Maybe Definitely – Definitely Maybe?
EC Competition Law – Is the Time Ripe for Reform?

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Summary

The aim of this article is to discuss whether the timing for the Commission's Proposal for reforming the implementation of Articles 81 and 82 of the EC Treaty is appropriate based on legal certainty considerations.

The Proposal suggests to decentralise the day-to-day application of the EC antitrust rules further than is the case today and to abolish the present notification system whereby undertakings can apply for exemptions pursuant to Article 81(3) and negative clearances. The article provides examples showing that presently, the answers to certain legal questions of EC competition rules are vague or contradictory, and that if the proposed reform were to be implemented in its present form, the undertakings would have to carry the full risk for compliance with the competition rules but without a simple or straightforward way of obtaining guidance or legally binding exemptions or negative clearances.

While recognising the need for a reform of the implementation system of the EC competition rules, the article argues that consistency and coherence in the understanding and application of the competition rules are a prerequisite to ensure legal certainty which, in turn, is a prerequisite for the implementation of the Commission's plans to decentralise EC competition law application. It is therefore suggested that the time is not yet ripe for the type of reform proposed by the Commission and that efforts should instead focus on creating the *basis* for such a reform by adopting clear guidelines and/or binding legislation that secure the legal certainty of the undertakings that have to operate under the EC competition law framework.

1. Introduction

Generally speaking, Article 81(1) of the EC Treaty prohibits agreements and concerted practices (hereinafter jointly referred to as "agreements"), which have as their object or effect the restriction of competition to the extent that the agreement appreciably affects trade between Member States. An agreement, which meets these criteria, is automatically void (i.e. it cannot be enforced), cfr. Article 81(2), unless the parties to the agreement have notified it to the European Commission and requested an individual exemption under Article 81(3) and the Commission grants the exemption because it finds that the agreement meets the conditions set out in Article 81(3).[1] Article 82 prohibits abuses of a dominant position within the EU or a significant part of it and which affects trade between Member States. There is no possibility for an exemption under Article 82. While the Commission as well as national competition authorities and courts can apply Articles 81(1) – (2) and Article 82, presently the Commission has the exclusive power to grant exemptions under Article 81(3).[2]

In September 2000, the European Commission presented a proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (hereinafter "the Proposal").[3] The Proposal constitutes a step in the reform process launched by the Commission in 1999 by its "White Paper on Modernisation of the Rules implementing Articles 85 and 86"[4] *[now Articles 81 and 82]* (hereinafter, the "1999 White Paper") and introduces fundamental changes to the present system of enforcement of the EC competition rules, in particular the two changes mentioned below:

Firstly, the obligation to notify an agreement or business practice to the Commission, which presently is a condition for obtaining an exemption under Article 81(3) of the EC Treaty, is proposed to be abolished. Consequently, agreements which satisfy the conditions of Article 81(3) are valid and enforceable *ab initio* with no administrative decision being required.[5] Secondly, the Proposal introduces a directly applicable exception system, whereby the Commission will no longer be exclusively empowered to grant exemptions under Article 81(3) of the EC Treaty.[6] Rather, national competition authorities and courts (hereinafter jointly referred to as "decision-making bodies") are empowered to decide whether the conditions of Article 81(3) are satisfied each time they apply 81(1).[7]

Put simply, if the Council adopts the Proposal in its present form, the result will be a decentralisation whereby the day-to-day application of EC competition law in relatively simple and straightforward cases will be transferred to the national decision-making bodies. The Commission's overall objective with the Proposal appears to be to liberate own resources in order to focus on complicated cases which significantly affect inter-Community trade.

