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**EC Competition System – Proposals for Reform**

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## **I. Introduction**

Ladies and Gentlemen,

At last year's conference I spoke under the heading "The Millennium Approaches" about the challenges which EC competition law is facing or which it will face in the near future. I came to the conclusion that time has come for a re-examination and modernisation of our rules, in particular the implementing and procedural legislation. Briefly, my reasons were as follows:

First, a fundamental change is taking place in the environment in which EC competition law operates. It is driven not only by developments for which the Community itself has opted, such as the single market and Economic and Monetary Union (EMU), but also by conditions which are inevitably imposed on us such as the pressures of globalisation and technological change.

Second, the accession of new Member States in the foreseeable future becomes an ever more real prospect. In March 1998, negotiations for accession were initiated with a first group of six candidate countries (Poland, Czech Republic, Hungary, Estonia, Slovenia, Cyprus). A further five countries (Romania, Bulgaria, Slovakia, Latvia, Lithuania) are continuing their preparations with a view to opening accession negotiations at a later stage<sup>1</sup>. Thus a European Union with more than 25 Member States is on the horizon. The first of our two main challenges will be how to bridge the enormous economic gap between old and new Member States and to avoid market distortions between advanced free-market countries and those completing their transition to a market economy. The second main challenge is that our institutional and procedural laws, which were designed for a much smaller Community, will have to undergo an overhaul in order to keep the system workable and allow the integration process to continue.

Third, there are new legal developments inside and outside the Community. The enforcement of competition principles has become more effective in most of the Member States. National competition laws are being set up or being reformed so as to be more efficient. Credible national competition authorities have been established

and there is increasing application of EC competition law not only by national courts but also by national competition authorities. Moreover, growing interdependence between the European Union and third countries brings us into contact with their competition law and enforcement practice and makes necessary the conclusion of bilateral as well as multilateral agreements.

## **II. The basic orientation of our reform efforts**

Let me say some words about the basic orientation of our reform efforts. EC competition law operates in five main areas:

- the control of Restrictive agreements and Abuses of dominant positions under Articles 85 and 86,
- Merger control,
- Liberalisation under Article 90,
- State Aid control,
- International co-operation.

While these different areas cannot be treated in all respects in the same way, the basic orientation of our reform efforts applies to all of them, albeit to substantially varying degrees. This basic orientation is to achieve several objectives which are closely interrelated. I think it is useful briefly to describe them before I turn to their implementation in the different areas of EC competition law.

### **A. The first basic orientation: The Commission has to concentrate on the essentials.**

#### **1. What are the essentials ?**

Our experience shows that the essential issues which should be treated by the Commission at European level cannot simply be defined on the basis of the criteria which decide whether Community law is applicable or not. In other words, not every

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<sup>1</sup> Moreover, Malta has recently revived its application for membership.

competition issue which involves effects on trade between Member States (in Article 85/86 and State Aid cases) or for which the thresholds under the Merger Regulation are met, necessarily and under all circumstances has to be dealt with in Brussels. Where certain requirements are met - I come to them later - some of these cases can be dealt with at least as effectively by national authorities and/or national courts. The reasons to keep their treatment on the national level are twofold: we want to ensure that decisions are taken as closely as possible to the citizens, and we recognise that the objectives pursued by EC competition law could not be better achieved if EC institutions dealt with these cases. This means that the criteria for identifying the essential competition issues and cases on which the Commission should concentrate follow the notions of **subsidiarity and proportionality**, more recently introduced in Article 3 b EC Treaty. I do not intend to elaborate any further here on the question whether these principles are exclusively or mainly designed for legislative action. The underlying ideas certainly also have a meaning for sensibly defining the roles which the Commission and national authorities and courts should play in the enforcement of EC competition law. Consequently, the Commission should concentrate on those cases where it can produce better results in terms of achieving the objectives of EC competition law as well as providing guidance and legal security within short, efficient and transparent procedures. Thereby we would provide an added value in comparison with national authorities or courts.

## **2. How can the Commission better concentrate on these essentials ?**

Basically, three things, which go hand in hand, are needed:

### **2.1 First, wherever possible, we need more decentralised application of the EC competition rules, but without jeopardising coherence.**

This is mainly, but not exclusively, a matter for the enforcement of Articles 85 and 86. However, State Aid and Merger control should not, in principle, be excluded from any decentralisation. Therefore, certain - though still limited - elements of decentralisation can be found in our concept for competition policy development in these two areas.

## **2.2 Second, adequate devices have to be found to free the Commission from unnecessary notifications.**

The Commission must regain the possibility to pursue a **more pro-active approach**. By spending less time re-acting to notifications which are of little interest from a policy point of view, it will have more time to deal with serious restrictions of competition, in particular those cases which it has chosen to take up *ex officio* or following a complaint. The Commission will thereby gain space to set its own priorities rather than have an agenda imposed on it by an excessively rigid system of compulsory or quasi-compulsory notifications.

## **2.3 Third, less *a priori* and more *a posteriori* control.**

More decentralisation as well as securing a more pro-active role for the Commission will lead to, and at the same time call for, reducing the amount of ***a priori* control** in favour of more ***a posteriori* control**. This will be exercised not only by the Commission but to an increasing extent also by national bodies. Where appropriate, this tendency should be promoted by further measures.

## **B. Our second basic orientation: The reformed system must ensure more efficient enforcement.**

This means that we have to strive for:

- more efficient procedures;
- a greater number of decision-makers applying EC competition rules;
- a network between these decision-makers.

## **C. Our third basic orientation: The reformed system must guarantee a coherent application of the rules and a reasonable level of legal certainty for the benefit of economic operators.**

In a system with different decision-makers, special provision has to be made for coherent treatment of similar cases and other aspects of legal certainty. Consequently, there should be:

- only one set of substantive rules for cases with effect on interstate trade;
- guidance on the interpretation of these rules provided by central bodies;
- centralised judicial review.

### **III. The application of these basic orientations of reform in different areas of EC competition law**

Merger control and Liberalisation under Article 90 of the EC Treaty are currently running quite smoothly. They will not be the subjects of major reforms in the immediate future. In the sphere of International relations, the task is not to reform an existing concept but to develop a system for the first time through bilateral and multilateral competition agreements.

