

Robert Schuman Centre for Advanced Studies

The Modernization of EC Antitrust Policy.
A Legal and Cultural Revolution

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Abstract

The White Paper on modernisation of EC antitrust policy suggests a radical departure from the existing system. According to Regulation No.17/62, agreements that fall under Article 81 (1), and are, therefore, prohibited, can only be exempted from this prohibition by the Commission, if they have been notified. Because of the Commission's exemption monopoly, Article 81 (3) has no direct effect. The White Paper proposes to abolish the existing system of notifications and the Commission's exemption monopoly. Instead, it suggests that Article 81 (3) should become directly effective, so that it can be applied also by national competition authorities and courts.

The White Paper raises a series of delicate legal and political issues that have been widely discussed. The present article presents these issues and examines them in depth.

The article shares the White Papers' conviction that a fundamental reform is needed, and that other options will not achieve the desired results. It agrees with the White Papers' objectives, and explains why the reform will not weaken the enforcement of EC antitrust rules. Contrary to the opinion of some critics, the reform is not incompatible with Article 81, and Article 81 (3) is capable of having direct effect.

With respect to legal security, the reform presents advantages and disadvantages. On the one hand, the abolition of the requirement of formal exemption decisions will increase legal security, as agreements will be valid if the conditions of Article 81 (3) are fulfilled. On the other hand, undertakings lose the possibility to request and obtain such decisions and their substitute, the so-called comfort letters. Is the Commission right to restrict severely the adoption of positive decisions in individual cases, recognising that the conditions of Article 81 (3) are fulfilled? Or should a system of voluntary notifications and requests for positive decisions (or an equivalent for the traditional comfort letters) be introduced? The article argues in favour of a less restrictive attitude than that taken by the Commission, though recognising that the existing system should not be re-introduced through the backdoor.

In spite of its pleading for radical decentralisation, the White Paper excludes positive decisions in individual cases taken by national competition authorities. It fears divergent national decisions, and the ensuing risks for the consistency of EC competition policy. However, the exclusion is hardly compatible with the concept of a network of competition authorities.

Radical decentralisation, leading to a considerable increase of authorities and courts applying Article 81 (3), will obviously give rise to differences in interpretation and application. The White Paper proposes a series of information, coordination and cooperation mechanisms to minimise these risks. The article agrees fundamentally with these suggestions, though they appear to be relatively “soft”. They may, however, be reinforced, in the light of practical experience, at a later stage.

The reform suggested by the White Paper will increase the responsibility of judges. The article does not share the doubts that judges are not qualified, or that judicial procedures are not adapted to handle the direct application of Article 81 (3). If additional reforms are needed, they can be introduced, again, at a later stage.

The White Paper underestimates, however, the difficulties for the accession candidates. These difficulties should be addressed through transitional arrangements.

INTRODUCTION

1. The White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty (the White Paper) of May 1999¹ is the most important policy paper the Commission has ever published in the more than 40 years of EC competition policy. It suggests a legal and cultural revolution in proposing a fundamental reorganisation of the existing responsibilities between the Commission, national antitrust authorities and national courts. The central piece of the reform is the abolition of the Commission's exclusive responsibility for granting exemptions according to Article 81 (3) of the EC Treaty. The Commission does not propose to share this responsibility with other, i. e. national, administrative antitrust authorities, like the Office of Fair Trading or the Bundeskartellamt. Instead, it suggests eliminating totally the requirement of any administrative exemption decision. It takes the view that Article 81 (3) should become directly effective², so that any administrative authority, court or tribunal can apply it. That is the legal side of the revolution.
2. At the same time, the White Paper breaks with the traditional belief that the exclusive responsibility of the Commission for granting exemptions is a sort of "natural" Commission monopoly. During 40 years, the Commission – and its Directorate General Competition (the famous DG IV³) - have defended the view that only a central EC authority could determine whether the conditions for an exemption are fulfilled. Article 81 (3) requires not only a careful determination of often highly complex economic facts. This paragraph demands also a delicate balancing and weighting of different, possibly contradictory elements, of arguments for and against a restrictive agreement. For this purpose, Article 81 (3) leaves a relatively large room for discretionary decision making. Until the adoption of the White Paper, the Commission, its DG IV and the vast majority of EC competition experts held the view that only the Commission is qualified to proceed with this balancing and weighting exercise. Even a sharing of responsibilities under Article 81 (3) with national antitrust authorities was considered to be dangerous and incompatible with the necessary coherence and consistency of EC

¹ OJ C 132, 12. 5. 1999, p. 1.

² The White Paper uses the terms "directly applicable" and "direct applicability". This paper will instead use throughout the text "directly effective" and "direct effect", except in passages quoted verbatim from the White Paper.

³ Throughout this text, the traditional designation "DG IV" has been maintained for reasons of convenience.

competition law and policy.⁴ In DG IV, the “natural” monopoly theory was an almost religious belief. It constituted for four decades DG IV’s main credo. Not to adhere to it was considered to be heresy and could lead to excommunication. A departure from this dogmatic position is the “cultural” side of the revolution initiated by the White Paper. It is, by the way, a convincing illustration that the widely held view according to which “Eurocrats” have only one main aim, i. e. to increase their own influence and power, is wrong.

THE ARCHITECTURE OF THE EC TREATY AND OF REGULATION NO. 17/62

3. Before examining the White Paper and its problems in more detail, it is useful to recall the architecture of the EC Treaty and of Regulation No. 17/62⁵, i. e. the major implementing regulation for Articles 81 (and 82).
4. Article 81 (1) prohibits “*all agreements between undertakings, ... 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...*” Article 81 (2) provides that “*any agreements ... prohibited pursuant to this Article shall be automatically void*”. Article 81 (3) states that “*the provisions of paragraph 1 may, however, be declared inapplicable in the case of any agreement ... which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not a) impose on the undertaking concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question*”.

⁴ I myself have pleaded repeatedly in favour of the maintaining the Commission’s monopoly; see in particular Ehlermann (1996), p. 93 – 95. My position was, however, based on the conviction that the time for a change was not yet ripe. This results clearly from the consideration that the movement towards a limitation of the Commission’s monopoly could start sooner in the area of vertical restraints, where a convergence of views would be easier to achieve, than in the field of horizontal restrictions of competition. In the forefront of my mind was the sharing the power of exemption with national competition authorities. But a more radical approach, i. e. the recognition of direct effect, was not excluded, as is shown by the reference to the territorial effects of decisions taken by a national judge (see p. 94).

⁵ Council Regulation No. 17 of 6 February 1962 (First Regulation implementing Articles 85 and 86 of the Treaty), OJ 35, 10.5.1962, p. 118 (special Edition 1959-62, p. 132).

5. It is remarkable that Article 81 (3) does not say *who* may declare the provisions of paragraph 1 to be inapplicable. Article 81 of the EC Treaty differs in this respect significantly from the corresponding article of the ECSC Treaty. Article 65 (4) ECSC Treaty specifies that “*the High Authority shall have sole jurisdiction, subject to the right to bring actions before the Court, to rule whether any such agreement ... is compatible with this Article*”. The attribution of the responsibility to adopt implementing rules for Article 81 – and its paragraph 3 in particular – is left to the Council. According to Article 83, it is the task of the Council “*to adopt any appropriate regulations or directives to give effect to the principles set out in Article 81 ...* “. Article 83 (2) states that these regulations or directives “*shall be designed in particular ... (b) to lay down detailed rules for the application of Article 81 (3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other*”. It is also noteworthy that Article 84 provides that “*until the entry into force of the provisions adopted in pursuance of Article 83, the authorities of the Member States shall rule on the admissibility of agreements ... in accordance with the law of their country and with the provisions of Article 81, in particular paragraph 3 ...*”. Until the entry into force of Regulation No. 17/62, the responsibility for granting exemptions under Article 81 (3) lay therefore with national authorities, and not with the Commission⁶.

6. It was Regulation No. 17/62 that established the Commission’s monopoly to apply Article 81 (3), and the corresponding requirement of prior notification of the agreements for which an exemption is requested. According to Article 9 (1) of Regulation No. 17/62, “*... the Commission shall have sole power to declare Article 81 (1) inapplicable pursuant o Article 81 (3) of the Treaty*”. No similar monopoly exists for the implementation of Article 81 (1). National competition authorities are allowed (according to Article 9 (3) of Regulation No. 17/62) to apply the provisions of this paragraph – possibly together with national competition law – as long as the Commission has not formally initiated an investigation procedure. The same is true for national courts. They are even obliged to apply Article 81 (1), as this provision has been recognised by the Court of Justice to be directly effective.⁷ In both respects, the EC Treaty differs from the ECSC Treaty which leaves no place for

⁶ The same is still true in those very limited areas for which the Council has not made use of Article 83, like air transport between the EU and third countries.

⁷ CJ, 30 January 1974, Case 127/73 BRT v. SABAM [1974] ECR 51, para. 15.

enforcement activities by national competition authorities nor by national courts, be it under ECSC or national law⁸.

7. The EC Treaty opens therefore more room for national application of EC competition rules and national competition law than the ECSC Treaty. The EC Treaty and Regulation No. 17/62 together establish, however, an unusual degree of centralisation if one compares the competition sector with other areas of Community law. As a general rule, national authorities apply Community law. The competition sector is the only one in which the Commission is entrusted with the application of Community rules to individual undertakings. Even more extraordinary is the existence of an implementation monopoly, like that for exemption decisions under Article 81 (3).
8. If and to what extent the EC Treaty requires a system of prior administrative authorisation decision will be examined shortly. At this stage, it is appropriate to note that Regulation No. 17/62 corresponded to the needs, but also to the concepts and perspectives of the early years of the EC. The EC was certainly intended to be a much less centralised system than the ECSC. However, the dominant legal and administrative culture of the EC of the “Six” was still rather centralist. France was clearly the politically dominant Member State. French views influenced heavily EC legislation and administration. French preoccupations about “uniformity” (and not only “coherence” or “consistency”) of the EC’s legal order were pervasive. In addition, there were hardly any administrative structures in the Member States that would have allowed an efficient decentralised application of EC competition law in general, and of Article 81 (3) in particular. Even if such structures had already been present, it would have been too risky to share the responsibility for exemption decisions with national authorities. During the first decades of the EC, there was no “competition culture” comparable to the one we have today. French planning concepts were opposed to Germany’s *Soziale Marktwirtschaft*. The presence and interference of the Member States in their respective economies were increasing, instead of decreasing. The promoters of an active industrial policy were in most Member States more influential than the advocates of a rigorous competition policy. The defenders of competition as a regulatory process, and competition policy as an indispensable instrument to defend this regulatory process, were therefore lucky to see the responsibility for exemption decisions attributed to the sole Commission.

⁸ Contrary to Articles 81 (1) and 82 EC Treaty, Articles 65 and 66 ECSC Treaty have no direct effect. See CJ, 13 April 1994, Case C-128/92 *Banks v. British Coal Corporation* [1994] ECR I-1209, para. 17 and 18.

THE CONSEQUENCES OF THE COMMISSION'S EXEMPTION MONOPOLY

9. The consequences of the entry into force of Regulation No. 17/62 are well known⁹. The Commission was swamped by more than 34 500 notifications, requesting negative clearances and/or exemptions according to Article 81 (3). In order to avoid a total administrative paralysis, the Commission adopted regulations exempting en bloc groups of (however narrowly defined) agreements, in particular of vertical restraints of competition. In addition, the Commission published notices and communications which signalled a de facto green light for certain types of agreements, like the successive “de minimis” notices. Finally, DG IV developed the informal instrument of so-called “comfort letters” which took largely the place of formal Commission decisions. Formal exemption decisions remained extremely rare¹⁰. During the last years, the average of such decisions has not exceeded 5 per year. In addition, DG IV was never able to eliminate totally the backlog that had built up since the first wave of notifications. Shortly before I arrived in DG IV, at the end of 1989, the statistics showed a backlog of 3 239 notifications that were waiting for some kind of formal or informal decision. 5 years later, at the end of 1994, a few months before I left DG IV, the backlog amounted still to 1052 notifications¹¹. Since 1994, the backlog has remained broadly the same¹².
10. During the first two decades, this situation was more or less accepted. DG IV's administrative difficulties were probably considered to be some kind of “teething problems”. However, the situation changed during the eighties. DG IV became the object of increasing criticism, both from a substantive and a procedural point of view. Substantive criticism focussed on legal formalism, particularly with respect to the appreciation of vertical agreements. Procedural criticism centred on the backlog, the length of procedures, insufficient transparency and motivation of comfort letters, as well as the lack of legal effects of such letters. In the beginning, this criticism was mainly external to the Commission. Progressively, it was

⁹ See for the following the detailed description of Goyder (1998), p. 34 et seq.

¹⁰ Forrester (1999) mentions a total of 222 decisions since the adoption of Regulation No.17/62. See his paper also for a short, but lively account of the existing system and its deficiencies.

¹¹ European Commission, XXIVth Report on Competition Policy 1994, p. 629, and p. 630 (for the preceding years).

¹² See the last published Competition Report: European Commission, XXVIIIth Report on Competition Policy 1998, p 399.

also voiced within the Commission's departments, in particular in DG IV itself.

11. With the beginning of the nineties, the criticism of DG IV's way of dealing with notifications under Article 81 (3) grew stronger and stronger. The positive experiences made under the new Merger Regulation¹³ seemed to prove that DG IV was perfectly capable of adopting well motivated, formal decisions in complicated cases within very short deadlines. If the Commission was not able to exercise satisfactorily its responsibilities under its monopoly for exemption decisions, established by Regulation No. 17/62, the monopoly should be reduced in scope (through a more realistic interpretation of Article 81 (1)), or shared with national competition authorities. A sharing of the monopoly was requested, in particular, by the *Bundeskartellamt* and the German government¹⁴. In support of their request, they invoked the subsidiarity principle¹⁵ that the Treaty of Maastricht had just elevated to the rank of one of the principles of the EC Treaty. The more radical solution, i. e. the total abolishment of any prior administrative exemption decision under Article 81 (3), was, however, rarely suggested and discussed¹⁶.
12. Until the adoption of the White Paper, the Commission's reactions to suggestions to tinker with its exemption monopoly were totally negative. The Commission favoured the decentralised application of Article 81 (1), first by adopting the Notice on cooperation with national courts of February 1993¹⁷ and later by publishing the Notice on cooperation with national competition authorities of October 1997¹⁸. However, both notices take the exemption monopoly of the Commission for granted. Both notices deal therefore with the decentralised treatment of complaints, not of notifications. Both notices take care not to jeopardise the Commission's sole responsibility to grant exemptions under Article 81 (3). This is particularly apparent in the Notice on cooperation with national competition authorities, which emphasises conspicuously the obligations that flow from the Commission's exemption monopoly in case of complaints against notified agreements. That notifications can and will

¹³ Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ L 395, 30.12.1989, p.1.