If put into practice, the Proposal will have a significant impact on the day-to-day application and enforcement of the EC competition rules in general, and in particular on the role of the national decision-making bodies: Whereas national decision-making bodies have so far

relatively rarely found themselves confronted with the situation of having to apply the EC competition rules (due to the obligation to notify agreements in order to obtain exemptions and the Commission's monopoly to grant exemptions pursuant to Article 81(3) of the EC Treaty), in the future they will, in the overwhelming majority of cases, be the first instance faced with competition law disputes; and in such cases reviewed by the national courts, the role of the Commission will be reduced to the one of an *amicus curiae*, which means that it may guide the courts through difficult cases by submitting its opinion in written or oral form.[8] With regard to cases handled by the national competition authorities, the latter must consult the Commission before adopting certain types of decisions.[9] The main exceptions to this will be severe antitrust infringements (e.g. "hardcore cartels" and certain types of cooperation arrangements and joint ventures) with Community-wide significance, where the Commission will continue to play an important role.

While the Commission's proposal has received what can only be categorised as a "carefully positive" reception by most of the Member States following the Industry and Energy Council meeting on 5 December 2000, many mainly German and British observers have expressed serious concerns about the proposal and the risks it gives rise to with regard to a reduction of legal certainty for industry and trade.[10]

The authors to this article do not intend to review technical or procedural specificities of the Commission's reform plans; nor do we take a position whether further decentralisation is the most appropriate way forward. Rather, the aim of this article is to discuss whether the timing for such a reform is appropriate based on legal certainty considerations. For this purpose, we will provide examples showing that presently, the answers to certain legal questions of EC competition rules are vague or contradictory.

Under a decentralised application system of the EC antitrust rules, uncertainties in the interpretation of law would bear the danger that decision-making bodies, located in different Member States with different judicial traditions and with differing understanding of and emphasis on competition policy, might decide similar cases in dissimilar ways. The basis for this concern is present already today, and it will likely only increase in the future in connection with the enlargement of the EU. This would be contrary to one of the main principles established by the European Court of Justice (the "ECJ") on various occasions, namely the need for consistent and uniform application of the competition rules.[11]

While the Commission is well aware of this problem, it is, however, optimistic enough to suggest that the frequent application of the same law and policy will, in itself, promote consistency throughout the Single Market.[12]

2. The Article 234 Procedure – Preliminary Rulings

When the Commission refers to promoting consistency (and with it: legal certainty) through the frequent application of the EC competition rules, it appears to have the regime of preliminary rulings under Article 234 *[ex Article 177]* of the EC Treaty in mind.[13] Under Article 234, national courts can (and, in some cases, must) submit questions to the ECJ on the interpretation of Community legislation. The main purpose of this procedure is to provide national courts with guidance and thereby prevent them from ruling in ways which are contrary to the Treaties' provisions (and, in effect, the case law of the ECJ) in order to ensure uniform application of Community law throughout the European Union.

The Commission's optimism appears to be based on the assumption that national courts are well aware of Community law and procedures available to them, and that they will make use of them. At the same time, the Commission rejects fears that decentralisation of application and enforcement powers will increase the number of procedures under Article 234 of the EC Treaty. It takes the view that a potential significant increase of preliminary ruling proceedings will be only of an initial nature, as it expects that most litigation before the national courts will concern areas where the law has already been clearly established.[14]

The Reform Proposal will have a significant impact on the application of the EC competition rules by national competition authorities.

However, a review of the development of questions concerning competition cases brought before the ECJ under Article 234 of the EC Treaty gives another impression. The review shows a very uneven distribution of Article 234-cases among the Member States from which the cases originate as well as an almost steadily increasing number of Article 234 requests from the first preliminary rulings in the early 1960s till today.[15] This development is not surprising. National courts have increasingly requested guidance from the ECJ for a number of reasons: Firstly, the ECJ has consistently prescribed that the whole economic context of any given agreement has to be taken into consideration when assessing its lawfulness.[16] Secondly, new business models have been – and will continue to be – continuous evolving (e.g. the arrival of franchising and the coming of e-business). And thirdly, the application environment of the EC competition rules is constantly changing (e.g. through structural changes to the various markets due to mergers and acquisitions and through the accession of new Member States to the EU). The ECJ's rulings are, therefore, often not of a general nature but rather

guidelines to the inquiring national court on how to solve the specific case under review. For these reasons, it would appear doubtful whether the Commission can rely on the Article 234-procedure as an appropriate and efficient tool to create or increase legal certainty.