Consequently, in view of the challenges which I described in the beginning, our **priority areas of reform** on which we are currently concentrating are State Aid and the enforcement of Articles 85 and 86.

I will first take you through certain aspects of State Aid control, Merger control and International co-operation. I will then devote the rest of my presentation to what we now regard as the **most sensitive reform**, namely the way in which Articles 85 and 86 are to be enforced.

#### **A. State Aid**

##### **1. The objectives and the projects**

For the modernisation of State Aid control, two reform projects are most significant. These are the introduction of group exemptions and the codification of the Commission's State Aid control procedures.



Both projects have made some progress during the last 12 months. In the field of group exemptions, the Council has accepted the Commission's proposal and on 7 May 1998 adopted an enabling Regulation on the basis of Article 94 of the EC Treaty. It empowers the Commission to adopt group exemption regulations for certain categories of State Aid. The Commission is currently drafting its first group exemption regulation which will cover State Aid to small and medium size enterprises (SMEs). With regard to codifying the Commission's State Aid control procedures, on 18 February 1998 the Commission issued a proposal for a Council Regulation which is also based on Article 94. We hope that the Council will reach an agreement on the proposal in November<sup>2</sup>.

The objectives of the modernisation exercise which we have begun in the State Aid sector are:

- to increase the effectiveness of State Aid control;
- to enable the Commission to concentrate on the essential and important cases;
- to improve transparency and legal certainty.

With the prospect of enlargement of the European Union, we need to streamline, simplify and clarify procedures, thus helping the candidate countries to align their legislation with Community law as well as helping the Commission to deal with the additional workload which will result from the accession of these countries.

## **2. The instrument of regulations based on Article 94**

The fact that the Commission has made the basic decision to use Article 94 as the legal basis for the modernisation of State Aid control constitutes a major change in its position. For the pursuit of its reform projects, the Commission could have stuck to its traditional instruments such as frameworks, guidelines, notices and communications. These have proven to be of considerable value for stating the Commission's interpretation of substantive and procedural issues. However, these instruments cannot provide the required legal certainty, and in some areas their large

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<sup>2</sup> In fact, the Industry Council of 16 November 1998 reached a political agreement on the Regulation on State Aid procedures. The formal adoption by the Council will take place as soon as the European Parliament has given its opinion, which is foreseen for December 1998.

number has not led to more transparency in the end. The Commission therefore thinks that the route of formal secondary legislation, which it is now pursuing with caution, can be a more appropriate way to ensure the required transparency and legal certainty. It involved a certain risk that once a proposal was submitted to the Council, it was out of the Commission's control and the very wide powers which the EC Treaty conferred upon the Commission could be reduced. On the other hand, at the end of the 1990s, the Commission's State Aid policy is well established, has the support of the Court of Justice and it can be expected that Member States generally accept the Commission's powers. So far, the Commission's strategy has worked well and the Council has fully respected its powers in the ongoing modernisation process.

### **3. Group exemptions for State Aid**

#### **3.1 The mass problem**

The Commission faces an **ever-increasing number of notifications** of State Aid cases. We lose too much time in examining notifications of State Aids which are obviously compatible with the Common Market. In numerous frameworks and guidelines the Commission has laid down concrete criteria for the compatibility of aid and Member States increasingly draft their aid schemes in line with this guidance. Under these circumstances, the added value of a Commission decision confirming that the published criteria have been met is very limited. However, the formalism of carrying out notification procedures in these cases has a substantial impact on the Commission's resources and obviously also on those of the Member States. Moreover, it prevents the Commission from concentrating on larger, more complex and more distorting cases.

Against this backdrop, the Commission considered a **simplification of procedures** appropriate where its level of experience allowed to define precise compatibility criteria and where it could be observed that Member States generally respected these published criteria. That is the case for most of the frameworks and guidelines dealing with horizontal aid. The enabling Regulation adopted by the Council empowers the Commission to issue group exemption regulations concerning State Aid for SMEs, R&D, environmental protection, employment and training as well as regional aid.

The Commission has to attach to any group exemption regulation mandatory conditions relating to admissible purposes of aid, categories of beneficiaries, admissible thresholds, cumulation of aid and conditions of monitoring. The approach and contents of the forthcoming group exemption regulations will mainly follow the lines of existing practice and to a large extent translate the criteria of the guidelines and frameworks into the more effective and reliable legal form of a regulation.

In terms of simplification of procedures, group exemption regulations will not only have the advantage of liberating the Commission of a large number of notification procedures in routine cases. They will also free the Member States from the administrative burden of notification and allow them to award aid, which is covered by a regulation, immediately and without a standstill period. Outside the scope of the group exemption regulations, the traditional notification procedure will continue to apply.

### **3.2 Decentralisation**

State Aid control is the area where, under the present circumstances, there are the clearest limits to decentralisation. In particular, the entrustment of **administrative State Aid control** to the authorities of the Member States would not be advisable. Due to the conflict of interests, which probably even a separate national supervisory body would run into, it cannot be expected that the national level would provide equally effective or even better control than the Commission. Under the present system there is also limited scope for direct applicability of State Aid rules by the national courts. In fact, only the standstill clause laid down in the last sentence of Article 93(3) is directly applicable. Following an action brought by an interested party against the grant of State Aid, a national court can at present only state that the subsidy is a State Aid in the sense of Article 92. In case it has not been notified to the Commission, the national court has to take all appropriate measures, including an order for recovery, so that the *status quo ante* is re-established.

Due to their direct applicability, group exemption regulations will grant more responsibility to national bodies. National authorities will have to check themselves whether their aid schemes are within the limits of a group exemption regulation. And

national courts, upon actions brought against the aid, will be able to decide the case and dismiss the action if they are convinced that the conditions of a group exemption regulation are fulfilled. In this sense, block exemption regulations will contribute to decentralisation.

