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I Introduction

The European Commission has proposed big changes to European competition law, the biggest changes since 1962, in terms both of substance and procedure. Change has been called for since at least twenty years, and resisted for about eighteen years. It is interesting that Director General Ehlermann presided over an administration which, broadly speaking, set its face against such fundamental reforms (though there were occasional flutters of boldness in theoretical individual decisions). Yet, translated to Florence, he has encouraged the discussion of outrageous heresies. Whether Dr Ehlermann is to be regarded as a Luther (an insider who became a successful outsider), or as a Becket or Savonarola or Tyndall, three clerics who died violently but whose efforts are better judged by posterity, it is sure that these meetings of a small number of enforcers, professors, academics and practitioners have contributed to the process of reform. Indeed, at the preceding meetings of this group in Florence in 1996 and 1997 (and 1998, to some extent), the faces of Commission officials flushed and blushed to hear severe criticisms: the European system of interpreting and applying the Treaty’s basic rule on anti-competitive conduct did not work, could not work, had to change. These remarks were not new, but the circumstances were different: the new Director General confronted by his persecutors, confronted by the statistics of a case-load which was impossibly high.

1 The author gratefully acknowledges the very generous assistance and advice offered by his colleague Ann Stanley, as well as a number of other helpful persons who have answered technical, policy and legal questions.
2 This quotation from the seventeenth political figure, Lord Halifax, appears in Senator Jordan’s Preface to the annotated version of the Constitution of the United States of America, published by the Congress in 1782.
3 William Tyndall believed in lay access to the Bible. He emigrated from England to Vilvoorde, near Brussels, for peace to continue his translation efforts, but was captured there by secret agents of Henry VIII of England.
debates, although sparingly. Chief Justice Marshall said that the framers of the Constitution expected that it should endure for ages to come and consequently be adapted to various crises in human affairs.

It has never been suggested in Europe that EC constitutional doctrines must be interpreted according to the original intent of the founding fathers, nor in light of the Minutes of the drafting of the Treaty of Rome. Although there were many similarities between French agricultural rules and the EEC agricultural regime, the Court has never looked at the former for help in understanding the latter. However, the Court does make a comparative law review of national laws and jurisprudence in appropriate cases. So a 'bad' historical precedent would not be an incurable impediment to reform. However, a positive or favourable historical indicator could be helpful reassurance that the new regime is not contradicted by the earliest practices relating to competition law.

A request was therefore made to the keepers of the Council's Archives, and in March 2000 Ann Stanley and I spent some happy hours browsing. The documents available are the French language Minutes kept by the forerunners of the Council Secretariat, along with a few texts from the States involved. Those documents can be corroborated by an article written by Arved Deringer in 1963 and by early books on competition law. I have also spoken to some of the now-retired officials who worked in the Competition Directorate General in the early 1960s.

1.1 The big issues to be settled

During the six months from September 1956 to February 1957, the negotiators had the task of reaching consensus on the competition law portion of the Treaty. There were broadly three models. The German approach contemplated preventive control: an anti-competitive arrangement should be void unless approved. The French approach left more authority to the enterprise, so that the arrangement could be implemented without prior approval, but could be rendered retroactively void by the authorities. The Dutch (there was also a Belgian-Dutch variant) provided for compulsory notification and provisional validity, if the competition authority showed that it was abusive, the invalidity would take effect only prospectively. There was concern about price discrimination and refusals to supply based on grounds of nationality and even race or religion. There were thus a lot of what would now seem extraneous issues, and there were also real divergences both as to what were the enforcement targets and how enforcement should be structured.

The secretariat of the Intergovernmental Conference for the Common Market and Euratom prepared a chart, dated September 24, 1956, which showed the main lines of divergence. It is attached as an annex to this article.

In early September 1956, the German delegation considered that the provisions on this topic should use as their starting point the prohibition of agreements/cartels. However, exceptions should be allowed for certain kinds of agreements/cartels, it being clearly understood that these exceptions would be subject to checks against abuse.

Conversely, the French delegation wanted a system similar to its own legal system, and was supported by Belgium, which considered that it might be desirable for psychological reasons, to replace the absolute prohibition of agreements/cartels by the notion of checks against abuse. The French proposal was the closest to what finally emerged:

1. All situations or practices involving arrangements or monopolies with the object, or which may have the effect, of hindering the exercise of competition, are incompatible with the Common Market, in particular:
   - fixing or determining resale or sale prices;
   - restricting or controlling production, technical development and investments;
   - partitioning markets, products, customers and sources of supply;
   - permitting the absorption or domination of the market for a product by an undertaking or group of undertakings.

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7 See the as-yet-unpublished papers presented at the colloquium on The Role of Comparative Law in the Emergence of European Law organised by the Swiss Institute of Comparative Law, Lausanne, April 2000
8 The patience, good humour and creativity of the staff in charge of the Archives of the Council, notably Mr Sanchez Martin, are warmly to be commended.
9 Giancarlo Marcone of the Commission Legal Service has indulged in some parallel archaeology, and has set forth the references to all the documents to which he refers in a bibliography. In Marcone's benefit, a similar table is annexed to this article.
11 Such as that by the late Graupner R. (1965) The Rules of Competition in the European Economic Community, Martinus Nijhoff, one of the first serious studies in

English of the subject.
2. Situations or practices whose authors are able to prove that they effectively contribute to the improvement of production or putting into circulation, or to the development of technical and economic progress, may be exempted from the above provisions. The authors must also show that the consumer receives a legitimate share of the profit resulting from these measures.

3. (Provisions concerning State and public service monopolies to be inserted) 16

1.2 Discriminations based on nationality, race or religion

There is no sign, however, that the delegations attributed overwhelming importance to what we are discussing forty-four years later in Brussels. They were looking at older doctrines. Should price discrimination based on nationality be prohibited? Should discrimination be addressed in the competition articles or in a separate Treaty provision? At the end of October 1956, there was apparent unanimity among the Delegations "to limit the ban on discrimination to those practices which are effective within the Common Market and where the operators who are treated differently are in competition with each other. Moreover, the making of price differentials in comparable transactions in order to obtain a dominant position should not be dealt with by the ban on discrimination but within the framework of rules on unfair competition." The reasoning seemed to be that, although the Single Market's replacement of the six national markets would seem to necessitate a general prohibition of discrimination on the basis of nationality, "the opening up of the common market is not a reason to forbid discriminations committed for non-commercial motives, especially since discriminations based on non-commercial motives such as religious or political beliefs are rarely encountered in commercial life."* The Chairman of the Groupe du marché commun therefore proposed as a basis of discussion the following text:

Within the Common Market, it shall be prohibited to apply dissimilar terms in similar situations to buyers or sellers in competition with each other (according to their nationality), in particular to ask from them or offer to them different prices. Indeed, the working group discussed a number of versions of Treaty articles that would have formally condemned discrimination in economic matters based upon nationality. In mid-November 1956, the full text of Article 40a as proposed by the Chairman of the working group read:

Discriminatory practices carried out by commercial partners in competition with one another for reasons of nationality are prohibited within the Common Market. (However, undertakings are not prohibited from establishing their offers on the basis of the conditions offered by other undertakings with regard to delivery.)

* The German and Italian delegations have proposed that this article be deleted. However, in a conciliatory spirit, the Italian delegation would be prepared to agree to the article being worded as follows:

"If it is established that competition in the Common Market is distorted by discriminatory practices whose effect is to place buyers or sellers in the other Member States at a disadvantage owing to their nationality, the Council may, on a proposal from the Commission, unanimously adopt regulations with a view to prohibiting such discrimination."**

18 1. L'ouverture du marché commun n'est pas, un motif de réprimer d'autres discriminations commises pour des motifs non commerciaux. A l'heure des classes, les discriminations fondées sur l'origine ou sur les convictions politiques ou religieuses, par exemple, ne jouent guère de rôle dans la vie commerciale. * Id.

19 2. Il est interdit, à l'intérieur du marché commun, d'appliquer des conditions inégales à des transactions comparables, avec des acheteurs ou vendeurs en concurrence entre eux, suivant leur nationalité, et notamment de leurs demander ou de leur offrir des prix différents. * Id.

20 Article 40 dealt with the principle of discrimination on grounds of nationality. Article 40a contained the prohibition of discrimination. Article 41 dealt with anti-dumping. Article 42 was the ancestor of Article 85 (1). The numbering of the Articles and paragraphs, however, changed weekly. 21 "Sont interdites à l'intérieur du Marché commun les pratiques discriminatoires exercées en raison de la nationalité, à l'égard des marchés courants et des conditions de leur concurrence entre eux." (Noteworthily, it is not prohibited for undertakings to influence their offers in order to benefit from the conditions offered by other undertakings, at the end of the week.)

* Les délégations allemande et italienne ont proposé de supprimer cet article. Toutefois, dans un esprit de conciliation, la délégation italienne serait disposée à accepter que cet article soit rédigé comme suit:

"S'il est constaté que la concurrence dans le Marché commun est faussée par la pratique de discriminations ayant pour effet de désavantager des acheteurs ou des vendeurs des..."
Two weeks later, the delegations had agreed to eliminate the Article concerning
discrimination on the basis of nationality. It is evident that the wisdom of
dealing with anticipated nationalist commercial behaviour in the private sector
was vigorously discussed and then discarded. With respect to discriminatory
rules adopted for the public sector, it was decided that the promulgation of
these should be prohibited, rather than prohibiting that they be obeyed.

1.3 A discursive early review of competition problems

The French and the German delegates had a difference in approach as to
whether unilateral price discrimination by a non-domestic company should be
legal. The drafters also pondered whether abusive monopolies should be
addressed together with cartels or in a separate provision. The French view was
digisite, suspicious of price discrimination, perhaps rather tolerant of hori-
zontal arrangements under supervision. The conflicting approaches to enforce-
ment emerge clearly.

- M. Muller-Armack (D) noted that: 'the question of discrimination or price
differentials should not necessarily be considered from the point of view of
practices which harm competition. Dumping, dual pricing etc. are often per-
fectly compatible with a free market. When it does not give rise to abuse and
is not based on discrimination for reasons of nationality, discrimination in
itself is in no way harmful to the competition regime but, on the contrary, is
one of its normal features.'

autres Etats membres en raison de leur nationalité, le Conseil, sur proposition de la
Commission, peut prendre à l’unanimité tout règlement en vue de l’interdiction de ces
discrimination.' Proposal submitted by the President with a view to drawing up provisions
relating to obstructions to competition, November 14, 1956, Council Archives,
CM/3/NEG0236, Doc. MAE 541/556.

