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# General Report on the Application of Community Competition Law on Enterprises by National Courts and National Authorities

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All opinions expressed are purely personal. This report had to be completed before the final texts of all the national reports had become available.

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## Summary

1. If the Commission's policy of decentralised application of EC competition law by national authorities and courts is to be effective, several conditions must be fulfilled. National authorities must have express power to apply EC competition law, or duplication of procedures will occur. They must have sufficient staff, sufficient powers and enough independence to decide cases satisfactorily within a reasonable time. There must be no specific obstacles to applying EC law. There must be judicial review of authorities' decisions, effective enough to allow Article 177 to be used whenever appropriate, and arrangements to ensure that national regulatory authorities and competition authorities do not approve agreements or prices contrary to EC law (Ahmed Saeed Flugreisen).

2. At present when the same case comes before the Commission and a national authority, duplicate procedures can sometimes be avoided pragmatically by informal contacts. It is probably not possible to have more formal criteria for allocating cases at present.

3. The Commission believes it is not obliged to decide EC competition cases merely to facilitate claims for compensation. It also believes that it may be obliged to deal with cases if national law produces a result different from EC law.

4. A number of obstacles to effective application of EC competition law are identified. Some result from EC law, some from national laws.

5. We need to think of the Commission and national competition authorities as a team applying EC competition law, and to make them a more coordinated team. The Commission should rarely need to deal with a case if the national authority applies EC law to it.

6. National competition laws are now mostly harmonised, but not national authorities' procedures and powers, and not civil and commercial remedies for breach of competition law. These two areas may need harmonisation in future.

7. National courts have a duty under Community law to protect fully rights given by EC competition law. The Court of Justice will have to decide precisely what this means for competitors and customers claiming compensation.

8. Suggestions are made for measures to be taken by public authorities, and for research, in particular into the effectiveness of competition laws and procedures.

9. It is not clear that the remaining differences between national laws and Community competition law are really necessary to protect identifiable interests. Costs to industry would be reduced if all national laws could be as far as possible identical to EC law (except that there would be no need to show an effect on trade between Member States). If, in relation to agreements and practices affecting trade between Member States, a national law is less strict than Community law, the only effect is that competition authorities should apply Community law.

10. It is suggested that most of the conclusions proposed in this report apply also, mutatis mutandis, in the European Economic Area.

## General Report

The European Commission now is clearly in favour of decentralisation of the application and enforcement of Community Competition law. In the past, the Commission was hesitant, for various reasons. Some Member States had no real competition authority, and if they had been urged to set them up, it was not clear how efficient they would be. Several States became members without having effective competition authorities. Some Member States had no strong tradition of competition law. The Commission was concerned about different interpretations of EC law arising. Until recently, no great enthusiasm for decentralisation was shown by national authorities. The Commission also assumed for some time that a largely centralised administration of Community competition law would work reasonably well, and was ambivalent about encouraging the exercise of decentralised power. There was uncertainty (felt also outside the Commission) about how well national courts would be able to apply economic principles and economic law. There was a regrettable delay, for which the Commission was not responsible, before the study of the application of Articles 85-86 by national courts was finally entrusted to the Union Internationale des Avocats[1].

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[1] This study resulted in the excellent publication edited by A. J. Braakman, published in most of the Community official languages, in English entitled The Application of Articles 85 and 86 of the EC Treaty by National Courts in the Member States (European Commission, 1997). This unfortunately does not cover Austria, Finland or Sweden, or the European Economic Area States. See also Temple Lang, European Community Constitutional Law and the Enforcement of Community Antitrust Law, in Hawk (ed.), 1993 Fordham Corporate Law Institute (1994, New York) 525-604: Temple Lang, EEC Competition Actions in Member States' Courts - claims for damages, declarations and injunctions for breach of Community antitrust law, in Hawk (ed.), 1983 Fordham Corporate Law Institute (1984, New York) 219-304: Forrester and Norall, the Laicization of Community Law - self-help and the rule of reason: how competition law is and could be applied, in Hawk (ed.), 1983, Fordham Corporate Law Institute (1984) 305-346: Behrens (ed.), EEC Competition Rules in National Courts (Nomos, Baden-Baden, 1994): Lässig, Dezentrale Anwendung des europäischen Kartellrechts (1997): Ehlermann, Implementation of EC Competition Law by National Anti-trust Authorities, 1996: Eur. Comp. L. Rev. 88-95: Bornkamm,, 'Anwendung des EG-Kartellrechts durch den nationalen Zivilrichter', in Schwerpunkte des Kartellrechts 1992/93, *FIW-Schriftenreihe* (1994), at 51: J.H.J. Bourgeois, 'EC Competition Law and Member State Courts', *Fordham International Law Journal* (1993), at 331; J. Goh, 'Enforcing EC Competition Law in Member States', [1993] 3 ECLR 114; A. Riley, 'More Radicalism, Please: The Notice on Co-Operation between National Courts and the Commission in Applying Articles 85 and 86 of the EEC Treaty', [1993] 3 ECLR 91; B. Rodger, 'Decentralisation and National Competition Authorities: Comparison with the Conflicts/Tensions under the Merger Regulation'. [1994] 5 ECLR 251; I. Van Bael, 'The Role of the National Courts'. [1994] 1 ECLR 3; R. Whish, 'The Enforcement of EC Competition Law in the Domestic Courts of Member States', [1994] 2 ECLR 60. See also House of Lords Select Committee, 'Enforcement of Community Competition Rules', Session 1993-94, 1st Report at points 131 and 132. J. Meade, 'Decentralisation in the Implementation of EEC Competition Law - A Challenge for the Lawyers',

As long ago as when Peter Sutherland was Commissioner responsible for competition (1985-1989), the Commission informally discussed with national experts a draft Regulation on application of Community competition law by national courts. The experts' reaction was not encouraging, and the matter was put to one side.

The Commission's present clear policy in favour of decentralisation has come about for a number of reasons. Most Member States now have national authorities which are showing themselves to be effective and professional. A majority of Member States have chosen to adopt national legislation closely based on Community competition law. National competition law traditions have developed rapidly and very successfully, notably in Italy. National authorities now favour decentralisation. New Member States had competition authorities and legislation similar to Community law before they joined, and future Member States have agreed to do so. There has been an increase in the number of economists able to provide advice on competition questions. The Commission now understands clearly that it cannot expect to increase its staff enough to handle all the cases submitted to it, with current statutory procedures. There is an increasing number of complaints which could, and therefore should, be dealt with at national level. The principle of subsidiarity is also relevant, although it does not seem to lead to any very precise consequences in this context.

It is perhaps surprising that the Commission took so long to decide that national authorities should have express powers under national law to apply Community competition rules. The principle that they should apply those rules was set out in Article 88, Economic Community Treaty, and in Reg. 17 of 1962. By the mid-1970s at least it was clear that the Commission's caseload was too great and the procedures imposed on it by Reg. 17 too cumbersome for the Commission to be able to deal with all its cases satisfactorily on its own. It is unsatisfactory that such a high proportion of all cases now dealt with by the Commission have to be handled by letters without legislatively-defined effects[2], because the procedures imposed on the Commission could not be carried out in all cases by any

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*Northern Ireland Legal Quarterly* (1986), 10: Bos, Towards a clear distribution of competence between EC and national authorities, 1995 7 ECLR 410-416. Mergers and State Aids are outside the scope of this theme of the 1998 FIDE Conference.

[2] See Braakman and Schröter, Introduction, in Braakman (ed.), The Application of Articles 85 and 86 of the EC Treaty by national courts in the Member States (1997), at pp. 118-119: see also the Swedish report.

obtainable numbers of Commission officials. The Commission did not even seriously encourage the adoption of national laws based on Articles 85-86: that happened almost entirely on the initiative of national governments.

The Commission never made a proposal on the basis of Article 87(2)(e) to clarify the relationship between national law and Community competition law. The Commission has however now published three Notices, on cooperation with national courts on Articles 85-86 and on State aids, and on cooperation with national competition authorities[3]. It has published the report of the Union Internationale des Avocats, already mentioned. Recently, Commission officials have also been actively considering a variety of legislative changes designed to lead to greater decentralisation and more efficient enforcement of Community competition law.

Whatever exactly was intended in 1962, in retrospect it is clear that Regulation 17 made sense only if the Commission dealt with a small number of important cases and national authorities dealt with all the rest. The very elaborate procedures of Regulation 17 (in particular the need for every formal decision to be announced in advance in all official languages in the Official Journal and to be discussed by the Advisory Committee) are appropriate only to large important cases which do not need to be decided quickly. Regulation 17/62 was not intended to produce the centralised application which in fact occurred. But the Commission for a long time failed to ensure that national authorities are able to apply Community law, and national authorities in general did not apply it. It is these two omissions which the Commission is now trying to correct. The Commission's present policy is in line with the original intention of the Treaty.

**What is needed for effective decentralisation**

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3 Notice on Cooperation between National Courts and the Treaty, O.J. No. C-39/6, 13 February 1993: Notice on Cooperation between National Courts and the Commission in the State Aid Field, O.J. No. C-312/8, 23 November 1995: Notice on Cooperation between National Competition

Successful decentralisation depends largely on the national authorities and courts. For decentralisation of the application of Community competition law to be effective and satisfactory, and for the principle of subsidiarity to be satisfied, the following are necessary:

- in each Member State, a national authority with express power to apply and enforce Community competition law;
- each national authority must have sufficient staff to deal reasonably quickly with its workload of cases under national law and Community law; it must not be assumed that national authorities have enough staff to handle their present workloads, or that they could get more staff when necessary;
- national authorities and courts must have procedures which allow them to decide these cases within a reasonable time;
- national authorities must have a sufficient degree of independence, professionalism and objectivity for their decisions to be generally accepted by companies, economists and lawyers;
- national authorities must have sufficient procedural powers to apply and enforce competition law effectively;
- there should be no specific obstacles to effective application of Community competition law;
- there must be judicial review of decisions of each national authority which is effective enough to enable all points of Community law which arise to be considered, and when necessary referred to the Court of Justice under Article 177[4];

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[4] Authorities and the Commission in handling cases falling within the scope of Articles 85 or 86 of the EC Treaty, O.J. No. C-313/3, 15 October 1997 (here called "The Cooperation Notice").
In the UK, for example, up to the present, in judicial review proceedings "High Court Judges, however, have shown no enthusiasm for allowing the merits of Monopolies and Mergers Commission references to be reopened in the courts and have not yet found in favour of an appellant in such a case on any substantive ground": Goyder, in 5 In Competition (1997) 1-3 at page 2. Judicial review which was limited to procedural questions would not be enough to ensure that issues of Community law could be raised. Apparently under the new UK legislation, there will be appeals on the merits from prohibition decisions of the new competition authority.
On the right to judicial review, see Case C-282/95P, Guerin Automobiles 1997 ECRI 1503: Case 294/83, Les Verts v. European Parliament 1986 ECR 1339, para. 23: Case 222/86 Heylens 1987 ECR 4097: Case 222/84, Johnston v. R.U.C. 1986 ECR 1651: Case T-95/94, Sytravel 1995 ECR II at p. 2668. There should be similar rights of judicial review, ultimately to the Court of Justice, of decisions of the Community Institutions and of decisions of national authorities insofar as they involve issues of Community law. See also Case 283/81, C.I.L.F.I.T. 1982 ECR 3415, 3431.
See also Canenbley and Klingbeil, Germany, in Braakman (ed.) op. cit. supra at p. 188.