¹⁴ For detailed references see Ehlermann (1996), p. 90.

¹⁵ Article 5 EC Treaty.

¹⁶ An exception is Kon (1982), p. 541 – 56, opposed by Steindorff (1983), p. 125 - 130.

¹⁷ Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty, OJ C 39, 13. 2. 1993, p.6.

¹⁸ Notice on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Articles 85 or 86 of the EC Treaty, OJ C 313, 15. 10. 1997, p 3.

be made to prevent negative court judgements, or administrative decisions, is evident. If their dilatory character is obvious, it is relatively easy to justify that DG IV puts them aside, and does not initiate a formal investigation procedure, in order to avoid the blocking effect of such a decision. It is much more difficult to argue that the Commission is allowed to remain passive if the dilatory character of the notification is not apparent. Is it legitimate to establish some sort of public interest doctrine in the treatment of notifications, following the example of the treatment of complaints, according to the *Automec II* jurisprudence¹⁹? Is the Commission entitled to delay deliberately the initiation of a formal procedure for the examination of notifications that probably do not lead to positive exemption decisions, thus facilitating prohibition decisions by national competition authorities? I believe that such a doctrine can be justified²⁰. However, the risk that the Court of Justice will not accept it, can hardly be denied. The retention of the Commission's exemption monopoly therefore constitutes a serious limit to the ability of national competition authorities to pursue actively even apparently well-founded complaints.

13. In view of the – at least implicit - defence of the Commission's sole responsibility to grant exemptions under Article 81(3) in the Notice on cooperation with national competition authorities of October 1997, it is not surprising that also the Green Paper on Vertical Restraints of January 1997²¹ was still based on the assumption that the Commission's monopoly will remain in place.
14. The White Paper was adopted by the Commission at the end of April 1999. It might have been adopted even earlier, if the Santer Commission had not decided to resign in March 1999. The White Paper precedes thus Council Regulation (EC) 1215/1999 of June 1999 authorising the Commission to adopt a broad block exemption that implements the conclusions of the discussions triggered by the Green Paper on Vertical

¹⁹ CFI, 18 February 1992, Case T-24/90 *Automec v. Commission* [1992] ECR II-2223, in particular paras. 77 and 87.

²⁰ See Ehlermann (1996), p. 93. See also Klimisch and Krueger (1999), p. 470/471.

²¹ Green Paper on Vertical Restraints in EC Competition Policy, COM (96) 721. See in particular the following passage: "The current system promotes consistency and uniform application of Article 85 throughout the Community for vertical restraints. Regulation 17 confers on the Commission the function of central antitrust authority, granting it the sole power to declare Article 85 (1) inapplicable by granting an exemption pursuant to Article 85 (3) ... In this way, decisions which involve complex evaluations of economic matters or balancing competition policy against other policies of the Community and which may have far-reaching consequences throughout the Community are taken by competent Community-level authorities"(para. 191).

Restraints²². The White Paper precedes even more the Commission's Regulation (EC) No. 2790/199/1999 of 22 December 1999 which contains the new block exemption, adopted on the basis of the Council's prior authorisation²³.

15. At first sight, this procedure is surprising. The Notice on cooperation with national competition authorities, published in October 1997, is relatively recent. Experiences under this Notice are therefore still limited. The block exemption regulation for vertical restraints will only be applied from 1 June 2000²⁴. They will however lead to a significant reduction of notifications. Why then the unusual precipitation in publishing the White Paper in May 1999?
16. The explanation lies of course in the "window of opportunity" which was offered by the last months of stewardship of Karel van Miert as Member of the Commission responsible for competition policy. During his 6 ½ years as EU Competition Czar", he had obtained many spectacular decisions in individual cases, the most spectacular one being probably the famous Boeing decision²⁵! The White Paper is the corresponding climax in advancing the institutional framework for EC competition policy. Its legislative implementation might be equal in importance to the Merger Regulation, adopted at the end of 1989²⁶. Negotiations on the Merger Regulation took 16 years. It is to be expected that the White Paper's suggestions will be transformed much faster into law.

THE WHITE PAPER

The Need for Reform

17. While the timing of the White Paper might appear surprising, the fundamental reasons for the initiative are not²⁷. The main reason is of course the dissatisfaction with the existing situation. DG IV's rare resources are absorbed by the examination of notifications and requests

²² Council Regulation (EC) No. 1215/1999 of 10 June 1999 amending Regulation No. 19/65/EEC on the application of Article 81 (3) of the Treaty to certain categories of agreements and concerted practices, OJ L 148 of 15. 6. 1999, p. 1.

²³ Commission Regulation (EC) No. 2790/1999 on the application of Article 81 (3) of the Treaty to categories of vertical agreements and concerted practices, OJ L 336, 29. 12. 1999, p. 21 – 25.

²⁴ See Article 13 of Commission Regulation (EC) No. 2790/1999.

²⁵ Commission Decision M 877 Boeing/McDonnell Douglas, OJ L 336 of 8.12.1997, p. 16.

²⁶ See footnote 13 above.

²⁷ See for the following White Paper, Introduction, paras. 1-9.

for exemption, instead of being devoted to the investigation of complaints and the launching and pursuit of ex officio procedures. Compared with the former, the latter are considered to be much more important for the effective protection of the competition in the EU, and for ensuring the respect of EC competition rules²⁸.

18. In addition, the conditions that not only justified, but even required the Commission's exemption monopoly in 1962, have changed profoundly: The White Paper is right to emphasise that the Commission has developed a comprehensive competition policy: that the Commission and the Court of Justice have established abundant case law, basic principles and well defined details; that Member States have adopted national competition laws and set up specialised authorities to implement them²⁹. According to the White Paper, these national competition policies "*form part of a coherent whole with the Community system*"³⁰. In addition, the overall context of EC competition policy is fundamentally different. The EU has grown from the original 6 to 15 Member States; its population has increased from 170 to 380 million inhabitants. Enlargement might lead to more than 25 Member States with more than 500 million people. Economic and monetary union will further competitive pressures, but, according to the White Paper, these pressures might also induce operators to take a protectionist attitude, compensating for their lack of competitiveness. Finally, globalisation will present new challenges for competition authorities, if markets are to be kept open, and competitive structures are to be preserved.

The Options

19. Before setting out the new approach, suggested by the Commission, the White Paper examines a series of options put forward to improve the system of prior administrative authorisation. None of these options is considered to be appropriate to solve the existing problems.

Simplifying the Exemption Procedure

20. It is generally recognised that one of the reasons for the unsatisfactory function of the existing system of prior administrative authorisations is the complexity of the procedures leading to formal Commission exemption decisions. It is, therefore, logical to examine the question

²⁸ Schaub/Dohms (1999), p. 1056.

²⁹ Sceptical about the the existence of a solid competition culture throughout the EU Moeschel (1999), p. 510/511; Monopolkommission (1999), para. 53/54.

³⁰ White Paper, para 4.

whether procedural simplifications could eliminate the current problems, or, at least, reduce them to such an extent that the proposed major reform becomes superfluous.

21. The White Paper examines some of these measures (like a reduction of languages, a simplification of Advisory Committee consultation procedures, and a generalisation of the so-called opposition procedure). It considers, however, that these measures would not lead to the desired results. At best, they would effectively improve the exemption procedure, giving undertakings an incentive for making even more notifications, thus continuing to oblige rare Commission staff resources to handle cases which are less useful than complaints and *ex officio* procedures, and standing in the way of increased decentralisation³¹.
22. Defenders of the system of prior administrative exemption do not agree with the White Paper. They point to the limited number of notifications received annually by the Commission, the probable effect of the recent reforms for vertical restraints (which will reduce this number even further), and the possibility of additional reforms (like a reduction of the existing information requirements, a better use of human resources within DG IV, and a reinforcement of its staff by the Commission)³².
23. It is true that the annual average of notifications looks rather manageable, and that, in addition, the recent measures for vertical restraints will lessen the pre-existing need for exemption requests. It is, however, likely that, today, a great number of agreements, which would still need an exemption, is not notified³³. Every enlargement will increase this number. Purely administrative, procedural reforms will not be able to handle these notifications efficiently. Over the last 10 years, the Commission has largely exhausted the potential of this type of reforms.

³¹ White Paper, para. 66-68. See also Schaub/Dohms (1999), p. 1057, in particular with respect to the objections against a larger use of the opposition procedure.

³² Austrian Government (1999); German Government (1999); Moeschel (1999), p. 511/512; Monopolkommission, paras. 57- 63, 66/67; Wolf (1999). As a general rule, references will only be made to critical comments and not to all those who agree, explicitly or implicitly, with the position expressed in the White Paper. References in this paper may, therefore, not reflect correctly the degree of agreement with the suggestions of the Commission.

³³ According to Siragusa (1999), agreements are notified only when they involve considerable investments and, in the absence of clear guidance by case law or Commission practice, there are serious doubts as to their compatibility with Article 81. Sceptical about this view Hawk (2000). Forrester (1999) notes that the best reason for notifying is not to avoid fines, but to obtain a tactical advantage in the event that the other contracting party chooses to try to evade its contractual obligations. Thus, filing a notification is a means of attaining the higher moral ground in the event that a controversy arises.

24. Moreover, there is the so-called backlog of old cases. It is sometimes asserted that the Commission could eliminate this backlog through one single major effort³⁴. I do not share this point of view. It is true that during the first years of the nineties, the existing backlog was substantially reduced³⁵. However, the methods used were not all “orthodox”. The remaining cases were and are difficult. And nothing guaranties that a reduced or even eliminated backlog might not increase or come back again in the future.
25. Among the suggestions put forward by the German Monopolkommission, there is one that seems to me to be important, though not very helpful in the context of improvements of the existing notification and exemption system. The Monopolkommission pleads for larger possibilities to enable the Member of the Commission responsible for competition to act on behalf of the whole Commission³⁶. In view of the excessively restrictive jurisprudence of the Court of Justice, I have already advocated in the past to use one of the Intergovernmental Conferences to amend the Treaty in this direction³⁷. It is regrettable that the recent contribution of the Commission to the next Intergovernmental Conference does not make any reference to this problem (which is of course not limited to competition policy, but which extends also to other areas of Commission responsibility)³⁸.

Reducing the Need for Prior Notification

26. The number of notifications depends, i. a., on the advantages attached to notifications (or the corresponding disadvantages of non-notification). One of the traditional disadvantages of non-notification results from the prohibition to grant an exemption for a period prior to the date of notification. It is, therefore, not surprising that the White Paper discusses, as one of the options avoiding the suggested radical reform, the potential of abolishing, totally or in part, this prohibition. However, it discards this option, as it would not have any influence on the need for exemption

³⁴ Moeschel (1999), p.511; Monopolkommission (1999), no. 58.

³⁵ See paragraph 9.

³⁶ Monopolkommission (1999) para. 63. See also Siragusa (1999). A larger delegation of powers by the Commission to the Member responsible for competition policy would help if the Commission itself (i. e. collegiate decision-making) were one of the important bottlenecks within the existing procedures. That is, however, not the case.

³⁷ Ehlermann (1995), p. 483/484.

³⁸ European Commission, “Adapting the institutions to make a success of enlargement: Commission opinion on the reform of the institutions of the European Union” of 26 January 2000, COM (2000) 34 final.

decisions in order to legalise an agreement that falls under Article 81 (1)³⁹.

27. The argument put forward by the White Paper is correct. The fundamental issue is not the timing of notifications and requests for exemptions, but the objective need to obtain a formal Commission decision declaring Article 81 (1) to be inapplicable. What is at stake is the principle of prior administrative authorisation, and not the moment at which this authorisation is asked for.

Interpreting Restrictively Article 81 (1)

28. The need for exemption decisions depends on the scope of Article 81(1). If this scope is broad, i.e. covering a large number of agreements, the need for exemption decisions is also great. If, on the contrary, this scope is narrow, the number of exemption decision will decrease accordingly.
29. The scope of Article 81 (1) depends essentially on two elements: first, the interpretation of the terms “*restriction of competition*”, and, second, whether the agreement “*may affect trade between Member States*”.
30. It is generally considered that, in the past, in spite of repeated indications from the EC courts in Luxembourg, the Commission has interpreted the notion of “restriction of competition” too broadly. Already since a couple of years, the Commission has indicated that it accepts this criticism. It has repeatedly stated that it is determined to interpret the notion of “restriction of competition” in a less formalistic (legalistic) way, in giving henceforth greater weight to economic reality. The new approach to vertical restraints is a clear illustration of this determination. The White Paper confirms this position⁴⁰.
31. Some advocates of a narrower interpretation of the notion of “restriction of competition” go, however, further. They propose to undertake *all* the balancing of the pro- and anti-competitive *economic* aspects of agreements under Article 81 (1). For the defenders of this thesis, Article 81 (1), taken by itself, requires an *economic* “rule of reason” test. If the pro-competitive aspects prevail, the agreement does not fall under Article 81 (1), so that an exemption decision under Article 81 (3) is not necessary. Only if the anti-competitive aspects predominate, recourse to Article 81 (3) is necessary. According to the advocates of this approach,

³⁹ White Paper, para. 63-65. See also Schaub/Dohms (1999), p. 1057/1058. In favour of this option Austrian Government (1999).

⁴⁰ White Paper, para 57.

Article 81 (3) allows to take into account non-economic objectives and values, like the environment, employment, industrial policy etc⁴¹.

32. The White Paper rejects this approach. It considers 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... It would at the very least be paradoxical [to do this] when that provision in fact contains all the elements of a “rule of reason”. It would moreover be dangerous if modernisation of the competition rules were to be based on developments in decision-making practice, subject to such developments being upheld by the Community Courts. Any such approach would mean that modernisation was contingent upon the cases submitted to the Commission and could take many years. Lastly, this option would run the risk of diverting Article 81 (3) from its purpose, which is to provide a legal framework for the economic assessment of restrictive practices and not to allow application of the competition rules to be set aside because of political considerations*”⁴².
33. The quoted passage is of considerable significance. It confirms that, for the Commission, only a certain part of the balancing of the pro- and anti-competitive *economic* aspects of an agreement can be undertaken under Article 81 (1); the rest has to be done under Article 81 (3)⁴³. Even more important is the refusal of the Commission to stretch Article 81 (3) beyond its limits, which are “*to provide for a legal framework for an economic assessment of restrictive agreements and not to allow application of the competition rules to be set aside because of political considerations*”⁴⁴. It would probably be exaggerated to assume that, according to the Commission, non-economic considerations are to be totally excluded from the balancing test required by Article 81 (3). Such an interpretation would hardly be compatible with the Treaty, the Court of Justice’s jurisprudence and the Commission’s own practice. However, the quoted passage is a clear indication that non-competition oriented, political considerations should not be determinative for the assessment under Article 81 (3). I fully subscribe to this approach.
34. The quoted passage also indicates that, in the context of the modernisation debate, the Commission has a clear preference for a legislative solution, i.e. a regulation adopted by the Council, instead of introducing changes

⁴¹ See in particular Wesseling (1999), p.422/423.