Another concern in this context is the length of time that is likely to pass from the commencement of a given business practice until a procedure before a national court is opened to clarify the lawfulness of the practice. And after this, it will normally take years until questions are referred to the ECJ and it eventually rules on them. Industry and independent lawyers have expressed fears that the Article 234-procedure is too lengthy, costly and tedious to ensure legal certainty.[17] In this context, it would appear appropriate to take a look across the Atlantic Ocean at the concerns expressed on the American antitrust enforcement: Recent surveys show that there is a big problem of efficiency in that parties, who are considering to bring legal action against a competitor or supplier, etc., for breach of the antitrust rules have to invest considerable time and money in determining the relevant market(s), the parties' market positions, and to demonstrate the other party's unlawful conduct; and all this, while still having to fear losing the trial. These factors tend to cause an unwillingness among violated parties to make full use of the legal antitrust instruments available to them and, instead, to encourage them to engage in unlawful business practices.[18] Adopting an enforcement system introducing what could be seen as similar conditions as those prevailing in the United States might cause similar difficulties in the EU.

3. Competition Policies and Guidelines

As noted above in the introduction, the Commission suggests that the frequent application of the same law and policy will promote consistency throughout the EU. However, when reviewing the Proposal, one could be led to believe that the Commission is not fully convinced of its own view that decentralised competition law application will lead to this, since it intends to shape its policies by issuing new guidelines and block exemptions.[19] While such measures should, normally, help to increase legal certainty, this will be the case only if such guidelines and block exemptions are precise, clear and easy-to-handle. In the following, we will briefly review past experiences and recent developments in three important areas to see, whether notices, block exemptions and jurisprudence provide a sufficient degree of legal certainty to overrule the above mentioned concerns about the timing of the proposed reform of the implementation of the EC competition rules.

Member States with different judicial traditions and with differing understanding of and emphasis on competition policy, might decide similar cases in dissimilar ways.

3.1 The de minimis *Doctrine*

Under the *de minimis* doctrine, agreements of minor importance should not be prohibited under Article 81 (1) and (2) of the EC Treaty, even if it is clear that they result in a restraint of competition. The main reason for this is that decision-making bodies should not be confronted with business practices which will affect competition and the parties in a given market only to a very limited extent; this reduces the administrative workload and allows the law enforcing authorities to focus on cases which are more likely to cause severe harm and damage. Another reason is that small and medium-sized undertakings should be able to strengthen their position which might, in turn, have positive effects on the economic situation in general.[20]

3.1.1 The non-binding character

In 1970, the Commission published the first Notice on Agreements of Minor Importance.[21] Since then, the Commission has – with irregular intervals – published updated versions of the notice, latest in 1997.[22] With these notices, the Commission has aimed at clarifying to contracting parties when an agreement would be regarded as fulfilling the *de minimis* criteria and, thereby, as falling beyond the scope of Articles 81 and 82 of the EC Treaty. The advantage for undertakings fulfilling these criteria is that they should normally not need to notify their agreements.

However, from the first notice until today, the notices have suffered from being of a general informative nature rather than a legally binding nature. This means that parties to an agreement or business practice can not fully rely on them. This lack of "trust" to the legal certainty of the notices has been further underlined by the jurisdiction of the ECJ; although the Court has never actually opposed the notice criteria *express verbis*, in several cases it has disregarded the market share criteria laid down in the *de minimis* notices. Until 1997, when the Commission adopted and published its latest Notice on Agreements of Minor Importance,[23] the market share threshold was set at 5% for both horizontal and vertical agreements. In its ruling in the joint appeal cases, *Pioneer vs. Commission* in 1983, the ECJ nevertheless found a market share of 3.18% enough for the agreement to affect trade between Member States appreciably because the parties were considered as market leaders.[24] From time-to-time, also the Commission has disregarded its own *de minimis* criteria. For example, in three cases from the 1980s, the Commission held that the agreements in question fell under Article 81 *[ex Article 85]* even though the parties to the agreements held only, respectively, 2, 3 and 4% of the relevant markets.[25]