### **3.3 Limited shift to *a posteriori* control**

A significant consequence of group exemption regulations is that, within their scope of application, they shift the current *a priori* control on the basis of notifications to the Commission to an *a posteriori* control of whether the conditions for exemption have been respected. Such *a posteriori* control is not exclusively exercised by the Commission. It can also be carried out by national courts. Within the scope of the group exemption regulations, *a priori* control will also become self-control to be exercised by the national authorities insofar as they themselves have to check whether their aid schemes comply with the conditions of the relevant regulation. Outside the group exemption regulations, the Commission's traditional *a priori* control will continue to apply.

Fears that the new group exemption element in the system might weaken the control of State Aid are unfounded. The Commission has not only the means to model a group exemption regulation according to the specific problems involved in a certain category of aid. It will also keep the power to amend a Regulation where necessary. Moreover, provision has been made that the *a posteriori* control of whether the conditions for a group exemption are met shall be as effective as the previous notification system, though less bureaucratic. By way of summary reports, Member States will have to keep the Commission informed about their application of the group exemption regulation. In case of doubt or following a complaint, the Commission will be able to require the Member State to submit all information necessary to verify compliance with the exemption. Third parties who suspect that State Aid granted without notification to the Commission does not fulfil the conditions for exemption cannot only complain to the Commission but can also seek clarification at the national level. They can bring an action against the State in the national courts invoking the

prohibition under Article 92(1) as well as the non-applicability of the group exemption regulation.

### 3.4 *De minimis*-rule

The enabling Regulation also provides for a legal basis upon which the Commission can establish a threshold-related *de minimis*-rule. This was previously only defined in a notice. Below the thresholds, a subsidy will not be considered to constitute a State Aid in the sense of Article 92(1)<sup>3</sup> and therefore not require notification.

## 4. The Regulation on State Aid procedures

The Commission's proposal for a procedural Regulation aims at improving transparency and legal certainty in State Aid procedures by bringing the procedural rules together in **one coherent and binding legal text**. At present, Article 93 EC Treaty is the only legal provision on procedures. On the basis of this Article, a set of rules has been developed through the Commission's practice and the case law of the Court of Justice. Where important procedural issues have arisen or been clarified, the Commission has issued notices and communications, normally published in the Official Journal. Legally speaking, these texts contained no more than an interpretation by the Commission of certain procedural questions and did not provide legal certainty apart from possible self-binding effects. Moreover, the piecemeal fashion in which procedures developed, resulted in a fragmentation of rules which reduced the clarity of the system provided for in the Treaty. While aiming to make the rules transparent, the multiplication of interpretative texts finally created less transparency. Integration of the procedural rules into one coherent text was thus required.

The second objective of the procedural Regulation is to **re-inforce the efficiency** of State Aid control. The Commission's long-standing experience has revealed some weak points in the system, in particular with regard to unlawful aid and recovery. In order to provide the Commission with all the necessary means to ensure effective

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<sup>3</sup> Therefore, strictly speaking, the *de minimis* rule is not a group exemption for State Aid.

control, the proposal seeks to enlarge the control system with some new instruments such as recovery injunctions against unlawfully paid aid or on-site visits to beneficiaries of aid.

## **B. Merger control**

### **1. The amendment of the Merger Regulation of 1 March 1998**

Our experience with the amended Merger Regulation in the first six months has been positive though limited. There were eight additional cases as a result of the new thresholds, which will lead up to approximately 15-20 additional cases per year. The number of notified mergers has increased significantly since the Merger Regulation came into force in 1990 (about 50 cases yearly in the early years to 170 cases in 1997 and probably 200 cases in 1998). Nevertheless, the additional increase following the amendment of the Regulation (Article 1(3)) was felt to be acceptable for reasons of subsidiarity. As you know, this principle is not a one way road. The new system of an additional set of lower turnover thresholds aims at **avoiding multiple notifications** of one and the same concentration in different Member States and thus has the same aim as the original threshold, i.e. to avoid multiple control in different Member States and to centralise the treatment of such cases in Brussels. The justification for this is that such an operation can in terms of length and cost of procedure be better dealt with on the European level.

As regards **full function joint ventures**, all of them are now treated as concentrations under the Merger Regulation (Article 3(2)) and they are therefore dealt with under the procedures of that Regulation. Where the creation of such a JV has as its object or effect the co-ordination of the competitive behaviour of undertakings which remain independent, the amended Regulation (Article 2(4)) now subjects such co-operative spill-over to an appraisal under the criteria of Articles 85(1) and 85(3) of the EC Treaty for establishing whether or not the operation is compatible with the common market. In the first six months, spill-over aspects were considered in eight cases, all

of which ended with authorisations because there were no serious doubts as to the compatibility with the common market (Article 6(1)(b) of the Merger Regulation). In all these cases, the Commission came to the conclusion that Article 85(1) was not applicable, because there was no appreciable restriction of competition. The test of how well the appreciation of spill-over aspects really functions is still to come. It will take place when a restriction in the sense of Article 85(1) is found to exist and Article 85(3) has to be assessed. As far as the allocation of tasks inside DG IV is concerned, where a full function JV entails the possibility of co-operative spill-over, the assessment of the entire operation under the Merger Regulation is carried out by the sectoral unit which is in charge of applying Article 85 in the relevant sector.

## **2. Referrals by the Commission to a national competition authority**

The reform of 1 March 1998 has also enlarged the possibilities for the Commission under Article 9 of the Merger Regulation to refer a case to a national competition authority where the effects of the concentration are felt on a market within this Member State which presents all the characteristics of a distinct market. After initial hesitation, the Commission has since 1996 used this provision more frequently. Due to the reform, this trend will probably continue. The referral of a concentration allows the inherent rigidity of the threshold system to be mitigated and, in line with subsidiarity, can be used to allow Member States to deal with cases that could not be handled better at the European level.

## **3. Possible reforms in the long run**

While DG IV is able at the moment to deal with all notified mergers, the accession of new Member States and the further integration of European markets will certainly bring about an increase in notifications to the Commission. The 250 million ECU threshold for Community turnover will be more easily attained and the likelihood that the current 2/3 rule is applicable will decrease. This could make it increasingly difficult for the Commission to handle all notified cases with the required care while respecting the tight time limits under the Merger Regulation. Article 1(4) of the Merger Regulation obliges the Commission to report to the Council on the operation of the **thresholds and criteria** set out in Article 1(2) and (3) before 1 July 2000.

