

Northwestern Journal of International Law & Business

Volume 6
Issue 3 *Fall*

Fall 1984

Continuing Search for Greater Certainty: Suggestions for Improving U.S. and EEC Antitrust Clearance Procedures

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The Continuing Search for Greater Certainty: Suggestions For Improving U.S. And EEC Antitrust Clearance Procedures

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* This article was written under the supervision of Professor James A. Rahl in the Senior Research Program at Northwestern University School of Law. The author's research expenses were funded by the School of Law. The author currently is employed as an associate at the law firm of Sidley & Austin, Chicago, Illinois.

The author obtained a large part of the information contained in this article during interviews of U.S. and EEC government officials and private antitrust lawyers conducted in January, 1984, in Brussels, London and Washington, D.C. The author would like to thank the following participants in those interviews:

In Washington, Charles S. Stark, Chief, Foreign Commerce Section, Antitrust Division of the U.S. Department of Justice; Craig W. Conrath, Assistant Chief, Foreign Commerce Section, Antitrust Division of the U.S. Department of Justice; Richard P. Larm, Stuart Chemtob, and Spencer Waller, staff attorneys, Foreign Commerce Section, Antitrust Division of the U.S. Department of Justice; Loren W. Hershey, staff attorney, Office of Policy Planning, Antitrust Division of the U.S. Department of Justice; Carl D. Hevener, senior staff attorney, Office of Evaluation, Bureau of Competition of the Federal Trade Commission; Arthur Aronoff and Phillip Ray, staff attorneys, Office of Export Trading Company Affairs, International Trade Administration, U.S. Department of Commerce; James R. Atwood, partner, Covington & Burling; Joseph P. Griffin, partner, Wald, Harkrader & Ross; Douglas E. Rosenthal, partner, Sutherland, Asbill & Brennan; R. Anthony Rogers, partner, Heron, Burchette, Ruckert & Rothwell; Mark Joelson, partner, Wald, Harkrader & Ross; Donald Flexner, partner, Crowell & Moring.

In Brussels, Roger Daouf, Assistant to the Director-General of Competition, Commission of the European Communities; John E. Ferry, Andrew Moat, Kurt Ritter, Klous Stöver, Norbert Menges, Hartmut Johannes, Fernande Espion, and Helmut Schröter, competition law officials of Directorate-General IV, Commission of the European Communities; Donald Holley, Mario Siragusa and Daniel Silver, partners, Cleary, Gottlieb, Steen & Hamilton; Jeremy Lever, Q.C.; Otto Grolig, partner, and Ben Van Houtte, associate, Crousse, DeKeyser, Hinnekens (Brussels Correspondent Office of Baker & McKenzie); Walter Van Gerven, chairman of the Belgian Banking Commission.

In London, Valentine Korah, Reader, Faculty of Laws, University College London; C.S. Kerse, U.K. Department of Trade and Industry.

CONTENTS

I. INTRODUCTION: THE NEED FOR EFFECTIVE ANTITRUST CLEARANCE PROCEDURES	805
II. AN EVALUATION OF CURRENT CLEARANCE PROGRAMS ...	812
A. <i>United States Clearance Programs</i>	812
1. Three Independent Programs	812
a. <i>The Department of Justice Business Review Program</i>	813
b. <i>FTC Advisory Opinion Program</i>	817
c. <i>The Department of Commerce Export Certification Program</i>	822
2. Alleged Drawbacks of Existing Clearance Programs	829
a. <i>Government conservatism</i>	830
b. <i>Lack of binding effect</i>	833
c. <i>Administrative burden and delay</i>	837
d. <i>No assurance of confidentiality</i>	840
e. <i>Publicity</i>	842
f. <i>Government scrutiny</i>	842
g. <i>Lack of judicial review of denied applications</i> ...	843
B. <i>The EEC Clearance Program</i>	844
1. A Single Program with Several Types of Clearance.	844
a. <i>Negative clearances</i>	845
b. <i>Individual exemptions</i>	846
c. <i>Comfort letters</i>	849
d. <i>The non-opposition exemption</i>	853
2. Procedures For Processing Applications	854
3. Alleged Drawbacks of the Existing Program	859
a. <i>The necessity of applying even in the absence of uncertainty</i>	859
b. <i>Problems caused by the paucity of formal decisions and delays in receiving formal decisions</i> ...	862
c. <i>Disadvantages of comfort letters</i>	868
d. <i>Conservatism</i>	871
e. <i>Administrative burden and expense</i>	872
f. <i>Government scrutiny</i>	872
g. <i>Confidentiality</i>	873
h. <i>Publicity</i>	874
III. SUGGESTIONS FOR IMPROVEMENT	874
A. <i>Improving United States Clearance Programs</i>	874

1. A Single Statutory Program Administered by a Special Office	875
2. Two Levels of Clearance	877
a. Certification	878
b. Business review letters	881
c. Non-opposition clearances	883
3. A Standard, Detailed Application and Formal Pre-Filing Counseling	883
4. Deadlines	884
5. Modifications	885
6. Confidentiality	885
7. Publicity	886
B. Improving the EEC Clearance Program	886
1. Improving Comfort Letters	887
2. Expediting Formal Decisions	888
3. Intervening in Member State Litigation	889
4. Deadlines	889
5. A General Non-Opposition Exemption	891
6. Expanding the Rule of Reason under Article 85(1)	892
IV. CONCLUSION: POTENTIAL SIDE EFFECTS OF REFORM	893

I. INTRODUCTION: THE NEED FOR EFFECTIVE ANTITRUST CLEARANCE PROCEDURES¹

Uncertainty about the application of antitrust laws² to business endeavors has been an historic concern in both the United States³ and the

¹ For the purposes of this paper, the term "clearance procedures" includes any procedure by which a business can voluntarily apply to an antitrust agency to elicit the agency's view about the legality of an agreement or practice under the system's antitrust laws. Informal oral advice will not be considered here as a clearance procedure, because there is no established procedure for obtaining it, and the advice given is only the personal view of the official contacted and not the official position of the agency itself. The possibility of initiating informal contact with the antitrust agencies, however, should not be overlooked. The FTC and the European Commission in particular encourage businesses to seek informal advice, and such advice can help a business decide whether it should utilize the agency's clearance procedure. Interview with Carl D. Hevener, senior attorney, Office of Evaluations, Bureau of Competition, FTC, in Washington, D.C. (Jan. 24, 1984); interview with European Commission officials, in Brussels (Jan. 12, 1984).

To encourage candor, the author agreed in most interviews not to attribute specific views and information to the person interviewed. Therefore, numerous citations to the interviews will omit the name of the particular person interviewed.

² In the EEC, the terms "competition law" or "cartel law" are preferred.

³ See, e.g., J. BURNS, ANTITRUST DILEMMA: WHY CONGRESS SHOULD MODERNIZE THE ANTITRUST LAWS (1969).

European Economic Community⁴ (EEC). A widely accepted principle in both systems⁵ is that before committing resources to an agreement or practice, a business should be able to determine with a reasonable⁶ degree of certainty that it will not be exposing itself to antitrust liability.⁷

In order to devise effective methods for combatting the uncertainty which businesses sometimes face under the antitrust laws, it is first necessary to identify the sources of the uncertainty. In both the United States and the EEC, the initial and fundamental source of uncertainty is each system's broadly worded antitrust statutes.⁸ Each system has depended primarily on its judicial and administrative bodies⁹ to interpret the word-

⁴ See, e.g., Ferry, *The Repose of Certainty and the Necessity of Uncertainty*, INTERNATIONAL ANTITRUST FIFTH ANNUAL FORDHAM CORPORATE LAW INSTITUTE (1978).

⁵ See, e.g., Baker, *Antitrust in the Sunshine*, 21 ST. LOUIS U.L.J. 347, 348 (1977) ("To facilitate an understanding of what conduct is and is not acceptable should be a major goal of an enforcement agency."); C. KERSE, EEC ANTITRUST PROCEDURES 212 (1981) ("The principle of legal certainty . . . has an established place as part of the general principles of Community law.")

⁶ As will be seen during the discussion of the business and legal communities' criticisms of United States and EEC clearance programs, *infra* text accompanying notes 163-266 and 404-518, businesses and lawyers often disagree about what degree of uncertainty is "reasonable." Each system must make the difficult threshold determination of what level of uncertainty it will tolerate.

⁷ Increased antitrust certainty does more than advance the equitable principle that a business should only be liable for conduct it knows or should know is illegal. It also enables businesses to forego or modify anticompetitive conduct and, as a result, businesses, the antitrust agencies and the judiciary are spared the time and expense of complex antitrust litigation. Increased certainty also contributes to a more competitive and efficient economy, because not only can businesses avoid anticompetitive behavior, but also they can engage in competitive conduct which they might otherwise forego or inefficiently modify due to unfounded antitrust fears. See, e.g., Baker, *supra* note 5, at 148; VON KALINOWSKI, ANTITRUST LAWS & TRADE REGULATION § 126.02 (1) (1981).

⁸ See, e.g., Kobak, *Three Approaches to the Bureaucratic Dilemma: The Administration and Enforcement of the Antitrust Laws of the United States, France, and the Common Market*, 23 ALA. L. REV. 43, 44, 85 (1970). In the United States, the major antitrust laws include the Sherman Act, 15 U.S.C. §§ 1-7 (1982), the Federal Trade Commission Act, 15 U.S.C. §§ 41-77 (1982), and the Clayton Act, 15 U.S.C. § 12-27 (1982), including the Robinson-Patman Act, 15 U.S.C. § 13 (1982). In the EEC, the major antitrust provisions are Articles 85 and 86 of the Treaty of Rome, which are comparable to Sections 1 and 2 of the Sherman Act.

⁹ In the United States, the federal courts have exclusive jurisdiction over suits concerning the federal antitrust laws brought by private parties and the Justice Department. 15 U.S.C. § 4 (1982). The FTC adjudicates its own antitrust complaints, with appeal to the federal courts of appeals. 15 U.S.C. § 45(b) (1982).

In the EEC, private actions alleging a violation of EEC antitrust law can only be brought in the courts of the member states. However, under Article 177 of the Treaty, a member state court may, and in certain circumstances must, suspend its proceedings and refer questions of community law to the Court of Justice for a preliminary ruling. Once the question has been answered by the Court of Justice, the national court resumes its proceedings and applies the ruling itself to the facts of the case before it. Alternatively, private parties may file a complaint with the Commission, and the Commission itself will bring an action if appropriate. The Commission may also initiate proceedings without a third-party complaint. Like the FTC the Commission tries the case itself as the court of first instance, and the defendant may appeal the decision to the Court of Justice. See generally G. BEBR, DEVELOPMENT OF JUDICIAL CONTROL OF THE EUROPEAN COMMUNITIES (1981).

ing of its antitrust laws, and over the years a considerable amount of case law has been generated which has clarified many of the ambiguities of those laws. With the aid of these large bodies of legal precedent, private antitrust counsel in many cases can provide sound advice to businesses about the antitrust risks of a particular course of conduct, thereby reducing uncertainty to a tolerable level.

However, such reliance on the judiciary for the interpretation and development of the antitrust laws brings with it a fair amount of uncertainty which private counsel may not be able to sufficiently relieve.¹⁰ There are three major sources of uncertainty for which legal precedent can provide little solace. First, as in any field of law depending so heavily on judicial interpretation, fringe issues and gray areas exist under the antitrust laws, and it often takes a long time for the judicial systems of the United States and the EEC to remedy this uncertainty.¹¹ Clarification of a particular ambiguity usually requires a controversy to raise the issue in litigation, and often the definitive answer must await appeal to the U.S. Supreme Court or the European Court of Justice. Even then, the uncertainty may persist if the high court's decision is vague or limited to the facts of the particular case, or if the court avoids answering the issue altogether.

Secondly, even when the law is relatively clear on a particular issue, an antitrust suit raising the issue may still be brought against a business which reasonably believes it is complying with the law. Such suits may be frivolous,¹² or they may be genuine efforts by private plaintiffs or the

¹⁰ While no one denies that uncertainty exists under the antitrust laws, the extent of this uncertainty has been debated in both systems. The antitrust agencies in both the United States and the EEC admit that a limited amount of uncertainty exists. See, e.g., Baker, *supra* note 5, at 348; Ferry, *supra* note 4, at 12-14. Many businesses and antitrust lawyers, however, claim that uncertainty is rampant. See, e.g., Handler, *The Inevitability of Risk Taking*, 44 ANTITRUST L.J. 377, 378 (1975); Van Bael, *EEC Antitrust Enforcement and Adjudication as Seen by Defense Counsel*, 7 REVUE SUISSE DE DROIT INTERNATIONAL DE LA CONCURRENCE 1, 2-10 (1979). The purpose of this article is not to quantify the amount of uncertainty but rather to suggest proposals for reducing the uncertainty that does exist.

¹¹ In the United States and the EEC, for example, there is a great deal of uncertainty about the application of each system's antitrust laws to joint research and development ventures because of a lack of case law on the subject. See Statement of William F. Baxter, Assistant Attorney General, Antitrust Division of the U.S. Department of Justice, before the Joint Economic Committee concerning the Need for Joint Research and Development Legislation 1-2 (Nov. 3, 1983); interviews with private antitrust lawyers, in Brussels (Jan. 3-5, 1984).

¹² Strike suits are rarely filed in the EEC, but their use in the United States is increasing because the threat of treble damages, class actions, liberal discovery and complex antitrust litigation make defendants willing to settle suits regardless of their lack of merit. See A. NEALE & D. GOYDER, *THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA* 492 (3d ed. 1980); Schwechter & Shepard, *The Effects of U.S. Antitrust Laws on the International Operations of American Firms*, 1 NW. J. INT'L L. & BUS. 492, 527 n.206 (1979).

antitrust authorities¹³ to convince the judiciary to overrule precedent or to carve out an exemption for the particular circumstances.

Finally, uncertainty is largely unavoidable in any area of the law in which legality depends upon an evaluation of individual circumstances.¹⁴ In both the United States and the EEC, the certainty of *per se* rules in many instances has been sacrificed in favor of rules which allow greater flexibility in order to achieve justice in individual cases.¹⁵ Under United States antitrust law, much business conduct is evaluated under a "rule of reason" analysis.¹⁶ In the EEC, a limited rule of reason analysis is used under Article 85(1). Under Article 85(3) any individual agreement may be exempted if it satisfies a test similar to a rule of reason analysis but which takes other factors besides competition into account.¹⁷ In cases

¹³ A former Assistant Attorney General in charge of the Department of Justice's Antitrust Division has noted that:

[T]he Antitrust Division does not view itself as a policeman on the beat enforcing 'the law' in a mechanical way. Rather, it likes to regard itself as a thoughtful champion of competitive policy. In some instances, for example, the Division will decline to enforce sweeping Supreme Court doctrines that make little economic sense. At other times it will seek to extend the law beyond its present boundaries—as a result of old, ambiguous or simply wrongly decided cases. Baker, *Critique of the Antitrust Guide: A Rejoinder*, 11 CORNELL INT'L L.J. 255, 256 (1978). See also, Reinsch, *The Export Trading Company Act of 1981*, 14 LAW & POL'Y INT'L BUS. 47, 103 (1982) ("The conflict between Justice Department and judicial interpretations of the Sherman and Clayton Acts amounts to a sentence of perpetual uncertainty for U.S. business").

¹⁴ Baker, *supra* note 5, at 348; Ferry, *supra* note 4, at 12-13, 23; Handler, *supra* note 10, at 377-78.

¹⁵ The business community generally favors the flexibility of the rule of reason over *per se* rules even though it often results in uncertainty. See J. VAN CISE, UNDERSTANDING THE ANTI-TRUST LAWS 120, 121 (rev. ed. 1966) ("The business community appears to register at the primaries for certainty as a matter of principle but, when forced at the polls to make specific choices in specific cases, it votes for flexibility."); Foer, *The Search for Greater Certainty*, TASK-FORCE REPORT ON INTERNATIONAL ANTITRUST 1 (unpublished report of the FTC obtained by the author through a Freedom of Information Act request and on file at the Northwestern Journal of International Law & Business).

¹⁶ Under the American version of the rule of reason, only restrictions on conduct which "unduly" restrain trade are deemed illegal. In applying this test to a particular case, a court must consider the facts peculiar to the business to which the restraint is applied, its conditions before and after the restraint was imposed, the nature of the restraint and its actual effect, the history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, and the end sought. See, e.g., *Chicago Board of Trade v. United States*, 246 U.S. 231, 238-39 (1918).

¹⁷ For an examination of the EEC's application of a "rule of reason" analysis, see Van Houtte, *A Standard of Reason in EEC Antitrust Law: Some Comments on the Application of Parts 1 and 3 of Article 85*, 4 NW. J. INT'L L. & BUS. 497 (1982). Unlike the rule of reason in the United States, the exemption clause in Article 85(3) requires the Commission and the Court of Justice to take other factors into account in addition to the effect an agreement has on competition. A restrictive agreement may be exempted if it contributes to improved methods of production or distribution or to economic progress (provided that the least restrictive means to secure that benefit has been adopted and that competition will not be eliminated over too wide an area). Such a complex evaluation creates more uncertainty than does the competition analysis of the American rule of reason.

[I]t embroils the European Court inexorably in weighing economic arguments in a way that the American courts have always sought to avoid as inappropriate for courts of law. It also greatly

analyzed under these flexible rules, the value of legal precedent is reduced.

In each of the above situations, a business is exposed to a variety of risks if it decides to implement its proposed agreement or practice. If a suit is brought against it and is not dismissed, the business will be forced to choose between either engaging in expensive, time-consuming litigation or abandoning or modifying its conduct, thereby perhaps sacrificing or diminishing the value of its investment. Even if it chooses to do the latter, the business may have to pay a damage settlement if the suit is a private action, or a fine if the action is brought by the European Commission.¹⁸ If it chooses to litigate, it faces the risk that its conduct may be temporarily enjoined and that it ultimately may lose. Even if it ultimately prevails, the expense and inconvenience of the litigation impose a heavy burden on the business. In the United States, sanctions for anti-trust violations can be quite severe: automatic treble damages and litigation costs in private suits;¹⁹ fines, actual damages and criminal sanctions in government suits;²⁰ and permanent injunctions or forced dissolution of a merger or joint venture in both private and government suits.²¹ In the EEC, sanctions can also be harsh: the Commission can impose fines amounting to as much as ten percent of the defendant's worldwide annual turnover and it can order a business to abandon or modify the activity, with a threat of periodic fines for noncompliance with its order,²² and

affects the enforcement process, because no agreement can be characterized as in a strict sense illegal *per se* such that defendant's own lawyers will say unequivocally that they must be abandoned. . . . As there is no clear guidance in industrial economics for quantifying such [economic] effects and expert witnesses would frequently disagree, [the type of balancing test in Article 85(3)] does indeed seem, as the American courts have always insisted, an inappropriate basis for legal decisions and one that is likely to render the law unpredictable.

A. NEALE & D. GOYDER, *supra* note 12, at 476, 483. Commission officials stress that exemption decisions do not serve as reliable precedent upon which other businesses in similar circumstances rely since the particular facts of each agreement are so important to the exemption decision that even a slight deviation could preclude an exemption. Interview with Commission officials, *supra* note 1.

¹⁸ See *infra* note 22.

¹⁹ Clayton Act § 4, 15 U.S.C. § 15 (1982).

²⁰ Under Sections 1 and 2 of the Sherman Act, antitrust violations are punishable "by a fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court." 15 U.S.C. §§ 1-2 (1982). Under § 4(a) of the Clayton Act, the Justice Department may bring an action for actual damages sustained by the government in its business or property. 15 U.S.C. § 15(a) (1982).

²¹ The FTC itself can issue cease and desist or divestiture orders without the assistance of a court. Federal Trade Commission Act § 6(b), 15 U.S.C. § 45(b) (1982); Clayton Act § 11(b), 15 U.S.C. § 21(b) (1982). The Government may also seek injunctive relief for violations of the Sherman and Clayton Acts, Sherman Act § 4, 15 U.S.C. § 4 (1982); Clayton Act § 15, 15 U.S.C. § 25 (1982), and the courts interpret these provisions as allowing them to order divestiture or dissolution. See, e.g., Standard Oil Co. v. United States, 221 U.S. 1, 77-78 (1911).

²² Article 15(2) of Regulation 17/62. The Commission does not hesitate to impose heavy fines in

in private actions in member state courts, actual damages, litigation costs, injunctions, dissolution orders, or automatic nonenforceability of the agreement are possible sanctions.²³

In both the United States and the EEC, the unfairness which uncertainty poses for businesses has been recognized and widely criticized.²⁴ Persistent efforts have been made to reduce this uncertainty and its accompanying risks. These efforts have taken three general forms: (1) additional legislation clarifying the existing antitrust laws;²⁵ (2) guidelines, notices, speeches, articles and other non-legislative statements issued by the antitrust agencies which expound on the law or agency enforcement policies;²⁶ and (3) clearance procedures.

The first two methods of reducing uncertainty have one major ad-

appropriate cases. In *Moet et Chandon (London) Ltd.* 2 Common Mkt. L.R. 166 (1982), the Commission imposed a fine of 1,100,000 European Currency Units (approximately \$1,000,000) because of the seriousness of the infringement (an export ban) and because the violation was intentional. Under Article 16 of Regulation 17/63, the Commission may also impose periodic penalty fines of 50 to 1000 European Currency Units per day to compel a defendant to comply with its decision. For a thorough examination of this sanction, see C. KERSE, *supra* note 5 at Chapter 7.

²³ Nonenforceability is the only sanction available to member state courts which is explicitly provided for by the Treaty. See Article 85(2). Most actions in member state courts raising EEC antitrust law involve one of the parties to an agreement using the nonenforceability claim as a "shield," *i.e.*, as a defense to its breach of the agreement. Few actions are brought by third parties using Articles 85 and 86 offensively. Damage awards, injunctions and other remedies are not provided for in any Community law, but some member state courts are beginning to impose these sanctions under their own laws on the theory that the directly applicable community antitrust laws are part of the member state legal order and violations should be punished accordingly. See, *e.g.*, *Garden Cottage Foods v. Milk Marketing Board*, [1983] 2 All ER 770, [1984] AC 130. The increased availability of these sanctions could increase the number of third party actions in member state courts. See Lang, *Community Antitrust Law - Competition and Enforcement*, 18 COMMON MKT. L. REV. 335, 337-45 (1981).

²⁴ See *supra* note 5; Korah, *Comfort Letters - Reflections on the Perfume Cases*, 6 EUR. L. R. 14, 38 (1981) ("The parties need to know that contractual protection from competition can be relied upon before they commit themselves to investment, not the prospect of a gamble in the courts"); Dixon, *Federal Trade Commission Advisory Opinions*, 18 AD. L.REV. 65, 68 (1965) (The FTC adopted guides and its advisory opinion procedure because of its concern "with the need of the individual, particularly the individual businessman, for such advice before he embarks upon a course which is likely to involve him in legal difficulties if he guesses wrong as to the law").

²⁵ In the United States, such legislation is rare. One only recent example is Title IV of the Export Trading Company Act of 1982, 15 U.S.C. § 6a (1982), which goes beyond clarifying the law and which itself has created some uncertainty. In the EEC, further legislation has taken the form of group exemptions, which spell out in detail circumstances under which certain types of vertical arrangements will automatically qualify for exemption under Article 85(3). See, *e.g.*, Regulation 1984/83 on the application of Article 85(3) of the Treaty to categories of exclusive purchasing agreements, O.J. EUR. COMM. (No. C172) 7 (July 10, 1982).

²⁶ In both the United States and the EEC, the antitrust agencies issue official guides and notices containing the agencies' views about what is and is not legal under the antitrust laws. See, *e.g.*, DEPARTMENT OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (1977), reprinted in ANTITRUST & TRADE REG. REP. (BNA) No. 799, at E-1 (1977), and TRADE REG. REP. (CCH) No. 266, pt. II (1977) [hereinafter cited as ANTITRUST GUIDE FOR INTERNATIONAL OPERA-

vantage over clearance procedures. Because both methods require no assessment of individual circumstances by the government, businesses are spared the administrative burden, expense, delay and other problems associated with individual clearance procedures.²⁷ Moreover, the antitrust agencies are able to devote their scarce resources to prosecuting serious antitrust violations.

Because of their efficiency, additional clarifying legislation and agency enforcement statements are to be welcomed, but these methods of reducing antitrust uncertainty do not eliminate the need for an individual clearance in many cases.²⁸ Both legislation and agency statements have an inherent limitation which prevents them in many instances from providing the certainty which businesses seek: neither takes individual circumstances into account.²⁹ Unless each system is willing to sacrifice its rules of reason and expand its use of *per se* rules, or enact legislation or guidelines specifying in detail what facts will result in antitrust liability, uncertainty will persist in many individual cases.

To compensate for this lack of certainty, both the United States and the EEC have adopted clearance procedures which can be utilized by businesses when they face an unacceptable level of uncertainty. Unfortunately, each system's clearance programs suffer from problems which discourage businesses from using them in cases of serious uncertainty.³⁰

This article will compare and evaluate United States and EEC clearance procedures in order to suggest needed reforms which could assist these clearance programs in fulfilling their goal of providing applicants the certainty they desire at an acceptable cost to both applicants and the antitrust agencies. It will begin by describing and critiquing the various

CTIONS]; and the European Commission's notice concerning Agreements of Minor Importance, O.J. EUR. COMM. (No. C313) 3 (Dec. 19, 1977).

²⁷ See *infra* text accompanying notes 163-266.

²⁸ This has been acknowledged by the antitrust agencies themselves. For example, the Department of Justice's guides emphasize the continuing value of the Business Review Program. See, e.g., ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS, *supra* note 26, at 1. The EEC group exemptions note that the clearance procedure of Regulation 17/62 is available to those businesses which are uncertain whether they qualify under the group exemption. See, e.g., Regulation 1984/83, *supra* note 25, preamble consideration 14.

²⁹ See Dixon, *supra* note 24, at 70:

[Guides and additional legislation] are extremely valuable in the [FTC's] efforts to clarify and elaborate upon the law as it applies to particular industries in the language of that industry. But they are universal in their application and do not fulfill the need of the individual member of any industry for authoritative advice as to his own peculiar problems . . .

See also Reinsch, *supra* note 13, at 106.

³⁰ Such disadvantages include expense, delay, lack of confidentiality for information submitted with the clearance application, and a lack of binding effect of government clearances. See *infra* text accompanying notes 163-266 and 404-519.

clearance programs and procedures of the United States³¹ and the EEC.³² It will then advance specific, detailed suggestions for remedying the drawbacks of current clearance programs.³³ Finally, it will conclude by assessing the possible impact of the proposed changes if they would be adopted.³⁴

II. AN EVALUATION OF CURRENT CLEARANCE PROGRAMS

A. *United States Clearance Programs*

1. Three Independent Programs

As is true with the enforcement of United States antitrust laws, several agencies are involved in the clearance process. Three United States agencies administer three independent clearance programs.³⁵ Each of the two major antitrust agencies, the Department of Justice and the Federal Trade Commission ("FTC"), operates its own independent, non-statutory program under which any type of business activity, both foreign and domestic, can be reviewed.³⁶ A third program, recently enacted by Congress and limited to export-related activities, is administered by the Department of Commerce with the concurrence of the Department of Justice.³⁷

³¹ See *infra* notes 35-258 and accompanying text.

³² See *infra* notes 263-519 and accompanying text.

³³ See *infra* notes 527-635 and accompanying text.

³⁴ See *infra* notes 635-39 and accompanying text.

³⁵ There are two additional statutory programs which have some of the attributes of clearance programs but which are beyond the scope of this paper. First, the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (1982), requires proposed mergers and acquisitions of a certain size to be notified to the Federal Trade Commission and the Department of Justice. If neither agency opposes the merger or acquisition, it may go forward. Unlike the clearance programs examined in this article, this program was enacted primarily for the benefit of the FTC and the Department of Justice and not for the benefit of businesses. Its purpose is to give those agencies advance notice of and information about proposed mergers and acquisitions so that such actions can be enjoined before consummation. S. KANWIT, FTC § 17.07 (Nov. 1979). Moreover, it is not a voluntary procedure, and the Act expressly provides that a decision not to oppose the merger or acquisition does not bar a subsequent challenge by the FTC or the Department of Justice. 15 U.S.C. § 18(a)(i)(1) (1982). In practice, however, a decision by the agencies not to challenge the merger or acquisition does have a limited clearance effect, since courts would not look kindly upon a government action against a merger or acquisition which the government could have prevented. See generally S. AXINN, B. FOGG & N. STOLL, ACQUISITION UNDER THE HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT (1980).

A second program which has some characteristics of a clearance program is the Webb-Pomerene Act, 15 U.S.C. §§ 61-65 (1982), which provides an exemption for export associations which meet certain requirements and register with the FTC. Unlike the clearance programs being examined in this paper, the antitrust agency does not review the association's activities and give or withhold its approval. In other words, it is a registration program, not a clearance program.

³⁶ See *infra* notes 38-98 and accompanying text.

³⁷ See *infra* notes 98-162 and accompanying text.

a. *The Department of Justice Business Review Program*

Although the Justice Department is, and prefers to remain,³⁸ primarily an antitrust law enforcer, it has for many years voluntarily played a limited regulatory role through its administration of a non-statutory clearance program. Under its Business Review Program,³⁹ the Department's Antitrust Division examines proposed courses of business conduct and expresses its present enforcement intention, *i.e.*, whether it would prosecute the applicant if the proposal were put into effect.

A request for a business review letter must be submitted in writing to the Assistant Attorney General in charge of the Antitrust Division.⁴⁰ The regulations do not provide for formal pre-filing counseling to discuss the information which will be required, but in practice such an opportunity exists.⁴¹ There are no standardized application forms or detailed

³⁸ Many Department of Justice lawyers would rather prosecute antitrust violations than investigate clearance requests. Interviews with Department of Justice lawyers, in Washington, D.C. (Jan. 25-26, 1984). For example, the Department officially opposed playing a leading role in the certification procedure of the Export Trading Company Act, *see infra* notes 98-162 and accompanying text. As a letter from Sherman E. Unger, General Counsel of the Department of Commerce, and William F. Baxter, Assistant Attorney General, Antitrust Division, to Senator John Heinz (Sept. 29, 1982) (on file at the Northwestern Journal of International Law and Business) stated:

The Antitrust Division . . . is structured as a law enforcement agency which exercises prosecutorial discretion in undertaking investigations of violations of antitrust standards and instituting enforcement actions in the courts. The certificate of review provisions of the House-passed bill would fundamentally alter that role with respect to export trading companies by assigning to the Department of Justice the regulatory task of rendering decisions of binding legal force on applications presented to it.