3.1.2 Precision

The 1997-version of the Notice on Agreements of Minor Importance has been criticised[26] for its imprecise reference to "territorial protection" as a criteria for an agreement *not* to fall within the scope of the Notice. The Notice indicates that the applicability of Article 81(1) cannot be ruled out for vertical agreements which have as their object to confer "territorial protection" on the participating or third undertakings, and that this applies even in cases where the aggregate market shares held by all of the participating undertakings remain below the thresholds.[27]

While it is well established by both Commission and ECJ practice that absolute territorial protection resulting in the prevention of otherwise legal parallel im- and exports constitutes a violation of Article 81(1) of the EC Treaty, there also exist other, "softer" forms of territorial protection which are generally permitted, e.g. when an exclusive distribution agreement prohibits the parties "active sales" in territories outside of their own territory as long as the agreement does not prohibit "passive sales."[28]

An enforcement system introducing similar conditions as those prevailing in the U.S. might cause similar difficulties in the EU.

It could be argued that while the formulation used in the 1997 *de minimis* Notice is not directly misleading, it does not tell the whole "truth" either; and it does not, therefore, increase legal certainty for undertakings considering to enter into agreements containing some type of market exclusivity. The Commission will only succeed in its strive towards increased legal certainty, if it is precise in its guidelines. Otherwise it will be the undertakings who have to carry the full risk, a risk they would have no way of resolving easily, and that be whether they are parties to a possible agreement or a plaintiff or defendant in a court case about the legality of a given agreement. This risk might even increase if the parties' possibility to notify agreements is abolished as set out in the Proposal.[29]

3.1.3 Alternatives

But what are the alternatives? It has been suggested that the only way the Commission could bind itself, the ECJ and national decision-making bodies to the *de minimis* criteria would be to adopt a "Block Negative Clearance Regulation."[30] To do so, under Article 83 of the EC Treaty, the Commission would require a similar empowerment from the Council as it has received in order to prepare and adopt block exemption regulations pursuant to Article 81(3) of the EC Treaty.[31] Although *de minimis* rules can be found in a number of the existing block exemption regulations (*see* below about "safe harbour" clauses), the Council has so far not adopted (had the opportunity to adopt) any such general block negative clearance regulation or empowered the Commission to adopt such a regulation.

On the other hand, it could be argued that such a regulation would be too general to ensure efficient *and* sensible competition control: Block as well as individual exemptions are tied to the prerequisites stipulated in Article 81(3). Generally speaking, this means that an agreement containing restrictions of competition must produce technical or economic benefits, and that consumers must obtain a fair share of these benefits, for the agreement to be exempted. The assessment of whether a given agreement meets these prerequisites normally take all relevant factors into consideration: In the case of a notification for an individual exemption, the Commission (and the Courts) have to analyse not only the legal issues, but also the economic environment within which the agreement is entered. Also in the preparation of block exemptions, the Commission has analysed both the legal and economic effects which are typical for the type of agreements which are covered by the given block exemption. The problem with a block *de minimis* regulation would be that it would have to cover all, or nearly all, kinds of markets and types of business activities; and the practice of both the Commission and the ECJ has shown that in certain circumstances, such as in oligopolistic markets or where new products with high future market potential are concerned, it may be necessary to move away from the *de minimis* criteria and apply Article 81(1) and (2), thus prohibiting the agreement. In a number of such cases, where the parties had notified their agreements requesting both a negative clearance and an exemption, the Commission further decided not even to grant an exemption pursuant to Article 81(3).[32]