- there must be effective arrangements between national competition authorities and national Ministries of transport and all other regulatory authorities, to ensure that the non-competition authorities do not approve, under national laws, arrangements or prices which are contrary to Community competition law or prices which result from such arrangements[5];
- it may also prove necessary, in due course, to make arrangements to minimise inconsistent applications of Community law, and to avoid duplication of procedures.

It is one of the purposes of this General Report to help to assess how far, in the present circumstances in the present fifteen Member States, all these requirements are fulfilled, and to help to identify the action needed to make sure that they are adequately fulfilled. It is emphatically not my purpose to argue against decentralisation, but merely to point out that it will not work satisfactorily everywhere unless certain conditions exist.

For this purpose, some of the requirements listed above need to be explained and discussed.

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5 Case 66/86, Ahmed Saeed Flugreisen, 1989 ECR 803.

| Member State | Legislation similar to EC law Arts. 85-86* | Express power to apply EC Arts. 85-86 | Approximate number of full-time professional or high-level officials in national authorities dealing with competition issues |
|---|---|---|---|
| **Austria** | | | 6 |
| **Belgium** | Yes | Yes | 22 |
| **Denmark** | Yes | | 48 |
| **France** | Yes | Yes | 178 |
| **Finland** | Yes | | 39 |
| **Germany** | | Yes | 130 |
| **Greece** | Yes | Yes | 15 |
| **Italy** | Yes | Yes | 115 |
| **Ireland** | Yes | | 22 |
| **Luxembourg** | | | 3 |
| **Netherlands** | Yes | Yes | 57 |
| **Portugal** | Yes | Yes | [130] |
| **Sweden** | Yes | | 90 |
| **Spain** | Yes | Yes | 50 |
| **United Kingdom** | Yes | | 185 |
| **European Commission - DG IV** | | | **153** |

* National legislation on merger control differs considerably between Member States.

These figures must be treated with great caution. This table is merely indicative. The figures for the different Member States cannot be directly compared with one another, because the definitions of what I have described as "full-time professional or high-level officials" used are not the same. The figures are based on information in the possession of the Commission at the end of 1997 and early in 1998, some of which have been adjusted in correspondence with me. They apply to all the national authorities (including, as far as possible) the responsible Ministries) where there is more than one, but do not include officials in national regulatory authorities who deal with competition issues. Several national authorities expect to increase the numbers of their professional officials as a result of the work resulting from recently adopted legislation.

In addition, these figures give no indication of the workload of each authority, which is a result of the number of cases, the nature of the procedures, and other factors which cannot be easily quantified. They therefore give no useful indication of whether the national authorities are more or less heavily burdened than the Commission. This is also because the figures include officials in Ministries, who are not normally involved in individual cases. The table also does not indicate the differences which exist in the treatment of mergers.

The table anticipates the adoption of the proposed UK legislation. The figure for DG IV includes A officials dealing with mergers, new legislation and international cooperation, but not those dealing with State aids. States which have national laws similar to Articles 85-86 do not necessarily have similar merger control laws. The German report calls attention to legislation recently introduced by the German Government which would make German competition law more like Community law in some respects.

**Express power to apply Community competition law**

A number of Member States now have, or soon will have, national competition laws very similar to, and based largely on, Community competition law, but some have not expressly authorised their national competition authorities to apply Community competition law. The question arises whether this is enough. In some Member States the national legislation expressly or at least clearly requires national courts and the national competition authority

to interpret the national competition law in the light of, and so as to bring about the same results as, Community competition law.

Several comments are needed[6]:

- Article 177 applies only when a national court decides that it needs a ruling on a question of Community law. It is not clear how far the Court of Justice will regard Article 177 as applicable when a national court is not formally applying Community law, but is applying national law and wants guidance on a Community law issue only so that it can decide a similar issue of national law so as to arrive at a similar or identical result[7]. It seems clear that in such a situation even a final court of appeal would not be obliged, under Article 177, to refer the question of Community law to the Court of Justice. There is therefore no assurance of uniform results;

- if a national court or competition authority decides a question of national law in such a way that the result is not the same as it would be under Community law, there is no infringement of Community law. (There would not necessarily be even an infringement of national law.) There is no right under Community law to judicial review, no right to the protection of Community law rules on fair procedures, no right to obtain a reference under Art. 177, and no assurance that there will in fact be

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6 In Temple Lang, European Community constitutional law and the enforcement of Community antitrust law; in Hawk (ed.), 1993 Fordham Corporate Law Institute (1994, New York) 525-604 at pp. 589-594, several other points are made. If a national competition authority is applying only national law, there is no obvious justification for it to exercise extraterritorial authority or for other national competition authorities to cooperate with it. The Commission has no power and no duty to help national authorities to apply national law. If the national law necessitates group exemptions identical to Community group exemptions, or merely makes a renvoi to them, the purpose of having a distinct national law is not clear: if it necessitates different group exemptions, the result, whatever its other merits, is not the same. If Community law is not applied, Community fundamental rights principles, in particular procedural safeguards, will not apply.

7 See Case C-28/95, Leur-Bloem, 17 July 1997 ECR I. Cp. Case C-346/93 Kleinworth Benson 1995 ECR I 615. See the comments in the Swedish and UK reports. In Leur-Bloem the Court said that a reference under Article 177 from a Dutch court is admissible "when the situation [before the national court] is not governed directly by Community law but the national legislature, in transposing the provisions of a directive into domestic law, has chosen to apply the same treatment to purely internal situations and to those governed by the directive, so that it has aligned its domestic legislation to Community law" (para. 34). This principle is not limited to cases involving directives: Case C-73/89, Fournier, 1992 ECR I 5621.
It should be noted that the German and Dutch Governments argued that the reference under Article 177 was not admissible in Leur-Bloem.

uniform application of competition law throughout the Community. (There will of course be national law rules on all these points, but they will be different in each Member State). The purpose which Article 177 was intended to ensure has been set aside. There is in fact less assurance of uniform interpretation than there would be in the case of an international agreement which was not part of Community law, but which had been adopted into national law by the ratifying States, because in that case the text being interpreted would be the same everywhere;

- if a national authority is not formally applying Community competition law, but merely a national law which is intended to be similar in its effects, it would hardly be authorised, even by an amendment to Reg. 17 to alter the effect of the Spanish Banks judgment[8], to use evidence obtained by the Commission and supplied to the national authority for Community law purposes;

- the Commission's practice is not to review a decision of a national authority when the latter applies Community law in an individual case, but to leave the matter in the hands of the national courts. However, the Commission considers that it may be obliged to consider and to deal with a complaint if it appears that the application of national competition law has not led to (or is not likely to lead to) a result substantially similar, in its economic effects, to the result expected under Community competition law. If therefore the application of national law has not led to such a result, even if the national law is apparently similar or even identical to Community law, the Commission may be obliged to reopen a case which has been decided by a national authority, because otherwise the complainant (and the public interest) will not obtain the protection which they should get under Community law. Unnecessary and undesirable duplication of procedures could therefore arise, since it is hard to see how the Commission could justify inaction in such circumstances. (This point is discussed below.);

- a simpler point can now be made, in the light of the above comments. The Commission can not be sure that decentralisation of the application of Community

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8 Case C-67/91, Asociación Espânola de Banca Privada, 1992 ECR I 4785.

competition law to national authorities will be satisfactory unless the national authorities apply Community law. It would not be enough for the Commission to say, in effect: "we will decentralise these cases to national authorities who will apply national competition law, and we hope that the results will be much the same as under Community law, although neither national law nor Community law provides any guarantee of this";

- although national competition authorities are perhaps not obliged by Community law to apply Arts. 85-86, national courts have a duty to do so. If therefore a national authority's practice diverged from Community competition law, the effect would be to force complainants who were thereby put in a less favourable position to go before national courts where, of course, they would not have the benefit of the national authority's investigative powers. (Complainants would also be led to complain to the European Commission, contrary to the whole purpose of decentralising). Complainants would have the authority's decision annulled by national courts only if it was a sufficient ground for annulment that the result arrived at under national law was not the same as the result which would be reached under Community law. It is not clear, under any national competition law, that such a difference, even if it was clearly proved, would be sufficient grounds for annulment. Even if it was sufficient, the law would be unsatisfactory because the aggrieved party would have to argue the case, in effect, a second time under Community law, at least to the extent necessary to show that the result differed in one or more respects. There would no doubt also be controversy about whether the difference shown was important enough to lead to annulment or reconsideration. Alternatively, if the complainant sued in the national civil courts under Community law without first seeking annulment of the competition authority's decision, it would find it difficult to persuade the court to reverse the result reached by a specialised competition authority;

- many cases will be subject to more than one national competition law. In such cases, there can be a "one-stop-shop" only if either the Commission takes over the case or it is somehow arranged that only one national authority applies Community

law. National laws, however similar, are likely to lead to multiple procedures at national level, quite apart from the risks of differing results and of duplication because the Commission is obliged to intervene. Only a single integrated competition law system applied by multiple authorities in partnership can give all the benefits which industry and consumers are entitled to expect;

- yet another difficulty would arise if a national authority applying national law discovered a Community-wide cartel with parties outside its jurisdiction. If the authority was applying Community law, it would be natural for it to give the Commission all the evidence it had obtained (subject to any constraints now imposed by national law). If the national authority is only applying national law, it is less easy to see grounds for saying that it should give the evidence to the Commission;

- there is no obvious reason for coordination of analysis or of penalties if only national law is being applied.

Not all of these problems may arise, and it is not yet possible to say how satisfactorily national laws based on Community competition law will work in practice. Probably little difficulty will arise in practice if each Member State has an effective competition law, even if it is not identical to Community law. No important problems seem to have arisen in Germany, for example, as a result of the fact that German law is not, and has not been, very similar to Community law. But the present situation raises another question. If the national laws are indeed intended to produce precisely the same results as Community law, and if they do produce them, then what reason can there be for not simply applying Community law?

It is significant that, as explained in the German report, even a Member State with such a well-established body of competition law as Germany considered it desirable to give the Bundeskartellamt express power to apply Community competition law. It is also significant that this was done although the German law was not harmonised with Community law, and that this power has been used in particular in areas not subject to German competition law -

areas in which no decentralisation would have been possible unless the national competition authority had express power to apply Community law.