In practice, however, the Department has attempted to become heavily involved in the Certification Program, much to the dismay of the Commerce Department. *See* 46 ANTITRUST & TRADE REGULATION REP. (BNA) 204 (Feb. 2, 1984) (interview with Donald Zarin, formerly of the Commerce Department's Office of General Counsel). The Department of Justice also opposes a proposed certification program for research and development joint ventures. *See infra* note 64.

³⁹ 28 C.F.R. § 50.6 (1984). The early forerunner of the Business Review Program was the "railroad release" letter, first issued in 1939, which expressed the Department's criminal enforcement intentions with regard to proposed conduct by the railroads. The program was subsequently expanded to include mergers and acquisitions generally. In 1968, the Department announced its current program. *See* ANTITRUST DIVISION, UNITED STATES DEPARTMENT OF JUSTICE, ANTITRUST DIVISION MANUAL III-74 (1979). The original regulations governing the Program were issued on February 1, 1968 (30 Fed. Reg. 2422 (1968)) and have been amended twice, on December 19, 1973 (38 Fed. Reg. 34804 (1973)), and on March 1, 1977 (42 Fed. Reg. 11831 (1977)).

⁴⁰ 28 C.F.R. § 50.6(1) (1984).

⁴¹ This opportunity is rarely taken, largely because it is not publicized. Interviews with Department of Justice lawyers, *supra* note 38. Businesses contemplating such pre-filing counseling should be aware that any advice rendered generally will be limited to answering questions about procedures and the types of information which will be required. *Id.* The regulations state that no oral clearance or any other binding advice will be given, 28 C.F.R. § 50.6(6) (1984) and most Department officials abide by this prohibition. Interviews with Department of Justice lawyers, *supra* note 38. Therefore, the Department is unwilling to discuss the antitrust merits of a particular course of conduct before a filing, although in some cases the Department may point a potential applicant to relevant cases, Department guidelines or other enforcement policy statements. *Id.*

guidelines pinpointing the information which must be submitted with the request. The Department's regulations simply state in broad terms that the request must be accompanied "by all relevant data, including background information, complete copies of all operative documents and detailed statements of all collateral or oral understandings."⁴² As a result of this lack of guidance, the Department cannot rely on the information provided in the application but instead must make supplemental information requests⁴³ in the vast majority of cases.

The most striking feature of the Business Review Program procedure is its lack of uniformity.⁴⁴ The regulations provide almost no guidance as to how requests are to be investigated. Moreover, no special Department office or section with its own internal regulations is routinely assigned the task of processing and investigating requests.⁴⁵ Instead, a request is assigned to the section or field office having commodity or geographic jurisdiction over the product or service involved,⁴⁶ and each section or field office is free to determine itself how it will investigate the request.⁴⁷

A request usually is assigned by the section or field office chief to a single staff member who adds the assignment to his enforcement activities. Usually working under the loose supervision of a superior, the staff member largely decides for himself how to investigate the request.⁴⁸ Normally, neither the staff member nor his supervisor has much experience with business review investigations, and, consequently, investiga-

⁴² 28 C.F.R. § 50.6(5) (1984).

⁴³ Interviews with Department of Justice lawyers, *supra* note 38.

⁴⁴ There is a uniform procedure for handling all requests when they are first received. A request is first passed to the Office of Operations, which will determine if the request is appropriate for consideration. The Office has the discretion to reject any request, 28 C.F.R. § 50.6(3) (1984), but it will do so only if the request is too vague, concerns on-going conduct, deals with issues under consideration, or becomes moot. J. ATWOOD & K. BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* 185-86 (2d ed. 1981). If the request is accepted, the Office will set in motion a liaison procedure with the FTC to determine whether the latter has any objection to the Department handling the request. For an explanation and evaluation of the liaison procedure, see Roll, *Dual Enforcement of the Antitrust Laws by the Department of Justice and the FTC: The Liaison Procedure*, 31 *BUS. LAW.* 2075 (1976). If no objection is made, and it rarely is, the request is then assigned to a section or a field office for investigation. It is during the investigation phase that uniformity is temporarily suspended. Interviews with Department of Justice lawyers, *supra* note 38.

⁴⁵ The program is so decentralized that the author had difficulty locating officials at the Justice Department who knew much about the actual functioning of the program. No "expert" on the program exists, and the author had to interview a number of officials to obtain an overall picture of the program.

⁴⁶ If the applicant has had pre-filing contact with a particular section or field office, the request may note this and the file normally will be referred to that section or field office. Interviews with Department of Justice lawyers, *supra* note 38.

⁴⁷ *Id.*

⁴⁸ *Id.*

tions often are run inefficiently because each investigator must learn how to conduct a business review investigation.⁴⁹

This lack of uniformity often makes it impossible for an applicant to determine in advance what will be required of it during the investigation. Invariably, the applicant must submit additional information. The extent and burdensome nature of the additional information request depends on the complexity of the proposed conduct and on the zealotry of the particular staff member and his inexperience with the Program.⁵⁰ In most cases, the staff member will conduct independent inquiries and market analyses.⁵¹ In some cases the staff member will negotiate with the applicant about modifying certain aspects of the proposal objected to by the staff member or his superiors, while in other cases the proposal will be approved or condemned as originally presented.⁵²

With the exception of export-related requests,⁵³ the staff is under no official or self-imposed time restrictions in processing the request.⁵⁴ The time needed by the Department to respond to a request varies considerably, and while often it responds in six to eight weeks, in many cases it takes considerably longer. Every applicant has the right to withdraw its application if it finds this procedure too lengthy or burdensome, but the Department expressly reserves the otherwise implicit right to take any

⁴⁹ *Id.*

⁵⁰ *Id.* This inexperience is a result of the high turnover of staff attorneys at the Department and the fact that so few requests are received each year that a particular section or field office is assigned few, if any, of those requests. *Id.* A Department official and a private attorney complained during the interviews that too often an overzealous staff member will investigate a business review request on the assumption that the applicant is trying to "sneak" something by the Department. As a result, supplementary information requests are unduly burdensome and time consuming, and the applicant is faced with the heavy burden of convincing the staff member that it has no anti-competitive intentions. *Id.*; interview with a private antitrust lawyer, in Washington, D.C. (Jan. 24, 1984).

⁵¹ There is no official provision for third-party comment, but staff members often contact competitors, customers, consumers and other third parties for information and comments. Interviews with Department of Justice lawyers, *supra* note 38. All information supplied by third parties is given on a voluntary basis. *Id.*

⁵² *Id.*

⁵³ Export-related requests must be answered within 30 days from the date the Department received all relevant data. Department of Justice Press Release (Dec. 6, 1978). There is, however, no deadline for deciding whether all necessary information has been supplied. Since it might take quite some time to satisfy the staff member that all the necessary information has been assembled, this deadline may not prevent a long wait for an answer. In fact, since the Department often responds within 30 days after receiving all relevant data anyway, this deadline makes little difference in most cases. It is the investigative phase which is so time consuming. See Schwechter & Shepard, *supra* note 12, at 526.

⁵⁴ Interviews with Department of Justice lawyers, *supra* note 38. The complexity of the matter, the time needed to collect the relevant information, the zealotry of the particular staff member, and the crush of other business all impact on the response time. *Id.* Staff members have other assignments, and usually those tasks will be viewed as more urgent than a "regulatory" assignment. Most Department lawyers want to prosecute violators, not regulate business activities. *Id.*

action it feels is necessary and to retain the information submitted.⁵⁵

Once the investigation is finished, the staff member prepares a draft business review letter and a supporting memorandum. These are carefully reviewed at several levels, including by the Assistant Attorney General, and changes may be made or more information may be required.⁵⁶ The final letter can give three possible responses to the request:⁵⁷ that the Department (1) does not presently intend to bring an enforcement action if the proposed conduct is implemented;⁵⁸ (2) declines to state its enforcement intention; or (3) will bring an enforcement action if the proposed conduct is put into effect.

The regulations do not prescribe the exact content of the letter. In practice, some letters simply state the procedural history of the request, the facts upon which the letter is based, the Department's enforcement intention, and a description of the Department's procedures in making public the information in the file. Other letters also give detailed legal reasoning to support the Department's position. A favorable letter may attach conditions or set forth the assumptions upon which it is based, but it imposes no expiration date or reporting requirements. Both the letter and the information supplied to support the request are placed in a publicly available file in the Antitrust Division's Legal Procedure Unit.⁵⁹ The Department issues approximately twenty business review letters in an average year.⁶⁰

Despite criticism of the Program by the bar and business community,⁶¹ there are no plans at this time to change the Program.⁶² The De-

⁵⁵ 28 C.F.R. § 50.6(11) (1984).

⁵⁶ FTC approval is not required. *Id.*

⁵⁷ 28 C.F.R. § 50.6(8) (1984).

⁵⁸ At one time the Department only expressed its criminal enforcement intention unless the request involved a proposed merger or acquisition. *See* the original version of the regulations, 33 Fed. Reg. 2422 (1968). Although later versions of the regulations do not specify that the clearance pertains only to the Department's criminal enforcement intentions, no one at the Department is sure if this policy has been officially changed. Interviews with Department of Justice lawyers, *supra* note 38. This confusion is another result of the lack of a central authority in charge of the program. In practice, however, a business review letter has always provided protection from civil actions by the Department as well. *Id.*

⁵⁹ 28 C.F.R. § 50.6(10) (1984). The letter is placed in a file and is made available to the public, and the supporting information is placed in the file within 30 days, where it remains for one year. Thereafter, the information is either returned to the applicant "or otherwise disposed of, at the discretion of the Antitrust Division." The Department recently released a *Digest of Antitrust Division's Business Review Letters, 1968 to 1982*, 45 ANTITRUST & TRADE REG. REP. (BNA), Special Supp. No. 1124 (July 21, 1983), which contains capsule summaries of all the business review letters issued between 1968 and 1982.

⁶⁰ *Id.*

⁶¹ *See infra* notes 155-258 and accompanying text.

⁶² Interviews with Department of Justice lawyers, *supra* note 38.

partment is content to play a very minor regulatory role,⁶³ and some officials fear that improving the Program could bring a flood of applications which would divert the Department's limited enforcement resources.⁶⁴

b. FTC Advisory Opinion Program

Like the Department of Justice, the FTC has long recognized the utility of a clearance program, and in 1962 it formally adopted its own non-statutory clearance program.⁶⁵ Under the FTC's Advisory Opinion Program,⁶⁶ a business may seek advice⁶⁷ from the FTC about the anti-trust legality of a proposed or on-going course of conduct.

Unlike the Business Review Program, the FTC Program provides three levels of clearance:⁶⁸ formal Commission advisory opinions, staff

⁶³ *Id.*

⁶⁴ *Id.* Pressures from the business community and the bar to reform the program were relieved to an extent by the enactment of the certification procedure for export-related activities contained in the Export Trading Company Act of 1982, discussed *infra* notes 98-162 and accompanying text. A certification procedure is also being considered by Congress for research and development joint ventures. See, e.g., *National Association of Manufacturers' Proposed Legislation*, 46 ANTITRUST & TRADE REG. REP. (BNA) 208-09 (Feb. 2, 1984). Once again, the Justice Department strongly opposes legislation creating a new certification procedure. See Statement of William F. Baxter, Assistant Attorney General, Antitrust Division, before the Judiciary Committee of the U.S. Senate (July 29, 1983). The Department instead has proposed a bill that would prevent research and development joint ventures from being condemned as a *per se* violation. The bill further provides a registration procedure whereby any research and development joint venture "fully disclosed" to the FTC and Justice Department may be liable only for actual damages, not treble damages, plus prejudgment interest. See *S. 1841 and H.R. 3878*, 45 ANTITRUST & TRADE REG. REP. (BNA) 366.

⁶⁵ FTC Procedures and Rules of Practice, 16 C.F.R. §§ 1.1-1.4 (1984); 3 TRADE REG. REP. (CCH) ¶ 9801. Before 1962, the FTC issued informal staff opinion letters. Since the creation of the FTC in 1914, there has been periodic debate as to whether the FTC has the authority to issue advisory opinions and, if so, whether it should exercise that power. See Kronstein & Volhard, *Brandeis Before the FTC in 1915: Should Advisory Opinions Be Given?* 24 FED. B.J. 609 (1964). In 1978, this debate rekindled and led to major changes in procedure. See remarks of Albert A. Foer, "FTC Antitrust Advisory Opinions," before the A.B.A. National Institute Program on Antitrust Counseling and the Marketing Process 7-8 (June 13, 1980).

⁶⁶ Enforcing the antitrust laws is but one of the FTC's duties, and FTC Advisory Opinions are also issued for other activities falling under the FTC's responsibility. For example, the FTC issues advisory opinions concerning the prohibition against unfair advertising contained in § 5 of the FTC Act.

⁶⁷ According to the FTC, this "advice" differs from a business review letter, since the latter is addressed solely to the issue of whether the Department intends on the day of the letter to initiate proceedings if the course of conduct is pursued. In contrast, the Commission advisory opinion undertakes to discuss in a meaningful way the interpretation of specific legal principles and their application to the fact situation presented, or points out why the Commission is unable to render a decision, e.g., insufficient information concerning the probable competition effect or impact of such course of conduct.

FTC OPERATING MANUAL 4.8.1. In practice, however, some business review letters do provide detailed legal reasoning. See *supra* note 58.

⁶⁸ The FTC's reasons for adopting different types of clearances are similar to the European

opinion letters signed by the Director of the Bureau of Competition, and staff opinion letters signed by the staff member who prepares the opinion. The first and most valuable type of advisory opinion is rendered by the Commission itself. Requests for a formal Commission advisory opinion will only be considered if (1) the matter involves a substantial or novel question of fact or law and there is no clear Commission or court precedent; (2) the matter is of significant public interest; or (3) a proposed merger or acquisition is involved.⁶⁹ Moreover, the Commission is unlikely to issue a formal advisory opinion as to ongoing conduct, although a staff opinion may be given.⁷⁰

In practice, the Commission renders very few formal advisory opinions on antitrust matters. The staff in the Bureau of Competition responds to the rest of the requests in opinion letters.⁷¹ An applicant can express a preference for a staff opinion letter.⁷² There are two types of staff opinion letters, which are the second and third levels of FTC clearance. One type is signed by the Director of the Bureau of Competition and has more morally binding effect on the Commission than the other type which is signed only by the staff member who prepared it.⁷³

A request for an advisory opinion must be made in writing to the Secretary of the FTC⁷⁴ or, if informal contact has already been made

Commission's reasons for creating comfort letters: (1) to expedite answers to the majority of requests by avoiding the long, burdensome procedure necessary for a formal opinion; and (2) to enable the FTC to reserve its formal opinions to answer novel or important questions. *See* 44 Fed. Reg. 1753 (1979).

⁶⁹ 16 C.F.R. § 1.1(a) (1984).

⁷⁰ Interview with Carl Hevener, *supra* note 1.

⁷¹ 16 C.F.R. § 1.1(b) (1984). Prior to 1979, the Rules did not provide for staff letters, although in practice they were given in the vast majority of cases. *See* 44 Fed. Reg. 1753 (1979). Before 1979, the Commission only averaged about 16 advisory opinions per year. *See* 44 Fed. Reg. 21624 (1979). Many of those concerned the other statutory provisions enforced by the FTC and were not related to antitrust. Interview with Carl Hevener, *supra* note 1. After amendments to the Rules in 1979 which made staff letters an official form of clearance, even fewer formal opinions have been issued each year. For example, between April, 1979 and June, 1980, the Commission did not issue a single advisory opinion, and the staff issued only five antitrust advisory letters. *See* Foer, *supra* note 65, at 5. Between July 29, 1981 and July 20, 1984, the Commission issued only fourteen formal advisory opinions. Letter from Carl Hevener to the author, dated July 20, 1984. In contrast, the Department of Justice issues on average about 20 business review letters per year. *See supra* note 60 and accompanying text.

⁷² An applicant can also request a formal advisory opinion, but this preference carries little weight, unlike a preference for a staff opinion, which is usually granted. Interview with Carl Hevener, *supra* note 1.

⁷³ *Id.* Unlike a Commission advisory opinion, neither type of staff letter is formally binding on the Commission. However, both have a morally binding effect, especially the letter signed by the Director of the Bureau of Competition because of his authoritative position. *Id.* The Commission has never taken action against any activity cleared by either type of staff letter. *Id.*

⁷⁴ 16 C.F.R. § 1.2(a) (1984).

with the Bureau of Competition, the written request may be sent directly there.⁷⁵ As with the Business Review Program, there is no standard application or set of guidelines specifying the precise information which should be submitted,⁷⁶ and this lack of guidance often leads to the same result:⁷⁷ most requests do not contain enough of the necessary information, and the FTC must request supplemental information.⁷⁸ Although the Rules do not provide for it, pre-filing counseling is available and encouraged.⁷⁹

As with the Business Review Program,⁸⁰ there are few formal guidelines for processing and investigating a request for an FTC antitrust advisory opinion.⁸¹ There also is no central office in the FTC's Bureau of Competition which processes and investigates all applications.⁸² A request raising an antitrust issue is handled first by the Correspondence Section, which in turn assigns the request to a staff attorney in the Bureau of Competition's Office of Evaluation, who decides whether the re-

⁷⁵ Interview with Carl Hevener, *supra* note 1.

⁷⁶ 16 C.F.R. § 1.2(a) (1984) merely provides that the request should "(1) state clearly the question(s) that the applicant wishes resolved; (2) cite the provision of law under which the question arises; and (3) state all the facts which the applicant believes to be material. In addition, the identity of the companies and other persons involved should be disclosed."

⁷⁷ See *supra* note 43 and accompanying text.

⁷⁸ Interview with Carl Hevener, *supra* note 1.

⁷⁹ *Id.* In contrast to the Department of Justice, see *supra* note 41, the FTC does not restrict its advice to specifying the types of information necessary or to explaining how the procedure works. The Bureau's Office of Evaluation is willing to discuss the merits of the proposal as well. These conferences also enable an applicant to clarify written material, to convey its good faith to the Commission, to determine in advance the information which will be required and the probable course of the proceeding, and to get its points across in a manner often impossible in written materials. VON KALINOWSKI, *supra* note 7, at 126. These informal contacts often result in a formal application not being filed, such as when the potential applicant discovers it has no real reason for its antitrust concern; where the conduct is objectionable and the potential applicant is not willing to modify it; or where the information requirements are considered too burdensome. Interview with Carl Hevener, *supra* note 1.

⁸⁰ See *supra* notes 41-42 and accompanying text.

⁸¹ The FTC OPERATING MANUAL's chapter on Industry Guidance provided some guidance about procedure, but the MANUAL has not been updated since the 1979 amendments which shifted the administration of the Program from the General Counsel's office to the various enforcement bureaus, such as the Bureau of Competition. The procedures described in the MANUAL are, therefore, obsolete to a large extent.

⁸² Before 1979, the Office of the General Counsel of the FTC was in charge of the Program. It would contact the Bureau of Competition for its advice when an application presented an antitrust issue. If the General Counsel and the Bureau Director disagreed as to the advice which should be given, the Commission would decide the matter. See FTC OPERATING MANUAL 8.4.9.1-2, 8.4.10.1. In order to streamline the procedure, the Program was taken out of the Office of the General Counsel and given solely to antitrust experts in the Bureau of Competition. No special section or group of staff members in the Bureau are in charge of all applications. Interview with Carl Hevener, *supra* note 1.

quest is appropriate for further consideration.⁸³ Often the staff attorney will answer the request himself, particularly if the question presented is easily answered.⁸⁴ In fact, very few requests ever receive a formal Commission advisory opinion or staff opinion letter. Most requests are so informal that they do not even meet the simple requirements for a request to be considered. Unless a faulty request clearly merits further consideration, the staff attorney will inform the applicant that the Commission cannot respond to the deficient request. However, the staff attorney will, on a purely informal basis, add helpful information or analysis, if possible.⁸⁵

If a request is not answered at this stage, it is assigned to the appropriate Assistant Director of the Bureau. The Assistant Director first determines whether the request should be answered by a Commission or staff advisory opinion.⁸⁶ If a staff letter is in order, the Assistant Director then decides which type of staff letter will be issued. Whichever type of response is chosen, the request is then assigned to one or more staff attorneys to conduct the investigation and draft the opinion. The depth of the investigation and the amount of review the draft opinion receives are much greater if the Commission itself will consider the request, and an extensive supporting memorandum must be submitted with the draft to the Commission. If either type of staff opinion letter is to be issued, the investigation is likely to be less intensive, and the opinion letter receives little internal review unless it will be signed by the Bureau Director. In no case does the FTC formally elicit third party comments, although the staff often informally contacts competitors and customers of the applicant for information.⁸⁷ The Bureau is under no time constraints to respond to applications.

The Program's lack of formal guidance and centralization results to

⁸³ Hypothetical questions will not be answered, and ordinarily no advice will be given when "(1) the same or substantially the same course of action is under investigation or is or has been the subject of a current proceeding involving the Commission or another governmental agency, or (2) an informed opinion cannot be made or could be made only after extensive investigation, clinical study, testing, or collateral inquiry." 16 C.F.R. § 1.1(b) (1984). Few requests are rejected in practice. Interview with Carl Hevener, *supra* note 1.

⁸⁴ If the staff attorney answers the request himself, an answer can be given in as little as one month from the receipt of the request (including a delay of approximately two weeks before the Correspondence Office assigns the request to the Office of Evaluation). *Id.*

⁸⁵ *Id.*; letter from Carl Hevener, *supra* note 71.

⁸⁶ The liaison procedure with the Department of Justice, see *supra* note 44, will only be used if the request is considered for a formal Commission advisory opinion. Foer, *supra* note 65, at 8. Despite the fact that the FTC does not clear its handling of the request with the Department of Justice, the Department of Justice has never challenged activity authorized by an FTC staff letter. *Id.*

⁸⁷ Interview with Carl Hevener, *supra* note 1.

some extent in a lack of uniformity and hence inefficiency and unpredictability. Much depends on the particular staff member to whom the application is assigned. The staff members have very little formal guidance about conducting the investigation, and hence to a large extent they are free to investigate the request as they wish.⁸⁸ As is the case with the Business Review Program,⁸⁹ the zealotness of the staff members, the extent to which they bring an "enforcer" attitude to the investigation, and their understanding of the Program's purpose will determine the extensiveness and tone of the investigation. Moreover, the staff members often have little experience in handling advisory opinion requests. Few applications are received each year, and those few applications are parcelled out to the various sections of the Bureau of Competition. Therefore, with the exception of the senior staff attorney in the Office of Evaluation, staff members have little opportunity to gain experience with the Program.

The content of all three types of advisory opinions is prescribed to a much greater degree than the content of business review letters.⁹⁰ Unlike some business review letters, a formal Commission advisory opinion always contains extensive legal analysis and an application of that analysis to the facts.⁹¹ In addition, a Commission opinion

may state which features of the conduct are likely to result in a violation of law, and it may recommend specific changes which, if adopted, will eliminate the likelihood of a law violation. The opinion may state, or clearly imply, whether the Commission will or will not undertake enforcement action if the course of conduct is pursued in the manner outlined in the advisory opinion. Instead of drawing a legal conclusion, the opinion may provide a statement or explanation about why the Commission does not intend to bring any legal action as a matter of enforcement policy, *i.e.*, the practice described may involve a technical law violation but the Commission does not feel that enforcement action would be warranted in the interest of the public.⁹²

Similarly, both types of staff opinions usually recite every material fact upon which the advice is based, discuss critical issues of legal interpretation and application, and indicate whether the staff would recommend an enforcement action to the Commission if the activity is pursued.⁹³ The critical difference between the Commission and the two types of staff advisory opinions is that the latter specifically warn the recipient that they

⁸⁸ *Id.*

⁸⁹ See *supra* notes 47-51 and accompanying text.

⁹⁰ See *supra* notes 55-64 and accompanying text.

⁹¹ See *supra* note 67 and accompanying text.

⁹² FTC OPERATING MANUAL, at 8.4.8.1.

⁹³ FTC OPERATING MANUAL, at 8.4.8.2.

are legally non-binding on the Commission or the staff.⁹⁴ Formal Commission opinions, in contrast, promise that notice of revocation will be given and no action will be taken with respect to activities undertaken in good faith reliance on the advisory opinion.⁹⁵

Neither the Commission nor staff advisory opinions are subject to an expiration date or reporting requirements, and there is no formal procedure for amending them. The opinion, the application, and any supporting materials are placed on the public record immediately after the opinion is issued.⁹⁶

At present, there are no plans to change the Advisory Opinion Program. The Commission believes that the several types of clearance can accommodate the needs of all applicants seeking increased certainty from the FTC.⁹⁷

c. The Department of Commerce Export Certification Program

In response to claims that the uncertain application of United States antitrust law to export activities has significantly deterred those activities and that the FTC and Justice Department clearance procedures and the Webb-Pomerene Act have not relieved that uncertainty,⁹⁸ Congress enacted a new clearance procedure especially for export-related activities. Title III of the Export Trading Company Act of 1982⁹⁹ (ETCA) established a certification program whereby a business can obtain an antitrust law exemption for proposed or on-going export-related activities if the conduct meets certain criteria.¹⁰⁰

A written application for certification must be filed with the Department of Commerce's newly created Office of Export Trading Company Affairs.¹⁰¹ In contrast to the other clearance procedures previously discussed, there is a standard application form and detailed regulations specifying the exact information which should be submitted.¹⁰² There is also a formal provision for pre-filing counseling,¹⁰³ and the Commerce

⁹⁴ *Id.* at 8.4.4; 16 C.F.R. § 1.4 (1984).

⁹⁵ *Id.* at 8.4.3; 16 C.F.R. § 1.3 (1984).

⁹⁶ FTC OPERATING MANUAL, at 8.4.11.1; 16 C.F.R. § 1.4 (1984).

⁹⁷ Interview with Carl Hevener, *supra* note 1.

⁹⁸ *See, e.g., Zarin, The Export Trading Company Act: Reducing Antitrust Uncertainty in Export Trade*, 17 GEO. WASH. J. INT'L L. & ECON. 297, 300, 316-17 (1983). The legislation does not amend or abolish the Webb-Pomerene Act, nor does it prevent exporters from using the FTC or Justice Department clearance programs.

⁹⁹ 15 U.S.C. §§ 4001-4021 (1982).

¹⁰⁰ 15 U.S.C. § 4016 (1982); 15 C.F.R. § 325.4(b) (1984).

¹⁰¹ 15 C.F.R. § 325.3(a) (1984).

¹⁰² 15 C.F.R. § 325.3(b) (1984).

¹⁰³ 15 C.F.R. § 325.3(c) (1984).

and Justice Departments have been publicizing this option.¹⁰⁴ Many applicants have taken advantage of the opportunity,¹⁰⁵ and a majority of those businesses decided not to apply, because, among other reasons, they discovered that their proposed conduct raised no significant anti-trust problem or they were unwilling to supply the required information.¹⁰⁶

Although the Commerce Department is in charge of administering the program, the Justice Department also plays a major role. The ETCA provides that the Attorney General must concur with the Commerce Department's draft certificate before the certificate is issued,¹⁰⁷ and the regulations specify the procedure for obtaining this concurrence.¹⁰⁸ In practice, this procedure is unnecessary because the two Departments currently work closely together during the investigation of the application and the drafting of the certificate.¹⁰⁹

Applications are handled in a much more uniform and efficient manner than under the Business Review or Advisory Opinion Programs. Upon receipt of an application, the Commerce Department has five days to determine whether the application contains the required information and is in proper form.¹¹⁰ Incomplete applications are returned for more information or clarification.¹¹¹ Once complete, however, every applica-

¹⁰⁴ Interview with Arthur Aronoff and Phillip Ray, staff attorneys, Office of Export Trading Company Affairs, International Trade Administration, Department of Commerce, in Washington, D.C. (Jan. 23, 1984). See also address by Irvin P. Margulies, Acting General Counsel, U.S. Department of Commerce, "The Department of Commerce View of the Export Trading Company Act," before the World Trade Institute Seminar on Advanced International Antitrust 15-16 (Dec. 5-6, 1983); remarks by Craig W. Conrath, Assistant Chief, Foreign Commerce Section, Antitrust Division of the Department of Justice, "A Few Early Observations on the Export Trading Company Act of 1982," before the International Committee and the Antitrust Committee of the Business Law Section of the Bar Association of Metropolitan St. Louis 6-7 (Oct. 13, 1983). Many applicants have utilized this opportunity. Counseling can be done over the phone, but officials at Commerce believe a meeting in person is more helpful for applicants. Interview with Arthur Aronoff and Phillip Ray, *supra*. They suggest that the applicant and its attorney first prepare a draft application and bring it with them to the meeting. *Id.* A financial analyst, a senior antitrust economist and an attorney from the office of the Assistant General Counsel for Export Trading Companies attend the meeting. The applicant is instructed as to how to prepare a complete, well-framed application, and the merits of the application are also discussed. *Id.*

¹⁰⁵ Interview with Arthur Aronoff and Phillip Ray, *supra* note 104.

¹⁰⁶ *Id.*

¹⁰⁷ 15 U.S.C. § 4013(b) (1982). The Foreign Commerce Section of the Antitrust Division administers the Program for the Justice Department.

¹⁰⁸ 15 C.F.R. § 325.4(c) (1984).

¹⁰⁹ Interview with Arthur Aronoff and Phillip Ray, *supra* note 104. Therefore, although the Justice Department did not want to play a major role in this "regulatory" program, it appears to be doing just that. See *supra* note 38.

¹¹⁰ C.F.R. § 325.3(d) (1984).

¹¹¹ As of January 1984, about half of the applicants had been returned.

tion must be processed. The Commerce Department has no discretion in accepting and rejecting requests for certification.¹¹²

Once the application is "deemed submitted," the Commerce Department must comply with a series of deadlines, the most important of which are: (1) within 7 days, a copy of the application and all supporting materials must be given to the Justice Department;¹¹³ (2) within 10 days, notice of the application must be published in the *Federal Register*, inviting third party comment to be submitted within 20 days to Commerce;¹¹⁴ and (3) within 90 days, a final decision must be rendered.¹¹⁵ With the concurrence of the applicant, this deadline for a final decision may be extended by as many as 30 days.¹¹⁶ Applicants may also request expedited handling of their requests and, if granted, an answer must be given within 45 days.¹¹⁷ In addition, the clock will be suspended if the applicant consents to supplying additional information requested by either Department.¹¹⁸

At the Commerce Department, a small group of staff attorneys is responsible for handling applications. These attorneys are gradually developing expertise in processing applications.¹¹⁹ They do not have anti-trust enforcement responsibilities. They are guided in their efforts by detailed regulations specifying how applications are to be processed, what information is necessary, and how certificates are to be drafted. The result of this centralization and guidance is that applications are processed, investigated, and drafted according to a procedure which is becoming increasingly streamlined and uniform, and businesses can better anticipate what will be required of them during the process before they apply.