23 The working group considered that: 'the field of application of the provisions con-
cerning discrimination for reasons of nationality goes beyond the scope of the competition
rules, and that these provisions, which contain one of the fundamental principles of the
Common Market, should be placed at the beginning of the Treaty, for example as Article 21bis,' (le champ d’application des dispositions concernant la discrimination en raison de la
nationalité dépasse le domaine des règles de concurrence et que ces dispositions, contenant
un des principes fondamentaux du marché commun, devraient leur place au début du Traité.
Par exemple, comme article 21bis). Projet de procès-verbal des réunions du Groupe
tenues les 27-29 Nov 1956, Council Archives, CM/3/NEG0146, Doc. MAE 785/556
(Doc. 10, 1956).

24 Id.

25 La question de la discrimination ou de la différenciation de prix ne doit pas être
envoyée nécessairement sous l'angle des pratiques nuisibles à la concurrence.
Dumping, double-price, etc. sont souvent parfaitement compatibles avec un libre marché. Les discrimi-
nations en elles-mêmes, lorsque elles ne donnent lieu à des abus et ne remettent pas à
des discriminations de nationalité, ne préjuge pas en rien le régime de la concurrence mais,
au contraire, représentent un aspect normal de ce qui

- M. Donnedieu de Vabres (F) 'on the contrary, insisted on the need to draw
up precise legal rules with regard to price discrimination and differentials.' He
further noted that: 'not all arrangements and concentrations should be
condemned, since they may be compatible with economic progress.'

- M. Muller-Armack (D) stated that: 'a clear distinction should be drawn
between monopolies and oligopolies on the one hand, and cartels on the
other. Monopolies and oligopolies are not necessarily incompatible with a
competition regime. What must be abolished are the abuses to which cer-
tain monopolistic situations might lead.' He suggested: 'for cartels, the
principle of an absolute prohibition, while foreseeing the need to authorize
the existence of certain cartels which could exceptionally be compatible with a
competition regime.'

- M. Donnedieu de Vabres (F) responded that: 'the meaning of the French
word “arrangement” does not correspond to the term “karrell” used by
the Germans. It has a wider meaning, which is why it requires a more supple
regulatory regime than that proposed by Mr. Muller-Armack. Moreover, au-
thorised exceptions must have a special character, and be allowed on a case by
case basis and not generally, as the French Delegation seem to accept.

- M. Van Tichelen (B) 'declared that for psychological reasons it was dan-
gorous to provide for condemnation of arrangements in principle, but that
it would be advisable to let certain arrangements continue to exist for some
time.

- M. Linnhorst-Homan (NL) responded that: 'psychological arguments must
not win out against the objective needs of the Common Market, and that
for commercial and financial circles— it would be better to know the contents
and scope of the Treaty from the outset instead of being obliged to dither in
a situation of uncertainty.'

36 au contraire, insiste sur la nécessité d’élaborer une réglementation juridique précise
en matière de discrimination de prix et de différenciation de prix ; il ne faudrait pas condamner
toutes les ententes et toutes les concentrations, car elles pourraient être compatibles avec le progrès économique.

37 Il faut bien distinguer entre monopolies et oligopolies d’un côté et cartels de l’autre. Les
monopolies et les oligopolies ne sont pas nécessairement incompatibles avec un régime de concurrence. Ce qu’il faut supprimer, sont les abus auxquels certaines situations
monopolistiques pourraient aboutir.

38 Le terme "entente" au sens français du mot ne correspond pas à celui de "karrell"
employé par les Allemands. Il est plus large que le second et, d’ailleurs, pourquoi il existe une réglementation plus sévère que celle prévue par M. Muller-Armack. En outre, les exceptions autorisées devraient avoir un caractère particulier, être admissibles sur le cas by case
et non par d’une façon générale comme semble l’admettre la délégation française "etc."

39 "Déclare qu’il est dangereux, pour des raisons psychologiques, de prévoir une
condamnation du principe des ententes, mais qu’il serait souhaitable de laisser subsister certaines
ententes pendant quelque temps.

40 "les raisons d’ordre psychologiques ne doivent pas l’emporter sur les nécessités objec-
tives du marché commun et qu’il vaut mieux— pour les milieux commerciaux et
M. Muller-Armack (D) suggested as a solution to 'the problem of sanctions against the formation of arrangements', the adoption of 'the principle of the declaration of nullity "ipso jure"'.

M. Van Tichelen (B) stated 'imposing an obligation to notify on undertakings'.

Thus at the beginning of the drafting process, the founding fathers were by no means agreed either on what constituted problems or on what the remedies might be.

The notion of refusal to supply and price discrimination which French law did not discard until 1996, forty years later, was much debated. The notion of nullity now provided in Article 81 (2) is mentioned first by the German delegate. It appears one month later in a Note by the Chairman of the Groupe du Marché Commun: 33

'As the market must be governed by the same principles whether that position results from the scale of production of an undertaking or from an arrangement between several undertakings. However, there are differences between the situation of agreements and that of monopolies, which must be taken into account when drawing up the legal requirements concerning them. Thus, for example, one of the characteristics of agreements is that they are likely to hinder or prevent competition, and legal requirements should be introduced bearing in mind this effect and the extent to which it is produced or sought.'

With regard to monopolies, on the other hand, the more complete the monopoly, the less likely is it that any competition will be compromised or eliminated will exist. As a result, what should be prohibited in the case of monopolies is not hindrance of competition but only abuse of the dominant position in the market. Finally, sanctioning the annulment of legal operations which lead to the acquisition of a dominant position in the market should only apply to agreements.

At the beginning of November 1956, the Expert Group issued a proposal which contained a provision embodying the notion of nullity: 25

Agreements or decisions prohibited by virtue of paragraph 1 above (referring to the prohibition paragraph) are null and void in law and may not be relied on before any Member State jurisdiction.

Agreements declared null and void in law are null and void in law.

The delegations' positions on the proposed text can be collected from the following exchange: 26

M. Muller-Armack (D) expressed his full preference for a ban in principle on agreements, which was also accepted by the German legislation. But this principle did not seem to be really envisaged in the proposal, since even if point 1 (of the first article) provided for a ban, point 2 introduced too many exceptions. For this reason it would be preferable not to retain the 'principle of a ban' at international level, when this principle was not accepted in German national legislation; it would be more advisable simply to include in the Treaty a general declaration stating the incompatibility of arrangements with the Common Market, and to leave it up to the Member States themselves to make sure that this principle is put into practice during the first phase, through close collaboration and reciprocal consultation.


26 Les accords au décisions interdits en vertu du paragraphe 1 ci-dessus sont nuls de plein droit et ne peuvent être invoqués devant aucune juridiction des Etats membres. Le même ralent laïque les accords déclarés incompatibles par les termes du paragraphe 2 ci-dessus n'ont interdits par la Commission.

27 Reservation expressed by the Belgian expert: he would prefer the prohibition to be laid down by a court.


29 Exprimait sa préférence pour le critère de l'interdiction de principe du conteneur, qui est également accepté par la législation allemande. Mais, ce principe n'est pas seulement possible en l'état actuel de la législation internationale, alors que ce même principe n'est pas accepté par la législation nationale allemande. Il vaudrait mieux se limiter à inscrire dans le Traité une déclaration générale qui bannisse de l'entente avec le Marché commun en laissant au chef de l'Etat membre la voie de veiller à la réalisation de ce principe au cours de l'avenir et non une collaboration étroite et une consultation réciproque.
less extreme position if all the other delegations were ready to accept the principle of the ban adopted in the German legislation.\textsuperscript{40}

- M. Müller-Armack (D) 'replied that his position on this problem was inspired by concern that should the proposed Treaty contain a ban in principle on arrangements, it would encounter strong opposition from certain circles with vested interests'.\textsuperscript{41}

- M. Hyzen (NL) 'drew the Group's attention to the hybrid nature of the proposal drawn up by the experts, which seemed to be a mixture of two different systems, one involving a ban and the other simply control of abuses'. He ended by saying that every possible effort must be made to reach one single solution.\textsuperscript{42}

- M. Donnedieu de Vabres (F) stated that 'a statement that arrangements and monopolies were incompatible and must be banned should not be abandoned. The fact that national laws on this subject were not harmonised was not an insurmountable obstacle. National laws should transpose the Treaty provision on agreements and monopolies, so that after a certain time international legislation could be drawn up'.\textsuperscript{43}

- M. Catalano (I) 'supported the German argument in favour of purely and simply deleting [the first article] which, unlike Mr. Müller-Armack, he thought was wholly superfluous, if not dangerous, since all transactions would be caught by the ban on discrimination which it laid down'.\textsuperscript{44}

In parallel to these discussions in November 1956 about what we would call, for the drafters' debate on prohibiting price discrimination, the basis on which national laws was proceeding tied to their discussion on whether the rules enunciated in the Treaty should be directly applicable to the Member States. The President noted that most of the Member States at least agreed that the Treaty should only contain fundamental legal principles.\textsuperscript{45} He concluded that because the delegations could not reach an agreement on the text proposed by the Expert Group, they would refer the matter to a 'groupe restreint' which would consider:

1. a draft compromise setting out the principle of a prohibition of agreements and monopolies, to be drawn up jointly by the German, French and Italian delegations;

2. a draft compromise which would be presented by the President of the Common Market Commission;

3. a proposal setting out the principle of a restrictive measure against agreements and monopolies, to be presented by the Dutch delegation.\textsuperscript{46}

In late November, the working group considered a set of draft competition articles, in which appear both malice and the prohibition of discrimination on the basis of nationality.\textsuperscript{47}

- first Article:
  - Discriminatory practices on grounds of nationality by commercial partners in competition with one another are prohibited within the Common Market;
  - The Council, acting on a proposal from the Commission, may adopt by qualified majority any legislation with a view to prohibiting such discriminatory practices;

- second Article:
  - (remind: question of anti-dumping legislation)

- third Article:
  - (1) All agreements between undertakings, all decisions by associations of undertakings and all concerted practices which are likely to affect trade between Member States and whose aim or effect is to prevent, restrict or distort competition within the Common Market are prohibited, in particular those which consist of:

- [list of 5 practices, much as they appear in what became Article 85 (1)]

\textsuperscript{40} 'se déclare très préoccupé par les conséquences que la proposition allemande semble entraîner à l'égard des objectifs assignés au Traité et demande à M. Müller-Armack, s'il est prêt à voir passer des positions moins radicales ou en cas où toutes les autres propositions seraient prêtes à accepter le principe de l'interdiction adopté par la législation allemande'.

