IV has little chance of receiving an increase in the number of officials to enforce competition law. Many agreements falling within the Commission’s interpretation of the prohibition of Art. 85 are neither notified nor exempted nor explicitly covered by the terms of a group exemption regulation. How can the supply of legal certainty be made to match the demand? Assuming that the problem of Art. 85 can be attacked in any of all of three ways, namely less need for decisions, simpler decisions, and alternative decision-takers, I recommend that the Commission: modify its interpretation of Art. 85(1) such that the number of agreements which in official theory are prohibited is lower; modify the manner in which it takes decisions to produce a greater number of decisions more rapidly, which are shorter and simpler; and increase the number of other entities which are encouraged to apply Arts. 85(1) and 86, and which are empowered to apply Art. 85(3).

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1. Interpreting Art. 85(1) Such That a Narrower Range of Agreements Will be Prohibited

In a mature legal system, it should not be necessary to obtain administrative approval of basically procompetitive exclusive agreements to be confident of their enforceability. If specific exemptions cannot be abolished, the Commission could announce that either the reply will take the form of an appealable letter, or, in cases not presenting important issues, the filing will be returned to the party. Silence by an administrative agency usually implies assent. If silence implies nothing, the agency should take steps to avoid misunderstandings. Clarifying the meaning of notification could be combined with better coordination between the Commission and the national authorities in handling notifications, as further discussed below.

The present system is not transparent because reality does not correspond to theory. Art. 85(1) applies to a vast range of agreements. An exemption is necessary for agreements to be enforceable, yet exemptions cannot be issued in the numbers required. The demand for legal certainty created by the Commission’s interpretation of the law far exceeds the supply of certainty which the Commission can deliver. This situation will worsen if competition law is invoked more frequently before national courts, and as the number of Member States grows.

Theology undergoes doctrinal revolutions, as do canon law, macroeconomic theory, social values, and others. Competition law should do the same. The Commission’s theories have evolved in a number of fields, and should be relaxed in others. Selective distribution would be a good starting point.

There must be continued readiness to take decisions in new areas of controversy, looking to the daily realities of the industry rather than fitting the industry into familiar doctrines. Broadcasting, telecommunications and sport are fields where the challenge is particularly strong.

A more realistic interpretation of Art. 85(1) would not affect the enforcement of Art. 86, which is where the Commission’s firepower is vitally necessary, especially in case of Arts. 86 and 90 and state-blessed entities.

In general, the Commission should be less concerned about market integration and theoretical contractual hindrances to cross border trade, and should place higher priority on situations where competition is not functioning due to governmental or regulatory obstacles.
2. Taking Simpler Decisions to Address more Problems

The decision should be merely a decision, not a principle graven in stone. More decisions should be rendered, even if shorter, which are administrative responses to the problem at hand rather than pieces of new rulemaking.

Some of the techniques of the Merger Task Force, notably deadlines, should be applied: an adequate, brief decision taken today is preferable to a perfect one taken in two years’ time.

Sophisticated companies have adapted intelligently to the realities of Art. 85(1), making a notification where commercial advantage is anticipated. Many would not miss the disappearance of the availability of notifications; for the exceptions, the Commission could provide authoritative advice with as much formality as the occasion demands.

If notifications are to be retained, it should be made less daunting for a non-expert to notify, notably by emphasising the availability of user friendly advice and of waivers of needless data when notifications are filed. The national competition authorities should perform this task.

Some of these reforms may require modifications of Reg. 17. Opening the glass showcase in which it is displayed may tempt profane Member States to scribble unwelcome changes, but perhaps this risk can be avoided without greater risks to future competition policy.

3. Increasing the Number of Entities Which Can Apply the Law

Rapid, advisory information and ideas should be proffered to national courts, despite the formal difficulties presented by doing so. Perhaps it is quicker and less costly to send an official to give oral explanations than to prepare a lengthy memorandum which must be full of caution and quasiformal language. Risks exist, but national judges would welcome the assistance. Unless national judges become more attractive dispute-resolvers, the Commission’s overload will not be cured.

High policy priority should be ascribed to helping ‘consumers’ of competition law, especially small and medium-sized enterprises outside major capital cities, to understand their obligations and their opportunities, and to assert them before their national courts. If successful, national courts would become more attractive fora, which would be a crucial step forward. Presently, complaining to the Commission is less costly, easier (and, arguably, more shocking for the target company) than filing and proving a case in a national court. Many complaints are not well founded, others are serious and well-founded. The Commission cannot forfeit its complaint-handling jurisdiction, nor would it be likely to want to do so. (I well remember Mr. Bulloch, my first complainant,\(^5\) saying how much he valued having been taken seriously.) I see no alternative to the Commission’s current policy with respect to complaints, which is to state plainly that certain complaints are better pursued nationally and to express in writing its concerns about doubtful complaints, even though such correspondence may be used by its addressee as a pretext for review by the Court of First Instance.

Information should be publicly available regarding Commission procedures, such as where a notification or complaint stands. The lack of transparency is especially serious in the case of state aids, where only insiders have information regarding procedures.