Hence, while it is not easy to find a solution that will bring about the desired balance between improving administrative efficiency and legal certainty, it would appear to us that abolishing the present notification system would only make the situation worse for the undertakings. So far, the parties to an agreement have been able to notify it to the Commission if they were in doubt whether the agreement produces appreciable effects on competition and trade between Member States. By doing this, they could obtain guidance and certainty from the Commission while, at the same time, reduce the risk of being fined for an inadverted violation of Article 81(1).[33] In the future, if the Commission's proposal comes into practice in its present form, the parties will have to carry the full risk without a simple or straightforward way of obtaining the required guidance.[34]

Having said this, there would appear, however, to be room for optimism: In its block exemption regulation for vertical agreements adopted in late 1999,[35] the

Commission introduced a so-called "safe harbour clause", whereby vertical agreements can escape the prohibition stipulated by Article 81(1) provided that the agreement does not contain "hardcore" restrictions (e.g. price fixing) and that the parties' aggregate market share does not exceed 30% of the relevant market.[36] The optimism is based on not only the contents and clearness of the "safe harbour clause", but in particular on the fact that it is included in a regulation which is legally binding for all decision-making bodies at both the national and EU level.

3.2 Per Se *Standards in EC Competition Law?*

Before going into the discussion whether *per se* standards exist in EC competition law and how this might affect the attainment of legal certainty, the general concept behind these rules should be briefly reviewed: The concept of *per se* infringements of antitrust legislation was developed through the antitrust practice in the United States as a classification of business conduct which is not open to the rule-of-reason balancing of the arguments. In other words, it was established through jurisprudence that certain agreements (e.g. price fixing and market division) would infringe the antitrust provisions of the Sherman Act *per se*, i.e. without an appraisal of the economic or legal circumstances of the given case being necessary to establish their illegality.

Initially the ECJ took a fundamentally different view. In *Société Technique Minière vs. Maschinenbau Ulm*, it is stated that "as Article 85(1) *[now Article 81(1)]* is based on an assessment of the effects of an agreement from two angles of economic evaluation *[i.e., the effects on trade between Member States and the effects on competition, ed. note]*, it cannot be interpreted as introducing any kind of advance judgement *[…]*. Therefore, an agreement whereby a producer entrusts the sale of his product in a given area to a sole distributor cannot automatically fall under the prohibition in Article 85(1) *[now Article 81(1)]*."[37]

However, in later rulings, the ECJ has shown that it is indeed ready to apply a *per se* standard. For example, in *Miller vs. Commission* the ECJ held that "by its *very nature*, a clause prohibiting exports constitutes a restriction on competition *[ed. emphasis]*". Furthermore, it stated that "the fact that the supplier is not strict in enforcing such prohibitions cannot establish that they had no effect since their very existence may create a visual and psychological background which satisfies customers and contributes to a more or less rigorous division of markets."[38] Even if the ECJ referred to "visual and psychological" effects, this comes very close to a *per se* prohibition: the Court clearly indicated that the mere *existence* of such clauses is sufficient, as they may create the necessary "visual and psychological background". If someone would ask why *per se* prohibitions exist in United States antitrust law, the arguments would certainly come very close to these.

An even clearer statement was given by the ECJ in *Ahlström and others vs. Commission*, saying "*by its nature*, a clause designed to prevent a buyer from reselling or exporting goods he has bought is liable to partition the markets *[ed. emphasis]*".[39] Even if one might be able to find differences in the wording of the statements (i.e. "the creation of a visual and psychological effects" vs. "by its nature"), it will still be hard even for competition law experts to explain any real difference in the meaning of the statements.[40] All in all, it would appear to be safe to say that Community policy on these questions is by no means obvious.

While recognising the need for a general reform of the implementation of the EC competition rules, it would appear to us that the time is not yet ripe for the type of reform proposed by the Commission.