\textsuperscript{41} 'répond en disant que sa position à l'égard de ce problème est suggérée par le souci que le projet du Traité au cas où il énonce le principe de l'interdiction des ententes, ne fasse l'objet d'une farce opposition venant de certains milieux intéressés'.

\textsuperscript{42} 'appelle l'attention du Groupe sur le caractère hybride du Projet établi par les experts qui semble mêler deux systèmes différents: celui de l'interdiction et celui du simple contrôle d'abus. Il conclut en disant qu'il faut faire tout effort possible pour aboutir à une solution unique'.

\textsuperscript{43} 'il ne faudrait pas renoncer à l'annulation de l'incompatibilité des ententes et des monopolies à celui de leur interdiction. Le fait que les législations nationales ne soient pas harmonisées à ce sujet n'est pas un obstacle insurmontable. Les législations nationales devraient incorporer les dispositions du Traité en manière d'ententes et monopolies, de façon qu'après un certain temps une législation internationale pourra être établie'.

\textsuperscript{44} 'se réfère à la thèse allemande de la suppression pure et simple des prévisions mentionnées qu'il considère, à l'opposé de M. Müller-Armack, absolument superflue si non dangereuse, car l'interdiction des discriminations qu'il énonce ne peut que frapper toute transaction'.

\textsuperscript{45} Mémoire interne of Sept. 7, 1956, Fascicule 5, supra note 23

\textsuperscript{46} 1 un projet de compromis formulant le principe de l'interdiction des ententes et monopolies à élaborer conjointement par les délégations allemande, française et italienne.

\textsuperscript{47} 2 un projet de compromis qui sera présenté par le Président du Groupe du Marché commun.'
(2) These prohibitions will not apply to agreements between undertakings, decisions by associations of undertakings and concerted practices with regard to which those concerned can supply proof that they contribute towards improving the production or distribution of products or promoting technical or economic progress, and that users receive a fair share of the resulting profits, and that they do not

- impose on those concerned restrictions which are not indispensable for the achievement of these objectives,
- give these undertakings the possibility, for a substantial part of the products in question, to fix prices, limit production or market openings or eliminate competition from other undertakings

(3) agreements or decisions which are prohibited by virtue of the previous paragraph are null and void in law and may not be relied on before any Member State jurisdiction. 46

It is curious that the third paragraph, establishing nullity, refers back to the second paragraph, which was the precursor of the exemption. Did the drafters consider that nullity should be inflicted upon agreements prohibited by virtue of the second paragraph (as not eligible for an exemption)? If so, we could conclude that the drafters did not, at least at this point, interpret Article 85 as necessarily establishing a prior authorization system. Only those agreements falling within the prohibition of the first paragraph and not benefiting from the exceptions laid out in the second paragraph would be automatically null and void.

One week later, the nullity provision had been changed, and referred back to the paragraph concerning the prohibition, not the exemption! 47 Unfortunately, the archival documents do not provide any explanation for the change.

Another week brought a further change: the nullity provision, still located in the third paragraph, refers to agreements prohibited by "the present article." 48 This version is very close to what ultimately became Article 85 of the Treaty, save that paragraphs (2) and (3) are reversed. The drafting group was charged with determining whether the removal of the words "sont nuls de plein droit" would weaken the scope of the paragraph. Thus, the drafters considered that it might be enough that an agreement could not be invoked before a national court.

But in a draft dated February 14, 1957, the nullity paragraph was eliminated and the notion incorporated into the first paragraph containing the prohibition: Sont incompatibles avec le marché commun. intitulés et nuls de plein droit. tous accords. 49

It was not until the late date of February 23, 1957 that the order of the paragraphs appears as it does in the final form of the Treaty. 50 At this time, there was also discussion of whether the nullity should be prospective only, and whether the intervention of a national authority would be necessary to establish nullity.

It is clear that the nullity provision bounced around frequently before definitively arriving in Article 85 (2), its final rest place. The provision was in paragraphs (3), (2), and (1) at different times. The uncertainty related not merely to its numbering, but, more importantly, to its functioning. Upon which triggering event was the agreement to be void, and from then when did the nullity run? Having looked at the texts, it seems impossible to say that they clearly favour one answer more than another.

I think it is fair to say that the two paragraphs could be regarded as complementary, each being a part of a single analysis but they cannot—in my view—be regarded as favouring either the control of abuse theory or the prohibition of restrictions theory. Nor do the words "ou travaux préparatoires" indicate the relative weights to be accorded to Article 85 (1) and (3). Were the energy, authority, skills and resources of the enforcing agency to be deployed principally in applying paragraph (1) or paragraph (3)? The Minutes do not much help us as to the nature of the exemption process. Is the agreement which is

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46 Article 1
Sont incompatibles avec le marché commun. intitulés et nuls de plein droit. tous accords. 49

47 Projet de Rédaction, Nov 28, 1956, Council Archives, CM/3/NEG0/217, Doc. MAB1657/156

48 Rédaction approuvée, Dec 6, 1956, Council Archives, CM/3/NEG0/236, Doc MAB1788/156

49 Projet de rédaction du 14 Feb 1957, Council Archives, CM/3/NEG0/236

50 We found no explanation of why Articles 40(1), (2) and (3) became Articles 85 (1), (3) and (2).
caught by Article 85 (1) unlawful because it restricts competition but curable by Article 85 (3) because it serves broad competition goals despite its restrictive features? In this case, the entirety of the analysis would be a competition law analysis. Or might the role of Article 85 (3) be to extend to the agreement the benefit of general economic and social goals? In either case, there is a two-step process: Now, the Commission got itself into early difficulties by finding too easily restrictive features that necessitated the use of the exemption mechanism. Instead of blessing the agreement under Article 85 (1) as benign in its entirety, the Commission used the costly remedy of Article 85 (3) (costly because the apparatus of formally deciding to grant an exemption was far too burdensome) Thus to the extent that Article 85 was based on a prohibition theory, then it was used too promiscuously. As a result, Article 85 (3) was used for the wrong purpose, to confirm the overall legitimacy of the deal, as opposed to being reserved for the special occasions where the deal called out for creative thinking, tolerance or the grant of a short-term exceptional approval. A simpler way of saying this is to observe that if negative cleanances had been issued more frequently, the Commission could have kept up with the demand for exemptions by sharing the task of blessing agreements with national courts. By contrast, under the regime adopted, national courts had no function, at least in theory, once they had concluded Article 85 (1) applied.

The words as the drafters left them are clearly based on a prohibition. The reforms would mean that an agreement containing a restrictive feature would no longer be void until exempted; it would be void if its restrictive features did not satisfy the criteria prescribed in paragraph (3), rather than solely because it had restrictive features. That change is, at least in theory, a profound one. I argue below that, in practice, the change is not an important one.) However, I do not find in the travaux préparatoires evidence that the drafters would have opposed such an outcome.

The travaux préparatoires indicate, I submit, that the drafters could legitimately expect three features in European competition law enforcement measures. First, the prohibition and punishment of the unacceptable. Second, the intelligent and pragmatic examination of doubtful matters with a view to determining in a timely manner whether they are acceptable. Third, abstention from interference in benign matters. Granting direct effect to paragraph (3) is not inconsistent with that division; nor does it seem inconsistent with what the drafters intended. The debate in 1956 and 1957 was not as focused and as scientific as the one we are conducting forty-five years later. The delegates were exploring in a basically amicable and collegial manner concepts that were unfamiliar to most of them.

1.4 British doubts about what it all meant

While the finished versions of Articles 85, 86 and 87 of the Treaty of Rome may have pleased the drafters, they left many questions unanswered. On April 10, 1958, the British Embassy in Paris addressed to the French Government an aide-mémoire recording that there was:

- uncertainty in commercial and legal circles in the United Kingdom about the effect of Articles 85, 86 and 87 on current and future commercial contracts between parties in the United Kingdom on the one hand and parties in the countries of the European Economic Community on the other.

The UK presented a number of pertinent questions, such as:

- In order that this uncertainty may be resolved, Her Majesty's Embassy would be grateful if the Ministry of Foreign Affairs would provide answers to the following questions:
  1. Article 88 of the Treaty of Rome provides that until the entry into force of the provisions adopted in application of Art. 87, the authorities of Member States shall, in accordance with their respective municipal law and with the provisions of Articles 85 and 86, rule upon the admissibility of any understanding and upon any improper advantage taken of a dominant position in the Common Market. To what extent, and in what ways, does the ratification of the Treaty of Rome affect or modify existing municipal law in this field in France?
  2. Is a party to a pre-existing contract entitled to repudiate it if it falls within the prohibited class of contracts indicated in Article 83 (1) and (2) and is not saved by Article 85 (3)?
  3. Would the ordinary courts apply Article 85 if the dispute were brought before them by another party to the contract?
  4. What would be the position in the event of any conflict between the substantive rules of existing municipal law in France and Articles 85 and 86 of the Treaty of Rome?

On June 12, 1958, the French Permanent Representation proposed that the aide-mémoire should be examined by a working group of the six Member States.

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53 Read a competition decision like Acale/Bluete/ANT Nachrichten technik, 1990 CJ 1, 321/91, which lumbers through a series of reasons why jurisdictionally the deal falls within the Commission's clutches (changes in the parties' level of autonomy in various respects), and then records the many virtues of the deal.

54 Aide-Mémoire of April 10, 1958 from UK Embassy to French Government, Council Archives, CM2/1958/748. Identical memoranda were submitted by embassies in four other capitals. The sixth memorandum perhaps got lost.

in order to achieve a common line (or, if this were not possible, parallel lines). The Commission's reaction was unwise. In a memorandum dated June 19, 1958, the Competition Directorate General expressed its fears:

The Commission fully understands the French desire to avoid any increase in existing levels of uncertainty about the interpretation of these articles, which could arise if six countries were to give different replies to the questions from the British government.