Cooperation with national competition authorities should be reviewed. They could offer practical, clear counsel to local enterprises, in cooperation with the EC Commission, and could thus play a role in a decentralised system of observance and enforcement. National regulatory authorities (responsible for telecoms, gas, energy, and so on) should also be involved.

Regional ‘attachés’ from DG IV in each Commission Information Office should be appointed to give advice on competition law locally.

National authorities should be allocated co-responsibility in the application of Arts. 85(1) and 86 under EC Commission supervision. Notifications with a German flavour should be forwarded to the Federal Cartel Office with a request for its advice within sixty days.

F. Reform at the Centre is More Important Than Decentralisation

Steps which are more modest than vast structural changes to be reviewed at an Intergovernmental Conference would put the Commission in a good position to defend itself against critics or jealous rivals.

The Commission has great prestige and has made great progress in EC competition law in thirty-four years. But more must be done. A market exists for convincing, prompt and intelligible analysis of competition problems rendered in a user-friendly way. The Commission must make greater efforts to strengthen its position in that market.

These familiar recommendations are not merely a replay of familiar ‘grogne’ by clever lawyers who do not live with Reg. 17 and the Commission’s creaky

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\(^5\) Distillers Company Ltd. v. Comm’n, 1980 ECR 2229.
internal rules, and who have the power to criticise but do not have the duty of applying the law. Any reform, however attractively packaged, will be unsuccessful unless the motor at the centre can be as active as necessary for stable forward progress. Existing structures do not function according to the applicable legal texts, and do not generate the richness of jurisprudence needed by fifteen Member States' diverse economies.

I have devoted so much space in this paper on the role of lawyers, presented at a high-level workshop on reform, to the working of the administrative machinery for two reasons. First, if the principal vehicle for enforcing the law is functioning imperfectly, it is of limited value for reform-minded debate to concentrate exclusively on how the lawyers behave. All would prefer to see competition rules applied transparently, vigorously, briskly. The power of the state can massively distort the marketplace and must, at times, be curbed. An appropriate competition policy is an essential component of a capitalist system. In Europe, it must constrain both the state and private enterprise.

It is plain that a lawyer in Inverness or Palermo who reads Reg. 17, and believes it means precisely what it says, would be mistaken. That is not fair, not transparent and not efficient. Yet only this month, Commissioner Van Miert stated that the time was not ripe for the Commission to give up its monopoly for issuing exemptions. I respectfully submit that the Commission cannot have it both ways. It must either commit itself to the appreciable risks of some of the changes mentioned above, or the Member States may seize the initiative and launch into the prodigious uncertainties of a new agency. For the reasons I mention below, I am very doubtful whether that would be an improvement.

Second, lawyers are adaptable creatures, who function in response to the legal and administrative structures which confront them. They will find ways of prospering and helping their clients to prosper in virtually any democratic environment subject to the rule of law.

A high priority should not be attached to making lawyers' lives easier, with one important exception: life is too interesting for specialist lawyers in Brussels and elsewhere, and too obscure for non-specialists in distant cities. The majority of lawyers who will encounter an EC competition law problem in their career are not specialists in Brussels. Those whom DG IV most regularly meets are not those who need help. The specialists will flourish in whatever conditions prevail.

Rather, those who should be considered are those at the 'periphery'. How can they get guidance? How can they know whether a case has been brought to DG IV's notice? How can they know whether a potential complaint is a waste of time? I offer two very specific examples, drawn from personal experience. Far too often, the attitude of Scots solicitors is to stay away from the Commission, to regard the block exemption regulations as mandatory norms, and to file notifications as if it were legally required. The same solicitors would never recommend, in a tax matter, that if in doubt the tax authorities should be requested to give a ruling. The client is advised: 'Do what the Commission would favour [not require or compel], because if you are wrong, you will be fined'. Too much analysis is distorted by a fear of penalties which in sober reality is groundless. Fear of fining is a major factor in the mind of non-specialist lawyers, yet it should not be. Likewise, it is not honest to pretend that specific exemptions are granted, when in reality this almost never happens. If reforms occur, non-specialist lawyers will be better placed to advise their clients accurately. Today, the gap between theory and reality signifies that non-specialist lawyers may well, in good faith and after prudent reading of the applicable texts, give inaccurate advice. That is profoundly wrong.

G. A New European Competition Agency

I seriously question whether any new entity, in Bonn or Luxembourg, would be more productive than the Commission in this century and perhaps several years of the next. How many years would be needed to agree upon the seat, the budget, who shall be consulted, how the votes shall be counted, who shall decide and what vetoes can be cast?

Though it is a separate debate, I also seriously question whether a European Cartel Agency would be more independent of Member State influence than DG IV is today. I have considerable doubts about whether a new agency would be free from the attempts of Member States to influence the decision making process. Moreover, I question whether today Member State lobbying in reality has a major impact on the application of Arts. 85 or 86. Governments rarely defend cartel members and are rarely strenuously involved in policy debates. When the level of a fine is being considered, a company under threat, as well as the relevant government, are likely to consult the cabinet of the Commissioner. I have doubts about whether fines are satisfactorily calculated, but Member State pressure is not the only, and perhaps not the biggest, problem. Certainly the level of Member State influence, directly and through friendly compatriot officials, is far less than over infringement proceedings under Art. 169. Member State pressure is probably more significant in cases involving Arts. 90 and 86 together, when applied to national champions; but I question whether matters could be otherwise, whichever agency were enforcing the law. Where Member State pressure is most significant, in the context
of state aids, I cannot see any way of avoiding the forceful expression of national will to the decision maker. I question whether a European Cartel Office in Luxembourg would be immune to this phenomenon.