Moreover, Article 9(10) states that the provisions on **referral of cases to Member States** may be re-examined at the same time. The Commission is therefore in any event obliged to reflect upon these two key elements which define **jurisdiction**. On the one hand, this exercise does not necessarily have to lead to any reform of the current system if there is no objective need. On the other hand, if a need for reform is found, it will not necessarily have to be confined to the aspect of jurisdiction. All will depend on the nature of any deficiencies which the current system might reveal in the future. The Commission could then use its July 2000 report to the Council as an opportunity to introduce into the discussion any options relating to jurisdiction or to procedure and substance of the examination under the Merger Regulation which seem appropriate for solving the problems.

### **C. International co-operation**

International co-operation in competition matters is the logical consequence of globalisation. The first priority is to co-ordinate competition authorities' actions in cases of world market scale. Another important objective, which requires some perseverance, is to establish international rules, ensure their enforceability and thereby provide more legal certainty on the international level. These are matters to be pursued in bilateral relationships, such as between the European Union and the United States, as well as in international organisations, in particular the OECD and the WTO. As I dealt with both aspects at length on last year's conference, let me just briefly concentrate on certain new developments in the last 12 months.

#### **1. The bilateral EU-US relationship**

The 1991 EU-US Competition Co-operation Agreement is currently working smoothly. In the last 12 months, it has played a role in several cases out of which the *WorldCom/MCI* merger was probably the most important. The Commission's investigations, and negotiations of remedies, were undertaken in parallel with the examination of the case by the US-Department of Justice (DoJ). The process was marked by close co-operation between the two authorities, including exchanges of views on the analytical method to be used, co-ordination of information gathering and joint meetings and negotiations with the parties. After the parties had undertaken to



divest *MCI's* Internet assets, thus eliminating the overlap with *WorldCom's* Internet business, the operation received clearance from the Commission and from the DoJ in July 1998. Following the divestiture of the relevant business to *Cable&Wireless*, the merger was put into effect shortly thereafter. The *WorldCom/MCI* case constitutes a good example of using the elements of **traditional comity** which the 1991 Co-operation Agreement contains. Traditional comity aims at bringing the respective positions, which competition authorities on both sides hold, and the remedies they seek, together so as to avoid creating a harmful effect to the market of the partner.

**Positive comity** goes beyond that and enables one side adversely affected by anti-competitive conduct carried out in the other's territory to request the other side's competition authority to take enforcement action. While the 1991 Agreement already contained a few elements of this principle, it soon appeared that certain conflicts could be avoided by using the positive comity concept more extensively. Our efforts to strengthen the relevant provisions of the 1991 Agreement have now led to the **1998 EU-US Positive Comity Agreement** which entered into force in June 1998. This agreement, like the 1991 Agreement, does not alter existing law, nor does it require any change in existing law. However, it does create a presumption that when anti-competitive activities occur in the whole or in a substantial part of the territory of one of the parties and affect the interests of the other party, the latter "will normally defer or suspend its enforcement activities in favour of" the former. This is expected to happen particularly when these anti-competitive activities do not have a direct, substantial and reasonably foreseeable impact on consumers in the territory of the party deferring or suspending its activities. Deferral will only occur if the party in the territory of which the restrictive activities are occurring **has jurisdiction** over these activities and **is prepared to deal** actively and expeditiously with the matter. When dealing with the case, that party will keep its counterpart closely informed of any developments in the procedure, within the limits of its internal rules protecting confidentiality. We hope that implementation of the 1998 Agreement will turn positive comity into the principle clearly to be preferred against stretching one's own competition law towards extraterritorial application.

In the future, the European Union will seek to intensify its co-operation with the US and - where possible - to establish similar co-operation agreements with other

important countries or trading blocks. The recent wave of **mega mergers in oligopolistic world markets** is only the most prominent example underlining the need for a network of effective bilateral co-operation. Moreover it points to an increasing need for multilateral action and international competition rules.

## **2. The multilateral perspective**

We believe that multilateral organisations should play an increasing role in providing instruments for regulatory and case specific co-operation.

From this perspective, we welcome the OECD Recommendation on Competition Co-operation as last revised in 1995. A further step has now been made by the 1998 OECD Recommendation on Hard Core Cartels. It aims at improving the effectiveness and efficiency of Members' law enforcement against hard core cartels by eliminating or reducing statutory exceptions that create gaps in the coverage of competition law, and by removing the legal restrictions that deny competition agencies the authorisation to provide investigative assistance to foreign competition agencies.

However, strengthening bilateral and multilateral co-operation will not solve all the problems created by the increasing number of global competition cases. The European Commission is therefore convinced that we need a set of binding international competition rules and that the WTO is the appropriate body in which they should be elaborated. The advantages of international rules are evident and can be briefly summarised :

- First, they can be part of a strategy on market access overcoming exclusionary anti-competitive practices.
- Second, they promote gradual convergence of national competition laws.
- Third, they help to avoid unnecessary duplication of work and costs.

While our US-American colleagues still remain hesitant, we are confident to convince them of the benefits of this approach. For a more profound analysis of this issue, I would like to refer you to tomorrow's roundtable on Antitrust and Trade Policy at which my colleague Jonathan Faull will further explain our position.

### **3. The relationship between the EU and its future Member States in Central and Eastern Europe**

The competition rules prevailing between the EU and the Associated Countries of Central and Eastern Europe are contained in bilateral agreements. They are part of the so-called **Europe Agreements** which concern a broader set of policies. The Europe Agreements tackle a number of competition issues directly through explicit provisions, but they also go further than that by containing a clause on approximation of legislation. These two aspects clearly illustrate the idea that liberalisation of trade goes in parallel with adopting regulations in the field of competition. More generally, it fits into the philosophy that governments are required to enforce competition rules in their countries as a condition for being admitted as players in a globalised economy.

#### **IV. The most sensitive reform: The enforcement of Articles 85 and 86**

The other major area of reform the Commission will have to turn to is, in view of the challenges I described in the beginning, the way we interpret and, in particular, the way in which we should enforce Articles 85 and 86.