A major impediment to the efficiency and predictability of the procedure, however, is the fact that the Justice Department is also heavily involved in the process. Multi-agency review is inherently less efficient than when a single agency administers a program, and that inefficiency is

¹¹² Interview with Arthur Aronoff and Phillip Ray, *supra* note 104.

¹¹³ 15 C.F.R. § 325.4(c) (1984).

¹¹⁴ 15 C.F.R. § 325.5 (1984). As of January 1984, no comments had been received. Interview with Arthur Aronoff and Phillip Ray, *supra* note 104.

¹¹⁵ 15 C.F.R. § 325.4(a) (1984).

¹¹⁶ *Id.*

¹¹⁷ 15 C.F.R. § 325.7 (1984).

¹¹⁸ 15 C.F.R. § 325.3(f) (1984).

¹¹⁹ As of January 1984, three staff attorneys in the Office of Export Trading Company Affairs currently work on the applications. Each is assisted by a staff economist and a staff financial analyst. Interview with Arthur Aronoff and Phillip Ray, *supra* note 104.

exacerbated when the agencies involved have diverse goals.¹²⁰ The Commerce Department's primary objective is to promote United States exports,¹²¹ while the Justice Department is charged with the promotion of competition.¹²² Thus far, there has been a considerable amount of duplication of effort by the two Departments.¹²³ Since the Justice Department is not comfortable relying on the conclusions of the Commerce Department,¹²⁴ each department conducts its own independent antitrust investigation and analysis for each application. Applicants are burdened unnecessarily by this duplication.¹²⁵

Furthermore, many people, including Commerce Department officials, have complained that the Justice Department has been too rigid and demanding in its investigation and in what it will agree to certify.¹²⁶ The Commerce Department has negotiated with the Justice Department to protect businesses from these allegedly unreasonable demands, and, as a result, there have been major disagreements between the Departments over several issues. First, the Justice Department generally has argued that in order to protect competition, the scope of certificates should be as narrow as possible, covering only that conduct which is specifically proposed by the applicant.¹²⁷ The Commerce Department, on the other hand, generally believes that certificates should be more broadly worded to allow the applicant some leeway to engage in activities which are not specifically proposed in the original applications so that the applicant

¹²⁰ Garvey, *The Foreign Trade Antitrust Improvements Act*, 14 LAW & POL'Y INT'L BUS. 1, 26 (1982).

¹²¹ 15 U.S.C. § 1512 (1982).

¹²² 15 U.S.C. § 15 (1982). As one author warned before the passage of the E.T.C.A., "[h]istory has shown that trade promotion agencies are generally insensitive to the fundamental goals of antitrust, and also that the tension between bodies charged with enforcement and those charged with promotion can result in extraordinary regulatory complexity and delay." Garvey, *supra* note 120, at 26.

¹²³ See Margulies, *supra* note 104, at 20.

¹²⁴ *Id.*; interview with Arthur Aronoff and Phillip Ray, *supra* note 104; interviews with Department of Justice lawyers, *supra* note 38.

¹²⁵ Margulies, *supra* note 104, at 20.

¹²⁶ *Id.*

The process involved in obtaining the concurrence of the Department of Justice in our proposed certificates of review is presently more serious than we had expected . . . the time and energy invested by the Department of Justice in its review of some early certificates of review which we have proposed is totally inappropriate to the size of the applicants involved and the conduct they propose to have covered by the certificates.

Id. Sylvester, *Is There a New Tool in Antitrust?* National Law Journal, Dec. 19, 1983, at 8, col. 2-3.

¹²⁷ Interview with Arthur Aronoff and Phillip Ray, *supra* note 104; interviews with Department of Justice lawyers, *supra* note 38. See Conrath, *supra* note 104, at 7-9. Mr. Conrath argues that specificity is in the best interests of (1) the applicant because a too general certificate may be held not to cover particular activities, and (2) the correct application of the antitrust laws, since conduct not intended to be covered might be held by a court to be immunized. *Id.* at 9.

will not be forced to return for re-certification every time its business plans change.¹²⁸ In addition, the Commerce Department is generally more willing to certify conduct which poses potential, not actual, anti-trust problems on the theory that mandatory periodic information reporting by the applicant¹²⁹ and the Department's power to revoke or amend certificates¹³⁰ provide adequate assurances that any certification mistakes can be rectified relatively quickly.¹³¹

In practice, the Departments have compromised.¹³² The Department of Justice has agreed to allow relatively broad certificates to be issued which do allow conduct raising potential antitrust concerns, provided that certain modifications are made, and that the certificates require strict information reports and impose other terms and conditions which will minimize the possibility that anticompetitive activity will be immunized.¹³³ As of January 1984, no application had been denied, although most proposals were substantially modified before a certificate was granted.¹³⁴

A second major point of disagreement between the Departments concerns the amount and types of supplemental information applicants must submit.¹³⁵ The Department of Justice wants to make more demanding supplemental information requests than the Commerce Department,¹³⁶ but even the Commerce Department's more moderate requests have been criticized by applicants and by the Commerce Department it-

¹²⁸ Interview with Arthur Aronoff and Phillip Ray, *supra* note 104.

¹²⁹ See *infra* note 113 and accompanying text.

¹³⁰ See *infra* note 121 and accompanying text.

¹³¹ Interview with Arthur Aronoff and Phillip Ray, *supra* note 104.

¹³² Thus far, compromises have been reached by the staff members of the respective departments without having to refer disputes to higher officials. *Id.*; interviews with Department of Justice lawyers, *supra* note 38.

¹³³ *Id.* A good example of such a compromise is the export certificate issued in *U.S. Farm-Raised Fish Trading Company, Inc.*, No. 83-00004, 48 Fed. Reg. 29,035 (1983) (Summary of Application) [hereinafter cited as *Farm-Raised Fish Trading Co.*]. At first, the Department of Justice balked at allowing the applicants, major domestic competitors in the catfish industry, to cooperate in export trade, because it feared that the collusion might "spill-over" into the domestic market. Strict terms and conditions designed to prevent domestic "spill-overs," as well as detailed annual reporting requirements and the reservation by the Departments of the right to request information at any time, induced the Department of Justice to assent to a certificate which, much to the applicant's pleasant surprise, was broader than the one it had originally requested. See interview with Arthur Aronoff and Phillip Ray, *supra* note 104; interviews with Department of Justice lawyers, *supra* note 38; interview with R. Anthony Rodgers, partner, Heron, Burchette, Ruckert & Rothwell, in Washington, D.C. (Jan. 26, 1984). The applicants, however, were not as pleased with the requirement to update information. *Id.* See also Sylvester, *supra* note 126, at 8, col. 2 (statement of Dennis Unkovic).

¹³⁴ Interview with Arthur Aronoff and Phillip Ray, *supra* note 104.

¹³⁵ Interviews in Washington, D.C. (Jan. 23-26, 1984).

¹³⁶ *Id.* Department officials justify their requests by pointing out that certificates are legally bind-

self as often unduly burdensome and beyond the information specified by the regulations.¹³⁷ The regulations theoretically protect applicants from burdensome and irrelevant information requests by providing that applicants need not provide such information.¹³⁸ However, the Departments may disagree with the applicant's position and deny the certificate. Convincing the Departments that their requests have been overly burdensome and irrelevant has been a difficult and only partially successful effort by applicants.¹³⁹

These disagreements between the Departments are more common and difficult to resolve when the Foreign Commerce Section of the Antitrust Division delegates applications to other sections having expertise in the subject matter of the application.¹⁴⁰ As is the case with the Business Review Program,¹⁴¹ the staff members in the other sections assigned to the application often have little familiarity with the procedure for investigating applications and drafting certificates.¹⁴² Furthermore, these staff members often do not keep in mind that the goal of the Program is to facilitate exports, and hence they may be more demanding in their information requests and more reluctant to grant broad certificates than are the staff members in the Foreign Commerce Section.¹⁴³

ing, and therefore the Department must be very cautious, even more so than under the Business Review Program. Interviews with Department of Justice attorneys, *supra* note 38.

¹³⁷ Sylvester, *supra* note 126, at 8, col. 2-3; Margulies, *supra* note 104, at 21 ("At times, we appear to be searching for documentary evidence of anticompetitive intent . . . [and] some applicants have received extremely burdensome supplementary information requests that are inappropriate to their size and the conduct they propose to certify."). Applicants are usually not aware that the Justice Department wants more information than the Commerce Department until after they apply, because the Justice Department does not send a representative to the pre-filing counseling session. Interviews with Arthur Aronoff and Phillip Ray, *supra* note 104.

¹³⁸ 15 C.F.R. § 325.3(b) (1984).

¹³⁹ Sylvester, *supra* note 126, at 8, col. 3; interviews in Washington, D.C. (Jan. 23, 1984). If an applicant finds the information demands or required modifications unacceptable, or if it appears the application will be denied or if, for any other reason, it wishes to terminate its application, it may do so and receive back all information it submitted. 15 C.F.R. §§ 325.3(e), .11(a) (1984).

¹⁴⁰ The Foreign Commerce Section is forced to delegate these applications due to its scarce manpower resources. Until recently, about half of the applications were delegated to other sections. 46 ANTITRUST & TRADE REG. REP. (BNA) 204. There are only 11 attorneys in the Section, and the staff has many enforcement responsibilities to fulfill in addition to examining export certificate applications. The Section does exercise loose supervision over the delegated certificates. Interviews with Department of Justice lawyers, *supra* note 38. To alleviate this problem, the Foreign Commerce Section recently hired an attorney with previous experience at Commerce to supervise ETC work. It is hoped that the Section will delegate fewer applications to other sections and that the Section will be able to exercise greater supervision of those applications which are delegated. Letter from Spencer Waller to the author, dated Nov. 5, 1984.

¹⁴¹ See *supra* note 48 and accompanying text.

¹⁴² Interview with Arthur Aronoff and Phillip Ray, *supra* note 104; interviews with Department of Justice lawyers, *supra* note 38; 46 ANTITRUST & TRADE REG. REP. (BNA) 204.

¹⁴³ *Id.*

Fortunately for applicants, the two Departments are beginning to coordinate and streamline their efforts. They now make supplemental information requests in a joint letter, and officials in both Departments state that their requests are becoming much less burdensome as they acquire experience with the Program.¹⁴⁴ Officials from both Departments also attend post-application meetings with applicants.¹⁴⁵ In addition, the Departments are developing standard language ("boilerplate") for the certificates thereby reducing inter-Departmental disputes over the scope and content of every certificate.¹⁴⁶

Once the staff members of the two Departments agree on the language of the certificate, the draft and a supporting memorandum usually are reviewed by two or three higher level officials in each Department before the final certificate is issued.¹⁴⁷ A summary of the certificate or an announcement that the certificate application has been denied must be published in the *Federal Register*.¹⁴⁸ If a certificate is granted, it must specify the export trade, export trade activities, methods of operation, and all persons protected from antitrust liability and the extent of that protection.¹⁴⁹ The certificate contains no legal analysis and none is required.¹⁵⁰ It does not set an expiration date.¹⁵¹ However, detailed annual reports are required and the applicant must report promptly any relevant changes in its export activities or any material fact upon which the certificate was issued.¹⁵²

Both Departments reserve the right to request information if they suspect that the certified conduct no longer meets the ETCA's stan-

¹⁴⁴ Interview with Arthur Aronoff and Phillip Ray, *supra* note 104; interviews with Department of Justice lawyers, *supra* note 38; Margulies, *supra* note 104, at 21.

¹⁴⁵ Interview with Arthur Aronoff and Phillip Ray, *supra* note 104.

¹⁴⁶ Interview with Arthur Aronoff and Phillip Ray, *supra* note 104; interviews with Department of Justice lawyers, *supra* note 38; Margulies, *supra* note 104, at 20; Sylvester, *supra* note 126, at 7, col. 4, and 8, col. 3.

¹⁴⁷ Interview with Arthur Aronoff and Phillip Ray, *supra* note 104; interviews with Department of Justice lawyers, *supra* note 38.

¹⁴⁸ 15 C.F.R. § 325.5(c) (1984).

¹⁴⁹ 15 C.F.R. § 325.4(d) (1984).

¹⁵⁰ See, e.g., *Farm-Raised Fish Trading Co.*, *supra* note 133.

¹⁵¹ *Id.* The Justice Department would prefer to impose an expiration date on certificates. See Remarks of Craig W. Conrath, Assistant Chief, Foreign Commerce Section, Antitrust Division, "Early Experience under the Export Trading Company Act of 1982," before the Pennsylvania Bar Institute Seminar on the Export Trading Company Act 11-12 (Nov. 2, 1983); interview with Craig W. Conrath in Washington, D.C. (Jan. 25, 1984). The Department is uneasy about granting open-ended certificates but, in a compromise with the Commerce Department, it will settle for extensive annual reporting and the power to request information at any time. *Id.*; interview with Arthur Aronoff and Phillip Ray, *supra* note 104.

¹⁵² 15 C.F.R. § 325.13 (1984); E.T.C.A. § 304(a)(1)(A), 15 U.S.C. § 4014(a)(1)(A) (1982).

dards.¹⁵³ Certificates also state that conduct not specified in the certificate is not necessarily illegal but instead is subject to the normal application of the antitrust laws.¹⁵⁴ Finally, the certificate sets forth a disclaimer that the United States government is endorsing neither the commercial viability and quality of the conduct or products, nor the legality of the conduct under United States laws other than the antitrust laws or under the laws of foreign countries.¹⁵⁵

Third parties have thirty days to bring an action in federal court to set aside the certificate as "erroneous".¹⁵⁶ Thereafter, private parties are barred from bringing an antitrust suit except under certain limited circumstances.¹⁵⁷ Indeed, Government agencies are barred absolutely from bringing antitrust suits until the certificate is revoked or modified with adequate notice.¹⁵⁸ Certificate holders can also apply for amendments to their certificates, and if granted the modified exemption dates from the date upon which the amendment was requested.¹⁵⁹

If the Commerce Department plans to deny an application in whole or part, or if it wants to modify or revoke a certificate, it must notify the applicant or certificate holder of its intention and give detailed reasons for its action.¹⁶⁰ The applicant or certificate holder is then entitled to present its arguments against the adverse action.¹⁶¹ If the Commerce Department denies, revokes or modifies a certificate, the applicant or certificate holder may appeal the action to a federal court, claiming that the Department's determination is "erroneous" under the ETCA's standards.¹⁶²

2. Alleged Drawbacks of Existing Clearance Programs

Neither the Business Review nor the Advisory Opinion Program is considered much of a success.¹⁶³ The two programs are infrequently employed¹⁶⁴ and many private attorneys allegedly only apply for a clearance

¹⁵³ 15 C.F.R. § 325.9(b) (1984).

¹⁵⁴ See, e.g., *Farm-Raised Fish Trading Co.*, *supra* note 133.

¹⁵⁵ *Id.*

¹⁵⁶ 15 C.F.R. § 325.10(a) (1984).

¹⁵⁷ See *infra* note 210 and accompanying text.

¹⁵⁸ See *infra* note 209 and accompanying text.

¹⁵⁹ 15 C.F.R. § 325.6 (1984).

¹⁶⁰ 15 C.F.R. §§ 325.8, .9 (1984).

¹⁶¹ 15 C.F.R. § 325.9 (1984).

¹⁶² 15 C.F.R. § 325.10(a) (1984).

¹⁶³ Foer, *supra* note 65, at 3; interviews with private antitrust lawyers in Washington, D.C. (Jan. 23-26, 1984).

¹⁶⁴ See *supra* notes 60 and 71 and accompanying text.

when unusual circumstances force them to do so.¹⁶⁵

Despite the fact that the Export Certification Program adopted many features intended to make it more attractive to businesses in need of increased certainty, many lawyers believe it will suffer the same lack of success.¹⁶⁶ Early experience under the Program indicates that this pessimism may be well-founded. For example, despite the enormous publicity given to the Program, the number of applicants averaged only about five per month during the first year, and most of those applications did not raise serious antitrust problems but instead appeared motivated by the desire for publicity or the overseas marketing advantage of having the U.S. government's "seal of approval."¹⁶⁷ In other words, antitrust uncertainty often has not been the main reason for applications.

Numerous explanations have been advanced for the private bar's reluctance to utilize government clearance programs, including the following:

a. Government conservatism

Many private antitrust lawyers believe that antitrust officials will only clear conduct which is almost certainly legal. In cases which raise antitrust uncertainties, and especially in so-called "close cases," antitrust officials allegedly are reluctant to grant clearances. In other words, it is claimed that although businesses confronted with antitrust uncertainty can obtain greater certainty by applying to the government for clearance, the answer they receive to their application is almost always negative or

¹⁶⁵ See, e.g., Warnke, *Risk Reduction: the Value of Clearance*, 44 ANTITRUST L.J. 387 (1975) ("[w]hen it comes to the question of antitrust clearance, don't do it unless you have to and usually not even then."). Some private attorneys believe clearances should only be requested when:

- (1) clearance is indispensable, such as when your client, another party, an outstanding court order, or lender demands it;
- (2) government disapproval is useful, such as when a deal is probably illegal, but your client or the other party is not convinced;
- (3) the deal is very large, and even a small amount of uncertainty is unacceptable; or
- (4) the deal probably will be investigated by the government anyway, and a request for clearance will enable your client to plead its case before the government forms a negative opinion.

Interviews with private antitrust lawyers in Washington, D.C. (Jan. 23-26, 1984). See also Warnke, *supra*, note 165 at 390.

¹⁶⁶ See, e.g., Bruce & Pierce, *Understanding the Export Trading Company Act and Using (or Avoiding) its Antitrust Exemptions*, 38 BUS. LAW. 975, 1015 (1983). Many private attorneys and some Department of Justice officials are skeptical about the future of the Certification Program, and they believe it would be a mistake to extend it to domestic activities because of all the problems facing applicants under the Business Review and Advisory Opinion Programs. Interviews with private antitrust lawyers, *supra* note 165; interviews with Department of Justice lawyers, *supra* note 38.

¹⁶⁷ Interview with Arthur Aronoff and Phillip Ray, *supra* note 104; Sylvester, *supra* note 126, at 8, col. 1-2; 46 ANTITRUST & TRADE REG. REP. (BNA) 205.

highly qualified and useless.¹⁶⁸

Assessing the validity of this charge is a difficult task. The author was unable to elicit a concrete example of such conservatism during interviews with private antitrust lawyers. The antitrust agencies publicly deny being unduly conservative,¹⁶⁹ and they point to statistics which show that most requests are cleared.¹⁷⁰ Private lawyers contend these statistics prove nothing, since the high percentage of clearances may merely reflect the fact that the majority of requests are not close cases.¹⁷¹ Antitrust officials also claim that a certain amount of "caution" is justified, but that such caution is not the same as being "unduly conservative."¹⁷² It is difficult, however, to determine at what point "justifiable caution" becomes "undue conservatism."

The truth probably lies somewhere between these conflicting claims. On the one hand, since the task of handling clearance requests is parcelled out to so many different antitrust officials,¹⁷³ the clearance decision often depends on the conservatism of the particular official assigned to the case. Therefore, it is probably unfair to generalize that the agency as a whole is unduly conservative. On the other hand, negative answers undoubtedly are justified in some cases, but a negative answer may seem "conservative" to the individual applicant who usually believes its request deserves a clearance. Whether justified or not, negative answers are likely to receive more attention by the antitrust bar than positive answers given in close cases since bad news usually attracts more attention than good news.¹⁷⁴

Therefore, many businesses are afraid to apply for a clearance be-

¹⁶⁸ See, e.g., Warnke, *supra* note 165, at 390-91 (Antitrust officials "are not paid to be permissive."); KANWIT FEDERAL TRADE COMMISSION, 25-3 (Nov. 1979) ("Since the FTC is likely to be conservative in its advice if the practice involved is truly controversial, requests often deal with practices which are not truly ambiguous."); J. ATWOOD & K. BREWSTER, *supra* note 44, at 186 ("the temptation will always be to say no or to be very qualified in the response"); Bruce & Pierce, *supra* note 166, at 1016 ("Questionable conduct will not be certified. No one who really needs a certificate is likely to get it."); GRIFFIN, THE EXPORT TRADING COMPANY ACT OF 1982 23 (1982) ("It is clear from past practice under the [other clearance programs] that you never get cleared for conduct that's dicey or in a gray area.")

¹⁶⁹ See, e.g., Baker, *supra* note 5 at 350; address by Thomas E. Kauper, Assistant Attorney General, Antitrust Division, to the New York State Bar Association (Jan. 24, 1973).

¹⁷⁰ *Id.* See also *Digest of Antitrust Division's Business Review Letters*, *supra* note 59, which indicates, for example, that in 1982, 19 out of 22 business review letter requests were granted. Two were denied, and in two cases the Department declined to state its enforcement intentions.

¹⁷¹ See, e.g., Warnke, *supra* note 165, at 390.

¹⁷² Interviews with Department of Justice lawyers, *supra* note 38.

¹⁷³ See *supra* notes 45, 82, and 140 and accompanying text. This is not true for the Export Certification Program when the Foreign Commerce Section does not delegate applications to other sections. See *supra* note 140 and accompanying text.

¹⁷⁴ Negative responses to applications are announced in a press release under the Business Re-

cause they cannot be assured of a non-conservative answer. Because antitrust officials are unduly conservative in at least some cases, applying for a clearance appears to potential applicants to be something of a gamble. Moreover, implementing a course of conduct after a clearance has been denied likely would result in a government antitrust suit.¹⁷⁵

There are several possible causes of government conservatism under the Business Review and Advisory Opinion Programs. One likely cause is that clearance requests are handled by staff lawyers who are not accustomed to telling businesses that their conduct raises no antitrust problems. These lawyers normally only prosecute businesses for antitrust violations, and they often have an "enforcement" mentality. It is often asking too much for them to suspend their "enforcement" outlook temporarily while they handle a clearance request.¹⁷⁶ The Export Certification Program partially remedies this problem by entrusting the handling of a request to a group of lawyers at the Department of Commerce who are not antitrust enforcers.¹⁷⁷ However, the Department of Justice lawyers involved in the process are primarily antitrust law enforcers,¹⁷⁸ a fact of which the bar is well aware.¹⁷⁹

A second possible cause of conservatism under the FTC and Justice Department programs is that negative answers are not expected by those agencies to undergo judicial review.¹⁸⁰ In practice the government's answer is second-guessed only when an applicant is given a clearance, since in the vast majority of cases only cleared requests have been implemented and open to challenge by third parties. An applicant has no cause of action against the government for a negative response. Therefore, an antitrust official may feel it is safer to deny the clearance.¹⁸¹ The Export Certification Program resolves this problem by making both negative and positive answers judicially reviewable.¹⁸² Hence, a negative answer must be just as well-supported as a positive one.¹⁸³

view and Advisory Opinion Programs, and in the Federal Register under the Export Certification Program.

¹⁷⁵ Interview with Carl Hevener, *supra* note 1; interviews with Department of Justice lawyers, *supra* note 38.

¹⁷⁶ Interviews with government and private antitrust lawyers in Washington, D.C. (Jan. 23-26, 1984).

¹⁷⁷ See *supra* note 119 and accompanying text.

¹⁷⁸ See *supra* note 140.

¹⁷⁹ There has been much publicity alleging that the Department of Justice is being unduly conservative in this program. See e.g., Sylvester, *supra* note 126 at 8, col. 2-3.

¹⁸⁰ In theory, negative determinations also would be reviewable if a disappointed applicant would implement the proposal despite the government's disapproval.

¹⁸¹ Interviews with private antitrust lawyers, in Washington, D.C. (Jan. 23-26, 1984).

¹⁸² See *supra* notes 156-62 and accompanying text.

¹⁸³ See Margulies, *supra* note 104, at 9.

A third alleged cause of conservatism is that the lack of a legislative mandate for the Business Review and Advisory Opinion might make some antitrust officials “squeamish” about clearing close cases.¹⁸⁴ The Export Certification Program not only provides this mandate, but it also creates a presumption of legality should the certificate be challenged in court.¹⁸⁵

A fourth possible source of conservatism is the antitrust official’s “natural worry that time will not permit adequate investigation, and that imagination is not reliable enough to permit the self-assurance necessary to give a firm commitment for the kind of transaction to which assurance is important.”¹⁸⁶ Afraid that he might be clearing conduct which is or might become anticompetitive, the antitrust official may choose to err on the side of caution and deny the request. The fact that business review letters and advisory opinions have no legally binding effect on the antitrust agencies or private parties,¹⁸⁷ however, should do much to relieve this fear, because any mistake can be easily corrected. Applicants can also allay the agency’s fear by making a full, detailed disclosure of the relevant information.¹⁸⁸ Although the Export Certification Program does have a legally binding effect on the agencies, private parties, and the courts,¹⁸⁹ the Program helps relieve the tendency of the antitrust official to be conservative both by giving the agency the right to revoke or modify the certificate if the conduct turns out to be anticompetitive¹⁹⁰ and by imposing stringent reporting requirements on certificate holders.¹⁹¹ Still, Justice Department officials say they are more “cautious” under this Program than under the Business Review Program because of the export certificate’s significant legally binding effect.¹⁹²

b. Lack of binding effect

Antitrust lawyers often complain that even when a clearance is granted under the Business Review or Advisory Opinion Program, it lacks the binding effect which would make it worth the effort.¹⁹³ A busi-

¹⁸⁴ See Kobak, *supra* note 8, at 67.

¹⁸⁵ E.T.C.A. § 306(b)(3), 15 U.S.C. § 4016(b)(3) (1982).

¹⁸⁶ J. ATWOOD & K. BREWSTER, *supra* note 44, at 185; Handler, *supra* note 10, at 381; Kronstein & Volhard, *supra* note 65, at 611-12; Warnke, *supra* note 165 at 387.

¹⁸⁷ See *infra* note 196 and accompanying text.

¹⁸⁸ See VON KALINOWSKI, *supra* note 7, at 126.

¹⁸⁹ See *infra* note 209 and accompanying text.

¹⁹⁰ See *supra* note 158 and accompanying text.

¹⁹¹ See *supra* note 152 and accompanying text.

¹⁹² Interviews with Department of Justice lawyers, *supra* note 38.

¹⁹³ See, e.g., Reinsch, *supra* note 13, at 106-07; Schwechter & Shepard, *supra* note 12, at 526-27; interviews with private antitrust lawyers in Washington, D.C. (Jan. 23-26, 1984).

ness review letter only states the Justice Department's present enforcement intention, and the Department "remains completely free to bring whatever action or proceeding it subsequently comes to believe is required by the public interest."¹⁹⁴ An FTC staff opinion is likewise not legally binding on the Commission or the staff and can be revoked without notice, and even a formal Commission opinion can be revoked or modified at any time after reasonable notice is given to the parties.¹⁹⁵ In addition, none of these clearances legally binds the other antitrust agencies, private parties or the courts.¹⁹⁶ Finally, neither a business review letter nor an advisory opinion provides protection if full disclosure of all the facts has not been made by the applicant or if the facts upon which the clearance was granted materially change.¹⁹⁷ Of course, conduct outside the scope of the clearance is not protected.¹⁹⁸

Although business review letters and advisory opinions have no legally binding effect, in practice these clearances all have a substantial morally binding effect on the issuing agency. Both agencies have rarely taken action against cleared conduct.¹⁹⁹ Officials of both the FTC and the Justice Department also insist that no business would be prosecuted for past actions taken in good faith reliance on a clearance.²⁰⁰ In addition, neither agency has ever prosecuted conduct cleared by the other,²⁰¹ and clearances by both agencies likely have a powerful deterrent effect on private plaintiffs.²⁰² If cleared conduct were ever challenged in court by either the issuing agency, another agency, or a private party, it is very likely that good faith reliance on the clearance would influence the court and at least mitigate sanctions.²⁰³

¹⁹⁴ 28 C.F.R. § 50.6(9) (1984).

¹⁹⁵ 16 C.F.R. § 1.3(b), (c) (1984).

¹⁹⁶ Interviews with Department of Justice lawyers, *supra* note 38; interview with Carl Hevener, *supra* note 1; Schwechter & Shepard, *supra* note 12, at 526. *See also* 43 Fed. Reg. 33,340, 33,505 (1978) (the FTC "has never felt itself legally bound by Business Review Letters issued by the Antitrust Division," and the FTC recognizes that the "Antitrust Division has not believed that its ability to challenge an acquisition was restricted by a Commission Advisory Opinion").

¹⁹⁷ Interviews with Department of Justice lawyers, *supra* note 38; interview with Carl Hevener, *supra* note 1.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* The FTC has never brought suit against activities cleared by a staff advisory opinion, but it has rescinded formal advisory opinions on a few occasions. However, it only did so after giving the businesses affected ample notice and an opportunity to cease the objectionable activity. Interview with Carl Hevener, *supra* note 1. *See also* Foer, *supra* note 65, at 6.

²⁰⁰ Interviews with Department of Justice lawyers, *supra* note 38; interview with Carl Hevener, *supra* note 1.

²⁰¹ *Id.*

²⁰² J. ATWOOD & K. BREWSTER, *supra* note 44, at 185; Foer, *supra* note 65, at 6.

²⁰³ J. ATWOOD & K. BREWSTER, *supra* note 44, at 185; interviews with Department of Justice lawyers, *supra* note 38. In one of the rare cases involving a challenge to conduct cleared by a busi-

Therefore, business review letters and advisory opinions provide recipients with a significant degree of protection. The business and legal communities' concern is largely unfounded. Absolute certainty and unlimited protection regardless of the circumstances are unrealistic demands.²⁰⁴ Still, since many businesses consider private actions to be the most serious antitrust risk,²⁰⁵ the lack of any legally binding protection against those suits diminishes the value of antitrust clearances in the eyes of the business community.²⁰⁶

One probable explanation for the business community's misperception that business review letters and advisory opinions provide little protection from antitrust liability is the agencies' repeated emphasis in their regulations, business review letters, advisory opinions, and public statements that the clearances are not *legally* binding.²⁰⁷ Moreover, the agencies have failed, except in the case of formal Commission advisory opinions, to assure the business community that reasonable notice of revocation will be given and that good faith reliance on an opinion will prevent any government suits. Unfortunately, both agencies "have fallen victim to the bureaucratic tendency of being institutionally reluctant to make an absolute commitment about anything."²⁰⁸

In contrast to the Business Review and Advisory Opinion Programs, the Export Certification Program does provide the assurance of a

ness review letter, the court was not impressed with the persuasive value of business review letters. *Blue Cross of Virginia v. Commonwealth of Virginia*, 176 S.E.2d 439, 211 Va. 180 (1970).