The Proposal focuses on administrative reform through decentralisation of control powers and powers to grant exemptions pursuant to Article 81(3) of the EC Treaty. The proposal does not, however, provide any clear indications on how to solve uncertainties as those mentioned above, at least not in the short to medium term. There would therefore appear to be grounds to argue that before adopting the proposed regulation on reforming the implementation of Articles 81 and 82 of the EC Treaty, the EU legislative bodies should focus on adopting clear rules and guidelines through which contracting parties will be able to obtain guidance for secure self-assessment of potential transactions' compatibility with EC competition rules which might affect trade between and within several EU Member States, and which are not covered in a clear way in the specialised block exemption regulations or individual decisions adopted by the Commission or the ECJ.

3.3 The Rule of Reason

In its 1999 White Paper, the Commission clearly stated that it opposes the adoption of a test of reasonableness in Article 81(1) of the EC Treaty.[41] Much has been written on this issue, and especially British literature favours the consideration of pro- and anti-competitive effects under Article 81(1).[42] On the other hand, German authors strongly disapprove.[43] In that sense, the Commission's intention to take a clear position is very welcome. However, a closer view of the Commission's

approach gives an impression that its efforts in this regard have been made only half-heartedly. Admitting that it has adopted a rule-of-reason approach in some of its decisions, and that this approach was confirmed by the ECJ, the Commission states that "if a more systematic use were made under Article *[81(1)]* of an analysis of the pro- and anti-competitive aspects of a restrictive agreement, Article *[81(3)]* would be cast aside."[44]

The problem with the above formulation is the word "systematic". Does the Commission want to have "just a bit" of a rule-of-reason? Are the cases, where a rule-of-reason approach was taken, still valid? The confusion of an observer – or a legal advisor for an undertaking – can only grow when considering a Commission decision adopted after the publication of the 1999 White Paper: In Inntrepreneur and Spring, the Commission found that certain agreements would rather promote competition than they would contribute to market closure.[45] This is clearly a balancing of pro- and anti-competitive effects of the agreements in question, and the decision goes further than the approaches admitted by the Commission in its 1999 White Paper, all of which were related to intellectual and industrial property rights and market entry. With formulations like these, the Commission risks playing into the hands of its critics, i.e., making it clear that its approach to evaluate agreements is not clear, thus strengthening the arguments against introducing the proposed reform at this stage.

4. Conclusion

While recognising the need for a general reform of the implementation of the EC competition rules, it would appear to us that the time is not yet ripe for the type of reform proposed by the Commission. Rather, we believe that the Commission's efforts should focus on creating the *basis* for such a reform by adopting clear guidelines and/or binding legislation that secure the legal certainty of the undertakings that have to operate under the EC competition law framework.

We have argued that consistency and coherence in the understanding and application of the competition rules are a prerequisite to ensure legal certainty which, in turn, is a prerequisite for the implementation of the Commission's plans to decentralise EC competition law application: In the 1999 White Paper, the Commission states that national competition authorities and courts will face mainly disputes in areas were the law has been well established in the past 40 years.[46] While this might be true for a number of cases, it is very likely that these decision-making bodies will also be faced with many cases and questions, for which there is no clear jurisprudence. The cases and questions will originate not only from the uncertainties described above, but also from the continuous developments of market structures, business practices and technology, etc.

We question whether to rely on the Article 234 procedure (on preliminary rulings) is an appropriate and efficient way to resolve these problems. The length of time that will pass from the time a potential claimant is subjected to an anti-competitive agreement or practice till it is brought before the national court, questions to the ECJ are formulated and a reply is received, and the national court eventually rules on the issue – and the costs connected with this – will prevent all but the financially strongest from even initiating a case. Policy- and lawmakers should not be afraid of learning from the American experiences, which tell us that leaving it up to the parties in trials before the courts is, *summa summarum* not the best way to ensure efficient and effective control of fair competition and, thus, legal certainty. To this comes a number of additional factors, namely differences in political and legal traditions (including the willingness of national courts to request preliminary rulings from the ECJ) among not only the existing EU Member States but also the future new Member States.