⁴² White Paper, para. 57.

⁴³ Expressly endorsed by Portuguese Government (1999).

⁴⁴ White Paper, para. 57.

progressively through individual decisions, which might – or might not - be reviewed by the EC Courts. The legislative procedure has the advantage of speed, clarity and certainty, provided, of course, that the judges in Luxembourg do not consider the regulation to be incompatible with the EC Treaty, in case its legality is challenged either directly or indirectly. Once again, I share the approach of the Commission. Undertakings and their legal advisors should know the new rules as rapidly and clearly as possible. They should not depend on the vagaries of individual decision making in Brussels and Luxembourg.

35. As mentioned earlier, the scope of Article 81 (1) depends also on whether an agreement “*may affect trade between Member States*”. This Court of Justice has traditionally interpreted this requirement in a rather broad way. Some authors argue that this interpretation should be revised and replaced by a narrower approach to what affects “interstate” trade⁴⁵. The consequences of such a narrower approach would, however, go much further than reducing the need to have recourse to Article 81 (3). A re-interpretation of the effects on trade between Member States would displace the borderline between Article 81 (and 82), on the one hand, and similar provisions in Member States competition law, on the other. The reach of EC rules would shrink, while the potential scope of national competition law would grow correspondingly. A re-interpretation of the “interstate trade” requirement is, therefore, advocated in particular by those who favour an extension of the scope of Member States competition laws. In support of their approach, they invoke the principle of subsidiarity, enshrined in Article 5 of the EC Treaty.
36. It is remarkable that the White Paper does not even mention the “effect on trade between Member State” element of Article 81 (1). It refuses implicitly to reconsider the interpretation of this additional requirement. This refusal is fully justified. The competition rules of the EC Treaty are part of the fundamental legal structure underlying the internal market. This structure would be weakened if their scope of application would be reduced, and if, as a consequence, national competition statutes, which differ among themselves, would fill the resulting gap. The subsidiarity principle of Article 5 of the EC Treaty does not require to re-interpret substantive Treaty rules, and, in particular, those guaranteeing competition within the internal market.

⁴⁵ Wesseling (1997), p. 95 – 97; Wesseling (1997), 47 - 54.

Sharing the Application of Article 81 (3) with National Competition Authorities

37. The fourth and last option which the White Paper examines (before it turns to its preferred solution, i. e. the direct effect of Article 81 (3)) consists of maintaining the requirement of prior administrative authorisation, but sharing the responsibility of granting such authorisations with the national competition authorities. The White Paper discards this option for fundamentally two reasons⁴⁶.
38. The first has become apparent already in the discussion of the first option. The Commission is not really interested in a different (and perhaps more efficient) allocation of notifications. The motive lies in its conviction that the examination of notifications does not contribute sufficiently to an effective enforcement of Article 81, whoever may be in charge of this examination⁴⁷.
39. The second argument is even more fundamental. It results from the perceived dangers of positive exemption decisions granted by different national competition authorities. This fear is only expressed once and almost “en passant”. It appears, however, clearly in the penultimate sentence of the section on decentralisation. This section reads as follows: *“If the national authorities were to apply Community law and had the power to adopt constitutive exemption decisions, there would be a major risk to the uniform application of Community law, particularly in the event of multiple notifications being submitted to different national authorities”*⁴⁸.
40. Before reaching this conclusion, the White Paper examines a series of problems, like the appropriate criterion for the distribution of notifications among the Commission, national competition authorities, and among these authorities; the limited territorial effect of exemption decisions adopted by such authorities; the need to introduce in all national competition statutes a notification requirement; the difficulties for future new Member States.
41. However, none of these problems seems to be technically insurmountable. To examine the items already mentioned in reversed order: The difficulties for future new Member States will be greater under a system of direct effect than under the regime of prior administrative

⁴⁶ See for the following White Paper, paras. 58 – 62.

⁴⁷ White Paper, para. 61; Schaub/Dohms (1999), p. 1056. For a more detailed discussion see paragraphs 70 and 71.

⁴⁸ White Paper, para. 62; Schaub/Dohms (1999), p. 1058/1059.

authorisation, as the first involves a much greater number of actors (administrators *and* judges) than the second (only administrators)⁴⁹. Obliging all Member States to introduce a notification system is, at least from an EC law point of view, a smaller step than to abandon the existing exemption requirement altogether. In addition, such an obligation would logically have to be accompanied by a legally binding provision requesting all Member States to enable their competition authorities to apply directly Article 81 (1) (and Article 82). It is surprising that the White Paper does not expressly foresee the adoption of such a provision.

42. With respect to the limited territorial reach of national administrative acts: It is true that the effects of exemption decisions taken by a competition authority of a Member State would normally be limited to the territory of this State. However, I do not see why the Council, acting under Article 83, could not extend these effects to the territory of the whole EU. In doing so, the Council would simply apply, in the area of competition law, a principle that has widely been used in internal market directives. It is, in practice, the same principle which underlies the mutual recognition of administrative authorisations, granted by one Member State, to exercise a certain commercial activity, for instance to operate a bank or as an insurance company. It is, therefore, neither necessary to attribute the national competition authority's decision to the Commission, nor to follow the road of a convention negotiated and concluded among Member States and leading to a mechanism of mutual recognition⁵⁰.
43. Remains the problem of distribution of notifications among the Commission and national competition authorities, as well as among these authorities. It is true that the centre of gravity criterion, advocated in particular by the Bundeskartellamt⁵¹, is not sufficiently precise⁵². Turnover thresholds are precise, but may not be appropriate for the purposes of applying Article 81 (3)⁵³. A possible solution might, therefore, consist in combining several criteria, in order to achieve legal certainty, and to prevent forum shopping. It is obvious that the danger of forum shopping would be considerable, and that it should be avoided by all means⁵⁴.

⁴⁹ For a more detailed discussion see paragraphs 141 and 142 below.

⁵⁰ See for more detail the discussion below at paragraphs 103 and 104.

⁵¹ See Klimisch and Krueger (1999), p. 473 et seq.

⁵² White Paper, para. 61.

⁵³ White Paper, para. 62.

⁵⁴ See paragraphs 99 - 101 below.

44. It thus appears that the technical arguments advanced in the White Paper's against a sharing of the Commission's exemption monopoly with national competition authorities are less convincing than those put forward against the other options⁵⁵. The fundamental objection rests on the perceived dangers for the consistent and coherent application of Community law. It seems to be this reason, together with the assumed low value of the system of prior administrative authorisation for the effective protection of competition in the EU, which leads the Commission to plead for the switch to the suggested regime of direct effect of Article 81 (3)⁵⁶.
45. The White Paper could have based its opposition to the sharing of the Commission's exemption monopoly with national competition authorities on one argument which is mentioned, but which does not seem to carry the same weight as the two already discussed. The White Paper recalls that a shared exemption system would continue to impede the application of Article 81 by national courts, as it would not remove the blocking effect of any system of prior authorisation, whether granted by the Commission or by national authorities⁵⁷. The argument is of course correct. But the blocking effect of a functioning system of prior authorisation would be smaller than that of the actual, non-functioning system. In addition, the role of national courts for the enforcement of EC competition law should not be overestimated. In the interest of efficiency, it should of course be encouraged and facilitated. However, it does not correspond to European habits and traditions. The European model of competition law enforcement is based on public enforcement by public authorities⁵⁸. Habits and traditions may change. But the change will be incremental and occur slowly. The "liberating" effect on national courts is, therefore, one, but not a decisive argument for the rejection of the "sharing of the monopoly" option.

⁵⁵ In favour of this option Austrian Government (1999); German Government (1999); Mok (1999), p. 320–322; also, but only as a second best solution, if administrative improvements of the existing system prove not sufficient, Moeschel (1999), p. 512; Monopolkommission (1999), para. 68. Expressly against this option Portuguese Government (1999); UK Government (1999) and EEA EFTA States (1999).

⁵⁶ This becomes particularly clear in the comments made by Schaub/Dohms (1999), p. 1058/1059.

⁵⁷ The limits of enforcement through public authorities, and the desirability, if not necessity, of additional enforcement activities through private action is stressed by Paulis (2000), one of the principal Commission officials responsible for the implementation of the White Paper.

⁵⁸ See Gerber (1998), *passim*. See also Moeschel (1999), p. 508; Monopolkommission (1999), para. 40.

THE WHITE PAPER: PROBLEMS RAISED BY THE NEW SYSTEM IF DIRECT EFFECT OF ARTICLE 81 (3)

Compatibility with Article 81

The Issue

46. The Commission's monopoly to grant exemptions according to Article 81 (3) was established by Regulation No 17/62. Regulation No 17/62 can be amended according to the same procedure under which it was adopted, i. e. according to the requirements of Article 83. But is it legally possible to abolish the principle that exemption decisions have to be taken either by a normative process of issuing block exemptions, or by administrative decisions adopted in individual cases? In other words, is it possible to transform the system of prior authorisation into a regime of directly effective exemption?
47. According to the White Paper, the Treaty negotiators had considerable difficulty in defining the conditions under which the prohibition of Article 81 (1) could be lifted. While the German delegation favoured an authorisation system, the French delegation was in favour of a directly effective authorisation regime. According to the White Paper, "*whilst those in favour of an authorisation system proposed wording along the lines of 'restrictive agreements may be declared valid', agreement was eventually reached on a negative wording: 'the provisions of paragraph 1 may, however, be declared inapplicable'*". The White Paper expresses the view that, "*by opting for this negative approach, Article 81 (3) allows the Community legislator the freedom to choose between an authorisation system and a directly applicable exemption system. Thus, the final choice of a system for controlling restrictive practices was left to the Community legislator*"⁵⁹.
48. A small, but strong minority of Member States and commentators contests the Commission's interpretation⁶⁰. Deringer, author of the EP's Internal Market Committee's Report on the proposal leading to Regulation No

⁵⁹ White Paper, para. 12 and 13. See also Deringer (1963), p. 256 – 266; Deringer (2000), p. 5/6, and Hoeren (1999), in particular p. 416 - 421.

⁶⁰ Austrian Government (1999); German Government (1999); Monopolkommission (1999), paras. 14-18; Monopolkommission (1999), paras. 14-18; Mestmaecker (1999), p. 525-527; Moeschel (1999); Mok (1999), p 318/319; Wolf (1999). It is surprising that the debate about the compatibility with the EC Treaty is practically confined to Austria and Germany, Mok being apparently the only exception.

17/62, expresses serious doubts⁶¹. It is therefore worthwhile to consider the threshold question whether Article 83 permits to switch from a system of prior authorisation to a regime of directly effective exemption⁶².

49. In examining the problem of potential direct effect of Article 81 (3), it is appropriate to distinguish carefully between two different issues. The first relates to the wording, structure and context of Article 81 in order to determine whether the EC Treaty requires a prior authorisation, independently of the question whether paragraph 3 of this Article is sufficiently precise to be applied directly by a judge. The second issue is confined precisely and only to this latter question.

Wording, Structure and Context of Article 81

50. Looking first at the wording of Article 81 (3), it is notable that Article 81 (3) does not use the word “*authorise*” or “*authorisation*”, like the corresponding Article 65 ECSC Treaty, which clearly requires a prior decision of the High Authority. However, even the words “*may be declared inapplicable*” suggest a positive action taken by somebody other than a judge. A judge does not normally “*declare*” a prohibition to be inapplicable; it simply does not apply a prohibition in deciding a case. It is, therefore, not astonishing that, in the Bosch case, Advocate General Lagrange recognised, “*that this [the requirement of prior authorisation] accords best with the terms of Article 83 (3)...The theory depending on ‘l’exception legale’ would have required a different text, for example: ‘The provisions of paragraph (1) shall be deemed not to apply...’ or simply ‘shall not apply’*”⁶³.
51. Defenders of the position that Article 81 (3) requires a system of prior authorisation invoke also the references to “*any agreement* [decision,

⁶¹ Deringer (2000), p. 6. Nehl (2000) shows understanding for the criticism, but considers that the Commission’s position is legally defensible.

⁶² In view of the fundamental importance of the threshold question of the compatibility of the envisaged abolition of the system of prior administrative authorisation with the EC Treaty, it is useful to note that this compatibility is expressly recognised (but not motivated) by European Parliament (1999); Finnish Government (1999); UK Government (1999). It is implicitly accepted by all those who agree in principle with the replacement of the system of prior administrative authorisation by a regime of direct effect of Article 81 (3).

⁶³ CJ, 6 April 1962, Case 13/61, de Geus v. Bosch [1962] ECR 45: Opinion of Advocate General Lagrange at 56. See also Waelbroeck (1972), p. 98/99. Waelbroeck takes the view that, according to its wording, Article 81 (3) seems to be more inspired by the concept of prior administrative authorisation than by that of legal exception. Having examined Regulation No. 17/62 and the jurisprudence of the Court of Justice, he concludes, however, that the EC competition rules constitute today a “hybrid system” situated between these two concepts.

concerted practice] *or category of agreement* [decision, concerted practice]”. It is argued that a switch to direct effect of Article 81 (3) deprives these limitations of any meaning⁶⁴.