The starting point for the Commission in this area is that **changes of the EC Treaty are not necessary** and in any case for the foreseeable future not possible. The reforms to come will therefore not be a matter for an intergovernmental conference but for the competent Community institutions themselves to propose and to decide. The instruments of reform will not only be formal secondary legislation but also interpretative guidelines, simple changes in practice and increased involvement of national bodies.

##### **A. Ongoing reforms**

The most important **projects currently under way** concern vertical restraints and horizontal co-operation agreements.

##### **1. Vertical restraints**

###### **1.1 Substance**

On 30 September 1998, the Commission adopted a Communication on the application of the EC competition rules to vertical restraints. It is a policy paper which, in essence, recommends a shift from the current legalistic approach relying on form-based requirements with sector specific rules to an **economic effects-based system covering virtually all sectors of distribution**<sup>4</sup>. It is proposed that this be achieved by **one single block exemption regulation** which is wider than the present ones and which will cover all vertical restraints concerning intermediate and final goods and services. The block exemption will be based mainly on a black clause approach, i.e. defining what is not block-exempted instead of defining what is exempted. This will

remove the straitjacket effect, a structural flaw inherent in any system which attempts to identify clauses which are exempted.

The principal objective of such a wide and flexible block exemption regulation is to grant companies which lack market power, and most companies do lack market power, a **safe haven** within which it is no longer necessary for them to assess the validity of their vertical agreements under the EC competition rules. In order to preserve competition and to limit the benefit of this exemption to companies which do not have significant market power, the block exemption will establish market share thresholds, beyond which companies cannot avail themselves of the safe haven.

For companies with market shares above the thresholds of the block exemption, it must be stressed that there will not be any presumption of illegality concerning their vertical agreements. The market share threshold will only serve to distinguish those agreements which are presumed to be legal from those that may require individual examination. To assist companies in carrying out such an examination the Commission intends to issue a **set of guidelines** covering basically two issues:

- First, the application of Articles 85(1) and 85(3) above the market share cap.
- Second, the Commission's policy of withdrawal of the benefit of the block exemption, particularly in cumulative effect cases.

Such guidelines should allow companies to make in most cases their own assessment under Articles 85(1) and (3). The objective is to reduce the enforcement costs for industry and to eliminate as far as possible notifications of agreements that do not raise any serious competition problem.

With regard to the use of market share caps, the Commission has in its policy paper not yet decided between a system based on one or two thresholds.

**In a two-threshold system**, the first and main market share cap would be 20%. Below this, it is assumed that vertical restraints have no significant net negative effects and therefore all vertical restraints and their combinations, with the exception

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<sup>4</sup> The Block Exemption Regulation on car distribution, which expires in 2002, is not covered by

of specified hardcore restraints, are exempted. Above the 20% threshold, there is room to exempt certain vertical restraints up to a higher level of 40%. This second threshold would cover vertical restraints which, on the basis of economic thinking and past policy experience, lead to less serious restrictions of competition. In this category would fall for example exclusive distribution mitigated by the possibility of passive sales and non-exclusive types of arrangements such as quantity forcing on the buyer as well as agreements between small and medium-sized enterprises (SMEs). A two-threshold system has the advantage of providing for an economically justified graduation in the treatment of vertical restraints. The principal drawback of such a system is its complexity and the risk of re-introducing formalistic criteria for the identification and definition of the individual vertical restraints covered by the higher threshold.

**In a one-threshold system**, all vertical restraints and their combinations, with the exception of hardcore restraints, are automatically exempted up to the level of a single market share cap. The level of such a cap has not been settled but it will have to be below 40%, the level at which single market dominance may start. It is likely to be in the range of 25 - 35%. The advantage of a single-threshold system arises from its simplicity, there being no necessity to define specific vertical restraints other than hardcore.

The **category of blacklisted hardcore vertical restraints** which will not be block-exempted under any of the models just described, will in any event contain minimum and fixed resale price maintenance as well as agreements leading to absolute territorial protection. In its policy paper the Commission also proposes to protect the possibility for arbitrage by both intermediaries and final consumers to a wider extent. However, the exact content of the hardcore list is being left open at the moment.

**As a result**, due to the scope of the new block exemption regulation, which will be wider than the current ones taken together, the Commission will in the field of vertical restraints be liberated from a large part of its current work on individual notifications. The target is to have the new block exemption regulation in force by the year 2000.

## 1.2 Implementation

### a) Extending the scope of the enabling Regulation No 19/65

Council Regulation No 19/65, which enables the Commission to issue block exemption regulations, does not provide a sufficient basis for the new policy on vertical restraints. In its current form, the enabling Regulation only allows to block-exempt categories of **bilateral exclusive** supply or purchase agreements concluded with a view to resale of the goods concerned, or agreements comprising restrictions on the acquisition or use of intellectual property rights. The Commission has now proposed to the Council to extend the scope of the enabling Regulation so that block exemption regulations can cover **all types of vertical agreements concluded between two or more firms**, each operating at a different stage of the economic process. In fact, it will be possible to cover vertical agreements concluded in respect of the supply and/or purchase of goods for resale or processing or in respect of the marketing of services, including exclusive distribution agreements, exclusive purchasing agreements, franchising agreements and selective distribution agreements, and combinations thereof.

Finally, the proposed amendment of Regulation No 19/65 will allow for **decentralised withdrawal of the benefit of a group exemption regulation**. This means that where group-exempted vertical agreements or concerted practices create effects incompatible with Article 85(3) and these effects are felt in a Member State which possesses all the characteristics of a distinct market, the competent national authority will have the power to withdraw the benefit of the block exemption in its territory and adopt a decision aimed at eliminating those effects. Instead of bringing a complaint to the Commission, third parties will in these cases turn to the national authorities.

The new block exemption regulation will **increase decentralisation** in yet another way. Under the existing system there is no scope for national competition authorities to apply Article 85(1) if the companies draft their agreements in accordance with the group exemption regulations. Even companies with strong market power and market

shares up to 100% are exempted. In the new system, above the market share cap of the block exemption regulation, there will be new space for national competition authorities to apply Article 85(1) in individual cases.