The *de minimis* problem is by no means an issue of minor importance, and the question of rule-of-reason inquiries and *per se* standards will appear on a regular basis as long as parties are not sure which arguments are acceptable. While the introduction of "safe harbour" clauses into binding block exemption regulations is a big step in the right direction and the body of binding legislation generally grows, there is in our opinion still a way to go till a sufficient degree of legal certainty has been achieved which can create the basis for the implementation of a reform of the nature proposed by the Commission.

NOTES

1 Parties to an agreement, which might violate Article 81(1), do not need to notify the agreement, if it falls within the scope one of the so-called "block exemption regulations", *see* below in section 3.1.3.

2 *Cfr.* Article 4 of Council Regulation No. 17 of 1962, (OJ P 13/204 1962).

3 Com(2000) 582 – 27. 09. 2000; *see also* Press Release IP/00/1064 of 27. 09. 2000

4 OJ C 132/1 1999

5 *See supra* note 3 at p. 10.

6 Article 9 (1) of Regulation No. 17 (*see supra* note 2) provides that: "Subject to review of its decision by the Court of Justice, the Commission shall have the sole power to declare Article 85 (1) [*now 81 (1)*] inapplicable pursuant to Article 85 (3) [*now 81 (3)*] of the Treaty."

7 *See, supra* note 3 at p. 16.

8 Article 15 of the Proposal, *see, supra*, note 3.

9 Article 11 of the Proposal, *see, supra*, note 3.

10 *See e.g.* A. Deringer, Stellungnahme zum Weißbuch der Europäischen Kommission über die Modernisierung der Vorschriften zur Anwendung der Art. 85 und 86 Eg-Vertrag (Art. 81 und 82 EG), EuZW 2000, 5; W. Desaelers/S. Obst, Weißbuch zum Europäischen Kartellrecht – Rechtssicherheit ade?, EWS 2000, 41

11 *See e.g.* Case 14/68, *Wilhelm v. Germany*, [1969] ECR 1, para. 6; Case 231/83, *Cullet/Leclerc*, [1985] ECR 305, para. 16; Case C-67/91, *Asociación Española de Banca Privada and others*, [1992] ECR I-4785, para. 12; Case C-92/91, *Taillander*, [1993] ECR I-5383, para. 14; Case C-393/92,

Almelo, [1994] ECR I-1477, para. 23

[12] Commission Proposal for a Council Regulation, *supra* note 3, at p. 8.

[13] *See* Mario Monti, Effective Private Enforcement of EC Antitrust Law, speech given at the Sixth EU Competition Law and Policy Workshop, Florence, 1-2 June 2001. The paper is available at http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/01/258|0|RAPID&lg=EN

[14] See *supra*, note 12.

[15] In the 1960s, the Court gave on average one preliminary ruling on competition law issues per year. This number raised to an average of three in the seventies and six in the eighties per year. By the middle of the nineties, yearly more than a dozen of the judgements under the Art. 177-procedure *[now Article 234]* concerned questions on the competition rules. Source: C. Jones/M. van der Woude/X. Lewis *E.C. Competition Law Handbook* [ed. 1996/97]. While these figures are not an absolute yardstick, and even if the figures do not necessarily indicate an increase of referrals per country, they *do* constitute a good indicator that the number of cases brought before the ECJ most likely will continue to increase as the environment of the enforcement of EC competition law is subject to continuous change. For example, the number of Member States has increased from 6 to 15 and will continue to grow.

[16] Case 56/65, *Societé Technique Minière v. Maschinenbau Ulm*, [1966] ECR 235, 250

[17] *See* the Commission's Summary of the observations on the White Paper on Reform of Regulation 17, at p. 17; Competition DG Document, available at http://www.europa.eu.int/comm/competition/antitrust/others/wp_on_modernisation/summary_observations.html

[18] *See e.g.* Areeda, 54 Antitrust L. J. 27, 28, and Piraino, 47 Vand. L. Rev. 1753, 1760 *et seq.*

[19] *See*, *supra* note 3 at p. 8.