52. In addition, opponents of the switch to direct effect of Article 81 (3) might also draw support from the structure of Article 81. It is remarkable that the exemption paragraph (3) follows the precision in paragraph 2 that “*any agreements or decisions prohibited pursuant to this Article shall be automatically void*”. A different order, i. e. one in which the exemption possibility precedes the statement of prohibited agreements being automatically void, would be more easily compatible with a regime of direct effect.
53. However, I do not believe that these arguments are decisive. They do not take into account what the Court of Justice has said with respect to Article 84, according to which “*until the entry into force of the provisions adopted in pursuance of Article 83, the authorities in Member States shall rule on the admissibility of agreements, decisions and concerted practices ... in accordance with the law of their country and with the provisions of Article 81, in particular paragraph 3 ...*”. According to the Court’s judgement in the BRT/SADAM case, the term “authorities” “*include[s] in certain Member States courts especially entrusted with the task of applying domestic legislation on competition...*”⁶⁵. In the light of this jurisprudence, it is at least impossible to argue that the prior authorisation would have to be a decision taken by an administrative authority.
54. Opponents of the White Paper’s interpretation of the EC Treaty invoke also Article 83 (2) (b). According to this provision, the regulations giving effect to the principles set out in Article 81 “*shall be designed in particular ... to lay down detailed rules for the application of Article 81 (3), taking into account the need to ensure effective supervision on the one hand and to simplify administration to the greatest possible extent on the other*”. It is argued that in a regime of a directly effective exemption, these words become largely obsolete.⁶⁶ I do not believe that this is true. The White Paper envisages a series of regulatory mechanisms that reduce the risks resulting from the direct effect of Article 81 (3). These mechanisms might very well find their legal base and justification in Article 83 (2) (b).

⁶⁴ German Government (1999); Mestmaecker (1999), p. 525; Moeschel (1999), p. 505; Monopolkommission (1999), para. 16.

⁶⁵ EC, 30 January 1974, Case 127/73, BRT v. SABAM [1974] ECR 51, at paras .15 and 16.

⁶⁶ Mestmaecker (1999), 525/526; Monopolkommission (1999), para. 17.

55. According to Mok, the Court of Justice has implicitly decided against direct effect of Article 81 (3) in its 1962 Bosch judgement⁶⁷. I do not share this point of view. In the now 37 years old Bosch case, resulting from a request for a preliminary ruling by a Dutch court, the ECCJ was not confronted with the question of prior administrative authorisation versus direct effect of Article 81 (3)⁶⁸. In addition, the just adopted Regulation No. 17/62, and its Article 9 (1), dispensed the Court to examine the potential direct effect of Article 81 (3), read together with Article 83. As Advocate General Lagrange said in its conclusions: “*if [according to Article 9 (1)] the Commission has sole power then national courts must necessarily be without jurisdiction*”⁶⁹. *Such a measure [Article 9 (1)] is, moreover, clearly within the very wide limits in which delegation under Regulation is permitted by Article 87*”.⁷⁰

Article 81 (3) is Sufficiently Precise to Be Able to Have Direct Effect

56. Even more important than the discussion about the formal requirements of the EC Treaty is, however, the second issue mentioned above, i.e. whether Article 81 (3) is sufficiently precise to become directly effective. The importance of this question can not be overestimated. If, in effect, the answer were to be negative, it would not be sufficient to substitute the word “*declare*” by another term. Instead, it would be necessary to amend the substance of paragraph 3, in order to make it “*justiciable*”.
57. Objections to the potential direct effect of Article 81 (3) are based on two different lines of arguments, which are, however, interconnected. The first refers to the traditional defence of the Commission’s exemption monopoly. According to this defence, Article 81(3) requires a complex weighting and balancing of often opposing interests, which are not limited

⁶⁷ Mok (1999), p. 318.

⁶⁸ This opinion is shared by Mestmaecker (1999), p. 527.

⁶⁹ That the attribution of an exclusive responsibility to the Commission excludes the possibility of national courts to apply a certain provision, in spite of its sufficiently precise character, results clearly from the judgement of the Court of Justice in the Banks/British Coal Corporation case (see footnote 7 above). In this case, Advocate General van Gerven had suggested to recognise the direct effect of Articles 65 (1) and 66 (7) ECSC Treaty, because of their wording and the parallelism with Articles 85 (1) and 86 EC Treaty, in spite of the text of Articles 65 (4) and 66 (7) ECSC Treaty. The Court of Justice took a different view. Relying on the attribution of sole jurisdiction to the Commission to rule on the compatibility with Article 65 of any agreement prohibited by Article 65 (1), the Court decided that, as long as such incompatibility has not been established by the Commission itself, individuals may not plead, in proceedings before national courts, that an agreement is incompatible with Article 65. The Court followed a similar reasoning for Article 66 (7), though its text is less explicit than Article 65 (4).

⁷⁰ See footnote 58 above.

to strictly economic, competition oriented considerations, but include the taking into account of non-economic values, like, for instance, the protection of the environment. Through this process, the Commission develops and pursues a competition *policy*. Such a process, it is argued, is appropriate for an administrative authority, but not for a court of law⁷¹.

58. The interpretation of Article 81 (3) is a matter of controversy. Opinions diverge as to whether, and to what extent, non-competition oriented considerations may be used to justify a favourable conclusion under this paragraph⁷². However, in spite of this uncertainty, the argument of the “non-justiciable” nature of Article 81 (3) is not sustainable. Three reasons can be advanced in support of its potential direct effect.
59. The first reason is the already mentioned interpretation given by the Court of Justice to the term “authorities” in Article 84. According to the Court, “authorities” include courts especially entrusted with the task of applying domestic legislation on competition. If judges sitting in specialised courts are able to apply Article 81 (3), judges of non-specialised courts must equally be able to do so. With respect to direct effect, the Court of Justice has never made any distinction between different types of jurisdictions and judges.
60. The second reason for the potential direct effect of Article 81 (3) results from a comparison with Articles 82 and 86 (2)⁷³. The Court has recognised the direct effect of both provisions⁷⁴. Each of them is at least as “imprecise” and difficult to apply as Article 81 (3)⁷⁵. This is particularly true for Article 86 (2). This provision provides an exception to Article 81 that goes even further than Article 81 (3). It dispenses undertakings entrusted with the operation of services of general economic interest of the respect of rules on competition “*in so far as the application of those rules does ... obstruct the performance, in law or in fact, of the particular tasks assigned to them*”. The exception is qualified by the

⁷¹ Moeschel (1999), p.509/510; see also Wesseling (1999), p.424/425.

⁷² See paragraphs 30 et seq. For Wish (2000), these divergences of opinion plead against the application of Article 81 (3) by judges. It is not clear whether Wish considers Article 81 (3) to be unable to have a direct effect, or whether he considers it to be unwise to entrust its application to national courts.

⁷³ Nehl (2000) draws the attention to the recognition of the direct effect of Article 81 (1). He considers that this paragraph may require as complex assessments as paragraph 3.

⁷⁴ For Article 82 never seriously in doubt, as demonstrated by the many requests for preliminary rulings. See Schroeter (1999).notes 28 and 29 ad Article 86.

For Article 86 (2) initially denied, but progressively recognized. See Hochbaum (1999), notes 71 – 73 ad Article 90.

⁷⁵ For a comparison between Article 81 and 82, see also Nehl (2000).

proviso that “*the development of trade must not be affected to such an extent as would be contrary to the interest of the Community*”. In view of the traditional lack of direct effect of Article 81 (3), it would have been logical to deny such an effect also to Article 86 (2). However, this argument has not deterred the Court of Justice to recognise the direct effect for Article 86 (2).

61. The third reason for the potential direct effect of Article 81 (3) flows from the jurisprudence of the Court of Justice on direct effect in general. The Court of Justice has accepted the direct effect of numerous provisions in spite of exceptions, conditions and qualifications, like those contained in Article 30, which require a balancing and weighting of opposing interests, many of those being of a non-economic nature. In addition, the Court has recognised the direct effect of provisions in spite of the lack of earlier administrative or judicial practice and decisions. In the light of this jurisprudence, doubts and differences of opinion about the precise contours of Article 81 (3) are, therefore, not an argument against potential direct effect of this paragraph.
62. A final argument against the potential direct effect of Article 81 (3) is based on the limits which the Court of Justice has imposed on itself (and the Court of First Instance) with respect to the review of the legality of decisions taken by the Commission under Article 81 (3). The Court of First Instance has resumed these limits recently as follows: “*The review carried out by the Court of the complex economic assessments undertaken by the Commission in the exercise of the discretion conferred on it by Article 85 (3) of the Treaty in relation to each of the four conditions laid down therein must ... be limited to ascertaining whether the procedural rules have been complied with, whether proper reasons have been provided, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers*”⁷⁶. According to opponents of the White Paper, this jurisprudence proves that this provision contains elements of administrative discretion, which are incompatible with the recognition of direct effect of Article 81 (3)⁷⁷.
63. It is true that the traditional jurisprudence of the Court of Justice with respect to the standard of review of Commission decisions taken under Article 81 (3) is hardly compatible with the concept of a provision having direct effect. The Court would, therefore, have to reconsider this

⁷⁶ CFI, 21 February 1995, Case T-29/92, SPO and others v. Commission [1995] ECR II-289, at para. 288, upheld on appeal, CJ, 25 March 1996, Case C-137/95 P, 1996 [I-1612].

⁷⁷ Mestmaecker (1999), p. 526; see also Moeschel (1999), p. 509; Monopolkommission, paras.18 and 47; Wesseling (1999), p. 424/425.

jurisprudence, and submit the Commission to the same type of control as under Article 81 (1) or 82⁷⁸.

64. Such reconsideration might be appropriate also for another reason. It is useful to recall that there are some doubts whether the actual system of decision-making under the EC Treaty is compatible with the requirements of the European Convention on Human Rights⁷⁹. The generous attitude of the Court of Justice with respect to Commission decisions taken under Article 81 (3) could be one of the arguments advanced by these critics. A stricter standard of judicial review of decisions taken by the Commission under Article 81 (3) would be a useful contribution to the defence of the role of the Commission under Articles 81 and 82⁸⁰.
65. In conclusion, the arguments advanced against the potential direct effect are not decisive. It is, therefore, possible to move from the existing system of prior authorisation to a regime of direct applicability in amending Regulation No17/62, following the procedure of Article 83. In order to overcome any remaining doubt, it might even be useful to clarify the wording of Article 81 (3) in the course of the forthcoming Intergovernmental Conference. However, such a clarification does not seem to me to be an indispensable prerequisite for the successful implementation of the White Paper.

The Commission's Objective: Increasing the Efficiency of Applying Article 81

The Issue

66. According to the White Paper, the objectives of the suggested reform are, *“in the first place, to refocus [the Commission’s] activities on combating the most serious restrictions of competition and, secondly, to allow decentralised application of the Community competition rules while at the same time maintaining consistency in competition policy throughout the Community. Lastly, the Commission considers that the procedural framework should ease the administrative constraints on undertakings while at the same time providing them with sufficient legal certainty.”*⁸¹

⁷⁸ Position shared by Deringer (2000), p. 8; Moeschel (1999), p. 509.

⁷⁹ See de Mello (1993), p. 601; Waelbroeck and Fosselard (1994), p. 129 et seq.; Forrester (1999).

⁸⁰ See Wills (1996) p. 329 et seq.

⁸¹ White Paper, para. 42. For the following see also White Paper, paras. 43 – 51.

67. This definition of objectives could have been drafted more carefully. In fact, the Commission pursues only *one* main goal, i. e. to increase the efficiency of the EC antitrust policy. In order to achieve this objective, the Commission proposes to adopt a system of radical decentralisation (including the national courts) through a regime of direct effect of Article 81 (3), abolishing the actual notification and exemption requirement. Decentralisation is a tool, not an objective. The same is true for the reduction of the workload of the Commission, resulting from the elimination of the requests for exemption decisions. A welcomed by-product is the easing of administrative constraints on companies. Providing undertakings with sufficient legal certainty and maintaining consistency in competition policy throughout the EU are important conditions of the reform. If they were not fulfilled, the reform would not be acceptable.
68. The most serious objection against the Commission's reform proposal focuses on the Commission's main objective. It is argued that the passage from the authorisation system to a regime of "exception legale" or "Legalausnahme" would weaken EC anti-cartel policy. Though not formally changing the legal consequences flowing from Article 81 (2), i. e. that prohibited agreements are automatically void, it would *de facto* lead to a substitution of the prohibition principle by the abuse principle⁸².
69. The "decrease of efficiency" argument is based on assumptions which I do not consider to be valid.

The Weak Contribution of the Existing System of Notifications and Requests for Exemptions to the Effective Enforcement of Article 81

70. The first is that the process of prior exemptions contributes substantially to the fight against prohibited agreements⁸³. That it makes *some* contribution to the enforcement of Article 81 is certainly true. However, the real question is whether a bigger contribution would not be made if the resources needed for the treatment of requests for exemption could be used for *ex officio* procedures and the investigation of complaints.

⁸² See German Government (1999); Mestmaecker (1999), p. 52; Moeschel (1999), p. 505: "Man kann von einer *Annaeherung an ein faktisches Missbrauchsprinzip insoweit sprechen, als keine Wettbewerbsbeschaenkung mehr einer praeventiven Erlaubnisentscheidung unterfaellt*"; Monopolkommission (1999), para. 6; Wolf (1999).

⁸³ German Government (1999); Wolf (1999); see also Moeschel (1999), p. 505/506; Monopolkommission (1999) paras. 28-32. Expressly opposed to this position Finnish Government (1999); French Government (1999); Irish Government (1999); Portuguese Government (1999), UK Government (1999); EEA EFTA States (1999); EFTA Surveillance Authority (1999).

Statistics show the great number of notifications (58% of all procedures) compared with the small number of negative decisions (9 decisions during 35 years of application of Regulation No. 17/62)⁸⁴. It is likely that many agreements falling under Article 81 (1), but perfectly susceptible to be exempted, are not notified. An efficient exemption system would lead therefore to an even greater number of notifications of unproblematic agreements. On the other hand, agreements that are unlikely to be exempted are and probably will never be notified. The contribution of the actual notification system to the efficient enforcement of Article 81 is, therefore, relatively small.

71. When Regulation No 17/62 was proposed and enacted, the Commission had practically no information of the competitive situation on different markets in different Member States. One of the reasons for the notification system which Regulation No. 17/62 established was to provide such information. Today, the need for information through notifications is much lower. Not only has DG IV acquired substantial knowledge of product and geographic markets through almost 40 years of applying Regulation No 17/62. It has also benefited from almost a decade of implementation of the Merger Regulation. DG IV therefore does not need anymore the notification system as a source of market information⁸⁵.
72. Not all resources freed by the proposed reform will be usable for ex officio procedures and the investigations of complaints. Providing undertakings with sufficient legal security should, as explained below, lead to some sort of partial substitute for the existing notification and exemption procedure⁸⁶. In addition, maintaining consistency in EC competition policy throughout the EU will require the establishment of mechanisms of information, consultation and decision making which will absorb resources⁸⁷. Some critics of the White Paper fear that these new procedures and mechanisms might be even more resource intensive than the existing exemption monopoly⁸⁸. They can also point to the probable

⁸⁴ It should, however, be noted that negative decisions alone do not reflect fully the effects of the Commission's activity in response to exemption requests. For a more complete picture, one would also have to take into account positive exemption decisions which provide for charges and conditions; positive decisions and comfort letters concerning agreements which have been amended in the light of criticism from DG IV; and requests which have been withdrawn because of objections from DG IV.