**b) Extending the waiver from prior notification granted by Article 4(2) of Regulation 17**

The Commission also proposes to extend the scope of Article 4(2) of Regulation 17 with a view to granting a waiver from the prior notification requirement under Article 4(1) in respect of **all vertical agreements**. According to Article 6(1) of Regulation 17, the rule is that an exemption decision by the Commission cannot take effect before the date of the notification. In contrast to that, for agreements falling under Article 4(2) of Regulation 17, Article 6(2) enables the Commission to allow the exemption take effect from the date of conclusion of the agreement. The proposed inclusion of all vertical agreements within Article 4(2) will have several beneficial effects:

- First, where a company has made a mistake in the assessment of its market share and is not covered by the block exemption, the Commission will be able to exempt retro-actively to the date of conclusion of the agreement, provided all the conditions of Article 85(3) were fulfilled from the beginning.
- Second, artificial litigation before national courts, where the competition rules are often invoked to escape from contractual obligations even though there is no real competition problem, will be eliminated. Where exemption decisions can take effect from the date of conclusion of the agreement and not only from the date of its notification, there is no longer an incentive to litigate about agreements, which are caught by Article 85(1) but exemptable, with the intention of exploiting their nullity for the period between conclusion and notification. The proposed reform will therefore strengthen the civil enforceability of contracts by putting the emphasis on protection of competition instead of protection of private interests often unrelated to competition.



- Third, the number of notifications presently made with a view to obtaining legal security will diminish. Companies can first make their own assessment under Articles 85(1) and (3) and avoid the cost of notification unless they have a real doubt about the applicability of Article 85(3). They know that in the event of subsequent litigation it would not be too late to notify to the Commission in order to receive an exemption taking effect from the date of conclusion of the agreement. This will allow the Commission to reduce the *a priori* control system based on notifications and to concentrate, together with the competition authorities of Member States on the more important cases, thereby increasing the efficiency of the EC competition rules. The objective is to reduce enforcement costs for industry and to eliminate as far as possible notifications which do not raise any serious competition problems.

## **2. Horizontal restraints**

The Commission is also reviewing its policy on horizontal co-operation agreements. Originally, the review was started as a complement to the exercise on vertical restraints and in the light of the expiring block exemption regulations on Specialisation (No 417/85) and R&D (No 418/85). Meanwhile, the validity of these two regulations has been extended by three years to the end of the year 2000, which will give us sufficient time for this review exercise. Though the project's focus in the beginning was on R&D and Specialisation agreements, it soon became clear that we had to include in the review other notices such as the 1968 Notice on Co-operation Agreements, the 1979 Notice on Sub-Contracting Agreements and the 1993 Notice on Co-operative Joint Ventures. It also turned out to be inevitable to look into other types of horizontal co-operation not covered by any regulations or notices such as joint buying, joint selling or standardisation agreements.

During 1997, an in-depth fact finding with European industry and Member States as well as a survey of literature and case law was carried out. The results show that:

- horizontal co-operation is increasingly important for industry due to globalisation and more dynamic markets;

- the types of co-operation activities have changed over the last decade (e.g. more joint ventures, outsourcing of R&D etc.);
- industry recognises that, although horizontal co-operation can bring about efficiencies, it can also cause competition problems such as collusion between the co-operating partners or foreclosure/exclusion of competitors; in this context companies noted that the market power of the co-operating parties is an important assessment criterion;
- Community competition rules are criticised as rather unclear, narrow and partly outdated.

The major aims of the review are to ensure **clarity and consistency of policy**. The current rules and notices are rather fragmented, and they are based on the legal forms of co-operation agreements. We therefore would like to come up with a more comprehensive approach which provides for an analytical framework for the assessment of horizontal co-operation in general. Greater emphasis should be put on **economic criteria** in order to distinguish between neutral or pro-competitive agreements and anti-competitive ones. In this context, it is intended to increase transparency and to give better guidance to industry.

For certain types of agreements which are generally considered to be less restrictive, **safe havens** defined in terms of the combined market shares of the participating undertakings could be established. They could be complemented by black lists of certain *per se* prohibited behaviour. Within these clearly defined safe havens, undertakings would not have to engage in any further assessment of the validity of their agreement under the EC competition rules. For agreements falling above the market share threshold and for agreements of another, generally more restrictive type, the Commission would give guidance about how it would assess Articles 85(1), 85(3) and 86 in certain circumstances.

Moreover, as far as the **implementation of this approach** is concerned one could imagine two options. The first would consist of a block exemption regulation applicable to the mentioned less harmful agreements up to the market share cap plus guidelines published by the Commission about its policy towards all other cases. Alternatively, the Commission could refrain from producing any new block

exemption regulation after the expiry of the current ones, and instead exclusively rely on guidelines.

We are still in the initial phase of discussions about future orientations in this area and the models I just sketched are only some of many options to be examined. Whatever the results, the public will be consulted, but probably not before 1999.

## **B. The orientation of further reforms**

I hope I have given you a certain flavour of what is already going on in our reform kitchen. I now come to the orientation of further reforms.

In the field of Articles 85 and 86, it is of particular urgency to look at the division of enforcement competences and at a possible reform of the procedural framework laid down in Regulation 17. For perhaps a too long time, this was taboo for the Commission. Today, it is a **major task** which still lies ahead of us. However, the debate is not new. Different concepts have already been presented. We have not yet reached any preliminary conclusion. The following elements and options will certainly require further discussion.

## **C. Increased decentralisation in the application of EC competition law and closer co-operation between the Commission and national competition authorities/courts**

This is a key element which will certainly be part of any new framework as it is both necessary and efficiency enhancing. More decentralisation is necessary because the Commission alone could never guarantee effective protection against restrictions of competition. The Commission and national bodies have to co-operate and a **common competition culture** has to be developed. This cannot be ordered from the top by the Commission but will have to grow all over the European Union. An increasing involvement of national bodies in the application of Community rules is already providing a fertile ground for such development. Moreover, co-operation between competition authorities is useful as it will promote an ever more similar control practice. Increased decentralisation will also depend on the extent to which complainants and litigants can have the realistic expectation that national competition

authorities and courts are able fully to solve the problems presented to them. Finally, increased decentralisation and closer co-operation will promote the Community-wide acceptance of EC competition rules which is an obvious problem in a further enlarged Europe.