In theory, national authorities do not need express power under national legislation to apply Community law if they can do so in the course of national procedures[9], since they have this power in principle under the Treaty and Reg. 17. But this power may not be used in practice unless there is national legislation implementing it, and it could not easily be used unless there are clauses in national legislation prescribing fines, powers to prohibit etc., in case of infringements of Community law. Legal certainty makes national implementing measures desirable.

The conclusion seems clear: there cannot be completely satisfactory decentralised application of Community competition law until all Member States' competition authorities have, and exercise, power to apply Community competition rules.

It will be seen that these issues are entirely distinct from the question how far duplication of legislative or quasi-legislative exemptions can be avoided e.g. by providing that a Community law group exemption will operate as a group exemption under national law also (as in the case in Denmark, Belgium).

One other point should be mentioned. When restrictive agreements in one Member State obstruct parallel imports of goods into another Member State, the national authority in the importing State, where the economic damage occurs, cannot exercise jurisdiction over the agreements in the exporting State. But no economic harm is being caused in the exporting State, and the national authority there has no clear interest, and might not even have power under national competition law, to prohibit the agreements on its territory. The solution (unless the Commission is to take up the case) seems to be that the national authorities must be able to apply Community law and that the authority in the exporting State must accept a duty under Article 5 EC Treaty, when called on either by the Commission or by the

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9 As discussed thoroughly in the French and Finnish reports. The Ahmed Saeed principle would be applied in the course of national procedures: see below.

authority in the importing State, to apply Community competition law in the interests of the importing State.

This is one of the situations in which it is clear that a national competition authority might have a duty under Article 5 EC Treaty to apply Community competition law, for the benefit of another Member State.

**Sufficient staff in national authorities**

This requirement for satisfactory decentralisation is largely self-explanatory. Nothing would be achieved by the Commission, which is understaffed in relation to its present responsibilities, trying to decentralise cases if some or all of the national authorities were equally understaffed in relation to the total caseload which would result, including the cases so transferred to them.

This requirement must not be taken for granted. In 1997, the members of the Belgian competition authority resigned en masse to protest against the fact that they were all part time and could not carry out their duties satisfactorily. The Finnish report says that the Finnish Competition Council is seriously short-staffed, and the Austrian, French and UK reports make similar comments.

Reference should be made to the Table, above, and the explanatory notes on the Table.

**National authorities must have procedures which enable them to decide cases within a reasonable time**

One of the unsatisfactory features of the present situation is that the Commission, with its existing staff, is unable to deal with all its cases within a reasonable time. Nothing would be gained by recreating the same situation at national level.

It is true that the procedures imposed on the Commission by Reg. 17 are slower and more burdensome than any procedure of any national competition authority. In particular, the

obligations of the Commission to publish its intention to give all favourable decisions, for third party comments, and to have every formal decision translated into eleven languages and discussed in draft with the Advisory Committee before being revised and retranslated, are without parallel in any national procedure[10].

However, it does not necessarily follow that any transfer of a case from the Commission to a national authority is a net improvement in efficiency, for several reasons. First, if a case is dealt with under Community law rather than national law, there are now (apart from the Notice on cooperation) no formal arrangements or requirements for consultation with the Commission or anyone else. Second, the case is resolved only on the territory of the Member State concerned: there may be unresolved issues in other Member States, and further proceedings elsewhere may be needed.

Third, if a party is dissatisfied with a Commission decision it can challenge it under Article 173 in the Court of First Instance, and there is then only one appeal, on legal issues only, to the Court of Justice. In contrast, a decision of a national authority can be challenged in the administrative courts (or whatever courts have jurisdiction to review administrative action) and there may be more than one appeal to the national court of final appeal which may be obliged to refer a question of Community law to the Court of Justice. When that Court has given judgment, the national court which referred the question under Article 177 must again sit to apply the Court's ruling to the facts of the case. In short, if one looks at the entire appellate procedure in each case, it could be longer if the case is first decided by a national authority than if it is first decided by the Commission.

This does not exhaust the differences. If the case is first decided by the Commission, it will be dealt with only under Community law. If it is first decided by a national authority, particularly if the authority is formally applying national law rather than Community law, other issues may arise which have to be resolved. Those issues, when resolved, will form part of the caselaw of the Member State concerned, but will not be binding precedents in other Member States, so that similar issues may have to be litigated under the other national

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[10] Procedures under the transport competition Regulations are even longer and more complicated, since they require publication of two notices in the Official Journal.

laws. A Commission decision is a more important precedent than the decision of a national authority even if the national authority is applying Community law.

**National authorities' independence, professionalism and objectivity**

It is obvious that national authorities applying competition law need to have the characteristics of independence, professionalism and objectivity, to an extent sufficient to ensure that those involved in individual cases will generally accept the conclusions as reasonable. National authorities must be sufficiently independent of both governments and the industries, including State-owned or State-controlled industries, which they deal with. This means having decisions effectively taken by lawyers and economists who have specialised training in competition law. Purely political appointees should be avoided, and the independence (and security of tenure) of the individuals concerned needs to be ensured. While the FIDE national rapporteurs have made no criticisms of national authorities in this respect, such important requirements cannot be taken for granted. Probably not all of the existing national authorities are equally professional. Some national authorities regard themselves as better than the European Commission in these respects. Where there is more than one national authority applying competition law, the extent to which each authority needs these characteristics depends on the structure and regime for law enforcement and the powers and roles of the respective authorities.

**The effectiveness of national authorities' powers**

National rapporteurs were not asked to assess the effectiveness of the powers of national competition authorities. These vary very widely, and comparisons and assessments would be complex. Some, e.g. the Bundeskartellamt, have greater powers than the European Commission in important respects (e.g. power to require evidence of witnesses on oath, powers to have individuals fined and put in jail). In the recent past, some national laws have clearly been ineffective (in Ireland because the law relied entirely on private enforcement, and, as the UK report explains, in the UK because there were no fast procedures, and because the substantive law was complex, form-based rather than economic, and for other reasons).

The powers of national authorities to enforce Community law should be as effective (and as vigorously applied) as their powers to enforce national competition law. National courts are required by EC law to give remedies for breach of Community law which are as effective as the remedies for breach of corresponding rules of national law[11].

In contrast, the UK report makes the interesting point that the powers available to the UK courts are far greater than those of the Commission under Regulation 17. The Belgian report says that there is no discovery procedure in Belgian civil procedural law.

**No Community law or national law obstacles to effective application of Community competition law**

The serious obstacles to the effective and efficient application of Community competition law which may result where national authorities have no power to apply Community competition law have already been discussed above. There are also problems e.g. in Portugal because there are no penalties provided for breach of Articles 85-86 under national law.

It is said in several national reports that national authorities are discouraged from applying Community law by the Commission's power under Regulation 17 to take the case away from them. So they apply only national law. The Cooperation Notice now deals with this. The Commission in practice would not take away a case from a national authority which was applying Community law (as distinct from national law), and there is no reason why the authority could not agree, in advance, with the Commission that the Commission would not intervene in a particular case if the authority was applying Community law.

The question of the Commission's present exclusive power to apply Article 85(3) is mentioned below.

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[11] See e.g. Case 68/88, Commission v. Greece, 1989 ECR 1965 at p. 2985-85: Case C-7/90, Vandevenne et al., 1991 ECR I 4371: Case C-382/92 Commission v. U.K., 1994 ECR I 2435: See Temple Lang, The Duties of National Courts under Community Constitutional Law, 22 European Law Review (1997) 3-18: Temple Lang, The Core of the Constitutional Law of the Community Article 5 EC, in Gormley (ed.), Current and Future Perspectives on EC Competition Law (1997), pp. 41-72.

The Spanish Banks principle is another obstacle, resulting from Community law, to more effective decentralised application[12].

A serious specific obstacle to effective application of Community competition law which has been identified in the national reports is the judgment of the Spanish Supreme Court of December 30, 1993, analysed and criticised in the Spanish report. The effect of this judgment and the Royal Decree on which it is based, as described by the Spanish rapporteur, is that the national courts may not apply Art. 85-86 until the appropriate national competition authority has first decided the case. If this is indeed the result of the Decree and the judgment, it seems to be incompatible with the principle of the direct application of Articles 85-86, with the duty of national courts to apply those Articles, and with the judgment of the Court of Justice in, among other cases, Simmenthal[13]. It also seems contrary to the principle that a remedy must not be too long delayed. By contrast, in France judges are not obliged to adjourn and wait for the competition authority's decision, although of course they may decide to do so.

Another important obstacle, which exists under several national laws, is that the national competition authority is not allowed to give confidential information to any other body, even to the European Commission, for the purpose of applying Community competition law. This impedes closer cooperation between the Commission and national authorities, and it should be dealt with either by national legislation or by a Community regulation, to make satisfactory cooperation possible. (Some national laws, e.g. the new Dutch law, specifically allow this). This means that each national authority is limited to the evidence it can obtain on its own territory.

Another similar (but less important) problem, mentioned in the Austrian report, is the refusal of one national authority to give information to another, on the grounds that it is confidential.

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12 Case C-67/91, 1992 ECR I 4785.

13 Case 106/77, Simmenthal, 1978 ECR 629: see also Case 127/73, BRT v. SABAM 1974 ECR 51: Case 37/79, Lauder v. Marty, 1980 ECR 2481, para. 13: Case C-234/89, Delimitis v. Henninger Bräu, 1991 ECRI 935, para. 45: Case T-51/89, Tetrapak, 1990 ECR II 309, para. 42: Case T-114/92, BEMIM, 1995 ECR II 147 at para. 62: Case T-5/93, Tremblay 1995 ECR II 185 at para. 59: Case C-282/95P, Guerin Automobiles 1997 ECR I 1503 at para. 39.

If the national competition authority has no competence to apply competition law in certain sectors, or to certain types of company, e.g. State-owned companies, this is also an important obstacle to effective enforcement. This is extremely important, because a number of national laws have exemptions or special rules for e.g. transport, agriculture, energy, posts, banking, telecommunications, cooperatives or the State-owned sector.

Certain rules of national law allow recovery of compensation for violation of competition law only if the defendant has been negligent[14]. This limitation seems inconsistent with the Community law principle that national courts must protect fully rights given by Community law. There is no reason to believe that the Community law right not to suffer loss due to a violation of Community competition law by private parties requires proof of negligence.