⁸⁵ Different Austrian Government (1999); German Government (1999); Moeschel (1999), p. 505; Monopolkommission (1999), para. 28.

⁸⁶ See paragraphs 76 - 112 below.

⁸⁷ See paragraphs 113 - 142 below.

⁸⁸ See in particular Mok (1999), p. 319/320. See also German Government (1999); Moeschel (1999), p.509; Monopolkommission (1999), para. 60.

decrease in notifications that will follow from the recent reforms in the field of vertical restraints⁸⁹. The end result of the reform (how many officials are really made available for more important tasks than the examination of individual requests for positive decisions or comfort letters) is therefore far from being certain.

73. However, these considerations are not decisive. A system of voluntary notifications which functions efficiently should lead to the notification of different cases than those notified today. The mechanisms to be instituted in order to ensure consistency of a radically decentralised EC competition policy will be investments in the future. They are designed to facilitate the coherent implementation of EC anti-cartel rules by national competition authorities and judges. i. e. a multitude of actors, throughout the EU. Over time, the application of these mechanisms will make a much bigger contribution to the effective enforcement of Article 81 than the continued clearing of requests for exemptions by the Commission.

A Change in the Burden of Proof?

74. Opponents of the reform proposals advance an argument that is more serious than any of the objections mentioned so far. They allege that the switch from a system of prior administrative authorisation to a regime of direct effect of Article 81 (3) would entail a change in the burden of proof. Today, the undertakings requesting an exemption decision have to show, to the satisfaction of the Commission (and in the case of an action before the Courts, to the satisfaction of the judges in Luxembourg) that the conditions of Article 81 (3) are fulfilled. In the future, the contrary would have to be demonstrated by all those who allege the illegality of the contested agreement. A private party, arguing the illegality of a contested agreement, would hardly ever be able to make such a demonstration⁹⁰.
75. This objection can be overcome. It should be perfectly possible to amend Regulation no.17/62 in such a way that the burden of proof remains a matter for the undertakings invoking Article 81 (3). Article 83 (2) (b) gives the Council the necessary power “*to lay down detailed rules for the application of Article 81 (3)*”. The burden of proof issue may be part of these rules.

⁸⁹ See paragraphs 22 and 23 above.

⁹⁰ See particularly Moeschel (1999), p . See also Mestmaecker (1999), p. 525 and 528; Monopolkommission, para. 12 and 60; Wolf (1999).

Easing of Administrative Constraints and Providing Sufficient Legal Security

The Issue

76. The White Paper mentions as one of the objectives of the reform the easing of administrative constraints on undertakings⁹¹. It is true that the abolishment of the notification requirement reduces paper work and costs⁹². However, this economy is not without a price: Undertakings lose the legal security flowing from formal exemption decisions (to the limited extent to which they are adopted) and of comfort letters⁹³.
77. There can be no doubt that in many respects the reform envisaged by the White Paper increases legal security. The direct effect of Article 81 (3) will eliminate the so-called “euro-defense” in all those cases in which the conditions of this provision are fulfilled. It will therefore lead to the legality of agreements that today are void, because they fall under Article 81 (1), but have not been the object of a formal exemption decision adopted under Article 81 (3). Even a comfort letter does not formally protect against the argument of violation of Article 81 (1), as such a letter does not have legal effects.
78. In addition, the White Paper promises the adoption of block exemptions, notices and guidelines⁹⁴. In a system characterised by the absence of prior administrative authorisation, block exemptions, notices and guidelines will acquire an even more important place than they have already today. Of particular importance will be a notice on the interpretation of Article 81 (3), in order to clarify its scope⁹⁵. These horizontal texts will not only be a major contribution to legal security, but also to the coherence and consistency of application of Article 81.
79. The White Paper also envisages the adoption of individual decisions that are not prohibition decisions, in exceptional cases, on grounds of general interest, e. g. where a transaction raises a question that is new. According to the White Paper, these decisions would be of a declaratory nature, as

⁹¹ White Paper, paras. 50/51.

⁹² It will, however, not reduce the need – and cost – of legal advice. According to the German Government, these costs may even increase.

⁹³ Hawk (2000), considers that the principal cause for uncertainty under the current system is the over broad interpretation of the scope of Article 81 coupled with the monopoly of the Commission to apply Article 81 (3).

⁹⁴ White Paper, paras. 78 and 85/86,

⁹⁵ Such a notice is expressly requested by the Portuguese Government (1999).

negative clearance decisions have at present⁹⁶. In addition, a new type of binding decision is proposed to make commitments enforceable that undertakings offer in order to prevent a prohibition of an agreement⁹⁷.

80. Only for one category of agreements it is envisaged to maintain the existing system of prior notification and authorisation. The White Paper suggests to retain this procedure for partial-function production joint ventures, as operations of this kind generally require substantial investment and far-reaching integration of operations, which makes it difficult to unravel them afterwards⁹⁸.
81. It is remarkable, that not only opponents⁹⁹ or sceptics¹⁰⁰, but also friends of the suggested reform consider the legal security problem to be one of the most problematical aspects of the White Paper¹⁰¹. They argue that the Commission has underestimated the need of undertakings for legal certainty. Business and practising lawyers, in particular, consider that the disappearance of formal exemption decisions, and even of informal comfort letters, constitutes a major loss. Comfort letters, though heavily criticised in the past, are suddenly praised as useful manifestations of DG IV's position on individual agreements, even though they lack any legal force in administrative or court proceedings.
82. Suggestions for additional guarantees are diversified and not always precise. Some argue for an enlargement of the exception foreseen in the White Paper for partial joint ventures¹⁰². Others plead for retaining the instrument of some sort of comfort letter (or business review letter of the US type)¹⁰³. A more far-reaching proposal is the introduction of a system of voluntary notifications and requests for individual positive decisions. The adoption of such decisions (and comfort letters) should not remain a monopoly of the Commission. The task should be shared with national

⁹⁶ White Paper, paras 88/89.

⁹⁷ White Paper, para. 90.

⁹⁸ White Paper, paras. 79 – 81. According to the UK Government (1999), the notion of partial function joint venture should be clarified;

⁹⁹ German Government (1999); Monopolkommission (1999), paras. 33-35.

¹⁰⁰ See Immenga (1999); Jalabert-Doury (1999), p. 505.

¹⁰¹ The most critical and articulate position in this respect is taken by Siragusa (1999). His views are shared by Forrester (1999). See also European Parliament (2000), para. 12, and UK Government which suggests to use the existing system for negative clearances for Article 81 as a whole, following the example of such clearances for Article 82.

¹⁰² Danish Government (1999); Finnish Government (1999); Italian Government (1999); EEA EFTA Member States (1999).

¹⁰³ Portuguese Government (1999). This seems also to be the position of the European Parliament. See European Parliament (2000), para. 12

competition authorities. In addition, the legal effects of individual positive Commission decisions should not be assimilated to negative clearance decisions. Such positive decisions should be legally binding¹⁰⁴.

Is Legal Security of Individual Undertakings a Legitimate Concern?

83. The objection that the need for legal security has been underestimated can be addressed from several angles. It can be argued that the task of competition authorities is to ensure the respect of competition law, not to assure individual undertakings that they comply with these rules. Competition authorities have to act in the public interest, not in the private interest of individual market actors¹⁰⁵.
84. This argument is certainly correct. However, it may well be in the public interest to give undertakings in certain situations an assurance that their agreements are compatible with the existing competition rules. This is particularly so in a phase of transition from a system of prior administrative authorisation to a regime of direct effect of Article 81.
85. A second line of reasoning addresses the asserted need for individual positive decisions. US observers of the EC competition law scene point out that, from a US point of view, the European concern for legal certainty is exaggerated. In the US, undertakings operate under antitrust rules that are in many respects stricter than the corresponding EC rules. Nevertheless, companies are not entitled to anything resembling a formal exemption decision under Article 81 (3). Business review letters are relatively rarely requested. Why are the same undertakings, which operate in the US without any official recognition of the compatibility of their agreements, so concerned about legal certainty when they apply the same agreements doing business in Europe¹⁰⁶?

¹⁰⁴ See in particular Siragusa (1999). Deringer (2000), p. 9-11, proposes a modified system of administrative *authorisation* that would allow voluntary notifications to the Commission and (perhaps) to national competition authorities. According to Deringer, voluntary notifications should produce provisional validity, so that positive decisions would have a legal effect. Deringer regrets the – in his view unavoidable – total absence of legal effects of block exemptions and positive individual decisions under the system proposed by the Commission. Rather opposed to any individual positive Commission decision outside the exempted sector of partial joint ventures, possibly enlarged to other agreements leading to substantial investments and far-reaching integration of operations, Italian Government (1999).

¹⁰⁵ Schaub/Dohms (1999), p. 1069; Paulis (2000).

¹⁰⁶ See Hawk (2000). See also UK Government (1999) which points out that US antitrust law is in place much longer and has produced more jurisprudence on which business can rely..

86. There is probably no simple answer to this question. One of the reasons may lie in the traditional European competition model, in which administrative authorities have played a predominant role¹⁰⁷. Another explanation may result from the closer relationship that exists traditionally in Europe between undertakings and the State in general. Whatever the explanation for these differences may be, I believe that the Commission should respond positively to the concern for legal certainty. However, one will have to proceed carefully if one wants to avoid re-introducing the existing system of notifications and requests for exemption through the backdoor.

The Legal Effects of Block Exemption Regulations and Positive Commission Decisions under the New Regime

87. To begin with the legal effects of positive decisions envisaged by the Commission. According to the White Paper, these decisions would normally (i. e. with the exception of decisions accepting commitments entered into by the parties) “*confine themselves to a finding that an agreement is compatible with Article 81 as a whole... They would be of a declaratory nature, and would have the same legal effect as negative clearance decisions have as present*”¹⁰⁸.
88. The direct effect of Article 81(3) will, of course, leave no place for individual exemption decisions or for block exemption regulations in the traditional sense. The White Paper recognises this in avoiding carefully the use of the words “exemption decisions”. It continues, however, to mention block exemptions. It even emphasises that, “*given the importance of legislation in the new directly applicable exception system, legal certainty for undertakings demands that an agreement exempted by a block exemption should not then be held contrary to national law*”¹⁰⁹. According to the White Paper, this can be achieved by invoking Article 83 (2) (e), which allows to adopt regulations (or directives) “*to determine the relationship between national laws and the provisions contained in this Section or adopted pursuant to this Article*”¹¹⁰. The White Paper

¹⁰⁷ See footnote 58 above.

¹⁰⁸ White Paper, para. 89. The reader wonders why the White Paper does not discuss the question whether positive individual Commission decisions could have a binding effect. It is possible that the apparent modesty is the result of the understandable aversion against anything that perpetuates, de facto, the actual exemption system. See paragraph 91 below. See also Hawk (2000). According to Deringer (2000), p. 7, the position taken in the White Paper is the only that is legally possible.

¹⁰⁹ White Paper, para. 85.

¹¹⁰ White Paper, para. 85.

considers, therefore, that block exemption regulations can be adopted also in the future and that they will continue to be binding¹¹¹.

89. If a block exemption regulation can derive its binding effect from 83 (2) (e), the same must be true for an individual decision, adopted by the Commission. With respect to Article 81 (1) and (3), such a decision can only be of declaratory nature: it does not transform anymore an illegal agreement into a legal one. However, the declaratory nature¹¹² does not necessarily entail that the decision is not binding, and that any national competition authority or court may disregard it¹¹³. A binding effect would be fully justified if the decision were reached according to a procedure that allows a full investigation of the facts, and that permits the participation of all interested parties, i. e. also of those who are opposed to the notified agreement. Acting under Article 83 (1), the Council should be capable of giving such a decision a maximum of legal effect, even if the decision does not fall under any of the five sub-paragraphs of Article 83 (2). These sub-paragraphs are only examples of the Council's legislative powers under paragraph 1 which allows to take regulations or directives "to give effect to the principles set out in Articles 81 and 82". The White Paper itself assumes the existence of such a power in suggesting the establishment of "a new¹¹⁴ kind of individual decisions in which the Commission would take note of commitments entered into by the parties and render them binding"¹¹⁵.
90. Exemption decisions have to be issued for a specified period¹¹⁶. Traditionally, this requirement has been considered to be an unwelcome limitation, particularly with respect to operations involving heavy long-term investments. Accordingly, the absence of a similar requirement in the Merger Regulation has been regarded as one of the major advantages

¹¹¹ According to Deringer (2000), p. 7, the new system will not allow to adopt binding block exemption regulations. According to the Finnish Government (1999), the role and functions of block exemptions are not clearly specified; maintaining block exemptions seems illogical. Deringer and the Finnish Government might, however, have overlooked the reference of the White Paper to Article 83 (2) (e). The position of the White Paper is expressly shared by the Italian Government (1999).

¹¹² Critical with respect to the distinction between declaratory and non-declaratory decisions the Finnish Government (1999).

¹¹³ This is, however, the view of Moeschel, (1999), p. 507.

¹¹⁴ In reality, this type of decision is not so new as it seems. It resembles strongly the traditional exemption decision. According to Article 8 (1) of Regulation No. 17/62, conditions and obligations may be attached to such a decision.

¹¹⁵ White Paper. para. 90. Opposed to such decisions Mestmaecker (1999) p. 527/528, who suspects these decisions to be instruments of industrial or employment policy.

¹¹⁶ Article 8 (1) of Regulation No. 17/62.

of the merger regime. Under the system of direct effect of Article 81 (3), advocated by the White Paper, the absence of any temporal indication in positive Commission decisions will be regretted¹¹⁷. It seems, however, difficult to introduce such an element into decisions that are, by nature, declaratory. Their legality depends, intrinsically, on a correct legal appraisal of the underlying facts. If these facts change to such an extent that the conditions of Article 81 (3) are not any more justified, the Commission's decision becomes illegal. No temporal indication in the decision can modify this logical consequence¹¹⁸.

91. Positive Commission decisions will have to be adopted according to procedures that respect the rights of the parties to the agreement, but also those of third parties. The process of adoption of such decisions will therefore remain complex, time consuming and resource intensive. The reluctance of the White Paper with regard to this type of decisions is, therefore, understandable.