²⁰⁴ As an FTC attorney involved with the Advisory Opinion remarked:

[T]o demand the complete elimination of [all possibilities that a clearance will be rescinded] constitutes a juvenile quest for absolute certainty. In the complex society . . . no person can be assured that no one will ever at any time and under any circumstances question the approval he has received. Because the procedure leaves some element of risk does not mean that it therefore contains no merit. In the great majority of cases, the requesting party will find that the opinion protects him against adverse action for his past actions taken in reliance upon the opinion and more than this he cannot fairly ask.

Dixon, *supra* note 24, at 74.

²⁰⁵ Interviews with private antitrust lawyers, in Washington, D.C. (Jan. 23-26, 1984).

²⁰⁶ *Id.*; Schwechter & Shepard, *supra* note 12, at 526-27.

²⁰⁷ Schwechter & Shepard, *supra* note 12, at 526; Kobak, *supra* note 8, at 55. See, e.g., Baker, *To Indict or Not to Indict; Prosecutorial Discretion in Sherman Act Enforcement*, 63 CORNELL L. REV. 405, 416 (1978) ("I would not feel bound by a prior business review letter—especially an old one—when the letter was based on what now would be regarded as incorrect analysis or policy.") (Baker is former head of the Antitrust Division). See also the Department of Justice Motion to Dismiss, in *Holly Farms Poultry Industries, Inc. v. Kleindienst*, Civil No. Cl-151-W-72 (D.M.D. N.C. filed May 22, 1972), filed in August, 1972. The action was brought against the Justice Department to force it to grant a business review clearance for the plaintiff's proposed conduct. The Department argued that the court could not force the Department to grant a clearance since a business review letter is merely "a statement of present enforcement intention made in part on the basis of assumed facts, for the convenience of [the applicant], in accordance with a procedure voluntarily made available, and is not binding upon [the recipient], upon this Court, or even upon the Attorney General."

²⁰⁸ Reinsch, *supra* note 193, at 107.

legally binding effect which many businesses and antitrust lawyers desire. The export conduct certified is exempt from both federal and state antitrust laws,²⁰⁹ and no lawsuit may be instituted against the certified conduct by government or private parties unless the certificate is revoked, with one exception: private parties injured by the certified conduct may bring a suit for actual, not treble, damages, injunctive relief and costs if the conduct certified does not meet the four statutory eligibility standards.²¹⁰

Besides being limited to actual damages, the ETCA deters private actions in several other ways. First, there is a legal presumption in court that the certified conduct does comply with the eligibility standards.²¹¹ Second, there is a much shorter statute of limitations than in other antitrust actions.²¹² Finally, a losing plaintiff must pay the certificate holder's defense costs, including reasonable attorney's fees.²¹³

Like business review letters and advisory opinions, an export certificate does not protect conduct falling outside its scope, and it may be revoked or modified if material facts change.²¹⁴ These limitations are reasonable since the government should only confer protection to those activities presented for clearance and upon the present or foreseeable facts. Conduct outside any of these clearances or changed material facts would not necessarily result in antitrust liability, since the government or private plaintiff still would have to demonstrate that the antitrust laws have been violated. As a means to protect itself against these uncertainties, an export certificate holder can easily apply for an amendment to its certificate.²¹⁵ Indeed, under the Business Review and Advisory Opinion Programs businesses can approach the agencies for a new clearance even though no formal amendment procedure exists. This option may be somewhat inconvenient and expensive, but it is a reasonable and necessary requirement.

The fact that the absence of full disclosure of material facts at the time a business review letter or advisory opinion is granted will nullify the protection of the clearance retroactively is a possible deterrent to us-

²⁰⁹ E.T.C.A. § 306(a), 15 U.S.C. § 4016(a) (1982).

²¹⁰ E.T.C.A. § 306(b)(1), 15 U.S.C. § 4016(b)(1) (1982).

²¹¹ E.T.C.A. § 306(b)(3), 15 U.S.C. § 4016(b)(3) (1982).

²¹² E.T.C.A. § 306(b)(2), 15 U.S.C. § 4016(b)(2) (1982). The statute of limitations is two years from the date the plaintiff has notice of the certificate's failure to comply with the standards of the ETCA, and in no event longer than four years. In other antitrust actions, the period is four years regardless of when the plaintiff receives notice. 15 U.S.C. § 15(b) (1982).

²¹³ E.T.C.A. § 306(b)(4), 15 U.S.C. § 4016(b)(4) (1982).

²¹⁴ See Commerce Department Guidelines for Issuance of Export Trade Certificates of Review (Apr. 8, 1983), *reprinted in* 44 ANTITRUST & TRADE REG. REP. (BNA) 816, 817 (Apr. 14, 1983).

²¹⁵ See *supra* note 159 and accompanying text.

ing those clearance procedures. Some applicants are concerned that the determination of what constitutes "full disclosure" and which facts are "material" lies with the antitrust agencies or the courts and that information which was inadvertently not disclosed or which is relevant only with the benefit of hindsight will deprive them of the protection of the clearance.²¹⁶ No applicant has yet been prosecuted under these circumstances,²¹⁷ but the fact that it could happen does create some anxiety for businesses. The Export Certification Program removes this possibility by specifying that the protection of the certificate will only be invalidated retroactively if the factual omission was fraudulent.²¹⁸

Finally, the fact that business review letters and FTC staff advisory opinions do not formally guarantee adequate notice of revocation and protection for good faith reliance creates a perception of uncertainty, even though in practice those clearances do provide such protection. The Export Certification Program explicitly guarantees such protection.²¹⁹

c. Administrative burden and delay

Some amount of compliance costs and delay are inevitable in any individual clearance program regardless of how well it is run. Many lawyers and businesses, however, complain that much of the burden and delay is unnecessary in the clearance program. They also complain that the delay is so long that it often results in lost business opportunities.²²⁰

This charge appears to be well-founded with regard to the Business Review and Advisory Opinion Programs. Neither of those programs has a standardized application form or any guidelines indicating what type of information must be submitted,²²¹ and, as a result, much time and effort

²¹⁶ See, e.g., Warnke, *supra* note 165, at 388.

²¹⁷ Interview with Carl Hevener, *supra* note 1; interviews with Department of Justice lawyers, *supra* note 38.

²¹⁸ 15 C.F.R. § 325.4(e) (1984).

²¹⁹ 15 C.F.R. § 325.9(c) (1984). The Commerce Department must first notify the certificate holder in writing of its intention to revoke or modify the certificate, and the certificate holder has 30 days to respond. If thereafter the certificate is revoked or modified, the effective date can be no earlier than 30 days after the revocation or modification decision. Some businesses and lawyers, however, contend that even these limitations do not provide adequate protection since the "sword of Damocles" is not totally removed. See, e.g., Garvey, *supra* note 120, at 37. Such demands for absolute and perpetual protection are unreasonable.

²²⁰ J. ATWOOD & K. BREWSTER, *supra* note 44, at 187; Baker, *supra* note 5, at 344-50; Garvey, *supra* note 120, at 26-27; Golden & Kolb, *The Export Trading Company Act of 1982: An American Response to Foreign Competition*, 58 NOTRE DAME LAW. 743, 771-72 (1983); Schwechter & Shepard, *supra* note 112, at 524-26; interviews with private antitrust attorneys, in Washington, D.C. (Jan. 23-26, 1984).

²²¹ See *supra* notes 42 and 76 and accompanying text.

are expended during the investigation when the agencies must make supplemental information requests.²²² Pre-filing counseling can help,²²³ but it is not often used.²²⁴ Zealous staff members may ask for an enormous amount of information not relevant to the application.²²⁵ Moreover, with the exception of export activities under the Business Review Program,²²⁶ the agencies face no deadline for responding.²²⁷ The time the agencies take to respond varies greatly,²²⁸ but most applicants must wait *at least* four to five months for a business review letter²²⁹ or formal FTC advisory opinion, and two to five months for an informal FTC staff opinion unless a relatively simple matter is presented which can be handled promptly by the Office of Evaluation.²³⁰

The Export Certification Program represents an improvement over the Justice Department and FTC programs in many respects. Its standard application and detailed guidelines make it more likely that the information in the initial application will be complete or at least that supplemental requests will be minimized.²³¹ Yet, there are complaints

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ See *supra* notes 50 and 89 and accompanying text.

²²⁶ See *supra* note 53.

²²⁷ See *supra* notes 54 and 87 and accompanying text. See also Schwechter & Shepard, *supra* note 12, at 542-25:

While the Justice Department, in certain cases, is prepared to work with requesting companies to provide them with a Business Review Procedure statement within an appropriate period of time so that business opportunities will not be lost, without a more consistently streamlined procedure, the business community has continued to perceive the usually extensive time involved in receiving a response to be a significant disincentive to making use of the Business Review Procedure.

²²⁸ The Justice Department took over five months to respond to a recent business review letter request by United Technologies Corporation, see Department of Justice Press Release (Oct. 27, 1983). But it took over 19 months to respond to a request by the National Egg Price System Study Committee and Urner Barry Publications, see Department of Justice Press Release (Sept. 9, 1983). The FTC's response time also varies considerably. For example, the FTC took only three months to answer a request for a staff opinion letter submitted by Herbert J. Messita, see the Advisory Opinion File in the FTC's Public Reference Branch, Room 130 [hereinafter cited as Advisory Opinion File]; in contrast, a staff opinion letter to the American Podiatry Association signed by the Director of the Bureau of Competition took five months to process, see FTC Press Release (Aug. 19, 1983) (actual letter on file in the Advisory Opinion File, *supra*). Similarly, a formal Commission advisory opinion was issued to the Phosphate Rock Export Association in a little more than four months, see Advisory Opinion File, *supra*, while another issued to Procter & Gamble took ten months. See Advisory Opinion File, *supra*.

²²⁹ Interviews with Department of Justice lawyers, *supra* note 38.

²³⁰ Interview with Carl Hevener, *supra* note 1. Under the FTC Program, it often takes two weeks or more simply for the FTC's Correspondence Section to assign an application to the Bureau of Competition. Since July 29, 1981, the average time for a formal Commission opinion has been seven months. Letter from Carl Hevener, *supra* note 71.

²³¹ See *supra* notes 102-05 and accompanying text.

that much of the information required is too demanding and unnecessary in many cases and often goes beyond the limitations of the regulations.²³²

The opportunity under the ETCA for pre-filing counseling, which is being publicized and is being taken advantage of with increasing frequency, allows an applicant and the Commerce Department to tailor the information requirements to the individual application.²³³ However, the absence of a Department of Justice representative at this pre-filing meeting often results in major supplemental requests, since the Justice Department normally requires much more information than does the Commerce Department.²³⁴ Post-filing conferences provide the applicant with an opportunity to convince the agencies that information requests are irrelevant and overly burdensome.²³⁵

The ETCA also imposes deadlines on the two Departments, thereby avoiding the often long delays which detract from the utility of the other clearance programs.²³⁶ However, some businesses and lawyers complain that the deadlines are still too long in many cases where time is of the essence.²³⁷

Unlike under the Business Review or Advisory Opinion Programs, the prospects for reducing administrative delay and burden are very promising under the Export Certification Program because the Program is more centralized and structured. Both the Commerce and Justice Departments believe that as they gain experience with the processing of applications and as standardized language is developed, information requests will become less demanding and the time needed to process applications will decrease significantly.²³⁸ Some private antitrust lawyers agree with this optimistic view.²³⁹

Nevertheless, a certain amount of delay and inefficiency is unavoidable under the Program since it involves two agencies which often duplicate each other's efforts.²⁴⁰ In addition, after a certificate is issued,

²³² See *supra* note 126 and accompanying text.

²³³ See *supra* notes 102-05 and accompanying text.

²³⁴ See *supra* note 136 and accompanying text.

²³⁵ See Interview with Arthur Aronoff and Phillip Ray, *supra* note 104.

²³⁶ See *supra* notes 110-15 and accompanying text.

²³⁷ See, e.g., Garvey, *supra* note 120, at 27.

²³⁸ Interview with Arthur Aronoff and Phillip Ray, *supra* note 104; interviews with Department of Justice lawyers, *supra* note 38; Margulies, *supra* note 104, at 213. For the first eleven certificates, it took from three to five months between acceptance of the application and actual issuance. The Commerce Department hopes to reduce this period to 60-70 days. 46 ANTITRUST & TRADE REP. (BNA) 205.

²³⁹ See Sylvester, *supra* note 126, at 8, col. 3; interviews with private antitrust lawyers, in Washington, D.C. (Jan. 23-26, 1984).

²⁴⁰ See *supra* note 123 and accompanying text.

reporting requirements make the certificate holder subject to continued administrative oversight.²⁴¹

d. No assurance of confidentiality

An application for a business review letter or an advisory opinion, the agency's response, and any information submitted in support of an application by the applicant or by third parties, is placed in a file open to the public.²⁴² Moreover, any information not placed in the file is subject to disclosure under the Freedom of Information Act.²⁴³ Therefore, many applicants and third parties volunteering information fear that sensitive business information may be acquired by their competitors by examining the file or through a FOIA request.²⁴⁴

The burden is on the party submitting information to request confidentiality and to justify that request to the agency receiving the information.²⁴⁵ Even if the agency grants the request and the information is withheld from the file, third parties may file an FOIA request. Then the submitting party and the agency must go through each document to remove only that information which is protected by the Act's business secrets exemption,²⁴⁶ and the burden of proof is on the agency resisting disclosure.²⁴⁷

Although the agencies claim they can protect truly sensitive infor-

²⁴¹ See *supra* note 152 and accompanying text.

²⁴² See *supra* notes 59 and 96 and accompanying text.

²⁴³ 5 U.S.C. § 552(a)(3) (1982). The Act requires administrative agencies to make available for public inspection and copying any identifiable record, including private documents held by government agencies. See Comment, *Administrative Disclosure of Private Business Records Under the Freedom of Information Act: An Analysis of Alternative Methods of Review*, 28 SYRACUSE L.R. 923, 927 n.13 (1977).

²⁴⁴ Interviews with private antitrust lawyers in Washington, D.C. (Jan. 23-26, 1984). See also VON KALINOWSKI, *supra* note 7, at 126-17-19; Baker, *supra* note 5, at 349; Warnke, *supra* note 165, at 391.

²⁴⁵ See 28 C.F.R. § 50.6(10)(c) (1984), which provides that a party seeking confidential treatment from the Justice Department must:

(1) specify precisely the documents or parts thereof that he asks not be made public; (2) state the minimum period of time during which nondisclosure if considered necessary; and (3) justify the request for nondisclosure, both as to content and time, by showing that disclosure would have a detrimental effect upon the requesting party's operations or relationships with actual or potential customers, employees, suppliers (including suppliers of credit), stockholders, or competitors. The Department of Justice, in its discretion, shall make the final determination as to whether good cause for nondisclosure has been shown.

See also 15 C.F.R. § 1.4 (1984), in which the FTC states that a request for confidentiality of information submitted in connection with the questions should be made separately.

²⁴⁶ 5 U.S.C. § 552(b) (1982). The exemption is contained in § 552(b)(4). Both agencies' regulations provide that their discretion to withhold information from the public is subject to statutory restrictions. 28 C.F.R. § 50.6(10)(e) (1984); 15 C.F.R. § 1.4 (1984).

²⁴⁷ 5 U.S.C. § 552(a)(3) (1982).

mation,²⁴⁸ applicants and third parties have no assurance that the agency will be successful. Moreover, businesses fear that the agencies may not agree with them in the first place that a certain piece of information is confidential.²⁴⁹ Finally, the process of removing the sensitive information from each document if a third party files an FOIA request is time-consuming and expensive.²⁵⁰

Once again, the Export Certification Program has adopted measures to alleviate this problem which has inhibited the use of the other clearance programs. Under the ETCA, only the final certificate itself is placed in the public file, not the information submitted in support of the application. The application and information submitted in support thereof by the applicant and third parties are exempt from disclosure under the Freedom of Information Act.²⁵¹ Moreover, the government is prohibited from releasing confidential information if such disclosure would cause harm to the person who submitted it except in certain limited circumstances and usually subject to a protective order.²⁵² The submitter is also warned of any request for the information in a judicial or administrative proceeding, and the Commerce or Justice Department must seek or support an appropriate protective order if it releases information in such instances.²⁵³ Since the Commerce Department is eager to encourage businesses to apply for certificates, it claims it will do everything it can to protect sensitive information.²⁵⁴

While these safeguards do provide more assurance of confidentiality,

²⁴⁸ See, e.g., ANTI-TRUST DIVISION MANUAL III-77 (1979), which states the Department's belief that most information which it would not disclose as a matter of discretion under 28 C.F.R. § 50.6(10)(c) (1984), would be within one of the Freedom of Information Act's exemptions.

²⁴⁹ Interviews with private antitrust lawyers, in Washington, D.C. (Jan. 23-26, 1984). See also Warnke, *supra* note 165 at 391.

²⁵⁰ Interviews with Department of Justice lawyers, *supra* note 38.

²⁵¹ E.T.C.A. § 309(a), 15 U.S.C. § 4019(a) (1982); 51 C.F.R. § 325.14(a) (1984). Information submitted to the Commerce Department before the official filing of an application, such as disclosures made at the pre-filing counseling meeting, is subject to the Freedom of Information Act. Margulies, *supra* note 104, at 9-10; interview with Arthur Aronoff and Phillip Ray, *supra* note 104. The Department warns potential applicants of this danger and generally returns the information as soon as possible. *Id.*

²⁵² E.T.C.A. § 309(b)(1), 15 U.S.C. § 4019(b)(1) (1982); 15 C.F.R. § 325.14(b)(1) (1984). Under E.T.C.A. § 309(b)(2), 15 U.S.C. § 4019(b)(2) (1982), and 15 C.F.R. § 325.14(b)(3) (1984), the Commerce Department may disclose such information (A) upon a request made by the Congress or any committee of the Congress, (B) in a judicial or administrative proceeding, subject to appropriate protective orders, (C) with the written consent of the person who submitted the information, (D) when the Commerce Department considers the disclosure to be necessary for determining whether or not to issue, amend or revoke a certificate and the person who submitted the information is warned and has an opportunity to advise the Department of the potential harm disclosure may cause, or (E) in accordance with any U.S. statutory requirement.

²⁵³ 15 C.F.R. § 325.14(c) (1984).

²⁵⁴ Interview with Arthur Aronoff and Phillip Ray, *supra* note 104.

there is still no assurance of total confidentiality. Furthermore, some businesses and lawyers are concerned that the *Federal Register* notice may contain confidential information, and that the actual certificate itself which is not protected from disclosure may contain confidential information.²⁵⁵

e. Publicity

For some applicants, a strong disincentive for applying under all three clearance programs, including the Export Certification Program, is the publicity which will be given to their conduct.²⁵⁶ They fear that this publicity will inform competitors of their plans or encourage litigation by private parties.²⁵⁷

Under the Business Review and Advisory Opinion Programs, publicity about an application is delayed until the clearance decision is actually made. There is no public notice of the filing of an application. This delay, however, may provide little comfort since potential plaintiffs and competitors may still be alerted before or shortly after the proposal is put into effect if, as is usually the case, the applicant postpones implementation of its proposal until after it receives a response. In fact, many of them will be alerted during the agency's investigation when approached for information and for their reaction to the applicant's proposal. The Export Certification Program is even less attractive in this respect, because not only is a summary of the granted certificate published, but also a summary of the application is published only ten days after the application is initially filed.²⁵⁸

f. Government scrutiny

Some applicants fear that an application for clearance will invite close government scrutiny of all their activities, both present and future,

²⁵⁵ 48 Fed. Reg. 10,598 (1983). The certificate is not published, but it is made available to the public at the Commerce Department. The Department has asked for public comments on whether confidential information should be deleted from publicly available certificates. *Id.* at 10599.

²⁵⁶ Each agency issues press releases announcing the factual background of the request, the agency's response, and a summary of the agency's legal reasoning (except for those business review letters which do not always contain such reasoning). At one time, the FTC published summaries of formal Commission advisory opinions, but it no longer does so. See 16 C.F.R. Part 15 (1984).

²⁵⁷ See, e.g., VON KALINOWSKI, *supra* note 7, at 126-19; Bruce & Pierce, *supra* note 166, at 1016; GRIFFIN, *supra* note 168, at 23.

²⁵⁸ See *supra* notes 115 and 148 and accompanying text. Commerce Department officials believe, however, that the potential damage of this publicity can be reduced by the fact that under 15 C.F.R. 325.3(b)(15) (1984), the applicant itself drafts the Federal Register notice. Margulies, *supra* note 104, at 17. While this opportunity may enable the applicant to protect confidential information, it cannot prevent alerting third parties about the basic facts of the applicant's conduct.

and that this scrutiny will reveal antitrust violations or other illegal activity.²⁵⁹ Hence, it is allegedly safer not to bring this attention and continuing oversight to one's activities.

Unless the potential applicant is concerned that it may be engaging in some illegal conduct, however, this fear appears largely irrational. According to the agencies, no file is created on the applicant, and there is no follow-up on the applicant's activities except in the case of export certificates, and in those cases the scrutiny is limited only to the certified conduct and does not examine the business's overall operations.²⁶⁰ The agencies do admit, however, that information about a former applicant which appears in the press and which is relevant to the application will quite naturally be noticed by those agency lawyers who worked on the application.²⁶¹

Some businesses also fear that an application will bring the government's attention to conduct it otherwise might not have noticed or might not have prosecuted even if it had noticed.²⁶² This fear may be correct in some cases, but this possibility is part of the risk evaluation each business must make when determining whether to apply. The fact that the government might not notice or might not prosecute does not mean, however, that private parties will not bring suit.

g. Lack of judicial review of denied applications

Some businesses and lawyers complain that under the Business Review and Advisory Opinion Programs, the applicant has no standing to appeal a denial of a clearance request to a court since the letter is merely "advice" or an expression of present enforcement intention.²⁶³ Standing can only be attained if the applicant gambles by going ahead with the activity and is sued by the government.²⁶⁴ Understandably, businesses would prefer not to take such a gamble in the hope that it would ultimately be vindicated in court.²⁶⁵ The Export Certification Program remedies this disadvantage by allowing the applicant to seek judicial review

²⁵⁹ Interviews with private antitrust lawyers, in Washington, D.C. (Jan. 23-26, 1984). See also VON KALINOWSKI, *supra* note 7, at 126-6, S. KANWIT, *supra* note 168, at 25-3, Schwechter & Shepard, *supra* note 12, at 524.

²⁶⁰ Interviews with government antitrust officials, in Washington, D.C. (Jan. 23-26, 1984).

²⁶¹ *Id.*

²⁶² Interviews with private antitrust lawyers, in Washington, D.C. (Jan. 23-26, 1984). See also J. ATWOOD & K. BREWSTER, *supra* note 44, at 187; VON KALINOWSKI, *supra* note 7, at 126-6.

²⁶³ Interviews with private antitrust lawyers, in Washington, D.C. (Jan. 23-26, 1984). See also VON KALINOWSKI, *supra* note 7, at 126-27. For an examination as to why denials of clearance requests are not judicially reviewable, see Dixon, *supra* note 24, at 75-78.

²⁶⁴ See VON KALINOWSKI, *supra* note 7, at 126-27.

²⁶⁵ *Id.*

of an application denied in whole or part.²⁶⁶

B. The EEC Clearance Program

1. A Single Program with Several Types of Clearance

In contrast to the United States, the EEC has only one clearance program. The Program is administered by the only Community antitrust agency,²⁶⁷ the European Commission.²⁶⁸ The origin of the EEC clearance program is found within the Treaty of Rome which created the EEC. Article 85(3) of the Treaty provides for an exemption from the Prohibition of Article 85(1)²⁶⁹ if certain conditions are met. It was not until five years after the creation of the EEC, however, that the Council of Ministers enacted legislation to provide a procedure for obtaining an exemption. That legislation, Regulation 17,²⁷⁰ also created an additional type of clearance, the negative clearance,²⁷¹ not provided for in the Treaty. Since then, a third type of clearance, the so-called "comfort letter,"²⁷² has been adopted by the Commission without a legislative mandate. A fourth type of clearance, a non-opposition procedure,²⁷³ has been adopted by the Commission in the drafts of its three latest group exemptions. All of these clearances require that the same application form (Form A/B)²⁷⁴ be submitted to the Commission, and all can be

²⁶⁶ See *supra* note 162 and accompanying text.

²⁶⁷ Under Article 88 of the Treaty, the antitrust agencies of the member states are also authorized to enforce the EEC competition laws, but in practice they have not done so since the Commission began enforcing those laws in 1962 after the enactment of Regulation 17/62. See Temple Lang, *supra* note 23, at 356. The courts of the ten member states are also empowered to give effect to the EEC's competition laws when those laws are raised before them.

²⁶⁸ Directorate-General IV (DG-IV) is the division within the Commission responsible for competition law matters, including the administration of the clearance program. The Legal Service of the Commission also plays a major reviewing role in the clearance program. See *infra*, note 334 and accompanying text. The Commission plays the leading role in shaping EEC antitrust law. The member state courts and the EEC Court of Justice usually follow its views. Moreover, the Commission acts as an administrative court of first instance when it files its own complaints, and its decisions stand unless overturned on appeal to the Court of Justice, which does not happen often. Interviews with Commission and private antitrust lawyers, in Brussels and London (Jan. 2-12, 1984).

²⁶⁹ Somewhat similar to Section 1 of the Sherman Act, Article 85(1) prohibits "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market."

²⁷⁰ Regulation 17/62, J.O. 204/62; O.J. (Special Edition 1959-62), p. 57, came into force on March 13, 1962.

²⁷¹ See *infra* notes 267-75 and accompanying text.

²⁷² See *infra* notes 312-48 and accompanying text.

²⁷³ See *infra* notes 333-48 and accompanying text.

²⁷⁴ For a detailed analysis of the function and content of Form A/B, see C. KERSE, EEC ANTI-TRUST PROCEDURE 45-50 (1981). Comfort letters are not legislatively sanctioned, and there is no official provision for them in Form A/B. Nevertheless, Form A/B serves as the unofficial applica-

granted for on-going as well as proposed conduct.²⁷⁵

a. *Negative clearances*

Under Article 2 of Regulation 17, “undertakings or associations of undertakings” may apply to the Commission to have it “certify that, on the basis of the facts in its possession, there are no grounds under Article 85(1) or Article 86²⁷⁶ of the Treaty for action on its part in respect of an agreement, decision or practice.”²⁷⁷ The Commission’s answer to this request takes the form of an official decision issued by the Commission as a collegial body. The decision is normally lengthy and resembles a judicial decision which, in effect, it is. Each decision recites in detail the facts upon which it is based, and a legal analysis follows explaining why the particular conduct does or does not deserve a negative clearance.²⁷⁸ This decision can be appealed by the applicant or affected third parties within two months to the Court of Justice.²⁷⁹

Negative clearances are not subject to an expiration date or any conditions or obligations, such as reporting requirements.²⁸⁰ However, the clearance is limited to the facts within the Commission’s possession, which are set forth in the decision, and a material change in those facts may invalidate the clearance.²⁸¹ There is no special procedure for either revoking the clearance or amending it to take changed circumstances into account. If the Commission would ever decide that a previously cleared agreement or practice no longer is legal under Articles 85(1) or 86, it would first negotiate informally with the business to remove the objectionable aspects of the conduct before formally instituting proceed-

tion form for comfort letters as well. Although the same form is used for both negative clearance and exemption requests, the text of Regulation 17 formally distinguishes between “applying for” a negative clearance and “notifying” an agreement for an exception. For the sake of convenience, this paper will not make such a formal distinction in terminology since in most instances the two types of clearance will be considered together. Both terms will be used interchangeably for both types of clearance.

²⁷⁵ Exemptions granted for ongoing conduct, however, can only have retroactive effect in most cases to the date the agreement was notified to the Commission. See Regulation 17/62, Article 6 of the Treaty of Rome.

²⁷⁶ Article 86 is similar to Section 2 of the Sherman Act. It prohibits an “abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it.”

²⁷⁷ A negative clearance cannot be granted for conduct which is illegal but against which the Commission has decided not to act. C. KERSE, *supra* note 274. As is the case with U.S. antitrust law, to establish a violation of EEC antitrust law it must be shown that the anti-competitive activity affects interstate trade.

²⁷⁸ For an example of a recent negative clearance decision, see *GEMA Statutes*, 25 O.J. EUR. COMM. (No. L94) 12 (1982); 34 Common Mkt. L.R. 482 (1982).

²⁷⁹ Article 173 of the Treaty of Rome.

²⁸⁰ Interviews with Commission officials, in Brussels (Jan. 12, 1984).

²⁸¹ Temple Lang, *supra* note 23, at 343.

ings.²⁸² The business itself may initiate contact with the Commission to request a new negative clearance to cover the changed circumstances.²⁸³

The Commission only issues one or two negative clearances each year.²⁸⁴ Because the procedure for taking a decision is so burdensome and time-consuming,²⁸⁵ the Commission and many applicants prefer instead to receive a comfort letter²⁸⁶ which can be issued much more quickly and with much less effort²⁸⁷ and which provides essentially the same protection as a negative clearance.²⁸⁸ Moreover, the Commission believes its non-binding notices and announcements further eliminate the need for time-consuming negative clearances since notices and announcements are, in effect, "group negative clearances."²⁸⁹

*b. Individual exemptions*²⁹⁰

Under Article 85(3) of the Treaty, the Commission may declare the prohibition of Article 85(1)²⁹¹ to be inapplicable to a notified agreement if the agreement satisfies the criteria listed in Article 85(3).²⁹² Thus, the Commission may exempt an otherwise illegal agreement under certain

²⁸² Interviews with Commission officials, in Brussels (Jan. 12, 1984). The Commission normally initiates such informal negotiations with businesses even when no prior negative clearance has been granted. In the vast majority of cases these negotiations enable the Commission to avoid the necessity of instituting formal proceedings. *Id.* See also C. KERSE, *supra* note 274, at 32. For example, in 1983 the Commission informally settled 343 cases without a formal decision. In that same year, the Commission took just 15 formal decisions, only one of which was a negative clearance. See EUROPEAN ECONOMIC COMMISSION THIRTEENTH REPORT ON COMPETITION POLICY (Apr. 1984) at points 80 and 81 [hereinafter cited as THIRTEENTH REPORT ON COMPETITION POLICY].