[20] *See* Commission notice on agreements of minor importance of 3 September, 1986, OJ 231/2 1986

[21] OJ C 64/1 1970

[22] OJ C 372/13 1997. It should be noted that in May 2001, the Commission published a draft new Notice on Agreements of Minor Importance, OJ C 149/18 2001. Since it is a very recent draft, for reasons of publication of this article, we have not been able to include it in our analysis. However, a preliminary review would indicate that the new draft notice provides only – if any – clarification of the issues mentioned later in this article.

[23] In the 1997 Notice, the *de minimis* criteria were simplified from including both turnover and market share thresholds to only include market share thresholds. The market share threshold for horizontal agreements remained at 5%, but for vertical agreements, it was increased to 10%. *See supra*, note 22, para 9.

[24] Cases 100 – 103/80, *Pioneer v. Commission*, [1983] ECR 1825.

[25] *Floral*, OJ L 39/57 1980; *Fire Insurance*, OJ L 35/20 1985; *Computerland*, OJ L 222/12 1987.

[26] *See* T. Jestaedt / T. Bergau, *Die neue Bagatellbekanntmachung der Kommission*, WuW 1998. 119, 121.

[27] Point 11 b of the 1997 Notice, *see supra*, note 22.

[28] *See e.g.* Article 3 d of Regulation 1983/83, OJ L 173/1 1983.

[29] *See supra* note 5 and below in section 3.1.3, *in fine*.

[30] M. Laurila, *The De Minimis Doctrine in EEC Competition Law: Agreements of Minor Importance*, [1993] 3 ECLR 97

[31] "Block exemption regulations" are directly applicable, i.e. they are directly enforceable before the national decision-making authorities without any further implementation measures being required. Such regulations identify clauses in certain types of agreements, which are generally considered to actually or potentially violate Article 81(1), but which nevertheless are considered to fulfil the criteria for exemption under Article 81(3). An agreement, which falls within the scope of a block exemption regulation, is automatically exempted, and the parties do therefore not need to notify it to the Commission to obtain a formal exemption decision.

[32] *See Floral*, OJ L 39/57 1980 and *Fire Insurance*, OJ L 35/20 1985. *Cfr. Computerland*, OJ L 222/12 1987, where the Commission granted an exemption.

[33] Article 15 (5) of Regulation No. 17 (*see supra*, note 2) stipulates, generally spoken, that parties who fully notify their agreement are protected from being fined.

[34] It could be argued that the parties will be able to obtain the desired guidance from the national competition authorities. While this is of course true for transactions with effects mainly within one of the EU Member States, the real problem arises where a transaction affects trade within or between several Member States. From whom should the parties concerned obtain guidance? In spite of the importance of this question, it will not be developed in this article, since the discussion would mainly be a repetition of the "One-Stop-Shopping"-discussion known from the Merger Control Regulation negotiations in the late 1970s and 1980s

[35] Commission Regulation No. 2790/1999 on the application of Article 81 (3) of the Treaty to categories of vertical agreements and concerted practices, OJ L336/21 1999.

[36] Article 3 of Commission Regulation No. 2790/1999, *see supra* note 35.

[37] *See* note 16, *supra*.

[38] Case 19/77, [1978] ECR 131 at para 7.

[39] Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, [1993] ECR I-1307 at para 176.

[40] The difference between these two statements seems to refer to the concepts of anti-competitive objectives and anti-competitive effects. A discussion of the differences between these two concepts could easily constitute a separate article (or two), and has therefore not been elaborated here.

[41] *See*, *supra*, note 4 at para.s 56 and 57.

[42] *See* Korah, The Rise and Fall of Provisional Validity – The Need for a Rule of Reason in EEC Antitrust, [1981] Northwestern Journal of International Law and Business, 3:320

[43] *See* note 10, *supra*.

[44] *See* note 4, *supra*, para 57.

[45] OJ 195/45 2000 at para 62.

[46] *See* note 4, *supra*, para 3. ❑