However, a number of obstacles to an efficient decentralisation and closer co-operation still remain. The **issues to be tackled immediately** are the following:

**1. The first issue: National authorities' power to apply Articles 85(1) and 86**

The aim is that in each Member State national competition authorities should be empowered to apply Articles 85(1) and 86. At the moment this is true only for eight Member States, the new Dutch competition authority having joined this club on 1 January 1998. The group of seven Member States, which still do not grant their competition authorities this power, might shrink in the foreseeable future: in Sweden there is a concrete reform bill and in Luxembourg and Denmark a certain prospect exists that the relevant laws might be amended within the next two years. There are no such reform plans in Austria, Finland and Ireland, and unfortunately the UK Government could not be convinced to foresee such power in the still pending UK Competition Law Bill. The competition authorities of these Member States can thus only apply their national competition law even in cases which involve effect on trade between Member States.

**2. The second issue: One single set of substantive rules for cases with effect on interstate trade, i.e. the EC competition rules**

In the current system, in cases with effect on trade between Member States, national and EC competition law can be applied in parallel by national competition authorities and the Commission. Neither Regulation 17 nor the Commission's 1997 co-operation Notice<sup>5</sup> could prohibit national competition authorities from taking up a case on the basis of national law even if the Commission is dealing with it on the basis of

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<sup>5</sup> Commission Notice on co-operation between national competition authorities and the Commission in handling cases falling within the scope of Articles 85 or 86 of the EC Treaty, OJ 1997 C 313/3.

Community law. The major **difficulties arising from such a system of double control** have been solved in the sense that the application of national law should not prejudice the coherent application of the EC competition rules throughout the Community and should respect the measures adopted for the enforcement of these rules<sup>6</sup>. For the sake of clarity and efficiency it nevertheless seems in the interest of all the parties involved, competition authorities and courts as well as economic operators, to aim for a system in which **only one set of substantive competition rules exists** for cases with an effect on interstate trade. Logically, these would be the EC rules. Such a system would provide the best guarantee for a coherent application of the competition rules by different decision-makers. This is essential for promoting an integrated internal market where economic operators do not wish to be exposed to a diversity of national regulations and the risks of divergent treatment of similar cases.

The new system will have to be accompanied by a **clear division of work** between national competition authorities and the Commission. National authorities would normally deal with all cases involving effect on interstate trade the effects of which have a centre of gravity confined to one Member State. This presupposes that all Member States empower their competition authorities to apply EC competition law.

### **3. The third issue: Instruments to ensure coherence in the application of the EC competition rules**

**3.1** The present co-operation between national competition authorities and the Commission should be developed into a true **network of competition authorities** with binding obligations of information and of co-operation.

**3.2** The Commission should provide **more guidance for national authorities and courts** on the interpretation and application of Articles 85 and 86. This can be achieved through:

- more guidelines published by the Commission;
- more leading decisions by the Commission;

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<sup>6</sup> See point 5, 16-22 of the Commission's 1997 co-operation Notice.

- and possibly the presence of the Commission as *amicus curiae* in national procedures.

Like in the present system, the CFI/ECJ will maintain the final word on the validity of decisions taken by the Commission and on the interpretation of EC competition law which is applied in national judicial proceedings.

## **D. The central open question: Modernisation of Regulation 17 !**

### **1. The remaining problems**

Even if we solve all the issues which I just mentioned, we remain with several problems. It is foreseeable that increased decentralisation of the kind just described - although being absolutely necessary - will not solve all the problems in the area of Article 85. In particular, **two basic problems**, which are interrelated, will remain:

#### **1.1 The Commission works far too re-actively.**

The Commission spends too much time dealing with what industry presents to it, in particular by way of notifications for exemption under Article 85(3) which often are of little interest from a competition policy point of view. Instead, the Commission should be enabled to adopt a **more pro-active approach**, concentrating on issues which are important for competition policy and which should be taken up *ex officio* or on the basis of complaints. In particular, I think of cartels, where today our efforts are by far insufficient.

#### **1.2 The current system of Regulation 17 is becoming inappropriate.**

Due to the particularly wide scope of Article 85(1), a great number of agreements require exemption under Article 85(3) in order to be legally enforceable. Consequently, for economic operators concerned about legal certainty, there is a substantial incentive to seek clarification upon the application of Article 85(3).

On this basis, Regulation 17 essentially does two things:

First, for participants to an agreement who are concerned about legal certainty, Regulation 17 turns the incentive to have the applicability of Article 85(3) clarified into a **quasi-obligation to notify** by stipulating in its Article 6(1) that an exemption cannot take effect before the date of notification. In order to avoid the risk of a period in which the agreement is irrevocably void, even though it might later have been exempted, parties will tend to notify on the date of the conclusion of their agreement.

Second, Regulation 17 sets a **clear limit to any effort of decentralisation** by stipulating in its Article 9(1) that the Commission shall have the sole power to grant an exemption pursuant to Article 85(3). The consequences of the Commission's exemption monopoly are the following:

- It prevents national competition authorities and courts from making a full assessment, including positive aspects, of a restrictive agreement.
- It leads to excessively centralised application in Brussels.
- It stimulates the application of national competition law instead of EC competition law in cases with effect on interstate trade.

## **2. What are possible solutions ?**

There are certainly many options for tackling the remaining basic problems of the current system. All of them will have to be analysed and discussed very carefully. Here, I can comment only on some of them.

### **2.1 'Rule-of-reason' approach in interpreting Article 85(1)**

As already indicated, one of the reasons for the large number of notifications for exemption lies in the fact that the prohibition under Article 85(1) has traditionally been interpreted by the Commission and the Court in a particularly wide manner. This is partly due to a too legalistic approach in the past. And it is also due to the division within Article 85 under which the anti-competitive effects are mainly

assessed under paragraph (1) while the pro-competitive effects are assessed and weighed against the anti-competitive effects under paragraph (3).