²⁸³ Interviews with Commission officials, *supra* note 282.

²⁸⁴ *Id.*

²⁸⁵ See *infra* notes 349-403 and accompanying text.

²⁸⁶ See *infra* note 476 and accompanying text.

²⁸⁷ See *infra* notes 385-98.

²⁸⁸ See *infra* notes 474-82.

²⁸⁹ Interviews with Commission officials, *supra* note 282. See also C. HARDING, NOTICES AND GROUP EXEMPTIONS IN EEC COMPETITION LAW 11-12 (1980).

²⁹⁰ For the purposes of this article, group exemptions do not qualify as a clearance procedure. No application is necessary, and there is no consideration by the Commission of the circumstances of the particular course of conduct. Rather, businesses determine for themselves whether their conduct qualifies under these statutory exemptions and hence is legal. The test of whether this determination is correct comes only if and when the agreement is challenged under Article 85(1).

²⁹¹ The Commission cannot exempt an agreement or practice in violation of Article 86. *Europemballage Corp. and Continental Can Co., Inc. v. Commission* (Case 6/72), 1973 E. Comm. Ct. J. Rep. 215, 12 Common Mkt. L.R. 199 (1973).

²⁹² The four criteria which must be satisfied are (1) the agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress; (2) consumers must be allowed a fair share of the resulting benefit; (3) the agreement must not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; and (4) the agreement must not afford the undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

prescribed circumstances. The Commission alone has the power to grant exemptions, and its exercise of that exclusive authority is subject to review only by the Court of Justice.²⁹³ The Commission can grant exemptions on an individual basis or for a defined category of agreements via a group exemption.²⁹⁴

Unless an agreement falls within a group exemption²⁹⁵ or within one of the limited exemptions from notification contained in Regulation 17,²⁹⁶ the parties to the agreement first must apply to the Commission in order for the agreement to be eligible for an exemption.²⁹⁷ Without such an application, if the Commission or a private party brings an action against the parties to the agreement, the tribunal hearing the case must

²⁹³ Regulation 17/62, Article 9(1) of the Treaty of Rome.

²⁹⁴ The Commission cannot adopt a group exemption without first receiving authorization to do so from the Council of Ministers. The Council has extended such authorization on two occasions. In 1965, it passed Regulation 19/65, O.J. EUR. COMM. (No. 36/533) (Mar. 6, 1965), which authorized group exemptions for bilateral exclusive distribution agreements and bilateral industrial property right licensing agreements. In 1971, it enacted Regulation 2821/71, O.J. EUR. COMM. (No. L285) 46 (Dec. 20, 1971), which authorized group exemptions for agreements concerning specialization, research and development, and the application of standards and types. There are currently six group exemptions in effect: Regulation 417/85, O.J. EUR. COMM. (No. L53) 1 (Feb. 22, 1985) (specialization agreements); Regulation 1983/83, O.J. EUR. COMM. (No. L173) 5 (Jun. 22, 1983) (exclusive distribution agreements); Regulation 1984/83, O.J. EUR. COMM. (No. L173) 5 (Jun. 22, 1983) (exclusive supply agreements); Regulation 2349/84 (O.J. EUR. COMM. (No. L219) 15 (Jul. 23, 1984) (patent licensing agreements); Regulation 418/85 (O.J. EUR. COMM. (No. L53) 5 (Feb. 22, 1985) (research and development agreements); and Regulation 123/85, (O.J. EUR. COMM.) (No. L15) 16 (Jan. 18, 1985) (motor vehicle distribution and servicing agreements). These regulations specify in detail the types of agreements which qualify automatically for an exemption without the need for applying for an individual exemption. Each contains a list of clauses which automatically disqualify an agreement (the black list) and a list of clauses which may be used in agreements without disqualifying them from coverage (the white list). The Commission also retains the right to withdraw the exemption from agreements which qualify under the group exemption but which in fact do not satisfy the criteria of Article 85(3). See, e.g., Article 6 of Regulation 1983/83.

²⁹⁵ Two of the primary purposes for the enactment of group exemptions are to relieve the Commission of the enormous burden of processing tens of thousands of individual exemption applications, C. KERSE, *supra* note 274, at 38; C. HARDING, *supra* note 289, at (V); and to provide greater legal certainty. *Id.* However, the number and types of agreements covered by the existing and proposed group exemptions is limited, and many agreements must be notified for an individual exemption. See *infra* notes 456-58 and accompanying text.

²⁹⁶ Regulation 17/62, Article 4(2) of the Treaty of Rome. The Commission can grant an exemption even if these agreements were never notified. The four types of agreements which do not have to be notified were considered by the drafters of Regulation 17 to be the least likely to be harmful to competition. The major purpose behind this exception to the notification requirement was to reduce the numbers of applications for clearance in cases least likely to violate Article 85. See V. Korah, AN INTRODUCTORY GUIDE TO EEC COMPETITION LAW AND PRACTICE 28 (2d ed. 1981). These agreements, however, may be declared void *ab initio* under Art. 85(2), and they do not enjoy immunity from fines unless and until they are notified. See Barounos, Hall and James, EEC ANTI-TRUST LAW 258 (1975).

²⁹⁷ Regulation 17/62, Articles 4(1) and 5(1) of the Treaty of Rome.

declare the agreement illegal if it violates Article 85(1).²⁹⁸

The decision granting the exemption is similar to a negative clearance decision.²⁹⁹ In addition to setting forth a detailed analysis as to why the agreement qualifies for an exemption, the decision must first explain why the agreement violates Article 85(1).³⁰⁰ The decision must also state the date from which the exemption shall take effect³⁰¹ and the period of time for which the exemption is valid.³⁰² Exemptions may not be granted for an unlimited period of time³⁰³ and usually are granted for seven to ten years.³⁰⁴ They may be subject to conditions and obligations, such as reporting requirements,³⁰⁵ and they may be revoked or amended by the Commission under certain defined conditions³⁰⁶ and under a prescribed procedure,³⁰⁷ subject to review by the Court of Justice.³⁰⁸ Exemptions may be renewed indefinitely if the agreement continues to meet the standards of Article 85(3).³⁰⁹ No special amendment procedure ex-

²⁹⁸ In either case the parties may apply for an exemption after the action has been brought, but the exemption process is a slow one and only the Commission, not the member state court, may grant it. Regulation 17/62, Article 9(1) of the Treaty of Rome. Moreover, the exemption does not cover any period before the date of application and the defendant may be subject to sanctions for that period of time.

²⁹⁹ See *supra* notes 276-89 and accompanying text.

³⁰⁰ *Consten and Grundig v. Commission* (Cases 56 & 58/64) 1966 E. Comm. Ct. J. Rep. 299, 5 Common Mkt. L.R. 418 (1966). For a recent example of an exemption decision, see *Langenscheidt/Hachette*, 25 O.J. EUR. COMM. (No. L39) 25 (1982), 33 Common Mkt. L.R. 181 (1982).

³⁰¹ Regulation 17/62, Article 6(1) of the Treaty of Rome. The date may not be earlier than the date of notification.

³⁰² Regulation 17/62, Article 8(1) of the Treaty of Rome.

³⁰³ *Id.*

³⁰⁴ In setting the expiration date, the Commission normally determines what amount of time is needed for the parties to attain their objective. See C. KERSE, *supra* note 274, at 144.

³⁰⁵ Regulation 17/62 Article 8(1) of the Treaty of Rome. The most common obligation is the filing of periodic reports providing the Commission with updated information. See C. KERSE, *supra* note 274, at 142. Before conditions or obligations are imposed, the applicant has a right to be heard. *Transocean Marine Point Association v. Commission* (Case 17/74), 1974 E. Comm. Ct. J. Rep. 1063, 13 Common Mkt. L.R. D11 (1974).

³⁰⁶ Regulation 17/62, Article 8(3) of the Treaty of Rome provides that the exemption may be revoked or modified with retroactive effect if (1) the parties commit a breach of any obligation attached to the exemption; (2) the exemption was based on incorrect information or was induced by deceit; or (3) the parties abuse the exemption. The exemption may be revoked or amended, but only with prospective effect, if there is a change in any of the facts which were basic to the making of the decision. The burden of proof is on the Commission. See C. KERSE, *supra* note 274, at 148.

³⁰⁷ Regulation 17/62, Article 19(1) of the Treaty of Rome provides that the Commission must give the parties concerned an opportunity to be heard.

³⁰⁸ Article 173 of the Treaty of Rome.

³⁰⁹ Regulation 17/62, Article 8(2) of the Treaty of Rome. The procedure for renewing an exemption is almost identical to that for enacting the original exemption decision. See C. KERSE, *supra* note 274, at 145. However, a formal application under Form A/B does not appear necessary for a renewal. See C. KERSE, *EEC ANTI-TRUST PROCEDURE SUPP.* 1984 at 11. A simple letter from the applicant may be sufficient. *Id.* at 33. Normally the agreement must be modified at least to some

ists other than the opportunity for the applicant to request a new exemption decision covering the changed circumstances or new activities.

Because of the complicated and time-consuming procedure for granting individual exemptions,³¹⁰ the Commission grants few exemptions each year. Between 1979 and 1982, for example, the Commission adopted only two exemption decisions each year.³¹¹

c. Comfort letters

Because the Commission is able to grant so few negative clearances and exemptions, the vast majority of clearance applications which are actually responded to in writing by the Commission are answered with an informal "comfort letter" which is issued by the Commission's Competition Directorate without the need for a formal Commission decision.³¹² The letter informs the applicant that the Commission does not intend to take action against the notified agreement or practice. The file is then closed, and except in rare circumstances, no formal Commission decision is ever taken granting an exemption or negative clearance.³¹³

The basis for the Competition Directorate's decision to close the file is either that an agreement or practice does not violate Article 85(1) or Article 86 or that an agreement violating Article 85(1) appears to qualify for an exemption under Article 85(3).³¹⁴ In the latter case, the Competition Directorate concludes either that the agreement falls within a group exemption or that it would qualify for an individual exemption if the Commission would take a formal decision on the application.³¹⁵ The comfort letter, however, does not qualify as an exemption decision and hence the applicant does not actually receive an individual exemption.³¹⁶

degree to qualify for renewal. Interviews with Commission officials, *supra* note 282. For an example of a recent decision renewing an exemption, see *Sopelém/Vickers*, 24 O.J. EUR. COMM. (No. 2391) 1 (1981), 35 Common Mkt. L.R. 443 (1982).

³¹⁰ See *infra* notes 349-403 and accompanying text.

³¹¹ See Written Question No. 2007/82, submitted by Mr. Battersby, Member of the European Parliament, to the Commission, 26 O.J. EUR. COMM. (No. C118) 22 (May 3, 1982). The Commission refuses to grant an exemption in approximately three cases each year. *Id.*

³¹² Interviews with Commission officials, *supra* note 282. See *infra* notes 394-403 and accompanying text, for a description of the procedure for issuing a comfort letter.

³¹³ *Id.* The Commission normally will only reopen the file if the agreement or practice is challenged in a member state court or if a third party files a complaint with the Commission. Lang, *supra* note 23, at 351. The Commission may also reopen the file on its own initiative if it discovers material facts not known at the time the file was closed or if material circumstances change. *Id.* at 352.

³¹⁴ Lang, *supra* note 23, at 354-55.

³¹⁵ *Id.*

³¹⁶ *Id.* See the *Perfumes* cases, *Procureur de la République v. Guerlain, v. Parfums Rochas, v. Lanvin Parfums*, and *v. Nina Ricci* (Cases 253/78, 1-3, 37 and 99-79), 1980 E. Comm. Ct. J. Rep. 2374.

In theory, the agreements not exempted by a group exemption remain illegal as a violation of Article 85(1). Moreover, neither third parties nor the recipient may be able to appeal the closing of the file to the Court of Justice since the letter does not constitute a "decision" under Article 173 of the Treaty.³¹⁷

There are no formal rules governing the content of comfort letters.³¹⁸ Usually the Competition Directorate states in the letter whether it is closing the file on the basis of a negative clearance or on the basis of an exemption, but often it simply states it is closing the file and does not specify the basis for its decision.³¹⁹ Normally, no legal reasoning or summary of the facts is included, unlike in a formal decision.³²⁰ The Competition Directorate usually expressly reserves the otherwise implicit right to reopen the file "if the factual or legal situation changes in such a way as to call for a revision of the position set out herein."³²¹ The recipient of the letter is also assured that it will continue to enjoy immunity from Commission fines even though the file has been closed.³²² The Commission imposes no expiration date, reporting requirements, or any other conditions or obligations.³²³ In addition, there is no formal revocation or amendment procedure.³²⁴

The Competition Directorate recently announced a new procedure to enhance the legal value of the comfort letter in special cases.³²⁵ Unlike with the original type of comfort letter, the Commission publishes a detailed factual summary of the agreement or practice and the basis upon which it intends to close the file. It also invites third parties to submit their comments about the Competition Directorate's proposed decision

³¹⁷ See Korah, *supra* note 24, at 30-34; Livingston & Sherliker, *Comfort Letters and Article 85 and 86: Procedure and Jurisdiction*, NEW L.J. 287, 288 (May 12, 1981).

³¹⁸ Interviews with Commission officials, *supra* note 282.

³¹⁹ The failure to indicate the basis for the closing of the file may have unfortunate consequences for the applicant if the validity of the agreement is subsequently challenged in a member state court. See *infra* notes 427-43 and accompanying text.

³²⁰ Interviews with Commission officials, *supra* note 282.

³²¹ See, e.g., the comfort letter closing the file on Notification No. IV/30. 477 (Apr. 15, 1983).

³²² *Id.* The issuance of a comfort letter has the incidental effect of terminating the period of provisional validity accorded from the date of notification to "old" agreements made prior to March 13, 1962. *Lancome v. Etos and Albert Heijn Supermart*, (Case 99/79), 1980 E. Comm. Ct. J. Rep. 2511, 31 Common Mkt. L.R. 164 (1981).

³²³ Interviews with Commission officials, *supra* note 282.

³²⁴ *Id.*

³²⁵ See EUROPEAN ECONOMIC COMMISSION ELEVENTH REPORT ON COMPETITION POLICY point 15 (Apr. 1982) [hereinafter cited as ELEVENTH REPORT ON COMPETITION POLICY. See also Notice from the Commission on procedures concerning notifications pursuant to Article 4 of Council Regulation No. 17/62, 25 O.J. EUR. COMM. (No. C296) 4 (Nov. 11, 1983); and Notice from the Commission on procedures concerning applications for negative clearance pursuant to Article 2 of Council Regulation No. 17/62, 25 O.J. EUR. COMM. (No. C343) 4 (Dec. 31, 1982).

to close the file.³²⁶ In all other respects, the two types of comfort letters are identical. Many private lawyers and even many Commission officials, however, do not believe this new type of letter will be more valuable to the recipient.³²⁷ It is being used only in special circumstances when the Competition Directorate wants to ensure that the letter is not opposed or when the Commission would like assistance in gathering information.³²⁸ In 1984, for example, the Commission issued only three of this new type of comfort letter.³²⁹ In the vast majority of cases, the Competition Directorate will issue the original type of comfort letter.³³⁰ The Commission does not publish the content of either type of comfort letter.³³¹

The Commission has not made publicly available any statistics on the number of comfort letters the Competition Directorate issues each year. It recently published statistics on the number of applications for a negative clearance or exemption which were settled without a formal decision being necessary. In 1982, for example, the Competition Directorate reached 419 of these informal settlements, while in 1981 the number was only 73.³³² In a large number of those cases a comfort letter was issued, but in many cases in which a notified agreement or practice was abandoned or expired, no letter was necessary.³³³

For a number of reasons, the vast majority of agreements and practices notified to the Commission since 1962 have never been answered by either a formal decision or a comfort letter.³³⁴ The Commission was inundated with nearly 40,000 applications during the first few years after the adoption of the clearance program in 1962.³³⁵ Since then the Commission has received an average of 160 new applications each year.³³⁶ Partly because of the Competition Directorate's scarce manpower,³³⁷ and

³²⁶ *Id.* See, e.g., Notice pursuant to Article 19(3) of Regulation No. 17/62 concerning notification No. IV/30.778—Rovin, 26 O.J. EUR. COMM. (No. C295) 7 (Nov. 2, 1983); Notice pursuant to Article 19(3) of Council Regulation No. 17/62 concerning an application for negative clearance No. IV/30.477—Europages, 25 O.J. EUR. COMM. (No. C343) 5 (Dec. 31, 1982).

³²⁷ Interviews with private antitrust lawyers and Commission officials, in Brussels and London (Jan. 2-12, 1984).

³²⁸ Interviews with Commission officials, *supra* note 282.

³²⁹ See FOURTEENTH REPORT ON COMPETITION POLICY (April 1985).

³³⁰ *Id.*

³³¹ *Id.*

³³² See Written Question No. 2007/82, *supra* note 311.

³³³ Interviews with Commission officials, *supra* note 282.

³³⁴ *Id.*

³³⁵ Korah, *supra* note 24, at 15.

³³⁶ See Written Question No. 2007/82, *supra* note 311. In 1973, 1,693 applications were received after the accession of the United Kingdom, Ireland and Denmark to the EEC. *Id.*

³³⁷ In the Competition Directorate, only 30 officials work on applications, and most of those officials spend much of their time on other matters. The Directorate's first priority is enforcement,

partly because of the cumbersome procedure for processing applications and issuing formal decisions,³³⁸ an enormous backlog of applications accumulated during the 1960s.³³⁹

To combat the backlog, the Commission has issued a series of group exemptions which have enabled the Competition Directorate to close thousands of files without the need for an individual response.³⁴⁰ An increased use of comfort letters has also helped reduce the backlog.³⁴¹ In addition, many agreements and practices simply expired or were abandoned after an indication from the Commission that no clearance would be given or that clearance would be given only if modifications unacceptable to the applicants would be made.³⁴²

The Competition Directorate now disposes of approximately 200 applications each year,³⁴³ and hence it does a little better than break even with the average number of applications it receives each year.³⁴⁴ As of the end of 1983, the backlog of applications considered pending had been reduced to 3,654.³⁴⁵ The Commission expects the patent licensing group exemption will drastically reduce that number.³⁴⁶

The Commission intends to continue its heavy reliance on comfort letters.³⁴⁷ However, it also plans to implement a more rapid exemption procedure for those cases which "obviously" satisfy the criteria of Article 85(3). It also plans to use comfort letters in lieu of formal negative clearances.³⁴⁸

not the administration of the clearance program. Interviews with Commission officials, *supra* note 282.

³³⁸ See *infra* notes 343-98 and accompanying text.

³³⁹ Interviews with Commission officials, *supra* note 282.

³⁴⁰ *Id.*; see *supra* note 294 and accompanying text.

³⁴¹ Interviews with Commission officials, *supra* note 282.

³⁴² Interviews with Commission officials, *supra* note 282; see also Written Question No. 2007/82, *supra* note 311.

³⁴³ Interviews with Commission officials, *supra* note 282.

³⁴⁴ *Id.*

³⁴⁵ THIRTEENTH REPORT ON COMPETITION POLICY, *supra* note 282, at point 82. Several hundred of these applications are old agreements notified in the years after the enactment of the clearance program in 1962. The Competition Directorate has no plans to respond to these applications after all these years. Interviews with Commission officials, *supra* note 282. Since the majority of these applications concern patent licensing agreements, many will be disposed of informally with the passage of the patent licensing group exemption. See FOURTEENTH REPORT ON COMPETITION POLICY, *supra* note 329.

³⁴⁶ See Written Question No. 2007/82, *supra* note 311. Approximately 63% of the applications relate to patent licenses. FOURTEENTH REPORT ON COMPETITION POLICY, *supra* note 329.

³⁴⁷ See Written Question No. 813/82, submitted by Mr. Prout, Member of the European Parliament, to the Commission, 25 O.J. EUR. COMM. (No. C275) 16 (1982).

³⁴⁸ ELEVENTH REPORT ON COMPETITION POLICY, *supra* note 325. *Id.* at 27-8.

d. *The non-opposition exemption*

The recently adopted group exemptions for patent licensing agreements, research and development joint venture agreements, and specialization agreements provide for a simple and accelerated clearance procedure whereby an agreement "equivalent in [its] nature or effect[s]" to agreements covered by the group exemption, but which fails to satisfy the express requirements of the group exemption may nevertheless be exempted ("assimilated") by the group exemption.³⁴⁹ The agreement must be notified to the Commission on Form A/B, and either the notification or an accompanying communication must refer to the assimilation provision of the group exemption.³⁵⁰ If the Commission does not oppose the notification within six months,³⁵¹ the agreement automatically falls within the group exemption's protection without the need for an individual Commission decision or comfort letter.³⁵²

As with any agreement falling within a group exemption, the duration of this exemption terminates when the group exemption itself expires, and it is automatically renewed if the group exemption is renewed and the agreement meets the criteria of the renewed group exemption.³⁵³ In order to protect against undeserving agreements qualifying under this procedure, the Commission may revoke the exemption for the agreement

³⁴⁹ See Article 4 of the Patent License Agreement Group Exemption (Jan. 1, 1983) [hereinafter cited as Patent License Agreements]; Article 5 of the Research and Development Joint Ventures Group Exemption (Jan. 1, 1984) [hereinafter cited as Research and Development]; and Article 4 of the Specialization Agreements Group Exemption. Some Commission officials would like to have a non-opposition exemption procedure adopted for all applications, whereby any application not answered within a certain period of time would automatically be deemed compatible with Articles 85 and 86. Interviews with Commission officials, *supra* note 282.

³⁵⁰ Article 4(3), Patent License Group Exemption, Patent License Agreements, *supra* note 349; Article 5(2), Research and Development Group Exemption, Research and Development, *supra* note 349. Article 4(3) of the Specialization Agreements Group Exemption, *supra* note 349. This non-opposition clearance is a hybrid. Like an individual exemption, the agreement must be notified to the Commission, and presumably it will be examined individually. Like a group exemption, however, there is no need for an individual decision or letter granting the exemption.

³⁵¹ Article 6(1) of the proposed Research and Development Group Exemption allows this waiting period to be reduced to 3 months for agreements relating to "important projects of common European interest," Research and Development, *supra* note 349.

³⁵² Article 4(1), Patent License Group Exemption, Patent License Agreements, *supra* note 349; Article 5(1), Research and Development Group Exemption, Research and Development, *supra* note 349; Article 4(1) of the Specialization Agreements Group Exemption, *supra* note 349. The Commission long ago proposed to use this clearance procedure with its other group exemptions, but certain member states opposed it. That opposition has weakened over the years as businesses have pressured the member states to adopt this new accelerated and simplified procedure. The member states are now willing to have this procedure implemented with the new group exemptions, but, as a compromise, the Commission must oppose a particular agreement if any member state so requests within 4 months after notification. Interviews with Commission officials, *supra* note 282.

³⁵³ Interviews with Commission officials, *supra* note 282.

on an individual basis if it finds the agreement does not in fact satisfy Article 85(3).³⁵⁴

2. Procedures for Processing Applications³⁵⁵

Applications for each type of clearance must be made on Form A/B and contain the information requested therein.³⁵⁶ Form A/B details the information which must be submitted. Although pre-filing counseling is not formally provided for, it is available and many businesses use the opportunity to tailor their information submissions to their particular circumstances and to discuss the antitrust merits of their agreement or practice.³⁵⁷ For the same reasons as applicants using the pre-filing counseling opportunity under United States programs, many potential applicants do not file applications after this informal exchange.³⁵⁸

Despite the detailed instructions on Form A/B, many applicants who do not take advantage of pre-filing counseling still submit insufficient applications, and substantial supplemental information requests must be made.³⁵⁹ Only in the most egregious cases will an application be returned to the applicant as incomplete.³⁶⁰ The Commission is in the process of revising Form A/B to provide even clearer instructions and specifications in order to increase the number of complete, well-framed applications.³⁶¹ It also plans to return many more applications if the new Form A/B is poorly completed.³⁶²

In order to maximize the chances that their agreement will be cleared, most applicants apply for both a negative clearance and an exemption at the same time and on the same Form A/B.³⁶³ In addition, even when an applicant believes its agreement would qualify for a negative clearance, it applies for an exemption anyway, since only an applica-

³⁵⁴ See, e.g., Article 9 of the Patent Licensing Agreement Group Exemption.

³⁵⁵ The Commission prefers not to make public the finer details of these procedures. The following description, therefore, is very general. For a detailed explanation of the procedure as it existed in 1973, see Graupner, *Commission Decision-Making on Competition Questions*, 10 COMMON MKT. L. REV. 291 (1973).

³⁵⁶ Form A/B does not differentiate between the various types of clearances except at the end of the application, where an applicant must explain why it believes its conduct qualifies for a negative clearance (Question IV) or why it believes its agreement qualifies for an exemption (Question V). Interviews with Commission Officials, *supra* note 282.

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ *Id.*

³⁶¹ See FOURTEENTH REPORT ON COMPETITION POLICY, *supra* note 329.

³⁶² Interviews with Commission Officials, *supra* note 282.

³⁶³ *Id.*; interviews with private antitrust lawyers, in Brussels (Jan. 2-5, 1984).

tion for an exemption protects it from Commission fines.³⁶⁴ Although Form A/B makes no provision for an applicant to designate a comfort letter as its preferred type of clearance, the applicant may express that preference informally to the Commission.³⁶⁵ Upon the adoption of the non-opposition exemption, the applicant will have to note on Form A/B or in a separate letter that this is the type of clearance for which it wishes to be considered.³⁶⁶

Following a reorganization of DG-IV effective 1 October 1984, a more efficient procedure for processing applications has been adopted.³⁶⁷ The application is sent first to Directorate B or C which are responsible for individual antitrust cases. These directorates are composed of six divisions, each with a specialized knowledge of a number of business sectors. Applications are assigned to the appropriate division.

With the exception of the proposed non-opposition exemption, the Commission is under no time constraints in responding to an application, and indeed it may never respond.³⁶⁸ The file is assigned to a *rapporteur*, who is responsible for preparing a "summary of a new case." After screening the application, the *rapporteur* either suggests the type of clearance for which the application should be considered or recommends that no further action be taken on the application at that time.³⁶⁹ If the application will be considered for clearance, it is assigned to a team of staff members, with the original *rapporteur* still in charge.³⁷⁰ As of 1 October 1984, the same team is responsible for the application throughout the procedure.³⁷¹

If the Commission will consider an application for a formal clearance decision, the *rapporteur* will usually begin an in-depth investigation, particularly if an exemption rather than a negative clearance is being contemplated.³⁷² Supplemental information is almost always required

³⁶⁴ Interviews with private antitrust lawyers, in Brussels (Jan. 2-5, 1984). See Article 15(5), Regulation 17/62.

³⁶⁵ Interviews with Commission officials, *supra* note 282.

³⁶⁶ See *supra* note 350.

³⁶⁷ Letter from R. Daoût of DG-IV, to the author, dated 11 February 1985.

³⁶⁸ See *supra* note 334 and accompanying text.

³⁶⁹ This will be done, for instance, when an agreement clearly falls within a group exemption. Interviews with Commission Officials, *supra* note 282.

³⁷⁰ *Id.*

³⁷¹ Letter from R. Daoût, *supra* note 367.

³⁷² Interviews with Commission officials, *supra* note 282. An exemption has a much greater legally binding effect than does a negative clearance, which is not formally binding on either the Commission or member state courts, and accordingly the Commission is more careful and thorough in its investigation. *Id.* In addition, the Court of Justice has held that the Commission "may not confine itself to requiring from undertakings proof of the fulfillment of the requirements for the grant of the exemption but must, as a matter of good administration, play its part, using the means avail-

from the applicant, but the exact amount of information requested will depend on how well Form A/B has been completed.³⁷³ Third parties are also asked for "necessary" information.³⁷⁴ The Commission must justify such third party requests.³⁷⁵ Third parties are first given an opportunity to supply the information voluntarily, which they almost always do.³⁷⁶ Formal decisions requiring the requested third party to provide the information are possible, and fines may be imposed if the party refuses to comply.³⁷⁷

As of 1 October 1984, a new directorate in DG-IV has become involved in the clearance procedure after completion of the inspection phase.³⁷⁸ It is responsible for coordinating all decision-making and ensuring coherence among decisions dealing with the same type of anticompetitive behavior in different sectors. If the *rapporteur* finds the agreement or practice objectionable in part, he will negotiate with the applicant to remove the obstacles to a favorable decision.³⁷⁹ Depending on the outcome of these negotiations, the *rapporteur* then prepares a draft decision either granting or denying the application.³⁸⁰

Next, the draft begins a long review process during which it is examined by a variety of Commission officials for review.³⁸¹ If any objection is raised along the way, the draft is returned to the *rapporteur* who must modify the draft in light of the objections made, and the draft begins the review process anew.³⁸² As many as 150 drafts and notes may pass between the *rapporteur* and the reviewing officials.³⁸³ The draft decision is then reviewed on its merits, by the newly created coordinating

able to it, in ascertaining the relevant facts and circumstances." *Consten and Grudig v. E.E.C. Comm'n.*, 1966 E. Comm. Ct. J. Rep. 299, 347, 4 Common Mkt. L.R. 418, 477 (1966).

³⁷³ Interviews with Commission officials, *supra* note 282.

³⁷⁴ The Commission derives this authority under Regulation 17/62, Article 11 of the Treaty of Rome. Parties are given six weeks to respond to the request, but an extension of three months is possible. Interviews with Commission officials, *supra* note 282.

³⁷⁵ Regulation 17/62, Article 11(3) of the Treaty of Rome.

³⁷⁶ Interviews with Commission officials, *supra* note 282.

³⁷⁷ Regulation 17/62, Article 11(5) of the Treaty of Rome.

³⁷⁸ Letter from R. Daoût, *supra* note 367.

³⁷⁹ Interviews with Commission officials, *supra* note 282.