The Commission (dishonestly or optimistically) expressed its desire to put an end as quickly as possible to this uncertainty, and asked for time to find a practical solution. It asked the Member States to give it some more time; and at the fourteenth meeting of Coreper in Strasbourg on June 20 and 21, 1958, there was a discussion of the subject. The Commission offered to propose an answer even before the summer holidays. The Italian delegation favoured a precise and comprehensive answer, but the French feared the need to offer a very complete and thorough reply, and proposed to send not a provisional answer which would in its turn call for an exhaustive follow up, and therefore favoured a simple answer. Belgium was troubled by the fact that there was no competition law in Belgium (has much changed?), and felt the need to offer reassurance to the British. The Netherlands favoured six different replies. Predictably, the outcome was the constitution of a working group which—rapidly—produced a common reply stating that:

The co-existence, foreseen by Article 89 of the Treaty, of national laws with the provisions of Articles 85 and 86 of the Treaty—a co-existence which national courts will eventually have to recognize—poses a problem of interpretation which can only be resolved definitively by the case-law of the Court of Justice in the context of the competition which is granted to it by the Treaty.

Furthermore, according to Article 89 of the Treaty, the Commission of the Community is charged when it takes up its duties—with ensuring that the principles laid down in Articles 85 and 86 are applied, which could lead the Commission to adopt a position on this subject.

The attention of the Commission has therefore been drawn to the questions raised. The Commission has informed the Government of that it intends, in the shortest possible time, to decide on its position on the most urgent practical questions regarding the application of these Articles. These questions include the problem of what procedure should be followed in order to put an end as soon as possible to the present uncertainties emphasized in the memorandum from the United Kingdom.

1.5 Conclusion on the archival evidence

The drafters were not contemplating the competition rules in the way that we have come to examine them. The text of Articles 85 and 86 was drafted in six months. The actual order of the paragraphs of Article 85 was still unsettled only days before the signing of the Treaty. The preamble was forgotten until just ten days before signing. The year after signature, neither the Member States nor the Commission were able to respond to the UK's questions about how the competition rules would affect executed agreements. The drafters probably did not fully realize the implications that these provisions would have in the ensuing years. These conclusions lead to the following remarks:

First, there was no single will or goal on the part of the drafters about the nature of the challenge to be confronted. Moreover, their concerns, to the extent they are discernible, are—not surprisingly—in different to those of today's enforcers. They were in a First of the Wood by today's standards. They were evidently worried about price discrimination, especially based on nationality. They were worried about what we would now call intra-Community dumping and anti-dumping measures. A reading of the Minutes does not suggest that they were unanimous in seeing competition as an instrument for deregulation, for adapting business structures and for stimulating economic efficiency and consumer welfare.

Second, they certainly looked at every possible variant, procedurally speaking. Should restrictive agreements be prohibited? Unenforceable? Void?

\[\text{\footnotesize Note of June 12, 1958 from French Permanent Representative, Council Archives, CM2/1958/748.}\]

\[\text{\footnotesize Note of June 12, 1958 from French Permanent Representative, Council Archives, CM2/1958/748.}\]

\[\text{\footnotesize Commission Memorandum of June 19, 1958, COM/58/132, Council Archives, CM2/1958/748 (La Commission comprend pleinement le désir français d'éviter l'incertitude actuelle sur l'interprétation de ces articles, qui pourrait se produire en cas où les six pays donneraient des réponses différentes aux questions du Gouvernement britannique).}\]


\[\text{\footnotesize La coexistence prévue par l'article 89 du Traité, des législations nationales et des dispositions des articles 85 et 86 du Traité—coexistence dans les juridictions nationales—auront\text{\footnotesize été} \text{\footnotesize éventuellement à considérer—pose un problème d'interprétation qui ne pourra être définitivement tranché que par la jurisprudence de la Cour de Justice dans le cadre de la compétence qui lui est attribuée par le Traité.}\}

\[\text{\footnotesize Par ailleurs, selon l'article 89 du Traité, c'est à la Commission de la Communauté qui incombe la tâche de veiller—dès son entrée en fonctions—à l'application des principes fixés par les articles 85 et 86, ce qui pourrait amener la Commission à prendre position sur ce sujet. C'est cette raison que l'attention de la Commission a été appelée sur les questions posées. La Commission a fait part au Gouvernement de de son intention de fixer, dans le plus court délai, sa position vis-à-vis des questions pratiques les plus urgents concernant l'application des articles mentionnés. Parmi ces questions figure le problème de la procédure à suivre afin de mettre fin, le plus tôt possible, aux investissements actuels soulevés dans l'acte-mémoire du Royaume-Uni.}\]

\[\text{\footnotesize Draft reply by the 6 Governments to the Memorandum from the United Kingdom, Council Archives, CM2/1958/748, Doc 676/538.}\]

Incapable of being relied on before national courts? Invalid after being declared unenforceable by national courts? *Ex tunc, ex nunc*? There were no obvious winners or losers. What they produced was an amalgam of several countries’ preferences.

Third, the new regime was based upon text drafted by a committee, a diplomatic compromise. The drafters’ governments were themselves unsure of the implications of that text only one year after its drafting had been completed. My impression is of well-intentioned confusion about a range of problems, rather than a focused, purposeful debate on accurately identified issues.

Fourth, Community law has moved on. Now it has the benefit of primacy over inconsistent national law, and of direct effect. The direct effect of Articles 85 and 86 was only established in my professional lifetime in BRT v SABAM. These judge-made creations are so important that it is not surprising the earliest texts were obscure without them, and that in judgments such as Portelange and Bosch the Court found these issues difficult.

As a result of all the foregoing, I submit that the answer to the question regarding the compatibility of the White Paper proposals lies primarily in the text of the Treaty itself, as explained by the European Courts and learned commentaries.

### III Textual considerations

Can we fairly read Article 85 as allowing what the Commission favours?

1. **The ECSC Treaty as a recent example**

The ECSC Treaty, signed in Paris on April 18, 1951, explicitly provides for prior authorisation. Article 65(1) contains a simple prohibition:

All agreements between undertakings, decisions by associations of undertakings and concerted practices tending directly or indirectly to prevent, restrict or distort normal competition within the common market shall be prohibited, and in particular those tending:

- (a) to fix or determine prices;
- (b) to restrict or control production, technical development or investment;
- (c) to share markets, products, customers or sources of supply.

Article 65(2) gives the High Authority/Commission the power to authorise certain categories of agreement:

However, the High Authority shall authorise specialisation agreements or joint-buying or joint-selling agreements in respect of particular products, if it finds that:
- (a) such specialisation or such joint-buying or joint-selling will make for a substantial improvement in the production or distribution of those products;
- (b) the agreement in question is essential in order to achieve these results and is not more restrictive than is necessary for that purpose; and
- (c) the agreement is not liable to give the undertakings concerned the power to determine the prices, or to control or restrict the production or marketing, of a substantial part of the products in question within the common market, or to shield them against effective competition from other undertakings within the common market.

Authorisations may be granted subject to specified conditions and for limited periods. In such cases, the High Authority shall renew an authorisation once or several times if it finds that the requirements of subparagraphs (a) to (c) are still met at the time of renewal.

The High Authority shall revoke or amend an authorisation if it finds that as a result of a change in circumstances the agreement no longer meets these requirements, or that the actual results of the agreement or of the application thereof are contrary to the requirements for its authorisation.

Thus the drafters of the EEC Treaty had before them the example of Article 65 of the ECSC Treaty. They were confronted with a broad range of possible control mechanisms. Arguably, the most compelling Community precedent would be Article 65, a prohibition of illegal conduct curable under limited conditions by the Commission and by no one else. They elected not to follow it. This seems to confirm the constitutional propriety of ascribing to other bodies the grant of exemptions under the Treaty of Rome.

2. **Article 85 (3) does not prescribe who shall decide upon exemptions**

Paragraph (3) states that the provisions of paragraph (1) may, however, be declared inapplicable.

There is no specification of which body may do the declaring: the Commission? The national courts? National regulators or competition authorities? It is clear from the Minutes already quoted that the delegates considered many hypotheses and came to a conclusion that did not decide for the future. When a Treaty, which in other respects is very precise about which institution shall do what, fails to specify who shall act, it means that the identity of the actor is left open. There are therefore good textual grounds for concluding that
the Treaty of Rome contemplated exemptions being granted other than by the Commission Nothing in Articles 87 to 89 of the EEC Treaty contradicts this conclusion 

3. Subsidiarity

It is also relevant that the Treaty has taken formal note of the doctrine of subsidiarity Article 3b, as amended by the Treaty on European Union, now reads:

The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty

I do not find attractive the notion of subsidiarity as a constitutional principle, but it has been adopted, and it is difficult even for an anti-subsidiarity-ist like myself to deny that it supports the proposition that national decision-making is not a priori inferior to Community decision-making. The local court or competition agency is likely to know the facts more thoroughly than a European agency. So decentralisation is consistent with the Treaty

4. Do Article 81 (1) and Article 81 (3) constitute a single text?

A more difficult textual question is whether one can fairly read Articles 81 (1) and 81 (3) together. This is a genuine and challenging legal problem with substantive and procedural consequences

Where only the Commission was in charge of the analysis, it did not make a great difference if the agreement was basically desirable in its totality, but contained restrictive clauses, the exemption decision would recite a litany of restrictions, and then a counterpoint of beneficial effects. The Commission was regularly encouraged to be bolder in applying Article 85 (1) in such a way as to find that clauses which notionally limited the economic freedom of the parties were nonetheless not anti-competitive in that their dispositions were a natural concomitant of a basically pro-competitive agreement. The ease with which clauses could be found restrictive meant that enterprises were reluctant to pursue formal exemption since obtaining one always involved the risk of being asked to make heavy concessions as the price of approval.

This phenomenon muddled the debate about the respective roles of Article 85 (1) and (3). Was the function of Article 85 (3) to cure, by reference to industrial policy, the competitive restrictions identified in Article 85 (1)? Or was it to be used only in the gravest cases, on pure competition grounds, where the criteria established by Article 85 (3) for the grant of an exemption had been stringently verified? If we looked at the decisions, however, the debate became irrelevant. The Commission's practice was not completely consistent, but generally if it granted an exemption it noted 'restrictive clauses' plus 'economic benefits', and then granted an exemption. Sometimes, there would be a bolder decision in which the restrictive features were minimised. Commission decisions, however, usually proceded to a classical textual analysis of restrictive clauses, followed by a curative recital of their wholesome economic effects.