Although it has not been discussed very fully in the national reports, it seems that in at least some Member States, it is difficult in practice to succeed in claims in national courts under competition law. The reluctance of national courts to apply EC laws is mentioned in the Danish and Dutch reports. In the UK legislation has for many years expressly allowed private claims for compensation for violation of national competition legislation, and it seems that no such claim was ever brought to court[15]. Also, the comment is often made that, outside Ireland and the UK, a private plaintiff in Europe has few rights to compel the defendant to disclose documents which may be necessary for the plaintiff's case, and that this is an important reason why potential plaintiffs go to competition authorities and the European Commission rather than directly to national courts. It is not easy to understand why there have not been more claims for compensation in national courts, except perhaps where, as in the Netherlands and Italy, interlocutory injunctions are often treated as definitive. The German report says that it is often difficult to prove that a restriction on competition is appreciable, and therefore that Community law applies. The Portuguese report says the courts in Portugal have been too demanding in deciding whether to order interim measures, and that it is not clear how far claims for compensation for breach of competition law can be brought.

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14 See e.g. Swedish report. In Austria fault must be shown.

15 Whish, Competition Law (3rd, ed., 1993) 173, 408, who says that the problems of causation and quantum of compensation are "formidable". However, there is no obvious reason why they should be greater in the UK than elsewhere.

The main procedures and practices which are intended to avoid the risk of conflicts between Commission decisions and national courts' judgments are well established[16] and seem to work reasonably well. However, serious problems would arise if national courts considered that they should reconsider findings made by the Commission in formal decisions, even in cases involving parties who could have challenged the Commission's decision under Article 173[17]. This view would inevitably create a risk of conflict, contrary to Article 5 EC Treaty. It would also be contrary to the principle of Community law that national laws and procedures must not make it unduly difficult in practice to obtain effective legal protection for rights given by Community law. Having to litigate all over again issues already decided by the Commission and not challenged, or challenged unsuccessfully, by the same parties would be a serious obstacle to the right to obtain compensation.

One more possible obstacle to enforcement of EC law rights in national courts should be mentioned. At least in the past, it was believed by lawyers that some national courts were prejudiced against arguments, and in particular against defences, based on Community law. Perhaps such arguments were made too often as a last resort, when they were plainly unconvincing. It should be noted, however, that requiring a higher burden of proof in Community law cases than in national law cases, or any prejudice against Community law arguments, would be clearly contrary to Community law principles[18].

Some national competition authorities (e.g. the Italian authority and the new Danish authority) have no power to adopt interim measures.

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16 See Notice on cooperation between national courts and the Commission, O.J. No. C-39/6, 13 February 1993: Braakman and Schröter Introduction, in Braakman (ed.), op. cit. supra, pp. 121-124.

17 In one unreported UK case the High Court considered that it was not bound by Commission findings: Merson v. Rootes Group, discussed by Hall and others, United Kingdom, in Braakman (ed.), op. cit. supra, at p. 400. See however British Leyland v. Wyatt Interpart 1979 3 CMLR 79: Hasselblad v. Orbison 1983 3 CMLR 679..

18 In Shearson Lehman Hutton Inc. v. Maclaine Watson (1989) 3 CMLR 429, it was held that as infringement of Article 85 carries with it a liability to penalties and fines, the burden of proof to be met is a high degree of probability. Since not all infringements of Article 85 in practice involve the risk of fines, this result is open to serious question. The Court's caselaw makes it clear that it must not be more difficult to protect a Community law right than to protect the corresponding national law right. This means that in each Member State the burden of proof, however exactly it should be described, should be the same for both kinds of rights. See the cases cited in footnote no. 11 above.

**The application of Article 85(3)**

Under Regulation 17/62, only the Commission has power to apply Article 85(3). The question whether national competition authorities should also have this power in their own Member States, has been raised. In fact, national authorities are not agreed on whether they wish to have this power[19], or on the arrangements for coordination which would be appropriate if they were given it. The issues are well known and I do not propose to discuss them here. It would be best to discuss them in the context of the expected proposals of the Commission for the revision of Regulation 17/62. If national authorities and courts were given power to apply Article 85(3), the requirements for effective application would be essentially those discussed in this paper. However, the need for coordination of national authorities' decisions would presumably be greater if they were applying Article 85(3), to ensure consistency and to avoid forum shopping.

A separate issue, not discussed here, is whether national competition authorities should in future have power to withdraw the benefit of a Community group exemption (or, which might have similar effects, to impose national rules stricter than a Community group exemption).

**Community law Rules about Competence**

- There are at present several areas of exclusive competence :the Commission alone deals with mergers under the Merger Regulation (subject to Articles 9 and 21), with exemptions under Article 85(3), and with cases under the European Coal and Steel Community Treaty[20];
- national competition authorities alone deal with (non-ECSC) cases not affecting trade between Member States only national courts can order compensation for breach of Community law.

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19 See e.g. Hawk (ed.), 1993 Fordham Corporate Law Institute (1994), pp. 598-600 and discussion at pp. 646-660.

20 Case 30/59, Steenkolenmijnen, 1961 ECR at pp. 22, 41: Case 1/58, Stork, 1959 ECR 17 at p. 27: Case 14/68, Walt Wilhelm, 1969 ECR 1 at p. 20: Case C-128/92, Banks v. British Coal, 1994 ECR I 1209 at p. 1276: U.K. Monopolies Commission, British Steel-Walkers (1990): see also Case C-319/93, Dijkstra v. Friesland, 1995 ECR I 4471, at pp. 4508-4513.

In Italy, all cases under Community law fall formally outside the scope of the Italian competition law.

All other cases involve concurrent powers. Cases which may be handled concurrently can involve

- parallel complaints to the Commission and national authorities
- parallel notifications (or the equivalent)
- a combination of a notification and a complaint.

Much depends on whether the national authorities :

- have power to apply Community competition law
- have a national competition law similar to Articles 85-86 ; or
- have national law based on the abuse principle (broadly, the principle is that a given type of behaviour is permitted until a competition authority has taken action ad hoc to prohibit it) or on a general prohibition qualified by exemptions, which is more like Community law.

The Commission has no power to apply national law. National authorities may apply Community competition law (though at present not Article 85(3)) and national law in the same procedure, which should increase efficiency.

There are some rules about allocating responsibilities :

- national courts must deal with EC competition law questions when they arise (though they may adjourn to await a Commission decision, or refer a question under Art. 177)
- the Commission must deal with requests for exemption under Art. 85(3), and with Merger Regulation and ECSC cases

- the Commission may refuse to deal with a complaint if it can be satisfactorily dealt with by a national authority or a national court[21]. "Satisfactorily" means that the Community law right is fully enforced (or a substantially similar result, economically, is reached). Full compensation should be awarded for any loss suffered, but that can be done only by a national court.
- a national authority (whether a competition authority or not) may not approve any practice, merger or agreement, which is contrary to Community competition law (Ahmed Saeed, 1989 ECR 803). This means that a national authority must not grant a licence which would strengthen an existing dominant position. This was the Commission's advice to the UK Independent Television Commission, on BSkyB-BDB in 1997; a national authority may not itself do what it must not allow a dominant company to do.
- the subsidiarity principle (Art. 3b, EC Treaty: Treaty on European Union) does not enable the Commission's jurisdiction to decide an individual case to be challenged.([22]) (If it did, there would be a duty on national authorities to apply Community law according to the Protocol on Subsidiarity, Amsterdam Treaty).

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21 Automec II, 1992 ECR II 2223 ; Bemim, 1995 ECR II 147 ; Tremblay, 1995 ECR II 185, 1996 ECR I 5547 ; Koelman, 1996 ECR II I ; SFEI, Jan. 15, 1997 ; Guerin, 1997 ECR I 1503.

22 It may be useful to explain why a company cannot use subsidiarity as a ground for challenging the Commission's exercise of jurisdiction in an individual case:
- the Commission already has a jurisdiction threshold : it has jurisdiction only if there is likely to be an effect on trade between Member States. If this requirement is met, Reg. 17/62 confers jurisdiction on the Commission in all cases.
- subsidiarity is generally regarded as a political or policy requirement about which the Council and Parliament should satisfy themselves before adopting general or legislative measures, not a justiciable requirement to be proved in every individual case.
- it would not be enough to show that Member States could, in the abstract, arrange to decide cases of the kind, the company would have to show that the Member State in question would in practice decide it satisfactorily, i.e. bring about the result required by Community law.
- so the Commission, to decide whether it should exercise jurisdiction, would have to make a preliminary finding about what the national authorities would do. But it has no power to assess what they would do under national law.
- no body should have to make a full enquiry and to estimate or reach a final conclusion merely in order to decide whether it or some other body should exercise jurisdiction.
- if the national authority had all the powers needed to apply EC law satisfactorily, the Commission would not normally take the case, and the company would have no reason to object to the authority taking it.
- it would interfere greatly with the exercise by the Commission of the powers conferred on it by Reg. 17 if it always was required to carry out a preliminary enquiry to see what national authorities (perhaps more than one) would do with a case. Such an unsatisfactory result could be accepted only if there were very strong reasons for it.

**Duties of national authorities and courts**

When a national authority or court deals with a competition case (under either national or Community law), it must in particular:

- avoid conflict with any decision of a Community institution in the same case[23] :

  Much depends on the facts of each case. Broadly, national courts need not worry about conflicts in cases not involving notifications, or if there are special circumstances in the national market and the Commission is dealing with a wider market, or in relation to causation or amount of damages, or if the Commission says that a national judgment would be useful, or if the national law is different from Community law and no conflict is likely.
- avoid using as evidence documents received from the Commission for consultative purposes : Spanish Banks, 1992 ECR I 4785
- keep confidential information secret
- avoid imposing a second fine to the extent that the Commission already fined : Boehringer, 1972 ECR 1281 ; Sotralentz, 1995 ECR II 1127
- raise questions of Community law on its own initiative[24]. In my view, this is a result of the national Court's duty to make sure that it observes Community law fully.
- a national court must give an effective remedy, procedurally and substantively, for breach of an EC law right[25] :
- avoid making it more difficult for the Commission to exercise its powers[26];

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23 Walt Wilhelm 1969 ECR I (A national authority cannot authorise what the Commission has prohibited) : G↙ttrup- Klim, 1994 ECR I 5641 ; Dijkstra 1995 ECR I 4471: Hasselblad v. Orbison, 1984 3 CMLRep. 679 ; MTV Europe v. BMG Records, 1997 CMLRep. 867 ; Fyffes v. Chiquita, 1993 FSR 83 ; Re Net Book Agreement, 1997 U.K. Restrictive Practices Court, 13th March 1997.

24 Peterbroeck 1995 ECR I 4599 ; Ahmed Saeed, 1989 ECR 803 ; Costanzo, 1989 ECR 1839.

25 Marshall N° 2, 1993 ECR I 4367 ; Draehmpaehl v. Urania, 22 April 1997 ECR I 2195: Garden Cottage Foods, 1983 2 All E.R. 770 ; Factortame, 1990 ECR I 2433 ; Temple Lang, The Duties of National Courts under Community constitutional law, 22 Eur. L. Rev. (1997) 3-18. Declarations, injunctions and damages must be given whenever appropriate.