Voluntary Notifications

92. Remains the question whether the amended Regulation No. 17/62 should provide for a system of voluntary notifications and requests for positive decisions. The White Paper does not envisage such a system. However, it states that the Commission should be able to adopt individual positive decisions where a transaction raises a question that is new, in order to provide the market with guidance. In practice, these individual positive decisions will be taken at the request of undertakings submitting their agreement for approval. The White Paper is therefore de facto relatively close to a system of voluntary notifications and requests for positive decisions.
93. A system of voluntary notifications should not lead, in practice, to a situation in which the Commission is seriously hindered in its efforts to refocus its competition policy in putting greater emphasis on ex officio procedures and complaints¹¹⁹. Undertakings should therefore not be given a *right* to obtain a positive decision¹²⁰. It must be within the discretion of the Commission to take such a decision or not. This does not mean that the discretion of the Commission has to be totally unfettered. The amended Regulations No. 17/62 might very well indicate some criteria

¹¹⁷ Emphasised by the German Government (1999).

¹¹⁸ Same opinion Deringer (2000), p. 7.

¹¹⁹ See Wolf (1999), who anticipates that the Commission (and national competition authorities) will be swamped with informal requests for information or comfort letters.

¹²⁰ In favour of such a right Siragusa (1999).

that help undertakings and the Commission in making their choices. However, these criteria should under no circumstances transform a possibility into a *right* on the part of the companies, and into an *obligation* on the part of the Commission.¹²¹

94. A system of voluntary notifications should not create any sort of blocking effect. Such an effect would run counter the main thrust of the reform, i. e. the direct effect of Article 81 in toto, and its immediate applicability by a judge in a court proceeding.

Voluntary Notifications and National Competition Authorities

95. The White Paper does not mention positive individual decisions taken by national competition authorities. It envisages only (negative) prohibition decisions adopted by such authorities. Implicitly, and in line with the rejection of the option of sharing the Commission's exemption monopoly with national competition authorities¹²², it seems to exclude the possibility of positive decisions taken by national authorities¹²³.
96. If one recognises the legitimate interest of business in a system of voluntary notifications, in view of obtaining positive individual decisions, it is difficult to limit such a system to notifications to and decisions taken by the Commission. The logic of the White Paper, and its insistence on the principle of decentralisation of decision-making, leads to the conclusion that the responsibility for the adoption of positive decisions should be shared with national competition authorities¹²⁴. It would be hardly defensible to abolish the existing exemption monopoly, but to maintain such a monopoly for decisions taken in response to voluntary notifications¹²⁵.
97. Comments on the White Paper make abundantly clear what can already be deduced from the White Paper itself. The Commission fears the risks that are likely to flow from divergent positive decisions taken by national competition authorities. It considers these risks to be much greater than those resulting from the incoherent treatment of complaints (the treatment

¹²¹ The White Paper does not discuss the future of requests for negative clearances. It would not be logical to abolish the right to request negative clearances for Article 81, but to maintain in for Article 82.

¹²² See paragraphs. 37 – 44 above.

¹²³ It does not seem therefore that “*the Commission and national authorities will be put on an equal footing*”, as suggested by Mersing (1999).

¹²⁴ The Finnish Government (1999) finds the exclusion of national competition authorities “strange”.

¹²⁵ In favour of decentralisation of positive individual decisions also Siragusa (1999).

of which is already decentralised today). For the Commission, the risks of divergences of positive decisions are higher. National authorities might be tempted not to apply Article 81 with sufficient rigour if national interests are at stake. Moreover, positive decisions might have a broader effect than negative decisions (at least in case of the rejection of a complaint). Finally, positive decisions are less likely to be submitted to the control of a judge, as the parties to the agreement, who benefit from it, will certainly not attack these decisions¹²⁶. In addition, there are the problems mentioned already above, like the territorial scope of decisions taken by national competition authorities and the criteria for the attribution of requests for positive decisions.

98. Before addressing the fundamental objections underlying the White Paper's approach, it is useful to discuss, once again, the two more technical issues, i. e. the attribution of notifications and the territorial reach of decisions taken by national authorities.

Attribution of Requests for Positive Decisions

99. It is obvious that a decentralised system of voluntary notifications and requests for positive individual decisions will create a problem of forum shopping¹²⁷. Without precise rules for the attribution of cases, undertakings will be tempted to address their requests to the authority that they expect to react most favourably to their demand. The situation mirrors the one under a decentralised system of complaints. While a complainant will look out for the most stringent authority, undertakings asking for a positive decision will direct their demand to the most lenient one.
100. Attribution rules have to deal with the vertical relationship between the Commission and national competition authorities. They must also clarify the horizontal relationship between national authorities. In both situations, they should be as precise as possible, insofar as positive individual decisions are concerned.

¹²⁶ See in particular the arguments advanced against the (rejected) option of sharing the Commission's monopoly with national competition authorities in Schaub/Dohms (1999), p. 1059. Also against positive individual decisions taken by national competition authorities Belgian Government (1999), at least at this early stage of development; Danish Government (1999); Italian Government (1999); Portuguese Government (1999), see however below.

¹²⁷ The problem of forum shopping is mentioned by many commentators. See Forrester (1999); Jalabert-Doury (1999), p. 507; Siragusa (1999). According to Schaub/Dohms (1999), p. 1058, this concern is exaggerated. However, they discuss this issue only in the context of the handling of complaints.

101. The desirability of a high degree of precision pleads in favour of criteria that are more narrowly defined than those set out in the 1997 Notice on cooperation between the Commission and national competition authorities¹²⁸. Their lack of precision has been criticised by commentators in the same way in which the White Paper objects to the centre of gravity approach advocated by the *Bundeskartellamt*¹²⁹. It would, therefore, be useful to examine in depth the suggestions to retain turnover criteria, following the example of the Merger Regulation. The White Paper does not consider them to be appropriate¹³⁰. Such criteria might, however, be combined with others. It should not be impossible to devise a system that avoids, as much as possible, multiple notifications and requests for positive decisions, and allows the Commission to deal with new problems, questions of principle, and any other matter that requires a response from the centre.
102. The problem of attribution is of course not limited to requests for positive decisions, but arises also with respect to complaints. In this latter situation, it may be possible to adopt less precise criteria, though, clearly, a balance has to be struck between predictability and flexibility. In particular, it might be useful to define in advance those cases that are reserved to the Commission¹³¹.

Legal Effects of Decisions Taken by National Competition Authorities

103. The White Paper assumes that the legal effect of a decision taken by a national competition authority¹³² is limited to the territory of its Member State¹³³. For a decentralised system of voluntary notifications, this is not good enough, if one wants to avoid multiple requests¹³⁴. In this respect,

¹²⁸ This view is shared by Kon (1999); Mersing (1999). See also Moeschel (1999), p. 512, and Monopolkommission (1999), para. 68, who discuss this point in the context of their preferred option of sharing the Commission's exemption monopoly with national competition authorities.

¹²⁹ White Paper, para. 61. For the position of the *Bundeskartellamt* see Klimisch and Krueger (1998), p. 1177; Klimisch – Krueger (1999), p. 471 et seq.

¹³⁰ White Paper, para. 62. In disagreement with the White Paper Siragusa (1999).

¹³¹ For precise criteria European Parliament (2000), at par. 19. See also Danish Government (1999); Finnish Government (1999), French Government (1999); Greek Government (1999); EFTA Surveillance Authority (1999). For flexibility UK Government (1999) and Schaub/Dohms (1999), p. 1064.

¹³² It is useful to recall that the White Paper does not envisage positive individual decisions taken by national competition authorities. According to the White Paper, such authorities may take only negative decisions (rejecting a complaint or acting against a forbidden agreement).

¹³³ White Paper, para. 60. It

¹³⁴ Nehl (2000). In favour of EU wide effect also Siragusa (1999) and Deringer (2000), p 9. Nehl (2000), finds it astonishing that the White Paper avoids the long discussed issue of the

there is clearly a difference between notifications and complaints. A prohibition decision with legal effects limited to the territory of one Member State might have wider ranging psychological consequences and lead to the withdrawal of the restrictive agreement throughout the EU. In the case of a request for a positive decision, a limited territorial effect would normally incite the interested undertakings to introduce multiple notifications. As said before, such a perspective is not desirable.

104. The problem of EU wide effect could be easily solved if the decision of the national authority was, in one way or another, taken over by or attributed to the Commission¹³⁵. However, such an approach seems to be contrary to the very idea of decentralisation. Another solution would be the adoption of a mechanism of mutual recognition by way of a convention among the Member States¹³⁶. This road would have to be followed, if there was not a shorter and simpler one. As mentioned before¹³⁷, I am convinced that the Council is entitled to establish the EU wide effect of decisions adopted by national competition authorities under Article 83¹³⁸. In doing so, the Council would simply apply, in the area of competition law, a principle that has been widely used in internal market directives. It is the principle of mutual recognition of administrative authorisations, granted by one Member State, to exercise a certain commercial activity, for instance to operate as a bank or as an insurance company¹³⁹.

Community wide binding effect of national decisions which he considers of central importance for the future coherent application of the network concept. He surmises that the Commission might want to avoid disturbance by “activist” national competition authorities. The problem of the territorial effect of decisions taken by national competition authorities is raised, but left open, by Mestmaecker (1999), p. 529, who considers the Commission’s concept of limited territorial scope as an argument against the suggested reform.

¹³⁵ Siragusa (1999); Hawk (2000).

¹³⁶ Siragusa (1999).

¹³⁷ See paragraph 42 above.

¹³⁸ The problems of the territorial effect of individual exemption decisions taken by national competition authorities have been discussed in some depth in the context of the proposals of the Bundeskartellamt, See Klimisch and Krueger (1998), p. 1178; Klimisch and Krueger (1999), 480 – 482. .

¹³⁹ Moeschel (1999), p. 512, and Monopolkommission (1999), para. 70, suggest to consider the national competition authorities as acting on behalf of the EC. In their view, this construction would give the Commission rights of control and instruction. They do not discuss whether it would also entail the EC-wide effect of decisions of national competition authorities. Nehl (2000) goes even further. He considers that, functionally speaking, a national competition authority, when enforcing EC competition rules, acts as a “Community agency”, and thus has to both the substantive and the procedural rules of EC law. While the first part of the conclusion is certainly right, the second (respect of procedural EC law) is not defensible as a *de lege lata* proposition, but can be used in a *de lege ferenda* context

105. The principle of EU wide would, however, hardly be acceptable if procedures before national competition authorities did not correspond to certain minimum standards assuring the possible participation of interested parties, in particular competitors, throughout the Community. These procedures would, therefore, have to fulfil certain minimum requirements in terms of publicity, due process and judicial protection.¹⁴⁰ The Commission has abstained from any suggestions in view of the approximation of procedures before national competition authorities. As will be explained later, this approach seems wise at this stage¹⁴¹ It is, therefore, appropriate to accept, for the moment, national competition authorities decisions the effect of which is limited to the territory of the respective Member State.

Coordination Mechanism

106. It is perfectly possible that the introduction of a decentralised system of individual positive decisions will require stronger mechanisms for vertical and horizontal coordination among the Commission and national competition authorities than the mechanisms suggested in the White Paper¹⁴². These stronger coordination devices should correspond to the greater risks for the coherence and consistency of EC competition law and policy that might well flow from the participation of national authorities in dealing with voluntary notifications. Such a strengthening of coordination structures seems to me to be more in line with the main thrust of the White Paper, than the refusal of decentralisation with respect to positive decisions. The refusal on principle sits uncomfortably with the basic concern for radical decentralisation. It is also hardly compatible with the idea that the Commission and the national competition authorities form a network. The fundamental principle of a network is mutual trust¹⁴³. And mutual trust seems to me to require, logically, the participation of national authorities in a system of voluntary notifications.

The problem of the territorial reach of national competition authorities decisions is rarely discussed contributions by Member States Governments. An exception is the Finnish Government (1999).

¹⁴⁰ See Ehlermann (1996), p. 94.

¹⁴¹ See paragraph 135 - 140 below.

¹⁴² Such a strengthening is advocated by Kon (1999).

¹⁴³ See for a more general discussion of the requirements of the network concept Nehl (2000) who considers that the Commission has not gone far enough in its reform proposals. Nehls criticism can, however, also be addressed to the existing situation, in which the handling of complaints is already decentralised.

Comfort Letters

107. The preceding discussion has focussed on formal decisions. It has not dealt with their traditional substitutes, i. e. comfort letters, Comfort letters are not mentioned in the White Paper. It is likely that the Commission does not see any need for maintaining a practice that tries to attenuate the worst consequences of the breakdown of the prior administrative authorisation system.
108. Comfort letters are, however, useful tools to accommodate the wishes of business to see the advantages of the actual system to be carried over into the new regime. The Commission might, therefore, not rule out to send informal letters, instead of taking formal positive decisions, in the future. In a regime of direct effect of Article 81 (3), informal letters are even much more justified than under the existing system of exemption, as a formal decision, setting aside the legal effect of Article 81 (2), is not needed anymore.
109. Because of the lack of legal effects, informal letters raise fewer questions than those discussed above for formal decisions. However, two problems should not be overlooked. The first is the Commission's understandable concern that the actual notification system does not return through the backdoor. The second relates to the activities of national competition authorities. If, and in so far as they would participate in the issuing of informal letters¹⁴⁴, the new regime will have to take care of the need for vertical and horizontal coordination. Though not formal decisions, even informal letters, sent by a competition authority, will exercise a strong influence on judges and courts. This influence might even be greater than under the existing system. It is, therefore, necessary to limit the risks for the coherence of EC competition policy that will inevitably flow from the activities of different national competition authorities.

Transfer of Information and of Files

110. A decentralised system of voluntary requests for positive individual decisions might be less in need for transfers of files among the Commission and national competition authorities, as well as among these national authorities, than a decentralised system of complaints. It is nevertheless highly desirable to eliminate also in this area the obstacles to vertical and horizontal cooperation that result from the Court of Justice's restrictive jurisprudence with respect to the confidentiality of information,

¹⁴⁴ According to the Portuguese Government (1999), national competition authorities should be even more accessible than the Commission to requests for informal opinions

received or collected by the Commission, and the use of this information by another competition authority¹⁴⁵. Regulation No. 17/62 will have to be amended accordingly¹⁴⁶. At the same time, the amendment will have to define the conditions which limit the use of transmitted files and information (like use by competition authorities and for enforcement of EC competition law only; strict respect of confidential information)¹⁴⁷.

111. The amendment of Regulation No. 17/62 should not be limited to eliminating the obstacles to the use of information received or collected by the Commission. It should also address the problems of exchange of information received or collected by national competition authorities, both in relation to the Commission and other national competition authorities. Strengthening the cooperation within the EC network of competition authorities in using a regulation adopted according to Article 83 is not only more efficient, but also more appropriate than the adoption of cooperation agreements among Member States¹⁴⁸.