Functionally, therefore, paragraph (1) and (3) have been read together in the Commission's practice. This had big implications for the enforcement of the law. The Commission was unable to deliver the exemption decisions for which its theoretical jurisdictional reach created a need.

Indeed, I submit that the core difficulty is not a textual problem at all but a problem of practicalities, of how the European Commission chose to structure its enforcement efforts. In the early 1960s, when Regulation 1762 was being drafted, the staff of DG IV had no special reason to be optimistic about the receptivity of businesses, their lawyers or even national judges to novel doctrines, promulgated by a young bureaucracy, still less the use of competition law as a tool for cross-frontier market integration. Naturally, the officials were reluctant to see their creature stifled at birth. So they decided that the basic prohibition should be interpreted as having a broad reach. It would be by the tolerant use of Article 81 (3) rather than by the mild use of Article 81 (1) that sensitive choices were to be made.

Producing a volume of decisions commensurate with the jurisdictional reach implicit in a broad interpretation of Article 81 (1) proved to be beyond the capacities of the Commission. The procedures adopted were too cumbersome, too thorough, too perfectionist, too slow. Some early decisions were taken very briskly, but others took years, even decades. The enforcement system effectively broke down; certainly specialist practitioners in Brussels had an

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64 Koranistimk ECR 900, OJ L 228/31 1990, for example, or Elaphuk Metal Box Ods, OJ L 209/15 1990, in which the Commission recited a lot of good reasons why the deal made sense as pro-competitive, dozens of decisions used this kind of reasoning in the past, but always as justification for granting an exemption under Article 81 (3), as opposed to negative clearance under Article 81 (1).

65 This approach to paragraph (1) may yet cripple the decentralisation effort, since if the authorities to whom power of enforcement is newly given follow the example of the European Commission from 1970 to 1999, they will create for themselves the same kind of difficulty as the Commission is trying to escape. Too many deals caught by the prohibition, too many candidates for exemptive treatment, too much procedural manipulation by using unanswered notifications as proof of legality.

66 Decision 724/80 CEE WE-A Fijpiew OJ L 303/62 1972, raced from opening to adoption in barely seven months.

advantage over non-specialists elsewhere. It was easier to prevent a decision being taken than to achieve the taking of a decision. Doubts and theoretical disputes could delay controversial decisions for years or forever. Victory in defending a client accused of an infringement would lie in the absence of defeat; that is to say in the non-taking of a negative decision rather than the taking of a favourable decision.

Thus the proposed reforms are largely a reaction to the Commission’s inability to enforce the system rationally. When the key documents were adopted over thirty years ago, expectations about how they would be enforced were different.

5. Are the Bosch and Portelange judgments relevant?

This is an appropriate moment to note the early judgments of the Court of Justice, where the Court had to consider the effect on ‘old agreements’ under the Treaty of Rome or Regulation 1762, of the new competition rules. Did a restrictive agreement become void from the moment of its signature, from the moment of the Treaty’s entry into force, from 1962, or from the moment of the notification? Or did it remain valid unless condemned? And if condemned, from what moment should the nullity run? The Bosch and Portelange cases offered an opportunity for the Court to consider how the competition rules ought rationally to be enforced.

In Bosch, speaking of ‘old agreements’, those signed before the entry into force of Regulation 1762, the Court said:

the authors of the Regulation seem to have envisaged also that at the date of its entry into force there would be subsisting agreements to which Article 85(2) applied but in respect of which decisions under Article 85(3) had not yet been taken, without such agreements thereby being automatically void.

The opposite interpretation would lead to the inadmissible result that some agreements would already have been automatically void for several years without having been so declared by any authority, and even though they might ultimately be validated subsequently with retroactive effect. In general it would be contrary to the general principle of legal certainty—a rule of law to be upheld in the application of the Treaty—to render agreements automatically void before it is even possible to tell which are the agreements to which Article 85 as a whole applies.

This seems consistent with the view that Article 85 is not a prohibition to which a potential cure is attached, but a conditional prohibition that applies if the cure is unavailable. Thus these paragraphs contradict the ‘German view’ that the reforms are improperly abandoning a regime of prohibition of infringements and adopting a regime of controlling abuses. They also contradict

Commission practice, which, was indeed to regard the denial of an exemption as having retroactive effect. The Court thought it would be wrong to prohibit and render void an agreement that might subsequently be validated retroactively.

However, the Court then discussed Article 85(2) which seems to regard Articles 85(1) and (3) as forming an indivisible whole. The Court was writing in an age when it was expected that the notification system would work rationally, with filing, examination and favourable or unfavourable response following each other in a rational manner and with reasonable speed. In Portelange, the Court may have noted the possibility of a problem of delay. It stated:

15 In view of the absence of any effective legal means enabling the persons concerned to accelerate the adoption of a decision under Article 85 (3)—the consequences of which are all the more serious the longer such a decision is delayed—it would be contrary to the general principle of legal certainty to conclude that, because agreements notified are not finally valid so long as the Commission has made no decision on them under Article 85 (3) of the Treaty, they are not completely efficacious.

16 Although the fact that such agreements are not validly notified give rise to practical disadvantages, the difficulties which might arise from uncertainty in legal relationships based on the agreements notified would be still more harmful.

19 It must therefore be concluded that the agreements mentioned in Article 85(1) of the Treaty, duly notified in accordance with Regulation No. 17, are of full effect so long as the Commission has made no decision under Article 85 (3) and the provisions of the said regulation.

I do not see in this judgment a definitive statement about whether Article 85(1) and (3) shall be applied in a sequential or in a unitary fashion. Both the Portelange and the Bosch judgments were considering practical procedural problems. They do not prove or disprove the Commission’s case: they were rational responses to the procedural situation as the Court could imagine it. They were adopted when all parties could reasonably expect that a notification would be examined promptly and decided with only moderate delay. It would therefore be unreasonable for the denial of an exemption to have retroactive consequences that went back a very long way. As we have learned, however, very few notifications lead to a formal decision and none are decided quickly. One may imagine that, confronted with such a procedural situation, the Court would have hoped to follow whatever approach was not inconsistent with the words of the Treaty and was most likely to deliver a procedurally rational framework within which business people could organise their affairs with a reasonable level of stability. The Bosch and Portelange judgments are best read as the Court’s reasonable expression of opinion as to how the notification system should work. I do not see them as making fundamental pronouncements relevant for all time in different procedural contexts. In any event, we should not feel

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69 Case 13/61 Bosch [1962] ECR 89
70 Case 10/69 Portelange v Smith Corona [1969] ECR 309
71 See Bosch at § 52

Portelange at §§ 15, 16 and 20
constrained by very early judgments when the Court was feeling its way (remember that the Court made early mistakes Sirena v Eda is probably the clearest).

6 Self-help and the rule of reason

Although the notion that ancillary restraints could be pro-competitive was helpful, and although the European Court was notably encouraging when it had a chance to bless a more robust approach to Article 85 (1), the Commission was reluctant to contemplate a reading of Article 85 (1) which allowed businesses on their own to conclude that a deal with restrictive clauses and pro-competitive effects was textually tolerable. My usual analogy for students is to say that DG IV was a catholic jurisdiction in which the affirmative approval of the priest was necessary; the layman was forbidden to discern the right path by consulting his conscience alone. He was eligible to receive blessing only after having made a full confession.

To quote the White Paper,73

The Commission has already adopted this approach to a limited extent and has carried out an assessment of the pro- and anti-competitive aspects of some restrictive practices under Article 85 (1). This approach has been endorsed by the Court of Justice.74 However, the structure of Article 85 is such as to prevent greater use being made of this approach: if more systematic use were made under Article 85 (1) of an analysis of the pro- and anti-competitive aspects of a restrictive agreement, Article 85 (3) would be cast aside, whereas any such change could be made only through revision of the Treaty. It would at the very least be paradoxical to cast aside Article 85 (3) when that provision in fact contains all the elements of a 'rule of reason' (Footnote referring to the Maize Seed and Prompria cases omitted.)

The Commission warned against

diverting Article 85 (3) from its purpose, which is to provide a legal framework for the economic assessment of restrictive practices and not to allow application of the competition rules to be set aside because of political considerations.75

The Commission had already started changing its mind (but was unwilling to voice doubts in public) when the intriguing judgment in Night Services77 emerged. There, the Court of First Instance offered its version of the point at which Article 85 (3) should become relevant:

The Commission submits that, whilst the analysis of an agreement must take account of its economic context, it does not follow that the rule of reason—a concept which the Court of Justice has hitherto declined to embrace—should be deserted. Consequently, it is necessary to balance the competitive benefits and harms of an agreement in relation to the granting of exemptions under Article 85 (3) of the Treaty but not in respect of the appraisal of restrictions on competition—which were, contrary to the United Kingdom's contention, fully explained in the decision—in accordance with Article 85 (1).78

Before any examination of the parties' arguments as to whether the Commission's analysis as regards restrictions of competition was correct, it must be borne in mind that in assessing an agreement under Article 85 (1) of the Treaty, account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned (judgments in Delimitis cited above, Gaitrup Khlm, cited above, paragraph 31, Case C-398/93 Oude Lusthuijsen and Others v Vormingsbeheer Co-operative HekIndustrieen [1995] ECR I-4515, paragraph 10, and Case T-179/98 YGB and Others v Commission [1997] ECR II-759, paragraph 140), unless it is an agreement containing obvious restrictions of competition such as price-fixing, market-sharing or the control of outlets (Case T-148/89 Triflunin v Commission [1995] ECR II-1065, paragraph 109) In the latter case, such restrictions may be weighed against the claimed pro-competitive effects only in the context of Article 85 (3) of the Treaty, with a view to granting an exemption from the prohibition in Article 85 (1) (emphasis added).