26 Lord Bruce, 1981 ECR 2105 ; Hasselblad v. Orbison 1984 3 CMLR 679

Cooperation between national authorities and the Commission under Article 5 is almost always informal. Formal advice from the Commission (as was given to the UK authorities in British Steel-Walker, British Airways-Sabena and BSkyB-BDB) is given if the national authority wants advice on the record. Even formal advice is not legally binding (except under Art. 90(3)), but the Commission should be consulted if its advice is not followed (see the cooperation Notice).

When a national authority deals with an issue under Community law, it must :

- cooperate with the Commission in any way that is appropriate under Article 5, EC Treaty;
- comply with Community principles of fair procedure, both with regard to the primary defendant and others directly affected[27];

  These procedural requirements are more important than they may seem, especially for administrative bodies unused to quasi-judicial procedures. For example, when an authority requests the defendant company to modify its arrangements, third parties with adverse interests should be allowed to comment on the result. When several parties are bidding for a licence, the authority should not invite one party to change its proposals without giving the other parties an opportunity to change their own proposals and later to say whether the changes are sufficient.
- stop its procedure, as far as EC competition law is concerned, if the Commission begins a procedure in the same case : Art. 9, Reg. 17.

The Commission has a duty under Article 5 to help the national authority to apply Community law[28].

**Allocation of cases**

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27 The right to be heard, objectivity, the right to effective judicial review : Sytraval,, 1995 ECR I 95 ; Netherlands v. Commission, 1992 ECR I 565 ; Boussac,, 1990 ECR I 307 ; Timex 1985 ECR 849 ; Transocean Marine Paint, 1974 ECR 1063 ; Air Inter, 19 June 1997 ; Lisrestal, 1994 ECR II 1177; The principle of proportionality, and legal certainty so that retroactive measures are allowed only if specifically justified : Man (Sugar), 1985 ECR 2889 ; Rochdale Borough Council, 1992 ECR I 6457 ; Matra Hachette, 1994 ECR II 595 ; G↙ttrup Klim, 1994 ECR I 5641 ; Staple Dairy Products 1982 ECR 1763 ; R v. Kirk, 1984 ECR 2689; see generally Lenaerts and Vanhamme, Procedural rights of private parties in the Community administrative process, 34 Common Market Law Rev. (1997), 531-569.

There are obvious practical reasons, and there sometimes are legal reasons, for avoiding as far as possible separate procedures before the Commission and before national authorities. Ideally, it should not matter whether a Community law case is dealt with by the Commission or by a national authority, the result should be the same (except for the geographical scope of the measure taken). The following considerations, most of which are informal practical guidelines and not legal rules, help to achieve this.

Under Regulation 17/62, only the Commission deals with Art. 85(3) cases, and, as the cooperation Notice says, it would normally be a more appropriate forum than a national cartel authority if more than one State is affected, and in particular :

(1) if the corporations involved were in two or more Member States, or if investigations, discovery of documents, or injunctions or other legal remedies were needed in several Member States;

(2) if the interest of the Community in the case was greater than that of any one Member State (e.g. where the cumulative effects of a cartel throughout the Community were considerable, but the effect in any one Member State was not);

(3) where the final remedy needs to apply in more than one Member State, especially if it needs to be uniform throughout the Community, e.g., where multiple licences of national patents are ordered;

(4) in merger or joint venture cases in which it is desirable to have one decision, to avoid conflicting decisions at national level and because such cases may involve divestiture;

(5) in cases involving governments, State corporations and State measures (including Art. 90 cases);

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[28] Zwartfeld1990 ECR I 3365 ; Delimitis, 1991 I ECR 935

(6) in important test cases or when the case will be an important precedent;

(7) in cases where Community fines are appropriate for all the companies;

(8) in some cases involving primarily companies of non-member states, e.g. where the consultation with the US authorities under the EC-US Cooperation Agreement would be needed;

(9) if it appears that the result in a national procedure will not be the same as under Community law;

(10) if the outcome has important consequences in more than one Member State.

In addition, provided the result is not affected:

- if there is real doubt whether there is an effect on trade between Member States, the national authority should act rather than the Commission;
- if the two procedures involve wholly different issues (e.g. because the national law is different from Community law), separate procedures cannot be avoided;
- if one authority is considering a preliminary issue which, if decided in one way, will prevent all other issues arising, that authority should decide first;
- the Commission believes that it is not bound to decide issues of EC antitrust law arising in complaints merely to facilitate claims for compensation by companies injured by the infringement (this point is discussed below);
- neither the Commission nor national authorities will knowingly facilitate forum shopping merely in the interests of a complainant;
- if interim measures are urgently needed, whichever authority can adopt them more quickly should do so : Sea Containers - Stena Sealink, O.J. n° L 15/88, 1994;
- if proper consideration of the case necessitates deciding if national legislation is consistent with Community law, the Commission should handle it : Rendo 1992 ECR II 2417.

As already mentioned, if a national authority proposes to apply Community law, and has jurisdiction to do so effectively, the Commission would normally leave the case to that authority. If a national authority has applied Community antitrust law, the Commission will rarely if ever review or reopen its decision (but there should be effective judicial review in national courts so that questions of EC law can be raised under Art. 177)[29].

If a national authority is not applying EC antitrust law but is sufficiently likely to bring about an essentially similar result by applying national law, the Commission, having verified as far as may be necessary that this is so, will leave the case to the national authority unless there is a Community interest in dealing with it (e.g. its importance as a precedent in other Member States)[30].

So duplication of procedures is much more likely to be avoided if the national authority applies EC antitrust law or, failing that, if national law is similar to EC antitrust law.

However, if it is sufficiently clear that the application of national law has not led to results substantially similar, from the economic viewpoint, to the results expected from applying Community competition law, the Commission believes that it may be obliged to reopen the case (see below).

The Ahmed Saeed principle (that no national authority should approve a practice, merger or agreement which is contrary to Art. 85-86) should help to enable the Commission to leave a case in the hands of the national authority when national procedure requires approval to be given or refused, and where Art. 85(3) does not apply.

There are of course specific provisions in the European Economic Area Agreement allocating cases to the European Commission or to the EEA Authority.

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29 Heylens 1987 ER 4097 ; Johnston v. R.U.C., 1986 ECR 1651 ; Les Verts, 1986 ECR 1339 ; Broekmeulen, 1981 ECR 2311).

30 Automec II, 1992 ECR II 2223

**Two Commission opinions**

As the cooperation Notice explains, the Commission considers that it is not obliged to decide issues of Community competition law arising from complaints or to adopt formal decisions merely to facilitate claims for compensation in national courts. The Commission has no power to award compensation, to determine how much compensation should be paid, or to decide issues of causation. A national court, on the other hand, which is competent to decide such issues, is also competent to decide any other questions which may arise, including the preliminary question whether the defendant has infringed Community law at all. Economy of procedure therefore leads to the conclusion that the Commission is not bound to determine the preliminary question unless there is some Community interest in doing so. This, of course, also means that the Commission need not use its resources on decisions in which there is no Community interest. However, a formal Commission decision, if one is adopted and not successfully challenged, is binding on the parties who could attack it under Article 173 and therefore cannot be questioned by them in a national court[31].

The Commission also believes that it may be obliged to begin a procedure if it appears clearly enough that the result of a procedure under national law has been, or will be, substantially different in economic terms from the result expected under Community law. There would be no justification for saying that a complaint should be rejected merely because the complaint had been considered under another competition law, with another result. There can be no presumption in Community law that the application of a national law, even one intended to resemble Community law, has led or will necessarily lead to the same results as Community law in all cases (especially if Article 177 does not apply). The Commission cannot refuse to exercise its powers if it is clear that a complainant's rights have not been protected and cannot otherwise be protected. Since national courts are

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[31] See an analogous situation in State Aids, Case C-188/92, TWD Deggendorf 1994 ECR I 833 (in which the Courts said that "the national court is bound" by the Commission decision); Advocate General Tesauro in Case C-266/93, BKA v. Volkswagen, 1995 ECR 1 3477 at p. 3505-6 and f.n. 50 writes of the national court being "precluded" by a Commission decision from applying an inconsistent national law. Decisions of the Commission in cases in which it has exclusive competence, under Article 85(3) and Regulation 26, are binding on national courts. See the Notice on cooperation with national courts, point 25. See also Case C-128/92, Banks v. British Coal, 1994 ECR I 1209.

obliged to protect rights given by Community law, the Commission must have a similar obligation in situations in which the complainant cannot obtain a remedy at national level.

I believe that the Commission is not obliged to deal with a complaint if national law has already led to substantially the same result as Community law. But the Commission may be obliged to act when the result under national law is different, and when the complainant cannot otherwise get protection.

This, however, does not answer the question whether the Commission could, or should, refuse to deal with a complaint when the national authority has applied only national law, but the national courts would be obliged to apply Community law. It seems that the answer most consistent with what the Community courts have said, notably in Automec II[32] is that the Commission has a duty to act if, but only if, the relevant national court cannot give an adequate remedy for any reason, e.g. because a remedy is needed in more than one Member States. In other cases to which Articles. 85-86 apply, the Commission has power to act, but no duty to do so.

**When two procedures occur**

If some duplication of procedures is unavoidable, many issues can arise. The duties of cooperation under Article 5 EC Treaty and some other legal rules and practices seek to deal with:

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[32] Case T-24/90, "Automec II", 1992 ECR II 2223 at paras. 87-98: see also Case T-114/92, BEMIM 1995 ECR II 147 at pp. 172-173: Case T-5/93 Tremblay 1995 ECR II 185 at pp. 208-213. In BEMIM and Tremblay the Court said that a person who lodges a complaint under Regulation 17/62 Article 3 has a right to a decision only if the complaint is within the exclusive competence of the Commission "as in the case of the withdrawal of an exemption granted under Article 85(3)". It seems reasonable to say that the same conclusion applies if the Commission is the only forum which can deal with the whole complaint in one single decision, even if the complainant could in theory protect its rights under Community law fully by going before national courts in two or more Member States. See also Case T-575/93 Koelman 1996 ECR II at para. 39.