³⁸⁰ *Id.*

³⁸¹ The Legal Service, the Director of Directorate B, the Director-General of the Competition Directorate, and the Commissioner responsible for competition matters are but a few of the officials who review the draft. *Id.*

³⁸² *Id.* See Graupner, *supra* note 355, at 297-98, 305 for a detailed description of this complex procedure.

³⁸³ See Graupner, *supra* note 355, at 305. As of 1973, the average case involved 50-70 such transmissions. Since each transmission takes up to half a day to pass from one office to another, an enormous amount of time is required for transmissions alone. *Id.*

directorate in DG-IV mentioned above.³⁸⁴

Once the draft decision emerges from this laborious process, it is translated into all the official languages of the EEC.³⁸⁵ The draft decision is then reviewed by the Advisory Committee on Restrictive Practices and Monopolies which gives a non-binding but influential opinion.³⁸⁶ The individual Commissioners receive the draft decision together with a supporting memorandum prepared by the *rapporteur* and a copy of the Advisory Committee's report. If no objection is made within five days, the decision is automatically adopted. If any Commissioner raises an objection, the Commission votes on the matter at its next oral session. A majority vote is required for passage. If the draft decision is rejected, and it rarely is, the whole process begins over again.³⁸⁷

If conditions or obligations are to be attached to an exemption, or if the decision is to be negative, the applicant has a right to be heard.³⁸⁸ If the decision will grant an exemption or negative clearance, the Commission publishes a summary of the application and invites interested parties to submit their observations within a period of not less than one month.³⁸⁹ The applicant is then notified of the outcome and the official decision is published in the Official Journal.³⁹⁰

This whole process takes a minimum of six months if the application is given priority, if a very simple case is presented, and Form A/B provides the requisite information.³⁹¹ The average case, however, takes from three to four years.³⁹² In at least one case, the process took fifteen years

³⁸⁴ Letter from R. Daoût, *supra* note 367.

³⁸⁵ Interviews with Commission officials, *supra* note 282. Graupner, *supra* note 355, at 298-99.

³⁸⁶ Interviews with Commission officials, *supra* note 282. This consultation is required by Regulation 17/62, Article 10(3) of the Treaty of Rome. The Committee is composed of member state officials competent in antitrust matters. Regulation 17/62, Article 10(4) of the Treaty of Rome. Article 10(6) requires that the Committee's opinion is not made public. Even the undertakings concerned are denied access to the opinion. If the Committee opposes the decision, the Commission will reconsider its decision and perhaps reject it altogether. See House of Lords Select Committee on the European Communities, Session 1981-82, Eighth Report on Competition Practice, paragraph 143 (Statement of Mr. Bail) [hereinafter House of Lords Report]. See also C. KERSE, *supra* note 274, at 121-24.

³⁸⁷ Interviews with Commission officials, *supra* note 282. Graupner, *supra* note 355, at 298-99.

³⁸⁸ Regulation 17/62, Article 19(1) of the Treaty of Rome. See also *Transocean Marine Paint Ass'n*, 1974 E. Comm. Ct. J. Rep. 1063, 2 Common Mkt. L.R. 459.

³⁸⁹ Regulation 17/62, Article 19(3) of the Treaty of Rome. Few third party comments are ever received. Interviews with Commission officials, *supra* note 282. The Commission has been criticized for waiting until this late stage to invite third party comments. Last minute well-founded objections can cause considerable delays. Eliciting comments immediately after the application is received would enable these objections to be dealt with at the outset. See, e.g., House of Lords Report, *supra* note 386, at 6-7 (written submission from the Confederation of British Industry).

³⁹⁰ Regulation 17/62, Article 21(1) of the Treaty of Rome.

³⁹¹ Interviews with Commission officials, *supra* note 282.

³⁹² Graupner, *supra* note 355 at 304.

to complete.³⁹³

If the Competition Directorate will consider the application for a comfort letter, this long and laborious procedure is largely circumvented. The investigation is not as extensive. Most letters are issued on the basis of the facts disclosed by the applicant.³⁹⁴ If modifications are necessary, however, the *rapporteur* will negotiate with the applicant, just as he does in cases considered for a formal decision.³⁹⁵ Once the agreement or practice meets the *rapporteur's* approval, he prepares a draft letter. Only a few officials in the Competition Directorate review the draft as opposed to the long list of officials who review drafts of formal decisions.³⁹⁶

If the letter is one of the new types of comfort letter which the Commission hopes will be more influential in member state courts, the Commission will publish a summary of the application and its intention to issue a favorable letter, and it will invite third party comments.³⁹⁷ These letters are also reviewed by the Legal Service and, upon request, by the Advisory Committee.³⁹⁸ Both types of comfort letters are sent out under the signature of the Director General or another senior official in the Competition Directorate.³⁹⁹ No Commission consideration or decision is necessary.⁴⁰⁰ The letter itself is not published.

It normally takes the Competition Directorate five to six months to issue a comfort letter.⁴⁰¹ If an application is given priority and if Form A/B provides the necessary information, the Competition Directorate can issue a letter in as little as three weeks.⁴⁰² In complex cases and in cases for which the new type of comfort letter is used, however, it may take over a year.⁴⁰³

³⁹³ The Agreements of David Campari-Milano SpA, 21 OJ. EUR. COMM. (L70) 69 (1978).

³⁹⁴ Interviews with Commission officials, *supra* note 282. See also Lang, *supra* note 23, at 355.

³⁹⁵ Interviews with Commission officials, *supra* note 282.

³⁹⁶ *Id.*

³⁹⁷ See *supra* note 326 and accompanying text.

³⁹⁸ Interviews with Commission officials, *supra* note 282. Although it may cause delays, the Commission is considering ways by which the Advisory Committee will be automatically involved in the review of these comfort letters. THIRTEENTH REPORT ON COMPETITION POLICY, *supra* note 282, at pt. 72.

³⁹⁹ *Id.* Unlike with the FTC advisory opinions, there is no difference in the legally or morally binding effect when the Director signs the letter, see *supra* note 70 and accompanying text.

⁴⁰⁰ See *supra* note 313 and accompanying text.

⁴⁰¹ Interviews with Commission officials, in Brussels (Jan. 2-12, 1984). Interviews with antitrust lawyers, in London (Jan. 2-12, 1984).

⁴⁰² Interviews with Commission officials, *supra* note 282.

⁴⁰³ *Id.* See, e.g., the comfort letter issued in response to Notification No. IV/30.477—Europages found in Letter from J.E. Ferry, Director, Commission of the European Communities (Apr. 15, 1983) (The letter was issued Apr. 15, 1983 in response to an application filed on Oct. 26, 1981. This letter was one of the new types of comfort letters).

3. Alleged Drawbacks of the Existing Program

If frequency of use were an indicator of success, then it would appear that the EEC clearance program has been a much greater success than its U.S. counterparts. On average, the Commission receives approximately 160 new clearance applications each year,⁴⁰⁴ while the Justice Department and the FTC together receive on average only about thirty applications annually.⁴⁰⁵ And while the Commerce Department received approximately 50 applications for export certificates in the first eight months of that program's existence, many applications were not motivated by antitrust uncertainty.⁴⁰⁶ In contrast, the European Commission received tens of thousands of applications during the first few years of the EEC clearance program's existence.⁴⁰⁷

These statistics, however, are misleading. In 1962 and for many years thereafter, there was an enormous amount of uncertainty about what Articles 85 and 86 prohibited, and that uncertainty undoubtedly accounted to a very large extent for the early flood of applications.⁴⁰⁸ The antitrust laws were a new concept for most Europeans, and the total lack of precedent and experience under those laws, along with immunity from fines, likely prompted the vast majority of those applications.⁴⁰⁹ As precedent, Commission notices, and group exemptions gradually removed much of this initial uncertainty, and as experience with the Commission's clearance program and enforcement policies grew, the number of applications tapered off to the present level of approximately 160 applications per year. Many of these applications have been also prompted not by uncertainty but by other factors.⁴¹⁰

Moreover, the best indication of a successful clearance program is not the number of applications filed but rather how well the program relieves antitrust uncertainty. There are many complaints that certain drawbacks of the EEC program prevent it from being a true success.

a. The necessity of applying even in the absence of uncertainty

Special features of the EEC clearance program, not uncertainty, account in part for the large number of applications filed each year. In contrast to Section 1 of the Sherman Act, Article 85(1) has been inter-

⁴⁰⁴ See *supra* note 336 and accompanying text.

⁴⁰⁵ See *supra* note 79.

⁴⁰⁶ See *supra* note 167 and accompanying text.

⁴⁰⁷ See *supra* note 335 and accompanying text.

⁴⁰⁸ Interviews with private antitrust lawyers, *supra* note 363.

⁴⁰⁹ *Id.*

⁴¹⁰ See *infra* pp. 157-60.

preted almost literally, with a rule of reason type analysis playing only a very limited role.⁴¹¹ Because there is no balancing of the pro- and anticompetitive effects of the particular agreement, many restrictions which on balance are not really anticompetitive are caught by Article 85(1)'s prohibition, and businesses must turn to Article 85(3) for absolution.⁴¹²

The problem with this arrangement is that regardless of its lack of serious anticompetitive effect, no agreement violating Article 85(1) is legal without a formal Commission exemption.⁴¹³ Private lawyers may believe that a client's agreement meets the criteria set forth in Article 85(3), and despite the absence of significant uncertainty, the agreement must be notified if it is to be rendered legal. Without an official Commission exemption, the agreement is illegal and any party to it is exposed to the possibility of Commission fines and administrative injunctions, claims of nonenforceability by other parties to the agreement, and private lawsuits by third parties in member state courts. In the latter cases, regardless of how innocuous or even pro-competitive an agreement may be, a member state court does not have the authority to exempt it and must declare the agreement or, if possible, its severable objectionable parts, to be null and void under Article 85(2).⁴¹⁴ If the agreement has not been notified for an exemption, the court cannot suspend its proceeding to request the aid of the Commission or the Court of Justice.

In practice, some lawyers decide to take a chance and not notify agreements under these circumstances.⁴¹⁵ Notification is purely voluntary, and these lawyers simply do not believe it is worth the delay, expense and other problems associated with the clearance program when they are reasonably certain that the agreement would qualify for an exemption.⁴¹⁶ They believe that at the present time the risks of not notifying an agreement which likely would qualify for an exemption do not outweigh the burdens of notification.⁴¹⁷ They believe that the Commis-

⁴¹¹ Interviews with private antitrust lawyers, *supra*, note 363. See also Forrester & Norall, *The Laicization of Community Law: Self-Help and the Rule of Reason: How Competition Law Is and Could be Applied*, 21 COMMON MKT. L. REV. 11, 12 (1984); Van Houtte, *supra* note 17, at 499-500; Korah, *The Rise and Fall of Provisional Validity—The Need for a Rule of Reason in EEC Antitrust*, 3 NW. J. INT'L L. & BUS. 320, 354-55 (1981). This formalistic interpretation is similar to that developed by the German courts under Article 1 of the German Cartel law. *Id.*

⁴¹² Interviews with private antitrust lawyers, *supra* note 363. See also Forrester & Norall, *supra* note 411, at 12.

⁴¹³ Regulation 17/62, Articles 4(1) and 5(1) of the Treaty of Rome.

⁴¹⁴ Van Houtte, *supra* note 17, at 508. See generally Korah, *supra* note 411, at 333-34 n.48. Van Bael, *supra* note 10, at 10.

⁴¹⁵ Interviews with private antitrust lawyers, *supra* note 363. See also Forrester & Norall, *supra* note 411, at 16, 35.

⁴¹⁶ Forrester & Norall, *supra* note 411. Interviews with private antitrust lawyers, *supra* note 363.

⁴¹⁷ Interviews with private antitrust lawyers, *supra* note 363. According to Forrester and Norall,

sion is unlikely to bring an action against such an agreement since the Commission saves its scarce resources to prosecute serious antitrust violations.⁴¹⁸ Furthermore, even if the Commission would bring an action, they believe fines would be very unlikely against an agreement which meets the standards of Article 85(3).⁴¹⁹ In addition, they reason that at present there is little risk that a private action would be brought by a third party against the agreement.⁴²⁰ Third party actions are rare, even against agreements which do not meet the criteria of Article 85(3),⁴²¹ and there is even less risk that an agreement which appears to satisfy those criteria would be challenged.⁴²² If the agreement would be challenged, the parties to it may notify the agreement to the Commission at that time, and the mere fact of notification usually carries great weight in member state courts, especially when the agreement appears to deserve an exemption.⁴²³ Since a member state court likely would be reluctant to declare an agreement illegal unless it clearly does not qualify for an exemption, the parties to the agreement believe there would be a good chance that the proceedings would be suspended pending a Commission decision.⁴²⁴

Nevertheless, many applications are filed despite a lack of substantive antitrust uncertainty because of the procedural uncertainty created by the Commission's monopoly over the exemption process.⁴²⁵

"such an approach entails the realistic acceptance of a substantial but tolerable level of uncertainty a level with which many businessmen are perfectly willing to live." *supra* note 411, at 16.

⁴¹⁸ Interviews with private antitrust lawyers, *supra* note 363.

⁴¹⁹ *Id.* The Commission has never imposed, and probably never would impose, fines for agreements which were not notified but would have qualified for exemptions. Forrester & Norall, *supra* note 411, at 34.

⁴²⁰ Interviews with private antitrust lawyers, *supra* note 363; Forrester & Norall, *supra* note 411, at 35.

⁴²¹ Forrester & Norall, *supra* note 411, at 35. Lang, *supra* note 23, at 352. Among other reasons, few private actions are filed because of the absence of treble damages, because discovery is not as far-reaching as in the United States, and because until 1979 no one was even sure that private damages actions were possible. *Id.*

⁴²² Forrester & Norall, *supra* note 411, at 35; interviews with private antitrust lawyers, *supra* note 363.

⁴²³ Interviews with private antitrust lawyers, *supra* note 363. Forrester & Norall, *supra* note 411, at 35. During the period before notification, the parties would be exposed to the possibility of Commission fines and member state sanctions since an exemption cannot be granted for a period earlier than the date of notification. Regulation 17/62, Article 6(1) of the Treaty of Rome. However, if the agreement would receive an exemption, it does not seem likely that any sanction would be applied by the Commission. *See supra* note 419.

⁴²⁴ Forrester & Norall, *supra* note 411, at 35; interviews with private antitrust lawyers, *supra* note 363.

⁴²⁵ Interviews with private antitrust lawyers, *supra* note 363. Some lawyers reportedly became so reliant on the notification procedure that they notify agreements which clearly raise no antitrust problems or which fit squarely within a group exemption. *Id.*; according to Forrester & Norall,

Although a failure to apply for an exemption may not involve substantial risks in a particular case, many lawyers and businesses understandably want to comply with the law.⁴²⁶ Unfortunately, requiring so many unnecessary notifications exacerbates many of the problems faced by businesses which do apply for reasons of uncertainty, and it diverts the Commission's scarce resources from enforcement.

b. Problems caused by the paucity of formal decisions and delays in receiving formal decisions

The EEC clearance program would be more attractive to many businesses if they could be assured of an expeditious decision. When the system was devised in 1962, it was intended that every applicant would receive a formal Commission decision on its application within a reasonable amount of time.⁴²⁷ However, the clearance program has not operated as planned. Only a few formal decisions granting or denying an exemption or a negative clearance are issued each year, and those applicants who do receive a formal decision normally must wait years for it.⁴²⁸ The few applications chosen for a formal decision are those which will help clarify an ambiguous area of the law or enable the Commission to set or change its enforcement policies, or in which the applicant can show a great need for a formal decision.⁴²⁹

Many applicants are quite pleased if their application is never considered for a formal Commission decision, because they obtain sufficient certainty merely by applying for a negative clearance or exemption.⁴³⁰ In fact, some applicants would not apply unless they were fairly certain that their application would not be considered for a formal decision.⁴³¹ For these applicants, the major impetus for applying is to gain immunity from Commission fines,⁴³² and as long as the Commission does not take formal negative action⁴³³ on their application, the immunity lasts.⁴³⁴

supra 411, at 31: "[T]he Commission's insistence on retaining intellectual control of the assessment of the validity of agreements tends further to perpetuate the phenomenon of overcentralization in Brussels. Practitioners may feel they are encouraged to notify and leave the thinking to the experts."

⁴²⁶ Interviews with private antitrust lawyers, *supra* note 363.

⁴²⁷ Interviews with Commission officials, *supra* note 282.

⁴²⁸ See *supra* notes 391-93 and accompanying text.

⁴²⁹ Interviews with Commission officials, *supra* note 282. See also Lang, *supra* note 23, at 352.

⁴³⁰ Interviews with private antitrust attorneys, *supra* note 363. See also Forrester & Norall, *supra* note 411 at 16, n.7; Written Question No. 813-82, *supra* note 347.

⁴³¹ Interviews with private antitrust lawyers, *supra* note 363.

⁴³² *Id.*

⁴³³ The Commission may terminate the immunity from fines only through the taking of a formal decision denying the application or through a "provisional decision" under Regulation 17/62, Article 15(6) of the Treaty of Rome. In the latter case, the Commission may suspend the immunity from fines if "after a preliminary examination it is of the opinion that Article 85(1) of the Treaty applies

Although a formal negative clearance or exemption would provide more certainty, they do not view the marginal increase in security to be worth the burdensome investigation, publicity, possible required modifications, and other disadvantages which formal decisions usually entail.⁴³⁵

However, the Commission's failure to render few formal decisions or to issue those decisions it does take within a reasonable time may create problems in some cases. First, an applicant and a member state court may face difficulties if an agreement or practice is challenged in a member state court. From the point of view of the applicant, the danger exists that a member state court might erroneously declare a notified agreement or practice to be illegal under Article 85 or 86 and, in third party suits, even award damages.⁴³⁶

Member state courts are obliged to suspend their proceedings and either refer the matter to the Court of Justice for a preliminary ruling under Article 177 of the Treaty⁴³⁷ or allow the parties to elicit the Commission's views.⁴³⁸ However, many member state courts have little or no familiarity with EEC antitrust law⁴³⁹ and in some cases a member state court may decline to suspend its proceedings and instead rule that the agreement or practice is "clearly" illegal and, in the case of an Article

and that application of Article 85(3) is not justified." The procedure followed by the Commission in adopting a provisional decision is extremely cumbersome and, as a result, the Commission has suspended fine immunity with a provisional decision in only a handful of cases. See Leigh, *Resurrection of the Provisional Decision*, 2 EUR. L. REV. 91, 92 (1977). The Commission has not passed a provisional decision for several years. Interviews with Commission officials, *supra* note 282.

⁴³⁴ Regulation 17/62, Article 15(5)(a) of the Treaty of Rome. Until recent years applicants were fairly well assured that the Commission would not take action on their application for many years, often even if the agreement clearly did not qualify for an exemption. See Graupner, *supra* note 355, at 296. However, notifying a clearly non-exemptable agreement will no longer gain immunity for a long period of time. Commission officials now screen every application, and such agreements are given priority. If the applicant will not modify or abandon the agreement, the Commission will institute formal proceedings and perhaps even take a provisional decision under Regulation 17/62, Article 15(6) of the Treaty of Rome. Interviews with Commission officials, *supra* note 282. Applicants which notify an agreement in cases of true uncertainty, *i.e.*, when it cannot be predicted what the Commission's position would be, normally can count on a long period of fine immunity. Even if theirs is the rare case that is singled out for a formal Commission decision, it normally takes years for the Commission to pass a decision. Moreover, they cannot be fined for the period during which the agreement is notified before the Commission's formal action.

⁴³⁵ Interviews with private antitrust lawyers, *supra* note 363.

⁴³⁶ *Id.* See also Van Houtte, *supra* note 17, at 508-09; Korah, *supra* note 24, at 24; Van Bael, *supra* note 10, at 3.

⁴³⁷ See *supra* note 9.

⁴³⁸ The Court of Justice has held that the member state court may suspend proceedings and either refer the question to the Court of Justice under Article 177 or allow the parties to obtain the Commission's viewpoint. *Brasserie de Haecht v. Wilkin*, 1973 E. Comm. Ct. J. Rep. 77, 86-87, 12 Common Mkt. L.R. 287, 302-03 (1973). The member state court may rule on the matter itself if it finds that the agreement either does not violate Article 85(1) or Article 86.

⁴³⁹ See *supra* note 401.

85(1) violation, would not qualify for an exemption, when in fact the Commission or Court of Justice would find otherwise.⁴⁴⁰ This possibility is not unlikely considering that on many issues the interpretation of the prohibitions contained in Articles 85(1) and 86 are not settled⁴⁴¹ and that the propriety of an individual exemption under Article 85(3) depends on a complex and difficult evaluation of the particular facts of the agreement in question.⁴⁴² A member state court may also be influenced to declare an agreement or practice illegal without first referring the issue to the Commission or Court of Justice because of the often long delays involved in doing so.⁴⁴³ On average it takes approximately twelve months to obtain a ruling from the Court of Justice after a reference has been made to it by a national court under Article 177.⁴⁴⁴

From the point of view of a member state court, a dilemma may arise when a plaintiff petitions it to find an agreement or practice in violation of EEC antitrust law. If it has any doubt about the legality of the agreement or practice, it may allow one or both parties to seek advice from the Commission, or it may refer a question to the Court of Justice under Article 177.⁴⁴⁵ But in doing so, it knows it probably will be quite some time, even years, before it gets such help, particularly if it desires a formal decision of either the Commission or the Court of Justice.⁴⁴⁶ In fact, it has no choice but to suspend its proceedings and wait until the Commission passes a formal exemption even if it has no doubt that an agreement deserves an individual exemption, because only the Commission can grant such an exemption and only by means of a formal decision.⁴⁴⁷ In either situation, the member state court may have to decide whether to grant interlocutory relief until it receives a response from the Commission or the Court of Justice.⁴⁴⁸ If it denies interlocutory relief, the plaintiff may suffer injustice during the often long wait if the agree-

⁴⁴⁰ Interviews with private antitrust lawyers, *supra* note 363.

⁴⁴¹ See *supra* note 11 and accompanying text.

⁴⁴² See *supra* notes 11 and 17 and accompanying text.

⁴⁴³ Interviews with private antitrust lawyers, *supra* note 363.

⁴⁴⁴ See House of Lords Report, *supra* note 386, at xix.

⁴⁴⁵ See *supra* note 438 and accompanying text. During the early years of the EEC the Commission was reluctant to render its opinion in cases before national courts. See Forrester and Norall, *supra* note 411, at 49. The Commission now welcomes such requests for advice. See THIRTEENTH REPORT ON COMPETITION POLICY, *supra* note 282, at pt. 218.

⁴⁴⁶ See *supra* note 391 and accompanying text.

⁴⁴⁷ See *supra* note 293 and accompanying text.

⁴⁴⁸ See Faull & Weiler, *Conflicts of Resolution in European Competition Law*, 3 EUR. L. REV. 116, 137 (1978); Korah, *supra* note 411, at 329. The Court of Justice has never ruled upon the extent of a member state court's authority to grant interlocutory relief when it suspends its proceedings under these circumstances. *Id.*

ment or practice is later found illegal and not exemptable.⁴⁴⁹ But granting such relief may be equally unjust to the defendant if it later prevails.

A second potential problem created by the Commission's inability to issue formal decisions within a reasonable period of time arises when the Commission decides to consider an application for a formal decision. If, as is usually the case,⁴⁵⁰ an applicant decided not to wait years for a response and already put the agreement or practice into effect, there is a very good chance that the Commission will require it to modify or abandon its conduct and its investment in it.⁴⁵¹ Even if only modifications rather than total abandonment are required, the modifications may be highly unfavorable and perhaps render the agreement or practice no longer economically worthwhile for the parties.⁴⁵² In the case of an agreement, the modifications may fundamentally alter the terms of the contract and require a renegotiation by the parties. In such cases, it is quite likely that in the interim the bargaining position of the parties may have changed, resulting in one of the parties being at a disadvantage.⁴⁵³

In addition to searching for new ways to streamline its formal decision-making procedure to increase the number of formal exemptions and the speed with which they are issued,⁴⁵⁴ the Commission already has taken a number of other steps to alleviate the above-mentioned problems. First, it has promulgated a series of group exemptions, formal notices, and less formal public statements by Commission officials interpreting the antitrust laws in an effort to educate both the business community and member state courts about what the antitrust laws prohibit.⁴⁵⁵ By examining these Commission promulgations and statements, member state courts are assisted in determining whether an agreement or practice is illegal so that it may avoid suspending its proceedings to seek the assistance of the Commission or Court of Justice. Moreover, this Commission guidance reduces the chances of an erroneous decision by a member state court. Group exemptions also save businesses the time, expense and other problems associated with applying for an individual exemption, and they enable member state courts to enforce agreements meeting the criteria of Article 85(3) without the need to suspend its proceedings to await an individual exemption by the Commission.

However, these measures provide only a partial solution. As al-

⁴⁴⁹ Fauli & Weiler, *supra* note 448, at 137.

⁴⁵⁰ Interviews with private antitrust lawyers *supra*, note 363.

⁴⁵¹ *Id.*; interviews with Commission officials, *supra* note 282.

⁴⁵² Interviews with private antitrust lawyers, *supra* note 363.

⁴⁵³ *Id.* See also Korah, *supra* note 411, at 351.

⁴⁵⁴ See ELEVENTH REPORT ON COMPETITION, *supra* note 325, at 15.

⁴⁵⁵ See *supra* notes 26 and 295 and accompanying text.

ready noted,⁴⁵⁶ group exemptions and Commission notices and announcements cannot take individual circumstances into account and hence may provide inadequate guidance to member state courts. Moreover, they only cover a limited field of activities and hence there is no applicable group exemption or notice covering many types of business arrangements.⁴⁵⁷ The coverage of group exemptions is further narrowed by the fact that the Commission limits group exemptions to agreements which meet very strict conditions and in some cases to businesses which do not exceed a certain annual turnover or market share.⁴⁵⁸

To qualify under a particular group exemption, businesses are required to tailor their agreements to the stringent requirements of the group exemption, thereby often losing a great deal of flexibility in their business dealings. Some businesses simply refuse to adhere to these "codes of conduct" in order to qualify for an automatic exemption.⁴⁵⁹ Still other businesses are disqualified at the outset because of the number of parties to the agreement or because of their turnover or market share.⁴⁶⁰ Some businesses and lawyers also complain that if an agreement falls within a general area addressed by a group exemption but the agreement does not qualify under it, there is a negative inference that the agreement is illegal.⁴⁶¹ Finally, group exemptions and Commission notices are strictly construed by the Commission, and in some cases businesses feel forced to file for an individual exemption rather than live with the uncertainty of whether their agreement qualifies under a group exemption.⁴⁶²

A second step taken by the Commission to relieve some of the difficulties caused by its failure to issue formal decisions efficiently is in some cases to express its view to member state courts about the applicability of Article 85(1) or Article 86, or about the likelihood of an individual ex-

⁴⁵⁶ See *supra* note 29 and accompanying text.

⁴⁵⁷ Interviews with private antitrust lawyers, *supra* note 363. See also Van Houtte, *supra* note 17, at 508. U.S. antitrust agency guidelines are also criticized on this ground. Interviews with private antitrust lawyers, in Washington (Jan. 23-26, 1984).

⁴⁵⁸ Interviews with private antitrust lawyers, *supra* note 363. See also Van Houtte, *supra* note 17, at 508-09. Van Bael, *supra* note 10, at 6. Regulation 417/85, *supra* note 295 for example, provides both a market share and turnover test in Article 3.

⁴⁵⁹ Interviews with private antitrust lawyers, *supra*, note 363. See also Forrester & Norall, *supra* note 411, at 5-6; Van Houtte, *supra* note 17, at 508-09.

⁴⁶⁰ For example, Regulation 19/65 *supra* note 295 states that group exemptions must be limited to bilateral agreements and are not applicable to agreements involving more than two parties.

⁴⁶¹ Interviews with private antitrust lawyers, *supra* note 363. See also Forrester & Norall, *supra* note 411, at 25.

⁴⁶² Interviews with private antitrust lawyers, *supra* note 363. See Ferry, *supra* note 4, at 11 ("blanket exemptions and guidelines, being derogations, must be construed strictly").

emption, before or in lieu of an official decision.⁴⁶³ This enables a member state court to suspend its proceedings for a much shorter period of time than if it would have to wait for a formal Commission or Court of Justice decision, unless a formal Commission exemption is necessary.⁴⁶⁴ In the latter case, a member state court at least has a good indication whether it should grant a temporary injunction pending the Commission's decision since it receives an indication from the Commission as to whether the defendant will eventually receive an exemption. Unfortunately, although the Commission is contemplating the creation of a formal consultative procedure,⁴⁶⁵ at this time it only provides this assistance on an *ad hoc* basis and has not announced to the business community or the member state courts the conditions under which it is willing to render such informal guidance.⁴⁶⁶ Furthermore, member state courts sometimes are not content with this informal DG-IV opinion and instead insist on a formal Commission decision.⁴⁶⁷

As a third measure, the Commission is willing to provide informal, non-binding advice to businesses about the antitrust merits of an agreement or practice before they sign an agreement or commit resources to an agreement or practice.⁴⁶⁸ In some cases, the parties can alter their agreement or practice at the outset or forego the activity altogether if the modifications are unacceptable. This helps avoid the problems which changes required long after implementation may bring.⁴⁶⁹ This advice, however, may take some time to obtain, particularly in complex cases in which a fuller investigation and analysis are necessary.⁴⁷⁰ Moreover, this informal advice from an official in the Competition Directorate is not legally binding upon the Commission, and modifications may be required later.⁴⁷¹ Finally, many businesses and lawyers are unaware that such an opportunity for informal advice is available.⁴⁷²

A fourth step was the creation of the non-opposition exemption pro-

⁴⁶³ Interviews with Commission officials, *supra* note 282. *See also* Faull and Weiler, *supra* note 448, at 138.

⁴⁶⁴ The Competition Directorate may express its view that the agreement or practice does not violate Articles 85(1) or 86, or it may state that the agreement violates Article 85(1) but does not qualify for an exemption under Article 85(3) or any relevant group exemption. In neither case is a formal decision necessary. Interviews with Commission officials, *supra* note 282.

⁴⁶⁵ THIRTEENTH REPORT ON COMPETITION POLICY, *supra* note 282, at pt. 218.

⁴⁶⁶ Faull & Weiler, *supra* note 430, at 138; interviews with Commission officials, *supra* note 282.

⁴⁶⁷ Letter from R. Daoût, *supra* note 367.

⁴⁶⁸ Interviews with Commission officials, *supra* note 282.