The route chosen by the Commission in the White Paper is faithful to its traditional doctrines:

The whole of Article 85 would then become a directly applicable provision which individuals could invoke in court or before any authority empowered to deal with such matters. This interpretation would have the effect of making restrictive practices which are prohibited by Article 85 (1), but which meet the tests of Article 85 (3) lawful as from the time they were concluded, without the need for any prior decision. Similarly, restrictive practices that restricted competition would be unlawful once the conditions of Article 85 (3) are no longer fulfilled. This new framework would mean that restrictive practices would no longer have to be notified in order to be validated. The arrangements for implementing Article 85 as a whole would then be identical to those for Article 85 (1) and Article 86.80

73 Case 40/70 Sirena Srl v Eda Srl and Others [1971] ECR 69
76 Case 161/84 Promptra de Paris GmbH v Promptra de Paris Iringard Schillgally [1986] ECR 335
78 Id at § 134
79 Id. at § 136
80 White Paper, supra note 73 at § 69
It is difficult to predict whether the analysis of a directly-effective Article 85 (1) and (3) would follow the liberal approach espoused in Guttrup Klim\textsuperscript{81} and European Night Services\textsuperscript{82} or the old approach in the joint venture cases like Alcatel, quoted above,\textsuperscript{83} or XIOpen.\textsuperscript{84} As noted elsewhere, I suggest that in jurisdictions where competition doctrines are new, or where the European Commission's policy serves as the role model for the local enforcement agency, there is a risk that it will be by the application of the exempted part of the equation that most sensitive decisions are made. In conclusion, I do not think, however, that there is a strong textual case against reading Article 81 (1) and Article 81 (3) together as a unity.

IV. Practical considerations

1. Legal certainty

Legal certainty or legal security (the terms seem synonymous) is very frequently invoked as a prime concern for those responsible for enforcing the competition rules. Advocates General, article writers, and the Commission itself have each stated on various occasions how important it was to ensure legal certainty. The absence of such certainty would typically be due to the unavailability of a formal Commission exemption decision, or due to the inherent uncertainty of a competitive situation in which a formal clearance or condemnation had not yet emerged. I have never been wholly convinced that an absence of legal certainty was such a terrible thing; or indeed that the achievement of legal certainty about the application of the competition rules was in truth feasible.

Competition law exists to encourage competition, not to prescribe or regulate rigidly or definitively. It is a plastic legal discipline. Its goal is to ensure the opportunity for economic operators to pursue prosperity in the marketplace and to engage in economic strife with each other. It is not realistic to imagine that a business manager can expect a high degree of legal certainty as to his competitive situation. There are certain matters in running a business where legal certainty is expected and indeed demanded. The formal requirements for the execution of a binding contract of employment must be known, and if they are not known or are constantly changing, business people can properly feel let down by legislators and judges. The terms of the law governing the lease of office premises or the effectiveness of a bank loan must be clear, and their application ought to be predictable. In private life, the rules governing the formal validity of a will and the constraints upon a testator's freedom to dispose of his assets as he chooses, are precisely defined by the law, and prudent people organise their affairs accordingly. By contrast, any business is today exposed to swings in the respective values of foreign currencies, changes in how business is conducted due to the Internet and e-commerce, continually growing social costs, the emergence of new products, and the gradual de-regulation of many markets which, in former years, were heavily regulated. The uncertainties posed for a business by these external political, fiscal, monetary, economic and social factors, to say nothing of changes in customer taste and the perpetually unforeseeable course of events, are far more significant and arguably far more threatening than the doubts attributable to the unpredictability of the outcome of any competition law dispute.

As long ago as the 1970s, prudent run companies were looking at the possibility of filing a notification with the European Commission, and concluding that this was one invitation they would not take up. Such companies would say to themselves that while it would be agreeable to have the formal confirmation of the European Commission that the arrangement to which they were party was valid and enforceable, there were countervailing drawbacks. The filing of a notification could draw attention to a transaction that might otherwise go unnoticed. More particularly, obtaining the Commission's approval could involve months and years of negotiation and concession. In most cases, the Commission's approval was not manifestly by any formal decision. The heart of the doctrine concerning whether a notification was desirable was therefore based on a fiction, namely that most notifications led to a formal disposition by the Commission's services. It can thus be observed that many companies have decided over the years that they will not exercise their option to file a notification requesting an exemption. They accept some diminution in the legal certainty governing their affairs, but do not regard this as troublesome.

2. Fictitious advantages of the reforms

At least one rationale for the change seems disingenuous. For example, it is contended that undertakings' legal certainty will remain at a globally satisfactory level, and in certain respects will even be strengthened. Thus, instead of depending on the Commission adopting an exemption decision, undertakings will be able to obtain
Immediate execution of their contracts before national courts, with effect from the date of their conclusion, provided that the conditions of Article 85 (3) are satisfied. There is no presumption that restrictive practices are void under Article 85: the prohibition contained in this provision is applicable only when the conditions of prohibition are met.

I call this fiction because companies did not find themselves having to wait for an exemption before being able to enforce a contract. In terms of legal certainty as that is conceived by the Commission, companies will not be better off. They will execute agreements containing clauses with restrictive features. If commercially convenient, they will endeavour to avoid complying with the contract on the grounds of competition law. There will be complaints or requests for the Commission's intervention to cure an uncertainty. The Commission's comments, whether framed as a formal decision (rare in the past and rare in the future) or in a simple administrative letter, will be given very great weight. While comfort letters did not formally solve the theoretical problem that only an exemption could cure a situation where there was a restrictive clause in a benign relationship, in actual practice I have never once encountered a judge who took the formal position that the agreement was necessarily damned since the Commission had not issued its formal blessing.

3 The supposed dangers of change

Supporters of the German view contend that by eliminating the automatic prohibition of paragraph (1), there is a danger of a loosening of the protections against anti-competitive agreements. On this basis, since the prohibition only bites once the grant of an exemption is refused, doubtful agreements and even plainly unacceptable agreements, will effectively remain provisionally valid until they are denied an exemption; by contrast, at the moment doubtful agreements fall under the prohibition of Article 85 (2) regardless of whether they might be said to be eligible for an exemption. Thus the victim of an illegal agreement might be forced to respect it, being unable to invoke its nullity in the absence of an affirmative decision in its favour, whereas today he could invoke nullity without needing to discuss whether an exemption might be available.

This is a substantial shift in the legal architecture of the competition rules. However, in my submission it will not make fundamental changes in practical outcome. At the moment, if Article 81 (1) is invoked before a national court, and if the court finds the presence of clauses deemed restrictive by the European Commission, in theory the court should either refrain from acting until the Commission has decided whether an exemption will be available, or should apply Article 81 (2). In actual practice, however, most judges are inclined to decide a case by enforcing or not enforcing the terms of an agreement rather than by doing an incomplete job. Thus in actual practice the courts are today not greatly hindered by the Commission's monopoly over the granting of exemptions; and I presume that judges who feel comfortable with competition law matters will welcome the new power to grant exemptions. Conversely, unlawful agreements upon which one party seeks to rely are unlikely to be enforced, regardless of the fact that in strict theory they would be enforceable for so long as an exemption has not been refused. In the same way as agreements in the past were prosecuted and threatened with fines, not because of their not having been notified but because of their contents and effects, agreements in the future will be threatened with nullity and fines not because they have not been granted an exemption, but because of their contents and effects. Functionally, Article 81 (1) and (3) are today read together. Functionally, they will be read together under the new regime. Neither outcome appears more or less likely to lead to genuine injustice.

4 Enforcement before thirty entities

Europe is not a judicially uniform continent. In certain countries, judges are well paid and honoured, the court system receives high amounts of public funding, the orderly handling of litigation is a high priority of the central government, and litigants and lawyers involved in the process are correspondingly fortunate. In other countries, judges are poorly paid, back-logs of judicial business extend to years, procedures are formalistic, slow and unpredictable. Litigation in any country is to be approached only reluctantly, but in the latter countries it is quite unlikely to yield timely satisfaction (I refrain from using the word 'justice'). Three contiguous extremes may be noted: Litigation before the High Court in England is luxury justice, costly and risky, but efficient and relatively rapid. In the Netherlands, kortgedwong procedure is in effect interim interlocutory hearings that can be heard within a few weeks of the initiation of litigation. Very often the first hearing, although notionally merely preliminary, constitutes the entirety of the proceedings. Those who want a quick answer can obtain one in a brisk and common sense atmosphere. In Belgium, the situation is very different. The judicial backlog is immense and it is not uncommon for ten years to elapse between the initiation of the litigation and its disposition. I lack personal experience, but I am commonly stated that litigation in Scandinavian countries is relatively rapid and efficient, whereas litigation before the Italian civil courts can be painfully slow. There are explanations for why the courts are so organised in each of the countries, and there is no early prospect of approximation of the different systems.

It must also be acknowledged that there are huge differences in the experience, skills, and resources of national competition agencies. Austria and Belgium are two countries where competition law enforcement is in serious difficulties. Although the need for an independent Kartellamt in Austria has been
recognised for years, and although a number of studies have been commissioned, and although there is cross-party agreement that the application of competition law needs to be improved, there appears little likelihood of change in the near future. The Ministry of Economics has the job of acting as competition authority, but it seems widely accepted that this is not successful. No competition agency has the right to apply Articles 81 and 82 of the EC Treaty. The Belgian Conseil de la Concurrence issued its second report with respect to the period 1994 to 1995. It has never issued a further report. In its second report, it stressed, as it had done in its first report, that due to staff and equipment shortages, it was able only partly to fulfill its duties under the Law of August 5, 1991, on the protection of economic competition. The report acknowledges that the Conseil de la Concurrence has, on a number of occasions, been unable to deploy officials to examine a merger within the statutory deadline. The Conseil de la Concurrence lacks books on competition law, legal periodicals, economic periodicals, filing cabinets, computers, and even enough officials who have fluency in Dutch and French. As protest about these inadequacies, the seven members of the Conseil de la Concurrence resigned. I may also observe that the decisions taken do not always carry complete conviction. In one case of which I have heard, the Conseil approved a joint venture between fruit and vegetable traders on the grounds that the parent companies and the joint venture would be active in different markets, the one being active in the long-term market for the sale of fruit and vegetables, the parent companies being active in daily operations. It was alleged that there were considerable spill-over effects between the two markets, but the joint venture was cleared nonetheless.

Other countries have very effective competition agencies. The Italian Autorita Garante della Concorrenza e del Mercato has had a tremendous impact in a short time led by eminent figures, and is well-funded and enjoying strong public support. Likewise in France, the Conseil de la Concurrence and the DGCCRF at the Ministry of Economic Affairs are widely regarded as knowledgeable, vigorous and effective. The German and Dutch agencies are similarly well-regarded, and in due course the UK, which has lacked an effective system of dealing with small cartels, will probably be endowed with a good regime. A report on each Member State's competition agency is beyond the scope of this paper. The point remains that there are substantial divergences.