- preventing the parties from using one authority to obstruct the procedure of the other (UK Monopolies Commission Reports on British Steel-Walkers and BA-KLM-SABENA) ;Notice on cooperation between the Commission and national authorities : Art. 15(6), Reg. 17;
- coordinating, gathering and analysis of evidence, and joint negotiations with the companies;
- avoiding conflicting decisions (as already mentioned, exactly what this means in practice depends on the circumstances: a national court is not always obliged merely to adjourn and wait);
- non-binding advice or views from the Commission : Brother Industries 1987 ECR 3757 : Zwartfeld 1990 ECR I 3365 ; Fyffes v. Chiquita, 1993 FSR 83;
- use of documents in one procedure which were obtained in another ; Spanish Banks case 1992 ECR I 4785 ; Postbank, 1996 ECR I 921 ; Apple (1992) I CMLRep. 969;
- complementing Commission decisions e.g. to determine prices and conditions for access agreements or to monitor compliance with the duties imposed by the Commission : British Steel-Walkers ; BA-KLM-SABENA ; BT-MCI 1994 ; Atlas-Phoenix - Global One 1996 ; or to deal with national issues ;
- interim measures : Ford Werke, 1984 ECR 1129 ; La Cinq, 1992 ECR II 1 ; B&I-Stena Sealink ; Sea Containers-Stena Sealink 1994, O.J. L 15/88;
- avoiding double fines for the same behaviour;
- the initiation of a procedure by the Commission does not affect the power of a national authority to apply national law : Article 9, Reg. 17/62; but, of course, its duty to cooperate under Article 5, EC Treaty, still applies;
- imposing parallel conditions and safeguards (the Commission can take note of what a national authority has done, but cannot simply rely on a national authority to do in the future whatever is needed under EC law).
- the extent to which a decision of the Commission, in effect, binds national courts or the parties before them : Iberian v. BPB, 1996 2 CMLRep. 60,1; 1996 ECC 467 : British Leyland v. Wyatt, 1979 3 CMLRep. 79 ; McCarthy v. Unichem, 1991, Eur. Comm. Cases 41. (It would seem an unreasonable obstacle to asserting rights under Community

law in national courts if findings of infringements made by the Commission and not challenged in Luxembourg had to be proved all over again against the same parties).

- the Commission may advise the national authority on how far it can take measures which alter the effect of an exemption under Article 85(3).

**Comments on the present Community/National Law Symbiosis**

The comments which follow are prompted by considering the overall situation as illuminated by the excellent national reports, and in the light of recent discussions on improvements and reforms in the Community competition law system. So many important legislative changes have been made recently, or are now being considered, in various Member States that the future is not easy to foresee clearly. Several Member States have adopted or are adopting important new legislation (Denmark, The Netherlands, the U.K.) and several others have adopted new legislation comparatively recently, e.g. Norway. The national reports are also so detailed that it is impossible to discuss here all the points made in them.

1. It is no longer correct to regard Community competition law as a legal regime applied primarily by the Commission and the Community Courts, and largely independent of national courts and national competition law. There is one single integrated Community regime applied by both national courts and authorities and the Community institutions. This requires new thinking and answers to new questions. In principle, duplication of procedures should be avoided and the result should be the same irrespective of where Community law is applied, and by what authority. In practice, not enough has yet been done to make certain that this is so. There is still a great deal to be done on all these questions. We need a new approach to make the national competition authorities of Member States, in addition to their responsibilities under national law, into a network or team applying one body of Community competition law as efficiently as possible. Only when national authorities are thought of as a team can we see clearly what is missing and what needs to be improved. Effective application of Community law by national

authorities which regard themselves as having other primary responsibilities will not occur without deliberate effort.

2. In Member States in which the rules on restrictive agreements and practices are similar to Article 85, national law or practice could ensure that Community law group exemptions or individual exemptions are treated as exemptions from the national rules. This is the position e.g. in Portugal. Something like this may already be the situation in Germany as a result of the Pauschalreisen II judgment, described in the German report.

In two cases in 1995[33], although the Court did not decide the question, Advocate General Tesauro stated that when a group or an individual exemption is applicable to an agreement, a stricter national law cannot be applied to it, because of the primacy of Community law. (He criticised the recital in the group exemption for car distribution, Reg. 125/85, which visualised the application of a stricter national law). The Commission has expressed the same view in principle, but has not always insisted on it [34].

If the view expressed by the Advocate General is correct, there is less scope left for national competition law in relation to agreements, decisions of associations of enterprises, or concerted practices which affect trade between Member States. National authorities, if the view of the Advocate General is confirmed, could not prohibit agreements which had been exempted under Article 85(3), and neither could they approve, under national law, agreements which were prohibited by Article 85[35]. It remains to be seen whether the Court of Justice will agree with the Advocate General and, if so, how far there is still scope for a national competition authority to add to or modify, without reversing, the effects of an exemption under Article 85(3) by imposing additional safeguards under national law, e.g. to deal with

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33 Case C-70/93 BMW v. ALD Auto-Leasing 1995 ECR I 3439, at pp. 3454-3458: Case C-266/93 BKA v. Volkswagen 1995 ECR I 3477, at pp. 3500-3507, conclusions of Advocate General Tesauro. The Advocate General relied on Case 14/68 Walt Wilhelm 1969 ECR I.

34 Reg. 125, recital 29: Temple Lang, European Community Constitutional Law and the Enforcement of Community Antitrust Law, in Hawk (ed.), 1993 Fordham Corporate Law Institute (1994) at pp. 553-566.

local or national problems not arising, or arising less acutely, elsewhere in the Community. National law would of course, continue to apply fully to agreements which do not affect trade between Member States[36].

3. Substantive national competition laws are now much more like one another, and more like Community law, than the powers and procedures of national competition authorities, or civil and commercial remedies for breach of competition law. Though still imperfect and incomplete, substantive harmonisation of competition law (except for merger control) has now broadly occurred. The tasks for the future are to complete this harmonisation, except for whatever differences are genuinely necessary, and to begin harmonisation of powers and procedures of national authorities, and the penalties they impose, and of civil and commercial remedies. For the two latter purposes, we need comparative studies on a scale larger than could easily be undertaken for a FIDE conference.

4. When a national authority applies Community competition law, assuming that it has all the necessary powers to do so satisfactorily (i.e. that the case does not require it to obtain evidence or to order a remedy outside its territorial jurisdiction), the Commission should not need to consider the case. Prompt remedies and interim measures should be available if they are needed. There should be no weaknesses or deficiencies in the powers or procedures of national authorities which the Commission is expected to remedy. Any dissatisfied party should be able to obtain effective judicial review from national courts, with the help of the Court of Justice under Article 177 if necessary. The Commission should not need to act as an appellate forum, and should not feel always obliged to intervene even when things are clearly going wrong.

Of course, this will not be the situation if the national authority applies only a national law which does not lead to the same result as Community law.

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35 Case 66/86, Ahmed Saeed Flugreisen 1989 ECR 803, pp. 851-856.

36 National authorities could also prohibit agreements which fall under Article 85(1) and require notification, but which have not been notified. In other cases, national authorities could act provisionally, subject to avoiding conflict with possible later Commission decisions.

5. At present, complainants appear to have substantially greater procedural rights under Community law than in national legal systems. This creates an incentive to complain to the Commission even in cases which could be dealt with satisfactorily by national authorities. This raises the question whether complainants should have greater rights under national competition procedures, or whether their rights under Community procedures should be reduced, in cases which could be satisfactorily dealt with by a national authority. The Belgian report suggests that harmonisation of complainants' rights would be desirable.

6. The Commission and national authorities need to develop closer informal arrangements for cooperation to try to ensure that they all reach similar conclusions in similar cases, without imposing on national authorities the burdensome procedures of the Advisory Committee under Regulation 17/62. This should also extend to coordination of the penalties to be imposed by national authorities for breach of Community law.

7. Smooth progress in the next couple of years will depend on how far national competition laws based on Community law in practice follow it precisely, with or without guidance from the Court of Justice under Article 177. It is not yet possible to be sure, and the result may be different in different Member States. The consequences may perhaps be similar to those which would result if the authorities applied Community law. It is clear that in several Member States the courts and the competition authorities deliberately follow Community law. The way the systems work in practice will depend on national courts: the Commission and the Court of Justice will not be able to ensure uniform results. If the results are similar to those given by Community law, and if this is intended to happen, national legislatures should give power to apply Community law as such, to avoid the procedural disadvantages outlined above.

8. It is not clear how far regulatory authorities have ensured that they comply with the important judgment of the Court of Justice in Ahmed Saeed Flugreisen[37]. The view

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[37] Case 66/88, 1989 ECR 803 at pp. 851-856.

apparently taken by competition authorities is simply that it is the job of regulators to ensure that they respect Community law. In that case, the Court said that national regulatory authorities should not approve, under national law, agreements or practices which are contrary to Community competition law, or prices which were fixed contrary to Community competition law. This principle is based on Article 5 EC Treaty. This is an important point which does not seem to be widely understood. In practice, it seems that national regulatory authorities, e.g. in the transport and telecommunications sectors, should consult the national competition authority to ensure that they do not infringe Community law. It also means that the decisions of regulatory authorities must be subject to effective judicial review and can be annulled if they are contrary to Community competition law. It also seems to mean that the validity of group exemptions given under national law, even if they do not purport to apply Article 85(3), could be challenged on the grounds that they clearly and directly approve arrangements which are contrary to Community competition rules[38].

9. In fact the Ahmed Saeed judgment has implications for competition authorities as well as regulators, although the Commission has never pointed this out. Article 5 must impose the same duty on competition authorities not to approve, under national competition law, any agreement or practice which is contrary to Community law: the duty must apply a fortiori to competition authorities as well as to regulators. The Court has also ruled that national administrative authorities, as well as courts, must raise points of Community law on their own initiative even if the parties have not raised them[39]. It seems to follow (and if this is correct it is certainly more important than is widely realised) that any national competition authority asked to approve an agreement or a merger under national competition law should always ask itself the question whether the agreement or merger is contrary to Community competition law even if it has no express power under

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[38] See, for example, the group exemption for retail sector chains, criticised in the Swedish report. I assume that the fact that a national group exemption covered some situations which were contrary to Community law could not be a ground for challenging the validity of the whole group exemption.

national legislation to apply Community competition law (including, in the case of a merger, Article 85 and Article 86[40]).

10. It seems to be generally accepted that there is a Community standard for judicial review of decisions of national authorities, when they have applied, or should have applied, Community law rules. In such circumstances, there seems to be a right to judicial review, by whatever national courts have jurisdiction, which is strict enough to enable any substantive or procedural point of Community law to be raised and decided, if appropriate after a reference under Article 177. This apparently implies, at least in some Member States (e.g. the UK, according to the UK report), stricter judicial review when Community law issues arise than in purely national law cases.

11. It seems from the national reports that the importance of the Commission's Notice on cooperation with national courts has been limited. Several reasons are given. Some national courts are not accustomed to the idea of asking any authority for information (except in special circumstances, e.g. on the question whether a government of a foreign State is recognised). When a national court wants guidance on a question of law, rather than factual information, it naturally prefers to use Article 177, so as to get an authoritative ruling. The Swedish report points out that national courts can expect to get information from the Commission, but do not ask for advice[41]. The UK and German reports discuss this question carefully, and the Dutch report makes some suggestions for improved cooperation.