Under a **rule-of-reason** approach, one could imagine weighing many of the pro-competitive and anti-competitive elements of an agreement already within Article 85(1). This would have to go together with a shift from a legalistic, form-based approach to a **more economic approach** which already characterises our current policy reform concerning vertical restraints. As a result, fewer agreements would be caught by Article 85(1) and a reduction in the number of notifications could be achieved without even amending Regulation 17.

Apart from a few allusions to rule-of-reason considerations under the notion of appreciable restriction of competition, the Commission has not followed this approach so far. Its policy rather was to maintain the division between Articles 85(1) and 85(3). Likewise, in the case law of the Court only limited allusions to this principle can be found. However, it would not be impossible for the Commission gradually to change its policy while analysing closely how the Court of Justice reacts. In other areas, most markedly in free movement of goods through the jurisprudence starting with the *Keck*-judgment in 1993, the Court has been willing to renounce from interpreting certain provisions in a way which had proved to be too wide and which had not really served the objectives pursued by them.

On the other hand, the rule-of-reason approach finds its limits in the EC Treaty which has provided for the separation into Articles 85(1) and 85(3). A rule-of-reason could easily deprive Article 85(3) of its function and amount to an **illicit factual amendment of the Treaty**. The power to amend the Treaty solely lies with the Member States.

Another drawback is that a switch to a rule-of-reason approach, which the Commission could only implement gradually, i.e. step by step, would probably be too slow to provide effective remedies for the weaknesses of the present system. Moreover, in such a process, the Commission would have **limited steering powers**, as the evolution of this approach would depend on confirmation by the Court of Justice which is difficult to predict.



## 2.2 Simplification of procedures

As another option, one could try to further streamline the procedures. The procedure for **rejection of complaints** could be simplified. Notifications for exemption could in unproblematic cases end with **abbreviated formal decisions** modelled on the Article 6(1)(b) decisions under the Merger Regulation. In comparison with the present comfort letter practice, such decisions would offer more legal certainty by taking effect against everybody. This however could lead to the paradox of even increasing the number of notifications. Likewise, realistically speaking, the introduction of **time limits for decisions upon Article 85(3)** to be taken by the Commission would rather increase the number of notifications. I do not want to be misunderstood on this point: I do not plead DG IV's failure to deal with certain notifications swiftly as an argument against time limits. However, in contrast to the further increasing but nevertheless limited number of mergers which fall under the Merger Regulation every year (probably 200 cases in 1998), one simply has to acknowledge that the number of agreements and concerted practices falling under Article 85(1), and therefore calling for an assessment under Article 85(3), is much higher. And it will significantly further increase in an enlarged Community of 20 to 25 Member States. The experience of the last decades and budgetary perspectives for the future make us believe that Member States will never give DG IV sufficient resources to deal with all cases of notification under the present system.

## 2.3 Power to exempt also for national cartel authorities

A further option would be to give the power to exempt under Article 85(3) also to national cartel authorities. This question has been the subject of some heated debate in the last years. Such a model **would maintain the excessively large notification practice** but liberate the Commission from a number of notifications which could adequately be dealt with by national authorities. As a consequence, the Commission would gain space for the above-mentioned more pro-active approach in pursuing its policy in cases of Community-wide interest. Use could be made of the more effective and more far-reaching investigative powers which some national competition

authorities have. Moreover, decisions would be made nearer to the companies which have to comply with them.

However, it is undeniable that a decentralisation of Article 85(3) would also involve certain risks and drawbacks:

- First, the power to exempt under Article 85(3) is something genuinely different from the power to prohibit under Article 85(1). There would always be a **danger of divergent decisions** under Article 85(3) being taken by different national authorities in similar situations.
- Second, exemption decisions taken by the competition authority of a Member State would be of **limited value for economic operators** if they could not take effect outside the territory of that Member State. Whether this is possible, seems at least questionable.

## 2.4 Other solutions

Other solutions and combinations of solutions could be considered. They would require more imagination and more courage than the options just described above.

One starting point could be to state that the Commission should concentrate on detecting and prohibiting restrictions of competition instead of dealing with notifications for exemption under Article 85(3). The principal aim could be not to distribute the treatment of notifications for exemption between national competition authorities and the Commission but to substantially reduce the number of these notifications.

Under this approach the separation of Article 85 into paragraph 1 and paragraph 3 on the level of the EC Treaty would not have to be changed.

The issues one would have to discuss rather concern Regulation 17. In 1962 it established a system which separates the enforcement of Article 85(1) from that of Article 85(3) and subjects the latter to an administrative decision to be taken by one

central authority at the end of a notification procedure. For those seeking legal certainty and enforceability of their agreements, Regulation 17 establishes a quasi-obligation to notify to the Commission, since there can be no exemption decision without notification.

The choice of such a centralised authorisation system based on quasi-compulsory notifications to the Commission can easily be explained by the circumstances prevailing in 1962. At that time, the Commission had hardly any information about existing agreements and practices. The Commission had not yet developed a decision-making practice and the judgments by the European Court of Justice were very few in number. Thus, there were practically no precedents set by European institutions which could have guided national authorities and courts. Moreover, in the Member States little to no competition legislation existed, very few competition authorities were in place and hardly any of them was really active. Moreover, complainants would not have turned to the Commission if it had not taken the leading role in the enforcement of Article 85.

It could be argued that 36 years later, circumstances have largely changed and that the centralised authorisation system based on quasi-compulsory notifications to the Commission has possibly become excessive. Today, there is a substantial body of case law created by the Commission and the Court of Justice which provides guidance in many questions. The existence and power of the Commission is well known to complainants. And finally, the impact of the notification system on compliance with Article 85 has been shown to have reached its limits where it comes to the most serious restrictions of competition. They are usually carried out intentionally and would therefore not be notified to the Commission even under a fully-fledged system of compulsory notifications.

## **V. Conclusion**

With regard to the **modernisation of Regulation 17**, today it would obviously be **premature to make a choice between any of the options** which I have sketched in the foregoing. But I can say that - in order to achieve the objectives which we have

to pursue - it will probably be necessary to touch on all or most of the parameters of reform which I outlined in this presentation. This will be the fascinating challenge we have to tackle in the near future.