It is sometimes argued that national judges cannot be trusted to do a good job of working with the unfamiliar economic doctrines involved in applying the competition rules. If judges are trusted to handle subjects like medical negligence, taxation, white-collar crime, and the calculation of damages in a vast range of circumstances, it seems unreasonable and elitist to deem them incapable of applying the competition rules. That said, the judges of certain countries are more familiar with competition law arguments than others, and this will hinder the invocation of EC competition law claims or defences before certain courts. Thus, Belgian, English and Dutch judges, to name only three, are unlikely to be nervous of confronting European competition law questions, whereas Portuguese and Greek judges might be.

Decentralising the government of a country can mean transferring authority from the central government to regional or local administrations. The roles and powers of the administrations to receive the new authority will be well known. If, tomorrow, the job of selecting the schoolbooks for primary pupils were to be effected by East Lothian District Council as opposed to a Scottish or UK Ministry, there is no doubt that the Council will know its task and be equipped to discharge it. By contrast, decentralising from the Directorate General for Competition to fifteen national authorities and more than fifteen judicial systems (regional judicial systems such as Scotland) represents quite a leap in the dark. Some agencies and courts are efficient, others are not. If the decentralisation were to work badly, substantial prejudice could occur for businesses located in Member States where enforcement is inefficient. The natural response will be forum shopping, which could take the form of pre-emptive action by initiating litigation in a slow jurisdiction, or by seeking to engage the attention of an efficient agency in a matter that is not primarily within its jurisdiction.

There will be many matters where more than one court jurisdiction or enforcement agency could be involved. Indeed, such is the trend to globalisation that it would not be surprising for three or four countries to have an interest in a particular controversy. The existing mechanisms for cross-border enforcement cooperation appear to be non-existent or rudimentary in many cases. While the goal of sharing enforcement responsibility with the Member States is plainly desirable, the European Commission will have an immense responsibility to coordinate, educate and mediate. It should also be ready to decide, in cases where this is appropriate, and I submit that the White Paper seems to contemplate something close to abstention in a wide range of situations. To the contrary, I would submit that since the Commission is the premier competition law agency in Europe, with excellent prestige, resources and experience, those resources ought to be available for deciding competition cases. To exaggerate the proposition, it would be disappointing if the Commission were to become merely a spectator of imperfect national enforcement of the competition rules that have been largely shaped by Commission enforcement action. Pursuing this theme, the Commission must have an enforcement role more extensive than major cartels, legislation, major mergers, and coordination. Today, businesses with a competition problem can obtain guidance in Brussels: one-stop shopping. The Commission's proposals go too far, I submit, in assuming that the move from centralised to decentralised enforcement will necessarily be a good thing. In many cases, especially at the beginning, substantial confusion seems likely. More precisely, there is a risk of wrong decisions, unjust decisions, or no decisions, and a step backwards from the level of enforcement, albeit imperfect, that we have today. Welcoming the proposal to share responsibility with national entities having resources beyond those of the Commission is not inconsistent with expressing alarm about the short- and medium-term problems which will probably arise if the Commission does not heavily and actively involve itself in the process of absorption into the Member States. The
Commission is traditionally very cautious about taking a position in cases pending before a national court. Because so much weight is attached to its opinion, what it says may effectively decide the competition point in dispute rather than merely giving guidance. The Commission therefore expresses itself very cautiously and the formulation of its replies to a request for assistance from a national court will normally take months. Possibly because of the Commission’s reluctance to take a false step in influencing the outcome of private litigation, its formal assistance has been requested on only a few occasions. Helping the process of decentralisation will involve giving help to national courts more quickly and less cautiously than has been the case in the past.

5 Notifications

The Commission dislikes notifications because they clog its in-box. This seems surprising, at least by reference to the volume of notifications recorded in the Annual Reports on Competition Policy. In 1998, there were 216 notifications; in 1999, there were 162 notifications. These numbers do not seem to be an excessive burden for a skilled administration with long experience and immense in-house knowledge. Moreover, a fair number of those must relate to transactions that are now eligible for a block exemption pursuant to the new doctrines on vertical restraints. In addition, a number are presumably principally national rather than European in scope. I therefore question whether the disadvantages to the Commission of notification are so serious as to outweigh the advantages of giving it thoroughly-documented, carefully-drafted descriptions of why particular transactions are to be regarded, in their entirety, as pro-competitive. When the private sector volunteers sensitive and potentially embarrassing information to a public authority, the public authority is better informed about market developments and techniques, learns who the big players are, understands where the controversies may lie, is better equipped to do its job, and is invited to guide major enterprises on how to respect the competition rules. These are important benefits. The notification system is capable of being abused. First, there is the notion of the so-called dilatory notification. The Commission’s Notice on Cooperation with National Authorities defines dilatory notification as

one where a firm, threatened with a decision banning a restrictive practice which a national authority is poised to take under Article 85 (1) or under national law, notifies the disputed agreement to the Commission and asks for it to be exempted under Article 85 (3).

Another category of potential abuse is what I call notification to achieve the higher moral ground, as follows: A firm enters an agreement. The agreement could be said to be caught by Article 81 (1) and there are doubts about whether the other contracting party might wish, in the future, for commercial reasons, to try to wriggle out of the contract, invoking the competition rules. Filing a notification offers the notifying party the opportunity to claim the higher moral ground; the Commission has been informed about the deal and has not challenged it. As a result, the transaction is presumptively valid under the competition rules. The vice in this situation is not the requesting of the Commission’s approval for a transaction, but the possibility that silence on the part of the Commission may be misrepresented as proving the agreement’s acceptability. The problem is curable by deadlines. If the Commission were obliged to respond to every notification within, let us say, forty-five days, the problem would be eliminated. There is a market for authoritative guidance on competition law matters. In the context of the Merger Regulation, the Commission is arguably the world leader in delivering such guidance. In the context of Article 81 (1), it could do better if it were less perfectionist and worked to brisk deadlines. While I accept that the Commission is not slamming the door in the face of those who wish to seek its guidance, I am not convinced that abandoning the notification entirely would be an appropriate response to the problem of supposed administrative overload through having had to examine less than two hundred filings.

6 Application in countries candidate for accession and other third countries

Obligations to adopt and apply competition rules are imposed by the European Association Agreements of 1993 and 1994 upon Poland, Hungary, the Czech Republic, the Slovak Republic, Romania, Bulgaria, Slovenia; by European Association Agreements of 1996 upon Lithuania, Estonia and Latvia; by Partnership and Cooperation Agreements of 1995 upon Russia, Belarus, Ukraine, Moldova; and by Mediterranean Agreements of 1995, 1996, 1997 and 1998 upon Tunisia, Morocco, Jordan, the Palestinian Authority and Israel. Like obligations are imposed upon Turkey, and upon Norway, Liechtenstein and Switzerland. The commonest method of implementation of these Treaty obligations has been for the third country to reproduce more or less faithfully the language of Articles 81 and 82 of the EC Treaty. My anecdotal experience suggests that enforcement agencies in Eastern Europe are most comfortable.

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67 Id. at ¶ 55
81 Council Regulation 4064/89 on the control of concentrations between undertakings, OJ L 257/4 1990
82 If resources are not available, why not levy a charge of, say, €10,000 per notification?
when applying a black-letter rule as set forth in a block exemption regulation, which they are likely to examine as if it was prescriptive and obligatory. Yet, the presence or absence of key clauses should not deliver certainty. Competition rules should move away from clause-driven unenforceability, for example whether know-how, which is the subject of an exclusive licence, should be recorded in writing in order for the licence to be exempted. These difficulties are well known to competition law specialists; and the Commission's theorists are correcting them. However, I question how the new enforcement jurisdictions will deal with their new responsibilities. Advising lawyers in these countries, practising before these administrations, certainly suggests that the competition law that is being exported from Europe to the East is the old law and not the new law. Again, the problem is capable of being solved, but it calls for the energetic involvement of the European Commission.

We are talking about competition, not aesthetics. Our criticisms of the new regime should be rooted in practicalities. Will the new system work better than the old one? A system which may contain paradoxes and inconsistencies but which functions well is to be preferred over a perfectly conceived system that does not function. I therefore commend the boldness of the Commission. It observed that the system is not functioning. It has adopted a path that will yield many more decisions applying the competition rules, some of which will be good and some of which will be bad. In this richer jurisprudence, there will be imperfections and injustices, but by the end of this decade, we should see the wholesome effects of the entering into daily business life of competition rules at national and international level. The difficulties of getting to that happy condition have been underestimated in the White Paper.

ANNEX 1: COUNCIL ARCHIVES—SUMMARY OF TOPICS

| DISCRIMINATION* |
|-----------------|-----------------|
| Projet allemand  | Projet français  |
| Art 42          | Art X (Doc Mar Com 37) |
| Est incompatible avec le marché commun | Sont interdits à l'intérieur du marché commun |
| communs et interdit le fait pour une entreprise de désavantage, dans des transactions comparables¹, des acheteurs ou vendeurs en concurrence entre eux, en raison de leur nationalité |
| des transactions comparables, à l'égard d'acheteurs ou de vendeurs en concurrence entre eux |

¹ Ces termes expression doivent être interprétés comme visant une inégalité dans les conditions faites à l'acheteur, qui dépasse l'inégalité que justifie la différence de nature des transactions comparables.
**ENTENTES**

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<th>Projet néerlandais</th>
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| Sont incompatibles avec le marché commun et interdits, dans la mesure où le commerce entre États membres s'en trouve affecté, tous accords entre entreprises ayant pour objet ou pouvant avoir pour effet d'entraver l'exercice de la concurrence, notamment — en fixant les prix; — en restreignant ou en contrôlant la production, la vente, le développement technique et les investissements; — en répartissant les marchés, produits, clients et sources d'approvisionnement. | Sont incompatibles avec le marché commun toutes les situations ou pratiques d'entreprises ou de monopole ayant pour objet ou pouvant avoir pour effet d'entraver l'exercice de la concurrence, en particulier; — en fixant les prix; — en restreignant ou en contrôlant la production, la vente, le développement technique et les investissements; — en répartissant les marchés, produits, clients et sources d'approvisionnement; — en permettant l'absorption ou la domination du marché d'un produit par une entreprise ou un groupe acteurs ou des vendeurs en concurrence entre eux dans la concurrence des marchés; a) l'exploitation abusive, par les entreprises publiques ou privées d'une position dominante sur le marché; b) les accords entre entreprises dont l'application constitue une entrave injustifiée à l'exercice de la concurrence. Ces pratiques abusives peuvent résulter notamment: — de la fixation de prix ou conditions de transaction; — de discriminations à l'égard des | Sont interdites à l'intérieur du marché commun les majorations ou minorations de prix et les modifications des conditions de vente opérées pour des transactions comparables, à l'égard d'acheteurs ou de vendeurs en concurrence entre eux, lorsque ces pratiques sont opérées: a) en application de réglementations publiques; b) pour obtenir une position dominante sur le marché; c) pour des motifs autres que commerciaux. | Sont incompatibles avec le Marché Commun et à interdire, dans la mesure où le commerce entre États membres s'en trouve affecté.  