12. The Court of Justice has said that national courts must give effective protection to Community law rights. This principle will in due course make it necessary for the Court to define the extent of these rights, and what effective protection

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39 Case C-312/93, Peterbroeck, 1995, ECR I 4599: Case 103/88, Costanzo, 1989, ECR 1839. The Ahmed Saeed judgment itself clearly requires regulators on their own initiative to avoid approving a price or practice contrary to Community competition law.

40 Case 6/72, Continental Can, 1973 ECR 215: Cases 142 and 156/84, BAT and Reynolds, 1987 ECR 4487

41 Some lawyers consider that the Commission should not offer opinions or advice either to a national court or to a national authority, even when asked for it because, when it does, the advice cannot be challenged directly and national courts and authorities are thought to be unduly influenced by it.

necessitates[42]. The Court will therefore have to answer a number of substantive law questions which have not yet been raised, at least as far as Community law is concerned, in national courts. These questions concern, in brief, who may sue for compensation for infringement of Community competition rules, in what circumstances, and for what compensation (see below).

13. Several national reports have rightly called attention to the fact that the normal rules and procedures of national competition law do not apply, or apply only with substantial modifications, to State enterprises (e.g. French report) or to particular sectors (agriculture, transport). Especially where the State-owned sector is important, these are serious lacunae in national competition laws, and in the areas in which these exemptions apply decentralised enforcement is possible only if it is clear that the authority can and will apply Community law fully.

14. As national courts apply Community competition law more frequently, and in particular as national authorities adopt decisions formally based on national law but intended to follow Community competition principles, we need to improve the existing arrangements for making information available on each State's caselaw in other Member States. The Braakman Report is useful, but it does not deal with Austria, Finland or Sweden, and in due course it will go out of date, especially in Member States which have enacted or are adopting new legislation (Denmark, The Netherlands, Norway, the United Kingdom). The Belgian report makes the interesting comment that Community law has been relied on less often after the coming into force of very similar national legislation, but it will remain important to know the caselaw of other Member States. One partial solution would be for every national competition authority to have its own website which could be connected by hyperlinks to the Commission's DG IV website. If this was done, summaries in a second language would be useful.

15. A potentially important type of development, noted in the French report, is the agreement of 26 September 1997 for cooperation between France, Germany and the UK on procedures for control of mergers under national law.

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42 Temple Lang, The Duties of National Courts under Community Constitutional Law, 22 European Law Review (1997), pp. 3-18.

16. An outsider may be permitted to question whether having more than one competition authority in a Member States is efficient. (It is, of course, normal and desirable to have a competition authority dealing with individual cases separate from the Ministry responsible for competition legislation, and essential to have an appeal to the courts.) The proposed rationalisation of the UK competition authorities seems to be a significant improvement.

17. It has sometimes been suggested that criteria more precise than the cooperation Notice should be adopted for the allocation of cases between the Commission and all the national authorities. It should be clear from this report that any such criteria would have to depend on whether the national authority would apply Community law effectively to the case. The answer to that question would be different in different Member States, and even in different cases. Therefore, it seems that generally applicable criteria for allocating cases between the Commission and national authorities are not possible at present. The best general mechanism for deciding which institution should deal with any particular case is informal discussions between the two institutions, more or less as at present (except that they should be done as a matter of routine, at the beginning of each case). No substantially better general system can be developed until most or all of the obstacles to national application of Community law have been eliminated and the requirements for effective decentralisation, listed above, have been largely met.

On the other hand, the national authority of a Member State in which all the requirements for effective national application were fulfilled could have a more formal bilateral arrangement for allocating cases, if that was thought desirable, and if the Commission was willing to distinguish between national competition authorities in this way.

**The European Economic Area**

Time and space do not permit a discussion in this paper of the important and interesting question how far the conclusions and statements suggested here would apply mutatis mutandis within the European Economic Area. However, since the EEA Treaty includes an Article 3 in substantially the same terms as Article 5 EC Treaty, I believe that most of them are applicable. The Norwegian report argues that national authorities in EEA States have the same competence to apply EEA law as national authorities in EC Member States have to apply Community competition law. It also points out, however, that national authorities in EC Member States have apparently no power to apply the EEA competition rules. This might be important in relation to agreements which do not affect trade between EC Member States, but do affect trade between an EC Member State and an EEA State. In other situations, it would not seem to make any difference whether EC or EEA rules were applied, since they are intended to be the same.

The question whether the EEA Agreement imposes any obligation on the courts or national authorities of EEA States to cooperate with the European Commission, or any obligation on courts or authorities in EU Member States to cooperate with the EEA authorities, does not seem to have been analysed in detail. Since the importance of Article 5 in the Community legal system has been underestimated, it is likely that the importance of Article 3 in the EEA system has been also.

**Harmonisation of civil and commercial remedies in national courts**

The extent of the national law and commercial remedies, in particular the right to compensation, for breach of competition law in different Member States is not yet clear. In these circumstances, there are two possible approaches. One is to wait for some years and to see what differences emerge, and then to propose some harmonisation measures. The other approach is to identify the principal issues and to propose harmonisation, without waiting until expensive litigation and frustrated plaintiffs have clarified or developed divergent national laws.

There are several arguments for harmonisation, whether soon or in a distant future. One argument is that differences between national laws on how much compensation can be claimed, by who, and in what circumstances, will distort competition. One must be clear what this means. It does not necessarily mean that the victims of a large horizontal cartel will be fully compensated in one Member State and get so little compensation in another State that the victim companies there are all under-financed and at a competitive disadvantage afterwards. Nor does is necessarily mean that the parties to such a cartel have to pay full compensation in one Member State (and so make no net profit from the cartel) while their competitors elsewhere have to pay so little compensation that they end up with substantial profits from the cartel. Both situations are possible, and either might lead to a situation in which a group of companies, indeed a whole national industry, was under-financed or made unjustifiable profits. But serious and striking differences in treatment are even more likely to arise between individual companies which, perhaps because of small differences between national laws, reach entirely different results when they try to claim compensation. Large distortions of competition are likely to occur as between individual companies, and will increasingly be considered unfair and unjustifiable in a single market.

To answer the questions when may a plaintiff sue for loss caused by an infringement and for what it can recover, it would be necessary to look at the national civil and commercial laws of the Member States of the Community, on both procedural and substantive matters, in particular[43]:

1. standing to sue, especially of indirect purchasers and consumer and other representative organisations;

2. causation and directness of injury and the nature of the injury which can be sued for;

3. whether intention or negligence must be proved;

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[43] Temple Lang, EEC Competition actions in Member States' courts - claims for damages, declarations and injunctions for breach of Community antitrust law, in Hawk (ed.), 1983 Fordham Corporate Law Institute (1984) 295-297.

4. measure of damages (availability of compensation for loss of profits, decreased revenue, increased costs, consequential loss of business and increased costs which might have been passed on to the plaintiff's customers);

5. if a claim against a State authority for a breach of Article 5 or Article 90 is planned, the rules relating to claims or injunctions against the State.

Community law may already include criteria in relation to the above matters. Other relevant national laws would include:

1. prescription (limitation) including whether the claim arose when the infringement occurred or when the damage was suffered or when the plaintiff first became aware of the unlawful acts;

2. national law requirements for temporary or permanent injunctions, if either is needed or may become necessary, and whether injunctions imposing positive duties such as the duty to supply goods or services, are possible;

3. national law rules on in pari delicto and unclean hands (claims by one party or former party to an unlawful agreement);

4. whether the national court's injunction can have any extraterritorial effect in other Member States of the Community;

5. indemnity and contributions between defendants and the basis for determining the amount of any contributions which might be recoverable;

6. discovery and limitations on the duty to disclose documents, including the principle against self-incrimination and restrictions on the powers of national courts to order production of documents physically situated in other Member States;

7. class actions (mentioned specifically in the Norwegian report);

8. recovery by a successful plaintiff of its lawyer's fees and expenses;

9. when injunctions will be thought more appropriate than damages, and vice versa;

10. estoppel due to failure to produce evidence to the Commission during the Commission's procedure.

How far do we need some harmonisation of the national law substantive rules on the extent of compensation for economic loss? The Norwegian report says that it would seem reasonable that the same opportunities to obtain damages should be available everywhere. Comparison with US antitrust law shows how many substantive questions are likely to need answers. In The Netherlands and the UK, the courts apparently consider that Article 85 is to benefit competitors and other third parties, and does not give the contracting parties themselves a right to positive relief, e.g. damages[44]. Should there be legal rules to prevent a party to an agreement, which has allowed the agreement to operate for years, from repudiating it (and obtaining compensation) on the grounds that it is, and always has been, contrary to Article 85? None of the national reports consider the question whether compensation can be claimed, and if so by whom, when a company which has paid an unduly high price as a result of an unlawful agreement has passed on the higher price to its customers. Is it only a company which is the direct and intended victim of a boycott or other exclusionary agreement which can sue, or can any company which has suffered loss as a result of any violation of Article 85-86? The caselaw of the Court would suggest that Community law requires the latter result[45].

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44 See the Dutch and UK national reports.

45 The Court of Justice has often said that national courts have a duty under Article 5 EC Treaty to protect fully rights given by Community law: see e.g. Case C-271/91 Marshall 1993 ECR I 4367: Case C-213/89, Factortame 1992 ECR I 2433: Case 240/87, Deville 1988 ECR 3513: Temple Lang, The Duties of National Courts under Community Constitutional Law, 22 European Law Review (1997), pp. 3-18: see also Case 127/73, BRT v. SABAM 1974 ECR 51, para. 16: Case 37/79, Lauder v. Marty 1980 ECR 2481 para. 13: Case C-234/89, Delimitis v. Henninger Bräu, 1991 ECR I 935, para. 45: Case T-51/89, Tetra-Pak 1990 ECR II 309, para. 42: Case t-114/92, BEMIM 1995 ECR II 147 at para. 62: Case T-5/93, Tremblay 1995 ECR II 185 at para. 59: Case C-282/95P, Guerin Automobiles 1997, ECR I 1503, para. 39.

If it becomes clear that there are big differences in the substantive remedies available under different national laws and that the protection of Community law rights which the Court has said is required by general principles of Community law does not get rid of these differences, there will certainly be pressure to harmonise them. A great deal of loss and inconvenience would be avoided if harmonisation work began soon.

**Suggested policy and research conclusions**

The following further conclusions are suggested. Some of these conclusions are obvious, others are probably controversial. They are not listed in order of certainty, but grouped as far as possible for convenience.

**Policy for authorities**

1. As the European Commission and at least some national authorities are understaffed in relation to their responsibilities, it should be policy everywhere to minimise unnecessary notifications (or the equivalent procedures) and to simplify procedures as far as possible.

2. Insofar as national laws are closely based on Community law, it should be possible to do more to eliminate duplication of notifications and individual exemption decisions and administrative letters.