As stated above, the administrative agency in Europe which has the best track record in resisting Member State pressure is the European Commission. It is by no means clear that a new agency would achieve this status, and certain that it would not do so quickly.

H. EC-law as Constitutional Law

The role of lawyers in Brussels, and their effective cooperation with the administration, is important. It is inherent in any branch of EC law that problems will frequently need to be addressed centrally and nationally, as a consequence of having a federal economic constitution enforced concurrently at central and state level. The phenomenon is not bad and is unfamiliar to EC lawyers.

I believe that some similarity exists between Brussels and Washington, DC in the 1930s or 1950s: an evolving law, young agencies, tension between the centre and the states. Talented personnel do not pass as freely from private practice to public sector and back in Brussels as would be desirable for each to know the other's problems. In general, I think the comparison is fair. However, I do not believe the floodgates of litigation would open if "American style" reforms were made, facilitating going to court or establishing clear deadlines and procedures. The high incidence of antitrust litigation in the US is largely attributable to treble damages, contingent fees and the absence of risk of being ordered to pay the legal fees of the unsuccessful party. US and EC antidumping regulations pursue similar goals and are comparable in a number of ways (indeed, the European version has become more "Americanised" over the years), yet their functioning is quite different.

I. Framework for Cooperation between Practitioners and Administration

Cooperation between the specialist bar and administration already exists. The current levels of cooperation need not be radically changed or reinforced. We should beware of establishing standing committees, consultative mechanisms and the like, a bureaucracy of ABA-type bodies. The Commission may have some monkish habits, but it does not inhabit a cloister. Officials are remarkably accessible to ideas and theories, willing to exchange ideas, explain, argue. Many periodicals are published, and even Europe, sometimes regarded as the Commission's Pravda or L'Osservatore Romano, is today capable of criticising or questioning competition decisions. A commendable level of exchange of ideas exists, albeit within a limited circle of persons.

Perhaps we should have a standing consultative committee. However, it would be difficult to avoid elitism if only a select few are consulted, or to avoid a huge, unwieldy body if everyone is eligible. The American Chamber of Commerce charges substantial fees for membership of its EC Committee, reflecting the thorough preparation and good documentation of its meetings. This does not seem to be a good precedent for the Commission to follow. In any event, I do not think that there is a lack of discussion. Conferences such as the Fordham Corporate Law Institute held in New York each October constitute a vast range of fora at which many ideas are exchanged. I submit that it is good for DG IV officials to accept invitations to such conferences.

Finally, in-house counsel is the front line of enforcement. In-house counsel is not an inferior, unreliable person who cannot be trusted to recommend that the law be respected or to discourage wrongdoing. It is crucial for the Commission to recruit the sympathy and participation of in-house counsel in upholding EC competition law. However, it is contrary to the enforcement goals of DG IV to undercut the role of in-house counsel by quoting in decisions their advice where it has not been followed by the company. We must work out an acceptable alternative to AMAS, an unworthy rule with which to enter the next century. It cannot be wise to discourage employed lawyers from expressing their advice in writing.

Conclusions

The Commission can either reduce the number of theoretically existing problems, or share the power to decide with other bodies, or change how it takes decisions. Some or all of these steps should be taken. If they are not, how can DG IV resist the radical suggestion that its powers should be spun off and given to a new European agency?

The experience of the Merger Regulation suggests that fixed deadlines and a more rigorous procedural framework help decision-making. It would, however, be unrealistic to assume that Art. 86 cases can be disposed of inside one month

or even four months. Even the most stakhanovite officials must learn, think, consult and respect the rights of the defence. It may be impossible to set a universally-applicable deadline. However, staff and lawyers could set a realistic timetable early on in the case.

The bipolar enforcement of Community law is a familiar phenomenon which presents no special difficulty in itself. It is a natural consequence of the Community’s ‘federal’ structure. Rather than considering whether the specialist lawyer would be helped or hindered by a different enforcement system, we should give high priority to furnishing reliable and user-friendly guidance to national non-specialist lawyers.

Common sense and the annual statistics tell us that the Commission is taking too few decisions and that a richer jurisprudence would be helpful. If this means shorter, simpler decisions which are not de facto regulations or advisory notices, so much the better. If this requires a modification of Reg. 17, so be it.

Existing administration cooperation with specialist lawyers is quite successful. More attention should be given to in-house counsel (AM&G needs reform) and to lawyers in distant cities (they have a right to deal with an administration where theory and rules match reality).

More important than how the lawyers are treated is how to deal with national courts. If they can be assisted in a prudent, rapid and helpful way, such as by furnishing testimony, the Commission will have taken a huge step towards a realistic workload.