Toutefois, lorsque la demande en est faite, les accords ou décisions de ce genre peuvent être autorisés si le requérant est en mesure de prouver qu'ils contribuent effectivement à améliorer la production ou la vente, ou à promouvoir le progrès technique et économique. Le requérant devra également prouver que les consommateurs bénéficieront raisonnablement des avantages qui résultent de semblables mesures.

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1. Cette expression doit être interprétée comme visant une inégalité dans les conditions faites à l'acheteur, ou dépassant l'inégalité que justifié la différence de nature des transactions comparées.

2. La question se pose de savoir si cette règle ne devrait pas être complétée ou remplacée par une disposition semblable visant les États membres.
DIVERGENCES—ENTENTES

Le texte allemand est le plus restrictif: il prohíbe seulement tout 'désavantage' fondé sur un motif de nationalité.

Le texte français est le plus large, en effet:

a) il prohíbe toutes majorations ou minorations de prix et toute modification des conditions de vente;

b) il s’applique non seulement dans les relations entre États, mais aussi aux transactions qui ne dépassent pas le cadre intérieur des États.

Le texte néerlandais est intermédiaire: il limite l'interdiction générale prévue dans le texte français aux trois cas a), b) et c).

Les projets français et belgo-néerlandais traitent sur le même pied les ententes et les monopoles. Toutefois, le projet français les interdit tous deux en principe, alors que le texte belgo-néerlandais les soumet au contrôle des abus. Le projet allemand distingue le cas des ententes, de celui des monopoles; il édicte l'interdiction des premières et soumet les seconds au contrôle de l'abus.

Les textes allemand et belgo-néerlandais limitent l'application des normes aux cas dans lesquels le 'commerce entre États membres s'en trouve affecté'.

Dans le projet allemand, les ententes peuvent être 'autorisées' dans certaines conditions; les ententes autorisées sont cependant soumises au contrôle de l'abus en application des dispositions inscrites sous b). Dans le projet belgo-néerlandais, ententes et monopoles sont soumis au contrôle des abus en application des dispositions inscrites sous a).
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<tbody>
<tr>
<td>Les États membres peuvent, avant l'expiration d'un délai de deux ans à partir de l'entreprise en vigueur du présent Traité, conclure un accord additionnel contenant des dispositions en vue de la mise en œuvre des principes énoncés aux articles 42 à 42b et du règlement de la procédure. Si, à l'expiration des trois années qui suivent l'entrée en vigueur du présent Traité à aucun accord additionnel de ce genre n'a pris effet, la Commission édictera même un règlement général d'utilisation comportant des dispositions de cette sorte, ce devant être approuvé par les États membres. Elle assure entre les États membres un échange de renseignements permanents.</td>
<td>A l'expiration d'une période de deux ans à partir de la mise en application du présent Traité, chacun des États membres devra avoir pris les dispositions législatives ou réglementaires nécessaires pour assurer la mise en œuvre effective des dispositions, en ce qui concerne le commerce intérieur de chaque État et le commerce entre États. La Commission sera consultée en vue d'assurer l'harmonisation de ces dispositions avant leur mise en vigueur par les États membres. Elle assure entre les États membres un échange de renseignements permanents.</td>
<td>La Commission prend des règlements généraux d'exécution soumis au vote de l'Assemblée pour la mise en œuvre des principes énoncés ci-dessus et fixe les mesures nécessaires a cet effet.</td>
<td>Trois systèmes sont en présence: a) le système français: chaque État prend les dispositions nécessaires; la Commission coordonne; b) le système allemand: conclusion d'un accord additionnel entre États membres; à défaut d'un tel accord dans une période de 3 ans, la Commission édicte un règlement général, avec approbation du Conseil statuant à majorité qualifiée; c) le système néerlandais: l'Assemblée Commission prend des d'exécutifs règlements généraux qui sont soumis au vote d'ensemble par l'Assemblée du Conseil de l'État.</td>
</tr>
</tbody>
</table>

1 La délégation néerlandaise a indiqué qu'elle préfère le système prévu par le Rapport, mais que, à défaut, elle pourrait se rallier au projet allemand sous réserve de l'assistance de l'Assemblée.

2 Il importe de préciser quand les réglementations d'application seront en vigueur, car la procédure qui y sera établie déterminera l'application des dispositions de l'État.

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**DECISIONS ET RECOURS**

<table>
<thead>
<tr>
<th>Projet allemand</th>
<th>Projet français</th>
<th>Projet néerlandais</th>
<th>Divergences</th>
</tr>
</thead>
<tbody>
<tr>
<td>La Commission crée une instance de recours qui examine, soit d'office, soit à la demande de l'État membre ou d'une entreprise, les cas de prétendue violation des principes de concurrence loyale, si elles sont énoncées aux articles 42 à 42b. L'instance de recours propose aux parties une solution amiable. Si les parties n'ont pas ou s'entendent dans un délai de trois mois à compter de la notification de la solution proposée, la Commission ou un État membre pourra saisir la Cour de Justice.</td>
<td>a) En cas d'application abusive ou de non application des dispositions prévues au A. ci-dessus après le délai de deux ans, l'État dont un ressortissant est lésé peut prendre provisoirement les mesures réglementaires nécessaires et saisir de l'affaire la Commission. Lorsque les situations ou pratiques visées au B. ci-dessus affectent le commerce entre deux ou plusieurs États membres, chacun d'eux peut saisir la Commission pour leur défense. La Commission peut également saisir d'office.</td>
<td>La Commission, soit d'office, soit à la requête d'un État ou d'une entreprise, instruit les cas d'infractions aux règlements généraux. Elle propose aux parties les conséquences et saisir l'instance constatée. Si, à l'expiration d'un délai de trois ans, elle constate que l'entreprise à laquelle l'infraction est reprochée, ne se conforme pas aux règlements généraux, elle applique les mesures suivantes: — dans le cas d'une entreprise, elle procède à l'annulation de l'infraction; — dans le cas d'un monopole, elle fixe les prix et conditions de vente à appliquer par l'entreprise en cause, ou établit des programmes de</td>
<td>Système allemand: 1. création par la Commission d'un instance, qui examine soit d'office, soit sur demande, les cas de prétendue violation; 2. l'instance propose aux parties une solution amiable; 3. a défaut d'acceptation de cette solution, recours à la Cour de Justice. Système français: 1. il appartient aux seuls États de prendre les mesures requises et/ou de saisir la Commission; 2. la Commission propose aux États les mesures relevant de leur compétence et prend les mesures qui relèvent de sa compétence propre; 3. en cas de non-application, la Commission saisit le Conseil, qui décide à la majorité qualifiée; 4. recours devant la Cour de Justice.</td>
</tr>
<tr>
<td>b) La Commission assure l'instruction des affaires en liaison avec les États intéressés et propose à ceux-ci les dispositions entrant dans le cadre de leur pouvoir propre et qui sont de nature à porter remède aux situations ou pratiques incriminées. La Commission peut également prendre les mesures relevant de sa compétence propre.</td>
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</tbody>
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## ANNEX 2: DOCUMENTS FOUND AT THE COUNCIL ARCHIVES

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<thead>
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<tr>
<td>27/5/1956</td>
<td>CM3/NEGO/026</td>
<td>MAE 139 056</td>
<td>Propositions de rédaction d'articles concernant les règles de concurrence et les distorsions</td>
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<tr>
<td>6/7/1956</td>
<td>CM3/NEGO/026</td>
<td>MAE 148 056</td>
<td>Projet d'articles concernant les règles de concurrence</td>
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<tr>
<td>4/9/1956</td>
<td>CM3/NEGO/026</td>
<td>MAE 233 056</td>
<td>Proposition de la délégation française concernant les discriminations en matière de prix et les pratiques restrictives de la concurrence</td>
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<tr>
<td>7/9/1956</td>
<td>CM3/NEGO/026</td>
<td>MAE/sec 29/56</td>
<td>Mémorial interne du secrétariat</td>
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<tr>
<td>10/9/1956</td>
<td>CM3/NEGO/026</td>
<td>MAE 325/56</td>
<td>Projet d'articles remis par M Tiesing, 10 09 1956</td>
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<tr>
<td>24/9/1956</td>
<td>CM3/NEGO/026</td>
<td>MAE 468 056</td>
<td>Tableau synoptique des projets d'articles concernant les règles de concurrence applicables aux entreprises</td>
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<td>6/11/1956</td>
<td>CM3/NEGO/026</td>
<td>MAE 468 056</td>
<td>Proposition de base pour la deuxième lecture par le groupe du marché commun en ce qui concerne les règles relatives à la discrimination entre ententes et monopoles</td>
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<td>7/11/1956</td>
<td>CM3/NEGO/026</td>
<td>MAE 527 056</td>
<td>Projet de rédaction sur les règles de concurrence</td>
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<td>12/11/1956</td>
<td>CM3/NEGO/0217</td>
<td>MAE 541 056</td>
<td>Proposition soumise par le Président du groupe du marché commun</td>
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<td>CM3/NEGO/236</td>
<td>MAE 547 I/56</td>
<td>Projet de rédaction de la délégation néerlandaise sur les règles de concurrence</td>
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<td>MAE 602 I/56</td>
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<td>MAE 657 I/56</td>
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<td>Extrait du procès-verbal de la réunion du 06 12 1956 des chefs de délégation</td>
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<td>CM3/NEGO/266</td>
<td>MAE 262 I/57</td>
<td>Rédaction approuvée par le comité des chefs de délégation concernant le chapitre relatif aux règles de concurrence</td>
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<td>MAE 472 I/57</td>
<td>Projet de rédaction des articles concernant les entreprises publics et monopoles d'état, par le secrétariat</td>
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<td>25/2/1957</td>
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<td>MAE 814 I/57</td>
<td>Projet de traité instituant la CEE</td>
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