⁴⁶⁹ *Id.* *See infra* notes 427-446 and accompanying text.

⁴⁷⁰ Interviews with Commission officials, *supra* note 282.

⁴⁷¹ *Id.* The "morally" binding effect of this informal advice will be greater if obtained from a high ranking official in DG-IV. *Id.*

⁴⁷² *Id.*; interviews with private antitrust lawyers, *supra* note 363.

cedure under recent group exemptions.⁴⁷³

c. Disadvantages of comfort letters

A fifth measure taken by the Commission to compensate for the paucity of formal decisions and the delays in obtaining them was the creation of a new type of individual clearance, the comfort letter. The Commission issues a large number of comfort letters each year.⁴⁷⁴ Applicants who request and merit a comfort letter normally will receive one from the Commission.⁴⁷⁵ Many applicants prefer a comfort letter to a formal decision⁴⁷⁶ for three reasons: (1) they are issued much more quickly than formal decisions,⁴⁷⁷ (2) applicants normally have to submit little if any information beyond that contained in Form A/B,⁴⁷⁸ and (3) the applicant does not lose its immunity from Commission fines.⁴⁷⁹

In spite of these advantages, some businesses and lawyers criticize comfort letters on a number of grounds. First, they stress that a comfort letter has no legally binding effect on the Commission itself and that the Commission may taken action later against the agreement or practice.⁴⁸⁰ The Commission has acknowledged publicly that comfort letters and other informal settlements may have "less legal value than a formal decision,"⁴⁸¹ and in a few celebrated cases the Commission has challenged agreements before the Court of Justice which it had cleared with comfort letters, arguing that comfort letters are not legally binding upon it as formal exemptions are.⁴⁸²

In practice, however, comfort letters have a significant morally binding effect on the Commission. Although the Commission has acted in a few instances contrary to a comfort letter, it has always done so with good reason, such as when additional material facts emerged, material facts changed, a decision of the Court of Justice undermined the legal basis upon which the letter was based, or the actual agreement imple-

⁴⁷³ See p. 181.

⁴⁷⁴ There are no publicly available statistics about the precise number.

⁴⁷⁵ Interviews with Commission officials, *supra* note 282.

⁴⁷⁶ Interviews with private antitrust lawyers, *supra* note 363.

⁴⁷⁷ See *supra* note 401 and accompanying text.

⁴⁷⁸ See *supra* note 394 and accompanying text.

⁴⁷⁹ See *supra* note 322 and accompanying text.

⁴⁸⁰ Interviews with private antitrust lawyers, *supra* note 363; Van Bael, *supra*, note 10, at 5; C. KERSE, *supra*, note 274, at 158; House of Lords Report, *supra* note 386, at p. 9 (submission of the Joint Working Party of the Senate of the Inns of Court and the Bar and the Law Society on Competition Law).

⁴⁸¹ FIFTH REPORT ON COMPETITION POLICY 9 (April, 1976).

⁴⁸² *Frubo v. Commission*, (Case 71/74), 1975 E. Comm. Ct. J. Rep. 563, 15 Common Mkt. L.R. 646 (1975); *DeBloos v. Bouyer*, (Case 59/77), 1977 E. Comm. Ct. J. Rep. 2359, 21 Common Mkt. L.R. 511 (1978); the Perfumes cases, *supra* note 316.

mented differed materially from the one notified.⁴⁸³ While it is true that the Commission has never revoked a negative clearance or exemption,⁴⁸⁴ it is also true that the beneficiaries of such formal decisions have to pay a much dearer price for them in terms of time, expense and administrative burden. This is particularly true with an exemption, because in return for its legally binding protection, applicants must endure a long, burdensome investigation.⁴⁸⁵ They are also burdened with periodic reporting requirements.⁴⁸⁶ When viewed in this light, it is no surprise that many businesses prefer a comfort letter to a negative clearance or even a legally binding exemption.⁴⁸⁷

A second criticism of comfort letters is that they do not legally or morally bind member state courts which are free to declare an agreement or practice cleared by a comfort letter illegal and even award damages or an injunction.⁴⁸⁸ However, the Court of Justice has instructed member state courts to give comfort letters significant weight.⁴⁸⁹ Because of this directive, and because of the Commission's unrecognized expertise and authority in EEC antitrust matters, member state courts have never acted contrary to the Commission's position taken in a comfort letter.⁴⁹⁰

Third, critics emphasize that if a comfort letter is based on the likelihood of an individual exemption under Article 85(3), a member state court nevertheless is powerless to enforce the agreement even if it wants to follow the Commission's view, because only the Commission through a formal decision can grant an exemption.⁴⁹¹ However, in such cases a member state court can suspend its proceedings to await a formal exemption without granting interlocutory relief to the plaintiff. No injustice would be done since the defendant would not be harmed during the wait regardless of its duration. The agreement would remain valid and enforceable. The Commission has expressed its willingness to reopen a file

⁴⁸³ See C. KERSE, *supra* note 274, at 160; Lang, *supra* note 23, at 355. For example, in *Camera Care Ltd. v. Victor Hasselblad AB*, 25 O.J. Eur. Comm. (No. 161) 18 (1982), 34 Common Mkt. L.R. 233 (1982), the Commission issued a negative decision against an agreement previously cleared by a comfort letter. However, the agreement actually implemented by the notifying parties "departed in several particulars from the sole distributorship agreement notified to the Commission." *Id.*, at 238, point 9.

⁴⁸⁴ Interviews with Commission officials, *supra* note 282.

⁴⁸⁵ See *supra* notes 343-82 and accompanying text.

⁴⁸⁶ See *supra* notes 305 and accompanying text.

⁴⁸⁷ Interviews with private antitrust lawyers, *supra* note 363.

⁴⁸⁸ *Id.* See Van Houtte, *supra* note 17, at 508; Faull and Weiler, *supra* note 448.

⁴⁸⁹ *Lancome v. Etos and Albert Heijn*, (Case 99/79), 1980 E. Comm. Ct. J. Rep. 2511, 2538, 31 Common Mkt. L.R. 164, 179 (1981).

⁴⁹⁰ Interviews with Commission officials, *supra* note 282.

⁴⁹¹ Interviews with private antitrust lawyers, *supra* note 363.

under these circumstances and to proceed with a formal decision.⁴⁹²

Fourth, comfort letters have been criticized for their brevity and frequent ambiguity: not only are the legal and business communities deprived of a potentially significant body of precedent and guidance, but also the persuasive value of the letters may be diminished in member state court litigation.⁴⁹³ The Competition Directorate acknowledges this deficiency, but it states that this is a necessary drawback if the Directorate is to issue letters quickly and efficiently.⁴⁹⁴ Since no member state court has yet acted contrary to a comfort letter, this problem does not seem to be serious in any event.

Fifth, critics note that while comfort letters may shorten the wait for a Commission response, they still usually require waiting many months and in some cases more than a year,⁴⁹⁵ and hence the problems caused by delays in waiting for formal exemptions⁴⁹⁶ are not eliminated. Indeed, before a comfort letter is issued, a member state court may be faced with a suit challenging the agreement or practice. However, the length of time the member state court must wait is normally considerably less than that involved for formal decisions. Moreover, if a member state court knows the Commission is about to express its views, it might be less inclined to decide the matter first,⁴⁹⁷ thereby avoiding the possibility of an inconsistent decision.⁴⁹⁸ Any injustice caused by the court's decision to either grant or deny interlocutory relief⁴⁹⁹ would also be limited to a shorter period of time. Although still a potential problem, such a possibility is raised in any litigation when a court must decide at the outset whether to grant interlocutory relief.

Other previously discussed potential problems raised by delay, *i.e.*, modifications required by the Commission after the investment has been made and, in the case of agreements, the necessity of renegotiation if the agreement had already been signed,⁵⁰⁰ are also not totally solved by comfort letters. However, given the shorter wait for a comfort letter, the parties may be able to wait for the letter before signing the agreement or investing any significant sums in the agreement or practice. If the urgency of the matter were explained to the Competition Directorate, it

⁴⁹² Interviews with Commission officials, *supra* note 282.

⁴⁹³ Interviews with private antitrust lawyers, *supra* note 363.

⁴⁹⁴ Interviews with Commission officials, *supra* note 282.

⁴⁹⁵ Interviews with private antitrust lawyers, *supra* note 363.

⁴⁹⁶ See *supra* notes 427-38 and accompanying text.

⁴⁹⁷ See *supra* note 443 and accompanying text.

⁴⁹⁸ See *supra* note 440 and accompanying text.

⁴⁹⁹ See *supra* note 449 and accompanying text.

⁵⁰⁰ See *supra* notes 451-53 and accompanying text.

likely would do its best to expedite the matter.⁵⁰¹

d. Conservatism

Some businesses and lawyers have voiced their concern that the Commission is too conservative in its evaluation of applications for clearance,⁵⁰² although this complaint does not appear as prevalent as it is against antitrust officials in the United States.⁵⁰³ The criticism is not so much that the Commission is not willing to grant a clearance, but rather that it too often requires unnecessary modifications before it will grant a clearance.⁵⁰⁴

Testing the accuracy of this charge is just as difficult as in the United States and for the same reasons.⁵⁰⁵ However, the fact that this is not a frequent complaint indicates it is not a recurring problem. Moreover, because the Commission plays a much greater role than the American antitrust agencies in determining what the law actually is,⁵⁰⁶ mandatory modifications are usually precisely what the Court of Justice would require. The complaint, therefore, is directed more at the strictness of the law than at the any undue conservatism in the Commission's clearance decisions.

Finally, the possible causes of conservatism in United States clearance program⁵⁰⁷ are not present in the EEC. Unlike under United States programs, the Court of Justice can review negative Commission decisions,⁵⁰⁸ the EEC clearance program is legislatively mandated,⁵⁰⁹ the staff members of the Competition Directorate are accustomed to being regulators and not just enforcers,⁵¹⁰ and mistakes are easily corrected except in those few cases receiving formal exemptions.⁵¹¹ The mere fact that the Commission is often willing to issue comfort letters purely on the basis of the facts supplied by the applicants⁵¹² demonstrates how unconservative the Commission is compared with the FTC or especially the

⁵⁰¹ Interviews with Commission officials, *supra* note 282.

⁵⁰² Interviews with private antitrust lawyers, *supra* note 363.

⁵⁰³ See *supra* notes 163-67 and accompanying text.

⁵⁰⁴ Interviews with private antitrust lawyers, *supra* note 363.

⁵⁰⁵ See *supra* notes 168-72 and accompanying text.

⁵⁰⁶ See *supra* note 268.

⁵⁰⁷ See *supra* notes 173-96 and accompanying text.

⁵⁰⁸ See Article 173 of the Treaty of Rome.

⁵⁰⁹ See Regulation 17/62 and Article 85(3) of the Treaty of Rome.

⁵¹⁰ For many officials in the Competition Directorate, the processing of clearance requests requires a substantial amount of their time. Interviews with Commission officials, *supra* note 282.

⁵¹¹ Only in the case of exemptions is the Commission required to pass a formal revocation decision. *Id.*

⁵¹² See *supra* note 394 and accompanying text.

Justice Department, which usually conduct independent investigations despite the fact that their clearances are not legally binding.⁵¹³

e. Administrative burden and expense

The demands placed upon applicants are not overly burdensome in the vast majority of cases. If the file is never considered for action, the only burden on the applicant is filling out Form A/B. Even when the Commission considers an application for a comfort letter, normally only a moderate amount of information, if any, is required beyond what is contained in Form A/B.⁵¹⁴ It is true that in those few cases considered for a formal decision, and particularly if an exemption rather than a negative clearance is contemplated, the demands placed on the applicant can be significant.⁵¹⁵ There are also added burdens after receiving exemptions since those clearances are subject to expiration dates and reporting obligations.⁵¹⁶

However, particularly in the case of an exemption, these demands normally can be justified. Exemptions have a significant legally binding effect⁵¹⁷ and are extremely difficult to revoke.⁵¹⁸ Furthermore, in the case of both exemptions and negative clearances, the Commission often addresses novel legal issues or clarifies ambiguous issues of the law for the entire business community;⁵¹⁹ and hence a greater degree of caution is justifiable. The burden, therefore, appears to be proportionate to the value of these formal clearances.

f. Government scrutiny

As in the United States,⁵²⁰ some businesses fear that applying for a clearance will expose all of their activities to present and future scrutiny by the Commission as well as by the member state antitrust authorities which automatically receive a copy of the application and the supporting

⁵¹³ See *supra* notes 51 and 87 and accompanying text.

⁵¹⁴ See *supra* note 394 and accompanying text.

⁵¹⁵ See *supra* notes 343-82 and accompanying text.

⁵¹⁶ See *supra* notes 303-05 and accompanying text.

⁵¹⁷ Both the Commission and member state courts are legally bound by an exemption until it expires or is revoked by a formal decision of the Commission. Interviews with Commission officials, *supra* note 282.

⁵¹⁸ In order to revoke an exemption, the Commission must go through the burdensome process of passing a formal revocation decision. In practice, the Commission has never revoked an exemption but instead has allowed them to expire without renewal. Interviews with Commission officials, *supra* note 282.

⁵¹⁹ See *supra* note 429 and accompanying text. The Commission stresses that the precedential value of a clearance is limited to situations in which the facts are nearly identical to the clearance case. Letter from R. Daoût, *supra* note 367.

⁵²⁰ See *supra* notes 259-62 and accompanying text.

material.⁵²¹ Unless these businesses believe that their conduct may be suspect, however, this concern would appear unfounded. Commission officials contend that there is no basis in fact for such fear of Commission scrutiny, particularly when one considers how scarce the Commission's resources are.⁵²²

As in the United States,⁵²³ many businesses in the EEC believe that there is a good chance their conduct will never be noticed, or not prosecuted even if noticed, because of the Commission's meager antitrust staff.⁵²⁴ Unlike in the United States,⁵²⁵ the risk of private causes of action by third parties under EEC antitrust law is not significant.⁵²⁶ This risk calculation is one each business must make for itself in deciding whether to apply. The clearance program is voluntary, and businesses must decide for themselves whether they will utilize it.

g. Confidentiality

Confidentiality does not appear to be a major concern for most applicants. Information submitted by applicants and third parties is not put on public file.⁵²⁷ There is no EEC equivalent of the Freedom of Information Act, and hence third parties do not have easy access to information submitted in support of an application.⁵²⁸ In fact, there is no publicly accessible register of applications, and the Commission considers the mere act of filing to be confidential.⁵²⁹ If the Commission denies parties access to this information, it is not a judicially reviewable act.⁵³⁰ Furthermore, the Commission and the member state authorities which receive this information are obliged not to disclose this data if it is related to "professional secrecy."⁵³¹ Finally, in publishing a notice or final decision the Commission also is obliged to "have regard to the legitimate interest of the undertakings in the protection of their business secrets."⁵³²

⁵²¹ See Regulation 17/62, Article 10(1) of the Treaty of Rome; interviews with private antitrust lawyers, *supra* note 363; Forrester & Norall, *supra* note 411, at 33.

⁵²² Interviews with Commission officials, *supra* note 282.

⁵²³ See *supra* notes 258-59 and accompanying text.

⁵²⁴ Interviews with private antitrust lawyers, *supra* note 363. Only 30 Competition Directorate officials spend part of their time on clearance applications. See *supra*, note 337.

⁵²⁵ See *supra* note 23.

⁵²⁶ See *supra* note 420 and accompanying text.

⁵²⁷ Interviews with Commission officials, *supra* note 282.

⁵²⁸ *Id.*

⁵²⁹ Forrester & Norall, *supra* note 411, at 48.

⁵³⁰ Interviews with Commission officials, *supra* note 282.

⁵³¹ Regulation 17/62, Article 20(2) of the Treaty of Rome.

⁵³² Regulation 17/62, Article 19(3) of the Treaty of Rome.

h. Publicity

Publicity is a potential concern in those few cases selected for a formal decision,⁵³³ a special comfort letter,⁵³⁴ or a press release.⁵³⁵ The vast majority of applications receive no publicity whatsoever.⁵³⁶ In those cases which are publicized, the publicity does not occur at the time of the application but instead comes shortly before (in the case of formal decisions and special comfort letters) or after (in the case of regular comfort letters) issuance.⁵³⁷ In many cases, this publicity does little harm to the applicant's competitive position since the agreement or practice usually has already been implemented for a substantial time period at the time of the publicity.⁵³⁸ During its independent investigation of an application, the Commission may inform competitors much earlier in some cases, however.⁵³⁹ Furthermore, publicity has little chance of inviting third party actions since such actions are infrequent, especially when an exemption, negative clearance or comfort letter has been issued.⁵⁴⁰

III. SUGGESTIONS FOR IMPROVEMENT

As the preceding examination of the United States and EEC clearance programs indicates, these programs have serious drawbacks which detract from their ability in many cases to provide businesses with an adequate degree of certainty that their conduct will not expose them to antitrust liability. In order to increase antitrust certainty, each system could adopt a number of reforms of their existing programs.

A. Improving United States Clearance Programs

Existing United States clearance programs, particularly the Business Review and Advisory Opinion Programs, are in need of a variety of reforms if these programs are to make a significant contribution to certainty under United States antitrust laws. These programs suffer from a

⁵³³ See *supra* note 390 and accompanying text.

⁵³⁴ See *supra* note 397 and accompanying text.

⁵³⁵ Even old-fashioned comfort letters are sometimes publicized in a press release, not to elicit third party comment, but because of their "particular importance, either because of the points of law raised or because of the economic power of the firms involved . . ." SIXTH REPORT ON COMPETITION POLICY 11 (April, 1977). See also C. KERSE, *supra* note 274, at 157-58.

⁵³⁶ Interviews with Commission officials, *supra* note 282.

⁵³⁷ *Id.*

⁵³⁸ Many applicants do not wait for a Commission decision or comfort letter. *Id.*

⁵³⁹ Independent investigations are almost always done when an application is being considered for a formal decision but not as often when a comfort letter is contemplated. See *supra* note 394 and accompanying text.

⁵⁴⁰ Interviews with Commission officials, *supra* note 282; See *supra* notes 420-22 and accompanying text.

number of problems, both real and perceived, which have prevented them from being viewed by most businesses as an acceptable option for relieving antitrust uncertainty. In fact, these programs are held in such low esteem by businesses and the bar that they are infrequently employed⁵⁴¹ and, on those occasions when they are employed, relief from antitrust uncertainty is often not the reason for the application.⁵⁴²

The following suggested improvements of the United States clearance programs are derived both from the advantageous features of the EEC program as well as from positive aspects of the three United States clearance programs themselves, particularly the new Export Certification Program. Although this paper advances these proposals in the framework of an entirely new clearance program, most of the features of the proposed program could be used to improve each of the three existing programs if a single program would not be adopted.

1. A Single Statutory Program Administered by a Special Office

The United States would be well advised to follow the EEC's example and adopt a single statutory clearance program administered by a central office with a staff experienced with the procedure of the program and attuned to its goals. A single statutory clearance program would have several advantages over the existing trio of separate and overlapping programs. First, a single program would enable businesses to obtain a clearance with an equally binding effect on all of the antitrust enforcement agencies, regardless of whether the conduct in question involves domestic or export-related activities. Under the Business Review and Advisory Opinion Programs, businesses are uncertain about the extent to which a business review letter or advisory opinion binds the other antitrust agency not involved in the clearance decision.⁵⁴³ The Export Certification Program does remedy this drawback by making the certificate equally binding on all antitrust agencies,⁵⁴⁴ but that clearance is limited to export-related activity.

Second, a unified or single program could remove possible sources of the undue conservatism which afflicts the Business Review and Advisory Opinion Programs.⁵⁴⁵ By entrusting the program to a select group of antitrust officials whose sole function is to administer the program, applicants could be more confident that staff members experienced with the

⁵⁴¹ See *supra* notes 163-67 and accompanying text.

⁵⁴² See *supra* note 165 and accompanying text.

⁵⁴³ See *supra* note 193 and accompanying text.

⁵⁴⁴ See *supra* note 209 and accompanying text.

⁵⁴⁵ See *supra* notes 173-96 and accompanying text.

program and familiar with the objective of the program would process their applications. The staff's experience and understanding of the program's purpose could reduce the likelihood that a clearance application would be treated with suspicion.⁵⁴⁶ Because they would not be involved with antitrust enforcement, the staff members handling clearance requests would be less likely to have an "enforcer" mentality⁵⁴⁷ and instead could be expected to be more objective and less suspicious of applicants making a good faith effort to comply with the antitrust laws. Moreover, giving the staff members a clear statutory mandate could reduce their reluctance to issue clearances in close cases.⁵⁴⁸

Third, a statutorily mandated clearance program could enhance the value of the program in the eyes of a skeptical business community. The security of having a clearance sanctioned by Congress could greatly increase the attractiveness of the program to businesses which now are wary of the Business Review and Advisory Opinion Programs because those Programs are not authorized by statute.⁵⁴⁹ Moreover, businesses could expect the statutorily mandated clearance to be a more persuasive authority before a court hearing a challenge of a cleared activity and, as a result, to be more of a deterrent to private actions.⁵⁵⁰

Finally, placing the administration of the program in a central office could significantly reduce the inefficient handling of requests which now undermines the attractiveness of the three existing programs.⁵⁵¹ Unlike under the Business Review and Advisory Opinion Programs,⁵⁵² the same group of staff members could handle all requests pursuant to detailed procedural guidelines. The burden and delay involved in applying would no longer depend to such a large extent on the inexperience of the particular staff members assigned to the application.⁵⁵³ Moreover, unlike under the Export Certification Program,⁵⁵⁴ only one agency would be involved, and consequently applicants would not be subjected to duplicative and conflicting requests or be the victims of inter-agency disputes over the drafting of clearances. Furthermore, as is increasingly the case with the Export Certification Program,⁵⁵⁵ the staff of the central office would likely develop experience, streamlined processing procedures, and

⁵⁴⁶ See *supra* note 50.

⁵⁴⁷ See *supra* note 176 and accompanying text.

⁵⁴⁸ See *supra* note 184 and accompanying text.

⁵⁴⁹ Interviews with private antitrust lawyers, in Washington, D.C. (Jan. 23-26, 1984).

⁵⁵⁰ *Id.*

⁵⁵¹ See *supra* notes 41-58, 68-92, and 121-25 and accompanying text.

⁵⁵² See *supra* notes 45 and 82, and accompanying text.

⁵⁵³ See *supra* notes 48 and 89 and accompanying text.

⁵⁵⁴ See *supra* notes 121-25 and accompanying text.

⁵⁵⁵ See *supra* notes 139-45 and accompanying text.

standard language (boilerplate) which could reduce the burdens and delays now facing applicants under the Business Review and Advisory Opinion Programs.⁵⁵⁶

A major obstacle to the adoption of this proposal could be the reluctance of the agencies excluded from the program to give up their current role in their separate clearance programs.⁵⁵⁷ In order to gain passage of the program, it may be necessary to give each of those agencies some limited role in processing applications raising issues in their area of expertise. For example, with regard to export-related requests, the Commerce Department might insist on the opportunity to become involved in the decision-making process. If such a compromise would be necessary, in order to avoid the duplicative efforts which hinder the efficiency of the Export Certification Program,⁵⁵⁸ a clear division of responsibilities between the agencies could be prescribed, and the agency playing the lesser role in the process could be required to assign the matter to staff members experienced with the program.

2. Two Levels of Clearance

One of the most advantageous features of the EEC and FTC clearance programs is the availability of more than one level of clearance. Because the processing of the more binding level of clearance requires more of each agency's scarce resources and is more burdensome and time-consuming for the applicant, it is reserved in each program only for those applications which truly need a more binding clearance, or which can give more certainty to the business community as a whole by clarifying the law or the agency's enforcement policy.⁵⁵⁹ The European Commission and the FTC use the second level of clearance for the vast majority of applications to provide a lesser but reasonable amount of certainty at a lower cost to the agency and the applicant.⁵⁶⁰ Neither the Business Review nor the Export Certification Programs have such an efficient option. In both, only the more resource- and time-consuming level of clearance is available.⁵⁶¹

The new clearance program could adopt the EEC and FTC approach and improve on it. Several levels of clearance could be made

⁵⁵⁶ See *supra* notes 219-33 and accompanying text.

⁵⁵⁷ Several government officials involved in the processing of clearance applications under the current U.S. programs opposed such an idea. See *supra* note 549.

⁵⁵⁸ See Margulies, *supra* note 104, at 20.

⁵⁵⁹ See *supra* notes 69 and 429 and accompanying text.

⁵⁶⁰ See *supra* notes 197-205, 462-75 and accompanying text.

⁵⁶¹ See *supra* notes 35-67, 93-162 and accompanying text.

available. As under the EEC and FTC programs,⁵⁶² applicants could be allowed to express a preference for a particular level of clearance, and the agency could grant that preference unless it is clearly not appropriate under the circumstances. For example, in cases where the most binding level of clearance is requested, in order to conserve its resources the agency could be given the authority to consider the application for a less binding level of clearance if in the agency's view the applicant does not really need the more binding clearance. Conversely, if a business prefers a less binding level of clearance because it would be less burdensome to acquire, the agency could be allowed to consider the application for a more binding clearance involving a more extensive investigation and analysis if the application raises a novel issue or is too complex for a less intensive evaluation.

The following levels of clearance could be made available:

a. Certification

A level of clearance with a high degree of legally binding effect could be reserved only for applications (1) in which the applicant demonstrates a true need for a highly binding level of clearance; (2) which are so complex that an extensive investigation of the facts and a refined economic analysis are required; (3) which present a novel legal issue, the resolution of which should have the concurrence of the highest antitrust officials; and/or (4) which present the agency with an opportunity to clarify existing law or enforcement policy.

This level of clearance could provide protection similar in many respects to that provided by the Export Certification Program.⁵⁶³ This clearance could insulate the recipient from both federal and state anti-trust actions by government and private parties, with the following exception: to protect the rights of third parties affected by the clearance, those parties could be allowed to appeal the agency's certification decision to a federal court within a limited period of time. If a court would overturn the certification decision, the certificate holder could be made liable for damages only from the date of the court's decision unless the plaintiff could show that the holder acted in bad faith. As a further measure of protection for third parties, upon a showing of good cause, a federal court could have the power to temporarily enjoin the objectionable aspect of the certified conduct until a final decision is rendered.

Also as under the Export Certification Program,⁵⁶⁴ conduct clearly

⁵⁶² See *supra* notes 72 and 365 and accompanying text.

⁵⁶³ See *supra* notes 206-18 and accompanying text.

⁵⁶⁴ See *supra* note 214 and accompanying text.

outside the scope of the certificate could be denied protection. Materially changed circumstances could result in revocation of the certificate and, absent a showing of bad faith, the certificate holder could be protected from liability until the date of revocation. Furthermore, formal amendment and revocation procedures could be adopted to protect the certificate holder, as under the Export Certification Program.⁵⁶⁵ A certificate holder could be allowed to extend its certificate to cover new activities, and it could be assured of adequate notice and an opportunity to terminate its objectionable activity if the agency would decide to revoke or modify its certificate.

To better protect certificate holders from frivolous or speculative litigation than does the Export Certification Program, third parties and the antitrust agencies not in charge of the clearance program could first be required to file a complaint with the agency in charge of the program. The complainants could request the agency to revoke or modify the certificate because of changed circumstances or to declare that the conduct of the certificate holder which is neither clearly within nor outside the certificate exceeds the intended scope of the certificate. If, on the other hand, the agency would refuse this request, the complainant could then be allowed to appeal to a Federal court, but, as under the Export Certification Program, a presumption of legality could be raised in favor of the agency's decision. If the agency would either revoke the certificate or find the conduct to be outside the certificate, an action in federal court could be allowed, but the court could be given the power to limit the recovery to actual damages if the certificate holder acted in good faith.

Finally, as under the Export Certification Program, a business, whose application is denied or is approved only upon conditions believed to be unjustified, could be given the right to appeal the agency's action to the federal courts. Similarly, a certificate holder could be allowed to challenge a revocation or modification of its certificate. The right to judicial review could assure those businesses that fear unduly conservative decisions by the antitrust agencies that those decisions would be subject to independent review.⁵⁶⁶ Judicial review could induce the agency to justify its negative decisions and thereby remove a source of conservatism which is alleged to exist under the Business Review and Advisory Opinion Programs.⁵⁶⁷

In return for this significant degree of protection from antitrust actions, the applicant could be required to cooperate in an extensive investi-

⁵⁶⁵ See *supra* notes 158-59 and accompanying text.

⁵⁶⁶ See *supra* notes 176-83 and accompanying text.

⁵⁶⁷ *Id.*

gation proportionate to the value of the clearance received. Because the right of third parties and the government to bring suit would be drastically curtailed by the certificate, and because of the possible precedent-setting effect of these decisions, the government justifiably would be cautious in its investigation, analysis and internal review of applications. Therefore the applicant fairly could be expected to cooperate in supplying information.

Furthermore, in order to facilitate the resolution of potential subsequent disputes over the exact scope and legal basis of the certificate or the denial thereof, and to provide a valuable source of precedent for the business community as a whole, the agency's decision could be required to contain an elaboration of the facts and legal analysis upon which it is based.⁵⁶⁸ Since the agency would issue relatively few of these clearances, this requirement would not necessarily place an unmanageable burden on its staff.⁵⁶⁹ In order to make the agency less reluctant to issue these binding certificates and to protect third parties and the public from anticompetitive activities, certificates could also be issued under express conditions and obligations, such as reporting requirements and, in appropriate cases, an expiration date.⁵⁷⁰

To further encourage applications from businesses uncomfortable with dealing with the government, an applicant could be assured that it could withdraw its application for any reason and receive all copies of information it submitted, as is the case under the Export Certification Program.⁵⁷¹ This would enable applicants who find information requests, required modifications, or conditions and obligations too onerous, to withdraw their application without the fear that a file full of their vital business information would remain with the government.⁵⁷² Of course, the government would not be precluded from later bringing suit against the implemented conduct and obtaining the information through its investigatory powers if it believed the conduct to be illegal.

One final protection could be extended to applicants to further increase the attractiveness of this clearance program. Since this level of clearance would normally take a long time to process, deserving applicants could receive some sort of interim protection from damages until the agency reaches its decision. Such protection could consist of limiting

⁵⁶⁸ Many private lawyers would welcome such a development. Interviews with private antitrust lawyers, *supra* note 549.

⁵⁶⁹ See *supra* note 68 and accompanying text.

⁵⁷⁰ Reporting requirements are used under the Export Certification Program for this reason. See *supra* note 129 and accompanying text.