Similarities and Differences with Respect to the Decentralisation of the System of Prior Authorisations

112. A decentralised regime of voluntary notifications and requests for positive individual decisions, as advocated here, presents similarities with a system of decentralised application of Article 81 (3) under the existing exemption system. There is, however, one fundamental difference between the two. A decentralised regime of voluntary notifications and requests operates in an environment of direct effect of Article 81 (3). Therefore, the courts will be able to apply Article 81 (3), independently of the Commission and the national competition authorities. In addition, neither the Commission nor the national authorities will be under any obligation to adopt positive individual decisions. Their position with respect to requests for such decisions can therefore remain discretionary. The advantages of these logical consequences of direct effect of Article 81 (3) justify, in any case, the radical reform advocated by the White Paper.

¹⁴⁵ CJ, 16 July 1992, Case C-67/91 *Dirección General de Defensa de la Competencia v. Asociación Española de Banca Privada (AEB) and Others*, [1992] ECR I-4785, paras. 37 et seq.

¹⁴⁶ Also advocated by the White Paper, but of course only with respect to the decentralised treatment of complaints, as the adoption of positive decisions is reserved to the Commission. In favour also Austrian Government (1999); Finnish Government (1999); French Government (1999); Irish Government (1999); Italian Government (1999); Siragusa (1999). Apparently opposed to the transfer of files Jalabert-Doury (1999), p.507.

¹⁴⁷ See the observations by Governments mentioned in the preceding footnote.

¹⁴⁸ See Italian Government (1999).

Maintaining Consistency in Competition Policy throughout the Community

Institutional Particularities of EC Competition Law

113. EC law is normally applied to undertakings and citizens by national authorities. That is true not only for EC directives, which have to be transposed into national law, before they become fully operational, but also for regulations, which are directly applicable, and for Treaty articles, which have direct effect. To mention but three examples from areas regulated by regulations: Customs duties prescribed by EC customs tariff are established and collected by national customs officials; subsidies provided for by the EC's agricultural market organisations are granted by national intervention offices; the respect of EC's rules limiting the maximum amount of driving hours for truck and bus drivers are controlled by national police officers. There simply is normally no EC administration, applying EC regulations in individual cases to undertakings and individuals. This is particularly true for the internal market, which is quasi exclusively regulated by national laws, sometimes approximated by EC directives, and administered by national authorities. In this respect, the EC Treaty differs fundamentally from the older ECSC Treaty, which submitted the coal and steel industry to the direct administration of the High Authority.
114. Legal rules that are applied by several persons are likely to be interpreted and applied differently. The risks for the coherence and consistency of Community policies are, therefore, considerable. The EC Treaty accepts this risk. The only mechanisms provided by the Treaty to limit these risks are the infringement procedure with respect to Member States, on the one hand, and requests of national courts for preliminary rulings of the Court of Justice, on the other. In the end, only the Court of Justice can ensure the uniform interpretation of EC law. But even the Court can not guarantee its coherent and consistent application in individual cases.
115. EC competition law is an exception to the general rule. In addition, it is the *only notable* exception. Under the EC Treaty, competition law is not only enacted in the form of general rules, which are to be applied, in individual cases, by national authorities. According to Regulation No 17/62, EC competition law is to be applied also, and even primarily, by the Commission. In addition, Regulation No. 17/62 has established the Commission's exemption monopoly.
116. EC competition law presents, therefore, a double particularity. One should be mindful of this double particularity in the context of the debate about

the future of EC competition policy, and the need to ensure its consistency. It is, indeed, only the second particularity, i. e. the Commission's exemption monopoly (which has become an anomaly over the years) which is at stake. The first particularity, i. e. the power of the Commission to apply EC competition law directly to undertakings, is not under discussion, and will remain. Its central role in determining EC competition policy will not be touched, but might probably even be strengthened¹⁴⁹. It is my firm conviction that this power contributes more to the coherence and consistency of EC competition law than can be achieved in any other area of EC law by the normal mechanisms intended to ensure the correct application of Community rules.

117. Compared with the overall situation prevailing generally on the internal market, the concern for the coherent and consistent application of EC competition law may be considered to be almost excessive. Not only the Commission's exemption monopoly has been defended as an indispensable tool to guarantee the consistency of EC competition policy. Concern has also been shown for the coherent application of the directly effective Article 81 (1), for which the two Commission Notices of 1993¹⁵⁰ and 1997¹⁵¹ have established special information and cooperation mechanisms. No similar mechanisms exist in any other area of EC law.
118. The preceding observations are not intended to criticise the legitimate fears that the elimination of the Commission's exemption monopoly will threaten the coherence and consistency of the future application of EC competition law¹⁵². They are set out to put the reform into a broader context. They show that a reform, which looks revolutionary and highly dangerous from the point of view of traditional competition law, is a step in the direction of normality from an overall internal market perspective.
119. Returning to the specific competition law context, it is obvious that the abolition of the Commission's exemption monopoly will increase the risk of divergent decisions. There is, therefore, a considerable need for more and enhanced cooperation between all actors, i. e. the Commission, national competition authorities and judges.

¹⁴⁹ White Paper, paras. 83 – 90.

¹⁵⁰ See footnote 17 above.

¹⁵¹ See footnote 18 above.

¹⁵² That the concerns for coherence and consistency have to be balanced against the requirements of efficiency of the application of EC competition law is noted by EEA EFTA States (1999), and Hawk (2000).

120. The application of Article 81 (3) will be difficult, particularly in the beginning. In spite of many Commission decisions and Court judgements, there is still considerable doubt about the correct interpretation of the notion of “restriction of competition” in the first paragraph of Article 81. The jurisprudence of the Courts is far from being coherent. Even greater is, however, the uncertainty about the interpretation of the third paragraph. The scope of Article 81 (3) is largely unexplored, if only because of the relatively few formal exemption decisions taken by the Commission, and the even smaller number of Court judgements reviewing these decisions. It will be one of the great merits of the abolition of the Commission’s exemption monopoly that more formal decisions interpreting Article 81 (3) can be expected. They will contribute to clarify progressively the scope of this key provision of the EC Treaty.
121. What are the mechanisms that the Commission envisages ensuring the consistency of the application of competition law throughout the EU?

Cooperation with and Coordination of Competition Authorities

122. With respect to national competition *authorities*, the White Paper mentions essentially three devices. The first is a simple information requirement. National competition authorities should be obliged to inform the Commission of all cases in which Article 81 is applied. The Commission believes that “*information of this kind together with any correspondence that may take place with the national authorities should ensure that the consistency of competition policy can be preserved without requiring machinery to impose solutions to conflicts in the application of Community law*”¹⁵³.
123. This statement is, however, qualified by the caveat (the second device) that the “*Commission would still have the possibility of taking a case out of the jurisdiction of the national competition authorities, by means of a mechanism equivalent to that in Article 9 (3) of the present Regulation No. 17*”¹⁵⁴. This right of evocation is thus not really new¹⁵⁵. It interferes much less with the autonomy of national competition authorities than a requirement of Commission consent, or the right of the Commission to annul a national decision. The latter would introduce an element of administrative hierarchy that is conspicuously absent in the EC Treaty and in secondary Community legislation.

¹⁵³ White Paper, para. 105.

¹⁵⁴ White Paper, para 105.

¹⁵⁵ Opposed, in the case of positive decisions, Deringer (2000), p. 9.

124. The apparent modesty of the Commission’s claim to maintain the right of evocation have, however, to be read together with the White Paper’s preceding “*principles for resolution of conflicts*”. It is useful to note, in particular, both the second and the fourth principles which read as follows:

“(2) When a national authority has adopted a positive decision¹⁵⁶ which is either no longer open to appeal or which has been confirmed on appeal, or a court has delivered a positive judgement (for example rejection of a complaint on the ground that a restrictive practice satisfies the tests of Article 85 (3) which is either no longer open to appeal or has been confirmed on appeal, the Commission can always intervene to prohibit the agreement, subject only to the principle of res judicata that applies to the dispute between the parties themselves, which has been decided one and for all by the national court.

(4) For as long as a decision of a national authority or a court is still open to appeal or the decision on appeal is pending, the Commission may at any time adopt a contrary decision. In that case the principle that conflicting decisions must be avoided will apply to the appeal body”¹⁵⁷.

Though theoretically correct, these paragraphs suggest a certain interventionism that does not sit comfortably with the basic principle of mutual respect between competition authorities that is highly desirable for the efficient functioning of the decentralised implementation of Article 81¹⁵⁸. This criticism might, however, not be justified in the perspective of a decentralised approach to voluntary notifications and requests for decisions, advocated above. As said before¹⁵⁹, the extension of the adoption of positive decisions under Article 81 (3) to national competition authorities could require stronger coordination mechanisms than necessary otherwise.

125. The third device suggested by the White Paper intends to assure the “*proper functioning of the network between the Commission and the Member States*” through “*a reinforcement of the role of the Advisory Committee on Restrictive Practices and Dominant Positions.*” The Committee “*would become a full-scale forum in which important cases would be discussed irrespective of the competition authority dealing with*

¹⁵⁶ From the perspective of the White Paper, a positive decision of a national competition authority is likely to mean the rejection of a complaint.

¹⁵⁷ White Paper, para. 102.

¹⁵⁸ Also critical Deringer (2000), p. 9. The Commission’s right of evocation is discussed in several observations by Member States, asking either for clarification and/or for a restrictive use. See Danish Government (1999); Irish Government (1999); Italian Government (1999); EEA EFTA States (1999).

¹⁵⁹ See paragraph 106 above.

*them ... [T]he Commission, acting on its own initiative or at the request of a Member State, could also be empowered to ask the Committee for its opinions on cases of application of Community law by national authorities.”*¹⁶⁰

126. These suggestions are perfectly reasonable¹⁶¹. It is, however, surprising that the White Paper requests systematic information on the application of *Article 82* by national competition authorities.¹⁶² Why is such information necessary, though *Article 82* is not at all concerned by the abolition of the Commission’s monopoly under *Article 81 (3)*¹⁶³? It is also surprising to read that national competition authorities should inform the Commission of any proceeding they were conducting under *national* law that might have implications for Community proceedings¹⁶⁴. What is the logical link with the proposal to allow *Article 81 (3)* to become directly effective?
127. It is understandable that the White Paper is mainly concerned with the vertical relationship between the Commission and the national competition authorities. However, it is highly desirable to promote also the cooperation and coordination among such authorities. The horizontal relationship between national competition authorities is, of course, in the first place, a matter for themselves. But the strength of the network between such authorities is also a legitimate concern of the central EU institutions. Interstate cooperation in the USA, more specifically the structure and activities of the US National Association of Attorneys General (NAAG), would be a useful source of inspiration¹⁶⁵.

¹⁶⁰ White Paper, para. 106.

¹⁶¹ See also the observations by Member States, like Italian Government (1999) suggesting more frequent and earlier meetings of the Advisory Committee; Portuguese Government (1999) and EFTA Authority (1999) recommending *ex ante* instead of *ex post* coordination; EEA EFTA States (1999) pleading for equal information.

¹⁶² White Paper, para. 107.

¹⁶³ Even systematic information on *Article 81* cases is considered to be excessive by EEA EFTA States (1999).

¹⁶⁴ White Paper, para. 105.

¹⁶⁵ Forrester (1999) with reference to O’Connor (1997), p. 147 –185. See also European Parliament (2000) para.20; Belgian Government(1999); Nehl 2000. See also paragraph 111 above with respect to the specific problem of exchange of files and information among national competition authorities.

Cooperation with and Coordination of National Courts

128. Also with respect to national *courts*, the White Paper suggests three devices to ensure the consistency of interpretation of EC competition law.
129. The first is, once again, an information requirement that would apply with respect to both Article 81 and Article 82¹⁶⁶. In view of the independence of the judiciary, the suggestion to establish such an information requirement could give rise to serious criticism, if such an obligation were not already to be found in certain national laws¹⁶⁷.
130. The second device suggested by the White Paper is a right of the Commission, subject to an authorisation by the national court, to intervene in national judicial proceedings as *amicus curiae*¹⁶⁸.
131. Finally, it is suggested to transform the cooperation mechanisms set out in the 1993 Notice on cooperation between the Commission and national courts into binding rules¹⁶⁹. These mechanisms allow the courts to ask the Commission for information on procedural, legal and economic issues. In a system of radical decentralisation, as suggested by the White Paper, it is even logical to extend the possibility of such assistance to national competition authorities, in so far as it does not exist already.
132. As in the case of national authorities, these suggestions for information, consultation and cooperation with respect to national courts seem to be perfectly reasonable¹⁷⁰. That, contrary to competition authorities, judges and courts can neither “cooperate” nor be “coordinated” when applying Article 81 is obvious¹⁷¹. The reader of the White Paper might, however, be surprised in noting the apparent confidence of the Commission that national *courts* will be able to apply directly the complex and delicate provisions of Article 81 (3). Before reverting to this – last – group of

¹⁶⁶ White Paper, para. 107. For the reference to Article 82, see paragraph 126 above.

¹⁶⁷ White Paper, para. 107. Doubts with respect to constitutional laws are mentioned by French Government (1999).

¹⁶⁸ White Paper, para. 107. Sceptical Finnish Government (1999); French Government (1999); German Government (1999); Irish Government (1999).

¹⁶⁹ White Paper, para. 107. See also footnote 17 below.

¹⁷⁰ Sceptical with respect to the strain on DG IV’s resources Forrester (1999).

¹⁷¹ This aspect – and the resulting risks for coherence and consistency of the application of EC competition law – are stressed by Austrian Government (1999) and German Government (1999). They exist, however, also today with respect to Article 81 (1), Article 82 and Article 86, like for any other directly effective provision of Community law.

problems¹⁷², it is useful to return briefly to national competition authorities, in particular those in future new Member States.

Obliging Member States to Entrust National Competition Authorities with the Application of Article 81

133. At present, only 8 of Member States have empowered their respective competition authority to apply Articles 81 and 82. Even under the existing legal rules, this situation is highly unsatisfactory. After all, Articles 81 (1) and 82 are directly effective since the entry into force of the EC Treaty. An amended Regulation No17/62 should therefore oblige all Member States to enable their competition authorities to enforce Articles 81 and 82¹⁷³.
134. If accepted, the reform suggested by the White Paper would have probably have repercussion on the substance of national competition law. It seems indeed unlikely that Member States would maintain a system of prior administrative authorisation if such a system would be abolished at the Community level. Opponents of the reform will consider this to be an argument that pleads against the suggestions of the White Paper¹⁷⁴. It is remarkable that others see this as a logical consequence, but without drawing any negative conclusions from it¹⁷⁵.