3. More effective cooperation between national authorities and the Commission would require national authorities to inform the Commission more, and more systematically, than they do at present about the individual cases they are dealing with.

4. The rights of complainants to obtain, in appropriate cases, injunctions and compensation from national courts for breach of either Community law or national law should be stated expressly in national or Community legislation, so that the Commission can rely on national courts taking appropriate action.

5. The Community legislature should alter the law as stated by the Court of Justice in the Spanish Banks case so as to allow evidence obtained by the Commission to be used by national authorities to apply Community law.

6. There should be greater use of electronic communication between the Commission and national competition authorities, to increase efficiency and closer cooperation.

**Policy for researchers**

7. We need to know more than we apparently do about why companies do not in practice claim rights which national law, on paper, gives them (e.g. in the UK and Ireland).

8. We need better statistics than are apparently available on the time taken for legal procedures in Member States, in national courts and in national competition authorities.

It has been suggested to me that it would be particularly useful to compare the number of hours spent in authorities actually working on cases with the total number of days from start to finish. The difference between these figures would be a measure of the efficiency of the procedures in question, since it would indicate the amount of time spent waiting for the next step to be taken (sometimes, of course, by the companies and not the authority).

Since it is notorious that court proceedings are exceedingly slow in some Member States, it is regrettable that all the statistics needed are apparently not available, so that the extent of the problem can be accurately assessed.

**The effectiveness of laws**

9. We need to review more frequently and more scientifically the effectiveness of our laws, powers and procedures. The official Swedish report[46] is a useful example of what can be done in this respect. Much could be learned also from "law and economics" research in the USA. The number of infringements, their duration, whether they stop when the parties are ordered to stop them, how often fines are imposed or compensation paid, the cost to society of enforcement and of voluntary compliance, are all capable of being estimated quantitatively. Efforts should be made to confirm or deny the widely held view that cartels are still common in some EC Member States. European lawyers need to give more attention to the economics and sociology of competition law in Europe.

When we ask how well a competition law works, we must be clear what we mean. It is not the same as asking if the market (which concerns a given range of products or services) is competitive. A competition law cannot guarantee that a market will be competitive: it can at most seek to ensure that the market in question is not made significantly less competitive by unlawful anticompetitive practices (and exploitative abuses). Effectiveness means the extent to which the law achieves objectives which it can fairly be expected to have, i.e. the

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[46] Konkurrenslagen 1993-1996 (Stockholm, 1997). This contains a summary in English on pp. 19-25. This contains the following striking passage:
"As far as we have been able to ascertain, there has been no general economic and legal evaluation of a national competition act in any country. It is uncertain whether there are any scientific economic methods of measuring the effects of KL [the Swedish Competition Act]. At any event there is no reason for making such measurements until the Act has been in force for a substantial period of time. Our survey is based on experience and opinions of authorities, companies, etc., who are affected in various ways by the Act.
*Theoretical viewpoints*
A socio-economic evaluation of KL is only possible over a long term. The Act should be seen in an international perspective and against the background of an economic theory which is to some extent uncertain.
As there are no general evaluations of different legislative models, it is difficult to determine how legislation on competition should be designed in order to give the best results. Experience of KL also shows that the questions of competition and competition law are very complex and probably considerably more difficult to assess than was acknowledged when the Act was introduced.
*Effects of KL from an economic viewpoint*
Hitherto many companies have amended their agreements and their behaviour in order to meet the requirements of KL. In other words, restrictions on competition have been removed. Whether KL has had an effect on competitive pressure in general can hardly be measured. Nor can any concrete effect on consumers be directly demonstrated."

detection and suppression of practices which it prohibits, without undue cost or inconvenience to the market participants, and by procedures which are fair and appropriate under the rule of law. This kind of assessment would not be limited to, though no doubt it would include, an assessment of the efficiency of each national competition authority. Since we cannot scientifically determine how often illegal practices occur, so as to determine what proportion are detected and stopped, we have to use as tests (1) whether, if the market is uncompetitive, we (as economists) can see reasons why this is so, other than anticompetitive practices; (2) general impressions of people, (3) the ease with which victims get redress and (4) the competition authority proves and stops practices when it suspects them. The third of these is a result of the efficiency or otherwise of court or competition authority procedures. The fourth is a result of the size, efficiency and legal powers and economic expertise of the competition authority.

Lawyers are not accustomed to measuring such things. We have not got (in Europe) many or well-developed recognised techniques for measuring them quantitatively, nor have we always got the statistical information needed for the techniques we have. Also, we tend to take for granted delays in court procedures which, objectively considered, are deplorable, and which may not be inevitable results of unavoidable constraints. Nor have we statistics on the cost to companies of voluntary compliance, or of obtaining redress, or of the adequacy of redress obtained (is compensation given for <u>all</u> the loss which has been suffered? Are there economist expert witnesses enough, with enough statistical information, to prove how much this loss is?) We can say that unnecessary notifications should be avoided, that duplication of procedures (including notifications) should be minimised, that competition authorities should be able to concentrate on important cases, that procedures should be as simple as possible and as quick as can be arranged, that voluntary compliance is better in a democracy than compliance brought about by official action, and therefore that companies should be encouraged to consult well-informed lawyers (without creating evidence against themselves) provided that the lawyers accept a professional ethics duty not to mislead courts or competition authorities and not to help

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See also McNutt, Some reflections on Irish competition policy, paper at a seminar organised by Competition Press, Dublin, 1997.

their clients to break the law[47]. We can identify uncertainties in law or in getting evidence which inhibit effective remedies, and specific legal rules which interfere with relief which we believe, on some policy criteria, should be given. We can (though we do not do so often enough) measure how long it takes to get remedies, in practice (e.g. in the Kort Geding procedure in The Netherlands) and the number of cases dealt with by the national competition authority and the national courts, but we cannot measure how many more the authority ought to deal with to enforce the law 100% (or, more precisely, as much as it is economically worthwhile to enforce, i.e. not where the cost of enforcement exceeds the economic gain achieved by it). We ought also to be able to assess in how many cases the truth is not finally disclosed because witnesses can not be required to give evidence on oath, with penalties for perjury (a weakness in the powers of the European Commission). Last, but in many ways most important, we need to improve the methods of calculating the profits made from unlawful behaviour and the losses caused by it, so that we can be sure that fines are large enough to take away all profits, and compensation is great enough to offset all losses.

**Other questions which could be considered**

The General Rapporteur proposes that the comments and suggested conclusions set out above should be discussed at the FIDE Conference. In addition, the following questions might be worth discussing if time permits:

1. To what extent do we need some harmonisation of the powers and procedures of national competition authorities (see the Spanish and, in particular, the Swedish reports)? If it should not matter to the companies involved which forum decides their case, will it not sooner or later be necessary to ensure that the procedures as well as the substantive law are similar, so that one can be confident of similar results? Do we not at least need an authoritative statement of the Community law principles of fair procedure (the rights of the defence, the right to consult one's lawyer, proportionality, legal certainty, non-self incrimination, the principle of

[47] The Consultative Commission of the European Bars and Law Societies has been repeatedly asked by the European Commission for confirmation on these two points.

legality, etc.), which apply in all cases in which Community law is applied or rights given by Community law are considered or protected? Do we need harmonised rules on the rights of complainants? On obtaining evidence ("discovery")?

The difficulties of harmonising power, procedures and penalties would be considerable. In some Member States (Austria, Ireland) the Constitution limits decision-making by authorities rather than courts. In some Member States, criminal law as well as administrative law is involved. In Denmark, Ireland and Sweden, the competition authorities have to ask courts to impose fines.

Nevertheless, substantial procedural differences, as they become more clearly known, will certainly cause dissatisfaction. It is true that insofar as national competition authorities are applying Community competition law, they must comply with Community procedural standards, and these will have a harmonising effect in the long term. But this is clearly not enough to avoid substantial procedural differences, and it would do nothing to harmonise investigative powers or penalties.

The need for harmonisation may be greater than this. At present, if parties to a horizontal cartel were held to have acted unlawfully, the consequences would be very different depending on which national authority dealt with the case, or on whether the Commission dealt with it. The Commission should not have to deal with a case merely because the relevant national authority has insufficient powers. The practice by which the Commission does not take a case if the national authority applies Community law assumes, implicitly but necessarily, that the national authority has all the powers necessary to apply Community law effectively, and to impose sufficiently large fines if appropriate.

2. To what extent are national laws distinct from Community competition law really needed at all (apart, of course, from the fact that national laws should not require proof of an effect on trade between Member States)? Companies have additional costs imposed on them because they have to comply with a series of national laws as well as Community law. Are these additional costs really necessary and justified by

identifiable needs or aims of national competition laws which are not dealt with, or could not be dealt with, by applying Community competition law principles? Companies accustomed to the European Coal and Steel Community Treaty regard the expiration of that Treaty, and consequently coming under EC and national competition laws, as a serious step backwards. The single integrated Community competition policy applied largely by national authorities, which is advocated here, does not exclude differing national competition laws, but they should not be more different than is objectively and genuinely necessary to achieve whatever national aims or needs may require. Apart from merger control, which is largely outside the scope of this paper, the specific reasons given for differences between national law and Community law are the need to promote the interests of small and medium-sized enterprises (Belgium), the wish to exempt certain sectors from competition law, and the wish to treat vertical restraints more leniently than the present Community law (Finland, and the UK 1997 legislative proposals; the long-standing German law is also relevant in this respect). These are things which could probably be done, to a greater extent, by Community law. The cost to Community industry of compliance with competition law would be greatly reduced if there was only one competition law in the whole of the Community (including one set of substantive rules on merger control), not sixteen as at present. It would be reduced still further if all the competition authorities applying Community competition law had the same procedural rules and investigative powers[48]. Harmonisation is not a bureaucratic ideal but a cost-saving policy for industry, which should not be neglected merely due to conservatism and inertia of national or Community politicians and civil servants. It is unsatisfactory for a company to be under one competition law when it signs an agreement which affects trade between Member States, and another when it signs an agreement which (perhaps temporarily) does not.

It is important to remember also that, insofar as agreements and practices affecting trade between Member States are concerned, nothing is achieved by national legislation which is less strict than Community law, because Community law will continue to apply even if national law does not. The effect, for such agreements, of

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48 See the Swedish report.

a legislative or other exemption from national competition law therefore is only to make it necessary for the national competition authority to apply Community law or, if it does not, to lead the Commission to apply Community law. When the national authority applies Community law rather than national law, no difficulty should arise. However, it would be very unsatisfactory if the national authority was unable or unwilling to apply Community law because it is stricter than national law, and if the Commission was obliged to intervene only for that reason. That is another example of a situation in which the national authority has a duty to apply Community competition law. But the Commission would be unlikely to invoke such a duty unless it was clear that the national authority was in a position to carry it out satisfactorily.