⁵⁷¹ 15 C.F.R. § 325.11 (1984).

⁵⁷² *Id.*

liability to interlocutory relief. However, to safeguard the interests of third parties and the public from possible abuses of such provisional validity,⁵⁷³ this protection could be granted only after the agency initially reviewed the application and found the application merited such temporary protection. If upon closer examination the agency would decide to deny the application, the applicant would be subject to antitrust liability only, if it continued the objectionable conduct. Without provisional protection, applicants would face the risk of full antitrust liability if they chose not to wait to implement their conduct and the agency later reject their application or accept it only after modifications. That risk under the existing clearance programs deters many potential applicants who do not want to or cannot wait.⁵⁷⁴ In fact, under the Business Review Program, applicants are required to await a decision of the Justice Department since it will not consider ongoing activities for a business review letter.⁵⁷⁵

b. Business review letters

A second, less binding level of clearance could be reserved for applications which the agency feels do not need the certification level of clearance. As with EEC comfort letters and FTC staff advisory opinions,⁵⁷⁶ the intensity of the agency's investigation of the application and its internal review of the draft-clearance, could be significantly less compared to that needed for the certification process since the binding effect of this second level of clearance would be correspondingly less. Consequently, the burden and delay applicants would endure would also be less. Whenever possible, the information required could be limited to that contained in the application unless the application is materially deficient. To encourage full disclosure, the protection of the clearance could be limited to those facts disclosed by the applicant, and penalties could be imposed for intentional nondisclosure or fraud.

The final clearances could be issued under certain conditions but, except in clearly appropriate cases, not with the periodic reporting obligations or expiration dates which could be attached to certificates. Instead, applicants could be required to inform the agency only if material changes in circumstances occur. Of course, the agency could be authorized to request information later if it reasonably suspected the conduct

⁵⁷³ The protection of provisional validity is available under the EEC clearance program, but only for "old" agreements. *See supra* note 322.

⁵⁷⁴ *See supra* note 220 and accompanying text.

⁵⁷⁵ *See supra* note 39 and accompanying text.

⁵⁷⁶ *See supra* notes 87 and 394 and accompanying text.

no longer qualified for clearance. As an incentive to the applicant to provide this information, the clearance could be limited to the facts as stated in the original application. By reducing the burden and delays involved with current clearance programs, many more businesses would be encouraged to apply.

In exchange for this less intensive and burdensome application process and reporting requirements, the recipient of this type of clearance could be given proportionately less protection than it would receive with certification. Unlike with certification, third parties could remain free to bring suits against cleared conduct in federal court for damages and/or an injunction. However, as under the Export Certification Program,⁵⁷⁷ the defendant could be protected to a greater extent than under the Business Review and Advisory Opinion Programs. For example, the plaintiff could be limited to actual damages and could be required to pay the defendant's litigation expenses if the defendant prevails. The issuing agency could also be required to submit a brief to the court explaining in detail the reasons for the clearance. Such protections would significantly deter frivolous and speculative litigation, and many more businesses might find the burden and expense of applying for clearance to be worthwhile.

With regard to government enforcement actions, the protection afforded by this level of clearance could be similar to that provided by certification. A favorable decision could protect the cleared conduct from challenge under federal and state antitrust laws by any antitrust agency until the issuing agency revoked the letter with adequate notice, and the business could be assured of protection from retroactive liability if it acted in good faith reliance on the clearance. Although this notice and protection from retroactive liability are now provided in practice under all the United States clearance programs,⁵⁷⁸ the business community might be less reluctant to apply for clearance if formal guarantees would be given in place of the current practice of the government emphasizing the lack of binding effect of business review letters and advisory opinions.⁵⁷⁹

Still other reasonable protections could be afforded applicants without endangering competition. As with the proposed certification clearance, applicants could be allowed to withdraw their application at any time and receive all information already submitted to the government. Moreover, a formal amendment procedure could allow businesses to re-

⁵⁷⁷ See *supra* notes 205-09 and accompanying text.

⁵⁷⁸ See *supra* notes 198-209 and accompanying text.

⁵⁷⁹ See *supra* note 207 and accompanying text.

quest alterations of their clearances to cover new activities or changed circumstances. Finally, some form of limited provisional validity could be provided until a final decision is reached.

c. Non-opposition clearances

A third possible type of clearance, similar to the proposed EEC non-opposition clearance,⁵⁸⁰ could be made available for certain types of activities which the government would like to encourage. Under this type of clearance, an applicant could fully disclose its activities and, if the agency failed to oppose the activity within a certain period of time, the conduct could be automatically cleared with a protection similar to that of the previously proposed business review letter/advisory opinion. Under this procedure, both the agency and applicants could be spared the burden involved with the issuance of an individual decision. A proposal somewhat similar to this has been advanced by the Justice Department with regard to research and development joint ventures. However, the Department would limit the protection of this clearance to a guarantee that a rule of reason would be employed if the action would ever be challenged in court and that damages would be actual, not treble.⁵⁸¹

3. A Standard, Detailed Application and Formal
Pre-Filing Counseling

As the Export Certification Program has demonstrated,⁵⁸² there are several advantages to providing businesses with a standard, detailed application and encouraging them to take advantage of the opportunity for formal pre-filing counseling. First, businesses could determine beforehand what would be required of them if they apply. By examining the application, businesses could discern what types of information would have to be furnished, and by talking with the agency before filing they could learn more about how their individual applications would be handled, including how much, if any, supplemental information would have to be provided. Second, pre-filing counseling would enable businesses to tailor their information submissions to their particular circumstances, thereby saving them time and expense in preparing the application.

A third advantage of a detailed application and pre-filing counseling is the information required by the application would serve not only as a guide for the agency's staff in its investigation but also as a form of protection for the applicant. The agency could be required to fully justify,

⁵⁸⁰ See *supra* notes 333-49 and accompanying text.

⁵⁸¹ See *supra* note 64.

⁵⁸² See *supra* notes 98-106 and accompanying text.

subject to judicial review, any information requested beyond that required by the application. Fourth, by utilizing pre-filing counseling, an applicant could determine whether it should apply at all. During the counseling session the potential applicant could discover that it has no cause for concern, or it could learn that it stands little or no chance of obtaining a clearance, or that it would have to make certain modifications to its business activity.

Finally, pre-filing counseling could offer applicants an indication as to whether they should risk implementing their conduct before receiving a final, definitive decision. Under the new clearance program proposed in this article, the agency could give some applicants a non-binding indication of the likelihood of receiving a favorable response and perhaps even confer limited provisional protection to the applicant if it appears a favorable decision is likely.

4. Deadlines

Establishing deadlines for responding to applications could encourage applications from those businesses for whom time is an important factor.⁵⁸³ Determining the maximum amount of time the agency would have to respond to requests for each type of clearance, however, could be a difficult task, because the need for a quick response must be balanced against the need of the agency for sufficient time to conduct a reasonable examination of the application, particularly in complex situations.⁵⁸⁴ Unrealistically short deadlines could lead to erroneous decisions which could harm competition and which could provide only temporary protection to the applicant until the mistake is corrected. The agency might also prefer to be overly cautious and deny applications or require modifications rather than risk clearing anticompetitive activities.⁵⁸⁵

One possible solution, currently employed in the Export Certification Program, could be to fix relatively short deadlines but provide the agency with the option, perhaps only with the applicant's consent, to extend the deadline in necessary cases.⁵⁸⁶ Another possibility could be to lengthen the deadlines but provide some sort of provisional protection to applicants which enact their proposals before a final decision is

⁵⁸³ Interviews with private antitrust lawyers, *supra* note 549.

⁵⁸⁴ Interviews with Department of Justice lawyers, *supra* note 38. *See also* Foer, *supra* note 15, at 5.

⁵⁸⁵ This worry is an alleged cause of conservatism under the Business Review and Advisory Opinion Programs even without the pressure of formal deadlines. *See supra* notes 184-89 and accompanying text.

⁵⁸⁶ *See supra* note 115.

reached.⁵⁸⁷ As under the Export Certification Program,⁵⁸⁸ the agency also could agree to accelerated deadlines in deserving cases.

5. Modifications

To further encourage businesses to utilize the program to relieve their antitrust uncertainty, the agency could formally commit itself to negotiating with applicants over removal of objectionable aspects of a proposed activity so that a clearance can be granted. This is already a regular but unofficial practice of the agencies under all of the existing clearance programs, although in the Business Review Program it is sometimes not done.⁵⁸⁹ Similarly, the agency could promise to negotiate modifications to on-going, previously cleared activity which no longer qualifies for clearance. Such an assurance could ease the concerns of businesses that a major investment might later have to be completely abandoned,⁵⁹⁰ but it would not preclude the possibility that businesses might have to accept modifications they oppose.

6. Confidentiality

To better insure protection of sensitive business information than under the Business Review and Advisory Opinion Programs,⁵⁹¹ the new program could follow the EEC's and Export Certification Program's example of withholding submitted information from the public, particularly the applicant's competitors, except in limited circumstances. Simply because a business is trying to comply voluntarily with the antitrust laws does not mean that its voluntarily submitted information should be disclosed to its competitors or possible plaintiffs. Similarly, third parties submitting information to aid the agency in evaluating an application should not be deterred from providing information by the risk of disclosure of their sensitive information.

As with the Export Certification Program,⁵⁹² the Freedom of Information Act could be made inapplicable. The information supplied would be withheld from public files. The program could also provide assurances that a protective order would be sought if the clearance is challenged in court and confidential information must be released.⁵⁹³

⁵⁸⁷ See *supra* note 573 and accompanying text.

⁵⁸⁸ See *supra* note 115.

⁵⁸⁹ See *supra* notes 310-11 and accompanying text.

⁵⁹⁰ Interviews with private antitrust lawyers, *supra* note 549.

⁵⁹¹ See *supra* notes 234-45 and accompanying text.

⁵⁹² See *supra* notes 241-51 and accompanying text.

⁵⁹³ See *supra* notes 251 and 253 and accompanying text.

7. Publicity

Since the rights of third parties may be affected by the issuance of a clearance, those parties could be informed of the government's intention to grant a clearance. However, the timing of the publicity could be linked to the potential impact that a particular level of clearance might have on those third parties' rights. Since third parties' rights to sue are significantly curtailed under the certification programs, those parties could be informed in advance of the agency's intention to certify the proposed activity and given an opportunity to comment. With regard to less binding levels of clearance, however, since the rights of third parties are not so prejudiced, the agency could withhold publicity until after it has issued the final decision, just as is the current practice under the Business Review and Advisory Opinion Programs.⁵⁹⁴ Unlike under those two programs, however, applicants could also be allowed to request a postponement of publicity in deserving circumstances, such as when publicity would alert a competitor who might then seize the business opportunity for itself before the applicant has the opportunity to implement its proposal.

B. Improving the EEC Clearance Program

Because of the unique features of the EEC antitrust system, the EEC clearance program already provides businesses with a considerable amount of antitrust certainty. A clearance from the Commission, and often simply an application for clearance, provides many businesses with sufficient protection from antitrust liability.⁵⁹⁵ However, the program does have several drawbacks which cause problems for many applicants, and those drawbacks could jeopardize the security of an increasing number of applicants if the number of private actions in member state courts rises in response to a greater availability of damages and injunctions in those courts against EEC antitrust law violations.⁵⁹⁶

The following suggested improvements were formulated under the following assumption: Commission competition officials, whose support is essential for the adoption of any changes in the present program, are reluctant to sponsor reforms which would require amending Regulation 17/62. They fear that the Council of Ministers would also implement changes in Regulation 17/62 to weaken the Commission's ability to enforce the antitrust laws.⁵⁹⁷ The antitrust laws of the EEC are not very

⁵⁹⁴ See *supra* notes 253-57 and accompanying text.

⁵⁹⁵ See *supra* note 430 and accompanying text.

⁵⁹⁶ Interviews with private antitrust lawyers, *supra* note 363.

⁵⁹⁷ Interviews with Commission officials, *supra* note 282.

popular in many member states,⁵⁹⁸ so inviting the Council to amend Regulation 17/62 could open the door to uninvited amendments. Therefore, the following proposals are improvements which the Commission itself could implement administratively without the need for Council action.

1. Improving Comfort Letters

The Commission's heavy reliance on comfort letters as a second, less binding level of clearance has been received favorably by the business community and antitrust bar⁵⁹⁹ and should be continued. Several improvements, however, would make comfort letters an even greater success. First, the Commission could announce an official policy of automatically re-opening a file closed by a comfort letter if the agreement or practice is challenged in a member state court.⁶⁰⁰ If the comfort letter failed to indicate the basis of the Commission's clearance decision, the Commission could inform the recipient or the member state court directly whether the comfort letter was based on the likelihood of a negative clearance or an individual exemption, or on the conformity of the agreement with the standards of a group exemption. Moreover, the Commission could indicate what further action it plans to take to assist the member state court.

If the letter was based on the likelihood that the Commission would have issued a formal negative clearance if it had processed the application for a formal decision, the Commission could simply submit a brief explaining its reasons for that position. Since member state courts may declare an agreement or practice to be legal under Articles 85(1) and 86 without the need for a Commission decision,⁶⁰¹ no formal negative clearance would be necessary. If the letter was based on the likelihood of an individual exemption, however, a formal Commission decision would be required, and the Commission could ask the member state court to suspend its proceedings to await an expedited Commission exemption decision. If the Commission no longer believed the agreement or practice qualified for clearance, it could explain its reasoning and urge the mem-

⁵⁹⁸ *Id.* Articles 85 and 86 of Regulation 17/62 are viewed by many businesses as impediments to cooperative ventures and agreements which, it is claimed, would enable community businesses to compete more effectively with large U.S. and Japanese businesses. Interviews with private antitrust lawyers, *supra* note 363.

⁵⁹⁹ Interviews with private antitrust lawyers, *supra* note 363. Since the business community is generally satisfied, the Commission intends to continue its heavy reliance on comfort letters. Interviews with Commission officials, *supra* note 282. *See also* Written Question No. 813/82, *supra* note 347.

⁶⁰⁰ The Commission already does this in many cases. Interviews with Commission officials, *supra* note 282.

⁶⁰¹ Only an exemption requires the intervention of the Commission. *Id.*

ber state court to take the defendant's good faith reliance on the comfort letter into account when assessing damages. This formal policy could replace the Commission's *ad hoc* approach to this problem,⁶⁰² and it could increase the business community's confidence in the value of the comfort letters.

Second, the Commission could formally announce to the business community the limited circumstances under which it would revoke a comfort letter in order to dispel the misconception that comfort letters provide scant protection to their recipients.⁶⁰³ In addition, when rescinding a comfort letter or taking action against an agreement or practice cleared by a comfort letter, the Commission could explain in detail the basis for its action. In cases where businesses relied in good faith on the comfort letter, the Commission could promise to forego fines.

Third, the Commission could improve and formalize the content of comfort letters.⁶⁰⁴ In addition to summarizing the facts upon which the letter is based, it could indicate whether the letter is founded on the conclusion that the conduct falls under a group exemption or would qualify for a negative clearance or individual exemption. It could also include a limited amount of legal reasoning in the letter to indicate to recipients, third parties and member state courts why the conduct was cleared and under what circumstances the clearance would be invalid. In order to reduce the time needed to draft legal reasoning for comfort letters, the Commission could develop standard language (boilerplate).⁶⁰⁵ The inclusion of legal analysis could also serve as a valuable indication to the business community of the Commission's enforcement policy and its interpretation of the antitrust laws.⁶⁰⁶

2. Expediting Formal Decisions

The Commission could take steps to reduce the "perfectionism" of its internal review procedures for draft exemptions and negative clearances⁶⁰⁷ and thereby reduce many of the problems which delays may cause.⁶⁰⁸ Influential officials in the Competition Directorate would like to see the following changes implemented:⁶⁰⁹ (1) a significant reduction

⁶⁰² See *supra* note 466 and accompanying text.

⁶⁰³ See *supra* notes 468-82 and accompanying text.

⁶⁰⁴ See *supra* notes 483-90 and accompanying text.

⁶⁰⁵ Commission officials already plan to do this for formal exemption decisions. See *infra* note 610 and accompanying text.

⁶⁰⁶ Interviews with private antitrust lawyers, *supra* note 363.

⁶⁰⁷ See *supra* notes 350-98 and accompanying text.

⁶⁰⁸ Interviews with Commission officials, *supra* note 282.

⁶⁰⁹ See *supra* notes 427-46 and accompanying text.

in the number of officials who must review draft decisions; (2) a revision of the procedures for review by the Advisory Committee, whereby draft decisions would be sent immediately to the individual members of the Committee who would have a limited time to submit comments, and a draft would only be considered by the Committee as a whole when one of the members has an objection; (3) immediate issuance of the decision in the operative language without waiting for translations into all official languages of the E.E.C., which would follow later;⁶¹⁰ (4) the development of standardized language (boilerplate) for decisions to eliminate the time- and resource-consuming process of negotiating the precise scope and wording of every negative clearance and exemption;⁶¹¹ and (5) a simplification of the procedure for revoking negative clearances and exemptions in order to induce Commission officials to grant exemptions and negative clearances with greater speed and less "perfectionism" since mistakes could be easily remedied. Under current procedures, the Commission has never revoked an exemption or negative clearance because of the enormous effort necessary to do so.⁶¹²

3. Intervening in Member State Litigation

If a notified agreement or practice is challenged in a member state court before the issuance of a formal decision or comfort letter, the Commission could make it an official policy to intervene in the action in much the same manner previously suggested for comfort letters.⁶¹³ The Commission could indicate to the court what action it plans to take on the application. It could ask the court to suspend its proceedings if more time is needed to investigate the application. In cases where the agreement or practice has already been investigated and in cases where it is clear and the agreement either is or is not legal, the Commission could express that view to the court, perhaps also providing a short supporting memorandum. If it appears that the agreement would qualify for an individual exemption, the Commission could ask the Court to suspend its proceedings while the Commission takes an expedited decision.

4. Deadlines

Many Commission officials would like to impose internal deadlines for issuing formal decisions and comfort letters in order to reduce the

⁶¹⁰ This reform would save weeks of time. Interviews with Commission officials, *supra* note 283.

⁶¹¹ This proposal is receiving serious consideration and could be implemented within the next five years. Interviews with Commission officials, *supra* note 282.

⁶¹² *Id.*

⁶¹³ See *supra* note 600 and accompanying text.

problems which delays now cause.⁶¹⁴ Deciding what time limits are appropriate, however, requires a realistic consideration of the feasibility of issuing decisions and comfort letters within a specified time period.⁶¹⁵ The reasonableness of a deadline in a particular case depends, among other things, on the Competition Directorate's workload at the time, the complexity of the matter, and the extent of the Commission's internal review procedures. Imposing unreasonably short deadlines could result in erroneous decisions harmful to competition and, as a result, could lead to cautious answers for fear that a positive answer might allow anti-competitive activities to receive clearance. As under the U.S. Export Certification Program, extensions could be available in complex cases,⁶¹⁶ and applicants could also be allowed to request abbreviated deadlines in deserving cases,⁶¹⁷ such as when an agreement or practice has been challenged in a member state court.

Prescribing deadlines could lead to the processing of applications in a faster, more efficient manner. Drafts of decisions and comfort letters would be reviewed more quickly. Indeed, some levels of review likely would have to be eliminated altogether. Potential applicants could be assured in most cases of having a decision within a reasonable period of time and would no longer be faced with the possibility of waiting years for a response. Assured of a response from the Commission within a reasonable period of time, member state courts hearing challenges to notified agreements and practices might be less reluctant to suspend their proceedings temporarily to await the outcome.

However, even before the expiration of the deadline, applicants could still be faced with problems while awaiting the final decision. If an

⁶¹⁴ Interviews with Commission officials, *supra* note 282. Establishing deadlines would have the additional consequence of forcing the Commission to respond to every application. Although this development might deter applicants who hope that the Commission will not take any action on their application, it would be more desirable from the competitive point of view since presently many possible anticompetitive agreements remain immune from Commission action and fines because the Commission is able to adopt only a few negative decisions or provisional decisions withdrawing fine immunity under its cumbersome internal procedures each year.

At present the Commission disposes slightly more applications than it receives each year. Interviews with Commission officials, *supra* note 282. However, many of the files disposed of are part of the enormous backlog of applications which originated in the 1960's, and each year many new applications go unanswered while the Commission processes the backlog of older applications. *Id.* Forced to answer all new applications in addition to working on the backlog would cause the Commission to either cut back on its efforts to reduce the backlog, to divert valuable resources from enforcement, to implement further group exemptions or to streamline its internal procedures so that it could handle more cases each year. Hopefully the Commission would choose the latter two options.

⁶¹⁵ See *supra* note 584 and accompanying text.

⁶¹⁶ See *supra* note 115.

⁶¹⁷ *Id.*

applicant would choose to implement the activity in the interim, it could risk sanctions in member state court litigation, as well as a lost or damaged investment if the Commission later either denies clearance or requires modifications of the proposed conduct. Nevertheless, the shorter the deadline, the more likely it would be that applicants could wait for a response before implementing the conduct. Similarly, member state courts would be more willing to suspend their proceedings pending the Commission's response to an application.

Many private lawyers and Commission officials also would like return to the use of provisional validity for new agreements.⁶¹⁸ However, that measure would require either Council legislation or a reversal by the Court of Justice of its decision removing provisional validity. With deadlines requiring the Commission to respond to applications within a short period of time, perhaps the Court of Justice no longer would find provisional validity to be objectionable.

5. A General Non-Opposition Exemption

Another possible reform, advocated by many people,⁶¹⁹ is an amendment of Regulation 17/62 and Article 85(2) of the EEC Treaty to allow an automatic exemption for a notified agreement after the lapse of a specified period of time.⁶²⁰ Under this proposal, the Commission would publish a summary of an application for an exemption in the Official Journal and invite interested third parties to submit their comments within thirty days. Unless the Commission would notify an applicant within ninety days of publication that there are serious doubts about the applicability of Article 85(3), the agreement would be exempt for a period of three years. As under its current practice,⁶²¹ the Commission also could be allowed to revoke the exemption via a formal decision if it later found the agreement to be anticompetitive and not deserving of an exemption, but liability would not be retroactive absent a showing of bad faith on the part of the applicant. This proposed reform could relieve the Commission of the burden of issuing individual exemptions for notified agreements which it believes clearly qualify for an exemption, and it would also spare applicants the delays and burdens now associated with the processing of applications.

⁶¹⁸ Interviews with private antitrust lawyers, *supra* note 363; interviews with Commission officials, *supra* note 282.

⁶¹⁹ *Id.*

⁶²⁰ House of Lords Report, *supra* note 386, at xvii (recommendation by the Select Committee), 4 (proposal of the Confederation of British Industry).

⁶²¹ *See supra* note 294.

6. Expanding the Rule of Reason Under Article 85(1)

Of all the potential alternatives for reforming the EEC clearance program, the call for increased use of the rule of reason is the most controversial. Many businesses and private lawyers strongly favor a significant expansion of the rule of reason under Article 85(1).⁶²² Many Commission officials, however, are adamantly opposed to such a significant expansion.⁶²³

Commission officials believe that many lawyers and member state courts are incapable of applying a rule of reason analysis correctly. Consequently, they fear that many significant anticompetitive activities would be implemented by businesses and enforced by the member state courts.⁶²⁴ Moreover, Commission officials fear that the various member state courts would interpret EEC antitrust law differently and hence impair the uniform interpretation of the antitrust laws.⁶²⁵ These Commission officials believe that the Commission has been able to avert these problems through its extensive control of the rule of reason analysis under Article 85(3).⁶²⁶

Commission officials also argue that an extensive use of a rule of reason under Article 85(1) would be inconsistent with the intention of the authors of the Treaty, who reserved that type of analysis for Article 85(3).⁶²⁷ Private lawyers, however, argue that it is not clear that the authors of the Treaty intended Article 85(1) to be interpreted so strictly.⁶²⁸ Commission officials further contend that such a reform would decrease antitrust certainty for the business community since in many cases businesses no longer would be sure whether an activity violates Article 85(1).⁶²⁹ Private lawyers argue, counter, that the uncertainty is simply shifted to the Article 85(3) test, which is highly unpredictable. Moreover, they point out that the Commission simply

⁶²² Interviews with private antitrust lawyers, *supra* note 363. See Van Bael, *supra* note 10, at 10; Korah, *supra* note 411, at 340; Forrester and Norall, *supra* note 411, at 38-39; Van Houtte, *supra* note 17, at 508-09.

⁶²³ Interviews with Commission officials, *supra* note 282.

⁶²⁴ Interviews with Commission officials, *supra* note 282. See Forrester and Norall, *supra* note 411, at 13.

⁶²⁵ Interviews with Commission officials, *supra* note 282. Private lawyers advocating a greater role for the rule of reason under Article 85(1) concede this would be a problem. Interviews with private antitrust lawyers, *supra* note 363; Forrester and Norall, *supra* note 411, at 44; Korah, *supra* note 24, at 15-16; Korah, *supra* note 411, at 339; Van Houtte, *supra* note 17, at 509. These lawyers argue, however, that such discrepancies in interpretation are preferable to the present unworkable system. *Id.*

⁶²⁶ Interviews with Commission officials, *supra* note 282.

⁶²⁷ *Id.*

⁶²⁸ Interviews with private antitrust lawyers, *supra* note 363. See Korah, *supra* note 24, at 37-38.

⁶²⁹ Interviews with Commission officials, *supra* note 282.

does not take many decisions under Article 85(3) and that, as a result, applicants have the unfortunate certainty that their agreements are illegal regardless of whether they are significantly anticompetitive or even pro-competitive.⁶³⁰

In response to the Commission's contentions, some antitrust lawyers concede that the system created by the Commission's strict interpretation of Article 85(1) would have many advantages if it actually worked. But they argue that since the Commission cannot issue enough clearance decisions within a reasonable period of time, some alternative is needed to solve the numerous problems caused by the Commission's inability to effectively use its exclusive authority under Article 85(3) to issue exemptions.⁶³¹ They further contend that those problems will worsen as the number of actions in member state courts increases.⁶³²

To the extent that the Commission adopts the other reforms previously suggested, the need for a significant expansion of the rule of reason under Article 85(1) would be mitigated. However, along with the other reforms, the Commission could continue to ease its strict interpretation of Article 85(1) in appropriate cases in order to decrease the number of clearly competitive agreements which have to be notified.⁶³³ To compensate for the resulting loss of control over the interpretation of the antitrust laws, the Commission could issue more official notices to assist businesses and member state courts in applying the rule of reason. The Commission could also make it a practice to submit comments to aid member state courts in litigation involving a rule of reason analysis under Article 85(1).

IV. CONCLUSION: POTENTIAL SIDE EFFECTS OF REFORM

If the foregoing proposed reforms of the United States and EEC clearance programs would be adopted, some private lawyers and government officials believe that a large number of businesses would be encouraged to apply for clearance. This development could create a significant new administrative burden on the antitrust agencies which currently do not have the manpower resources to handle the additional workload.⁶³⁴ They fear that even though clearance programs are in-

⁶³⁰ Interviews with private antitrust lawyers, *supra* note 363.

⁶³¹ *Id.*

⁶³² *Id.*

⁶³³ The Commission has gradually increased the role of the rule of reason under Article 85(1). See Van Houtte, *supra* note 17. One author has argued that the decisions of the Court of Justice do not preclude member state courts from using a rule of reason analysis under Article 85(1). See Korah, *supra* note 411, at 343-48.

⁶³⁴ Interviews in Brussels, London, and Washington, D.C. (Jan. 2-12, 23-24, 1984).

tended to help businesses reduce antitrust uncertainty, many businesses without serious antitrust concerns might apply simply as a precaution. As a result, an increased administrative burden on the antitrust agencies would impair their efforts both to process the applications of businesses facing serious uncertainty and to perform their vital antitrust enforcement function.

This concern overlooks the fact that the application for an antitrust clearance would still involve significant effort and expense, at least some delay, and other disadvantages for applicants. These are deterrents which would help minimize the number of "unnecessary" applications. Furthermore, many businesses are reluctant to deal with the government, and they likely would avoid applying for clearance in the absence of significant antitrust uncertainty. In any event, to the extent that applications do not raise serious antitrust concerns, they could be processed quickly and perhaps not answered at all if a non-opposition clearance is adopted.

Some private lawyers, in contrast, fear that even significant reforms of the existing programs would not overcome many businesses' aversion to the administrative burdens, expense, delay and government scrutiny involved in applying for an antitrust clearance.⁶³⁵ The reforms proposed in this paper are designed to relieve the unnecessary drawbacks which deter businesses with significant antitrust concerns from applying, while at the same time maintaining safeguards against anticompetitive activities being certified. A certain amount of expense and inconvenience for applicants are inherent in any clearance program, and each business must perform its own cost-benefit analysis in reaching its decision about whether or not to apply.

The reforms proposed in this paper would likely increase the number of applications under both the United States and EEC programs. By streamlining the programs as suggested, the workload created by the increased number of applications would be offset at least to some extent by increased efficiency. It is quite possible, however, that increased manpower resources would have to be devoted to the clearance programs. Hopefully, the United States Congress and the EEC Council of Ministers would supply funds to hire additional staff to administer the programs. Increasing antitrust certainty would justify the added expense since it would benefit individual businesses as well as the economy in general.⁶³⁶ It also would repay some of the added expenditures by saving the system

⁶³⁵ Interviews with private antitrust lawyers in Brussels, London and Washington, D.C. (Jan. 2-5, 23-26, 1984).

⁶³⁶ See *supra* note 7.

much time and resources by decreasing litigation.⁶³⁷

Finally, increasing the role of the clearance programs could impact on each system's reliance on case law as the major method of interpreting and developing the antitrust laws.⁶³⁸ This reliance on case law is particularly heavy in the United States. However, such a development could have the advantage of developing a more uniform and certain interpretation of the antitrust laws. Reliance on the judicial system, particularly one as extensive and dispersed as that of the United States, often results in very divergent and conflicting interpretations of the antitrust laws.⁶³⁹ By creating a unified clearance program administered by a single agency which can issue reasoned clearance decisions with limited binding effect, an influential and internally more consistent source of precedent would develop. The European Commission already provides this beneficial effect to a large extent through its leading role in the interpretation of the EEC antitrust laws. By issuing more well-reasoned clearance decisions, the Commission could strengthen that role.

⁶³⁷ *Id.*

⁶³⁸ *See supra* notes 9-11 and accompanying text.

⁶³⁹ *Id.*