Further Harmonisation?

135. The White Paper does not discuss any wider reaching suggestions relating to the structure, powers, procedures, resources, and judicial control of national competition authorities, in so far as they are asked to apply directly Article 81 in toto. This is somewhat surprising, as the *Automec II* jurisprudence of the Court of First Instance suggests that in the absence of certain guarantees at national level, the Commission is no allowed to direct complaints to national competition authorities¹⁷⁶. It is, therefore, understandable that commentators of the White Paper consider that the Commission has not gone far enough in its requests to Member States governments. Some of them claim that national competition authorities should be obliged to operate according to the same basic principles and

¹⁷² See paragraphs 143 – 155 below.

¹⁷³ European Parliament (2000), para. 20; EEA EFTA States (1999).

¹⁷⁴ Austrian Government (1999).

¹⁷⁵ Finnish Government (1999); UK Government (1999). Opposed to any, even indirect change of national law Greek Government (1999).

¹⁷⁶ See footnote 18, in particular paras. 87 – 94 of the judgement.

rules as the Commission, when applying directly Article 81, including its paragraph 3¹⁷⁷.

136. Most supporters of the White Paper will probably sympathise with the requests for more guarantees for the efficient and correct application of Article 81 (and 82) by national competition authorities (and courts). However, at least at this stage of the debate, the self-restraint of the White Paper seems to be preferable.
137. Firstly, because the approach of the CFI in the *Automec II* case does not correspond to everybody's conception of the principle of the subsidiarity. The true meaning of subsidiarity is better served if undertakings have to live with the imperfections of national administrative structures in general, and national competition authorities in particular (as well as with the deficiencies of the national judiciaries). Under the subsidiarity principle, it can not be the job of the EU institutions to assume responsibilities simply because the situation at the national level is *de jure* or *de facto* unsatisfactory.
138. Secondly, it might not be wise to increase the suspicion of opponents of the White Paper that, instead of promoting subsidiarity, the reform is a disguised exercise in centralising competition law and policy in the EU. It is, indeed, perfectly possible that the direct effect of Article 81 (3) will lead to a broader blocking effect of Article 81 with respect national competition law than the existing system of prior authorisation under the *Walt Wilhelm* doctrine of the Court of Justice¹⁷⁸. For those who want to promote and extend the reach of EC competition law, this effect is of course welcome and even one of the advantages of the new system¹⁷⁹. However, friends of Member States competition statutes will consider it with scepticism, if not with hostility¹⁸⁰.
139. Finally, the problems of disparities and deficiencies of national competition authorities and courts can be addressed at a later stage, i. e.

¹⁷⁷See in particular Nehl (2000), but also Jalabert-Doury (1999), p. 506; Kon (1999); Mersing (1999), who also advocates that national competition laws are brought into line and are applied in conformity with EC competition rules, in order to bring about a common competition culture. Harmonisation is also mentioned by Italian Government (1999); Portuguese Government (1999); EEA EFTA States (1999).

¹⁷⁸CJ, 13 February 1969, Case 14/68 *Walt Wilhelm v. Bundeskartellamt* [1969] ECR 1.

¹⁷⁹See, for instance, Paulis (2000), who mentions this aspect as one of the major advantages of the reform.

¹⁸⁰See Mestmaecker (1999), p. 529; Moeschel (1999), p. 508/509; Monopolkommission (1999), paras. 43/44. For a reconsideration of the relationship between EC and national competition laws Wesseling (1999), p. 431.

after the new system has been put in place, and practical experiences have been made. If these experiences establish the desirability of further reforms, in particular the need for approximation of legislation, appropriate proposals should be made, but only at this later stage, and in view to address proven practical problems.

140. Among the proposals intended to maintain coherence and consistency in spite of decentralisation one can also find the suggestion to allow the judicial review of decisions of national competition authorities by the Court of First Instance and, on appeal, by the Court of Justice¹⁸¹. An innovation of this type would clearly go beyond all other previously mentioned mechanisms. Its introduction could hardly be limited to the area of EC competition law and constitute a major change of the institutional architecture of the EU Treaty. It seems, therefore, unrealistic to pursue its discussion in the limited context of the White Paper¹⁸².

National Competition Authorities in Future Member States

141. Is it realistic to expect competition authorities of future new Member States to be able to perform this task from the date of accession? The White Paper is ambiguous in this respect. On the one hand, it considers, in its introduction, enlargement to be one of the factors that make it necessary to strengthen competition policy with regard to cartels and abuses of dominant positions. On the other hand, it recognises, immediately thereafter, that “*any proposal to amend the competition rules of procedure must take account of the fact that those countries, with administrative structures that are still not very familiar with the concepts of market and free enterprise, will have to apply them as part of the *acquis communautaire**”¹⁸³. The latter consideration is an argument that one expects to plead rather against a radical decentralisation of Article 81 (3). However, it is not really discussed in the operational part of the White Paper. Only two further references are made to the future new Member States. The first can be found in the passages that reject the option of sharing the Commission’s monopoly under Article 81 (3) with national competition authorities. The White Paper argues (correctly) that such a system “*could prove particularly difficult for the new Member States,*

¹⁸¹ Opening the road for direct actions before the Court of First Instance is one of the reasons for Siragusa (1999) to plead in favour of a construction according to which decisions taken by national competition authorities should be taken over by the Commission, or be considered as delegated Commission decisions.

¹⁸² This position is shared by Deringer (2000), p. 9.

¹⁸³ White Paper, para. 7.

*whose administrative structures might not be up to such a task*¹⁸⁴. The other reference is made in the section dealing with the problems of the consistent application of EC competition rules, arising from the suggested direct effect of Article 81 (3). However, this reference is limited to the promise that, in the context of pre-accession strategy, the Commission will devote particular attention to the development of competition in the candidate countries, and that it will provide their competition authorities with increased assistance¹⁸⁵. The White Paper does not explain why a process of decentralisation that extends to the judiciary entails lower risks for the consistency of EC competition policy than the more limited sharing of responsibilities between the Commission and national competition authorities of the future Member States¹⁸⁶.

142. The particular problems arising in future new Member States are, however, solvable. They could be addressed by a transitional regime, according to which the Commission maintains special responsibilities for the territories of the newcomers¹⁸⁷. In addition, it should be remembered that the so-called Europe Agreements between the EU and the accession candidates oblige these countries already at present to apply the principles of Article 81 and 82, and to harmonise their national competition law with existing EC competition law.¹⁸⁸ The accession candidates have thus assumed obligations which go far beyond those which exist for existing Member States.

Special Problems for the Judiciary

The Issue

143. The proposed switch from a system of prior administrative authorisation to a regime of direct effect of Article 81 (3) will affect primarily the national courts. Their responsibilities will increase considerably. Instead of applying or waiting for a prior decision taken by the Commission or a

¹⁸⁴ White Paper, para. 62.

¹⁸⁵ White Paper, para. 106.

¹⁸⁶ The problems which the reform advocated by the White Paper would raise for the future Member States are stressed by Austrian Government (1999); German Government (1999). Deringer (2000), p. 11, considers that the switch from the existing to the new system would be a “catastrophe” for the accession candidates. On a similar line Mestmaecker (1999), p. 525.

¹⁸⁷ Nehl (2000).

¹⁸⁸ See – as an example – Articles 63 and 69 of the Europe Agreement between the European communities and their Member States, of the one part, and the Republic of Poland, of the other part, OJ L 248, 31. 12. 1993, p. 1.

national competition authority, the courts will have to decide themselves whether the conditions of Article 81 (3) are fulfilled or not.

144. Even supporters of the reform suggested by the White Paper voice concern whether national judges will be able to perform this new task¹⁸⁹. They question whether ordinary judges are sufficiently equipped to find the right answers to the complex questions of fact and law which an economic and legal appreciation under Article 81 (3) requires.
145. It is true that the application of Article 81 (3) is not easy. However, as pointed out before, it is not more difficult than the application of Articles 82 and 86 (2)¹⁹⁰. In addition, the present difficulties are in part transitional. They result from the (until now understandable) absence of any Commission guidance for the decentralised application of Article 81 (3), the scarcity of formal Commission decisions, and the lack of authoritative interpretations given by the Court of Justice.

Qualification of Judges

146. Remain the general propositions that judges are not qualified to undertake complex economic considerations, or that they should not be asked to decide issues implying the balancing of opposing interests and values. Neither proposition is tenable. There are other areas of the law (like intellectual property law) that require economic appraisals as difficult as competition law. In addition, any judge who has to rule on the respect or violation of human rights (like the principle of freedom of speech) is used to extremely delicate and often highly controversial operations of weighing and balancing of contradictory interests and values¹⁹¹.
147. While I am convinced that objections of principle against the direct application of Article 81 (3) by national judges are not justified, I concur with the view that it would be useful to dispose of judges and courts specialised in competition matters¹⁹². Courts that supervise the activities of national competition authorities have in fact such specialised knowledge. Final courts of appeal might also dispose of chambers

¹⁸⁹ Opposed are of course all those who are against the direct effect of Article 81 (3). See paragraphs 46 et seq. above. See in particular Mok (1999), p. 320/321. Strong reserves are expressed by Belgian Government (1999). Sceptical (also with respect to the reform in general) Jalabert-Doury (1999), p.506.

¹⁹⁰ See paragraph 60 above.

¹⁹¹ The UK Government (1999) states explicitly that it does not see any problem in principle with UK courts applying Article 81(3) as a whole. Scepticism with respect to judges is not shared by Forrester (1999) and Hawk (2000).

¹⁹² In favour of specialised courts also European Parliament (2000), para. 18.

composed of judges who have acquired experience in antitrust law. However, Article 81 issues can appear in such a wide range of cases that the generalised requirement of a specialised judge seems impracticable and unrealistic. In no case should it be a pre-condition for the acceptance and introduction of the new system of direct effect of Article 81 (3).

Appropriateness of Procedural Rules

148. In addition to the concerns about the qualifications of judges, critical observers doubt whether the existing rules of judicial procedure are appropriate to deal efficiently with competition law matters¹⁹³. For opponents of the White Paper, these doubts are arguments against the proposed reform¹⁹⁴. For supporters of the White Paper, they are reasons for requiring the approximation of national rules of judicial procedure¹⁹⁵. The arguments and demands are similar to the requests already mentioned with respect to the structure, powers, procedures and judicial controls of national competition authorities. Here, too, the additional steps are requested in order to enhance the efficiency of proceedings in competition matters, this time of private actions before national courts.
149. Once again, though sympathising with the suggestions for a more efficient handling of competition matters before national courts, it is useful to caution against too much enthusiasm for further reform. In the light of experience, there might come a moment where proposals for the approximation of national rules of judicial proceedings become necessary and appropriate. I am, however, convinced that this moment has not yet come. In addition, approximation of national rules of judicial proceedings might be much more controversial than the adoption of EC rules for the functioning of national competition authorities. A sector specific intervention in the case of specialised administrative bodies (like national competition authorities) is very different from a similar interference with rules of judicial proceedings that can probably not be limited to competition matters.

¹⁹³ See in particular Belgian Government (1999).

¹⁹⁴ Moeschel (1999), p. 509; Monopolkommission (1999), para. 48.

¹⁹⁵ See in particular the detailed arguments advanced by Kon (1999), a longstanding advocate of allowing Article 81 (3) to become directly effective. Kon also suggests introducing “*a more decisive mechanism*” for cooperation between the Commission and national courts, inspired by French legislation. French law allows a court to transfer a file of the case to the Conseil de la concurrence, which provides its advice to the court by way of expert evidence on the matter.

Inappropriate Inspiration by US Competition Law Concepts?

150. Critics of the White Paper have observed that the Commission's reform suggestions seem to be inspired by concepts and methods of antitrust policy enforcement in the USA, in particular a heavy reliance on private action before ordinary courts of law. These critics consider that it is dangerous to follow such concepts without adopting at the same time those elements which ensure that private action is such a successful instrument of competition law enforcement on the other side of the Atlantic. They refer to the possibility of class actions, discovery procedures, treble damage, contingency fees etc. They also refer to the greater deterrent effect of criminal sanctions, i. e. imprisonment, as opposed to purely administrative fines imposed on undertakings. They consider that these characteristics of US antitrust law are neither desirable, nor do they have any realistic chance to be introduced in Europe. However, without these instruments, the reform will not lead to the desired strengthening of competition law enforcement through increased private action¹⁹⁶.
151. It is true that the reforms suggested by the White Paper will bring EC competition law closer to the US model. Its emphasis on the role of national courts (and indirectly on private action) is remarkable, though by no means totally new. Since the eighties, the Commission has advocated a greater use of the direct effect of Article 81 (1) (and Article 82), as demonstrated by the Notice on cooperation between the Commission and national courts,¹⁹⁷ which precedes by several years the Notice on cooperation between the Commission and national competition authorities¹⁹⁸. The White Paper considers that these efforts have been largely unsuccessful because of the blocking effect of the prior authorisation system¹⁹⁹. It remains to be seen whether this is true²⁰⁰. Perhaps this blocking effect is overestimated. It is, however, clearly too early to judge the chances of future developments of private action and court proceedings. Let us see whether and how they progress.
152. The truly new element of the White Paper is the less prominent role attributed to competition authorities, be it at EU or at national level.

¹⁹⁶ See Moeschel (1999), p. 508; Monopolkommission (1999) paras. 36-40; Wolf (1999).

¹⁹⁷ See footnote 17 above.

¹⁹⁸ See footnote 18 above.

¹⁹⁹ White Paper, para. 39.

²⁰⁰ It is interesting to note that Braakman (1999) considers that the system of direct effect of Article 81, advocated by the White Paper, will lead to a reduced application of this provision in injunction proceedings.

Taken together with the emphasis on the importance of national courts, this signals a certain departure from the traditional European model of competition law enforcement, characterised by heavy reliance on the actions of a more or less independent administrative competition authority²⁰¹. This can be seen as an application of the subsidiarity principle in its broadest meaning, i. e. a retreat of the State and public authorities in favour of private initiatives.

153. The authors of the White Paper might be surprised by this “fundamentalist” interpretation. It is more likely that they considered decentralisation, as said before, as a tool²⁰². The dominant concern and final objective of the White Paper is to enhance the efficiency of EC competition policy by eliminating relatively unproductive, though highly resource intensive reactions to notifications and requests for exemptions.

Effects on the Court of Justice and the Court of First Instance

154. The reforms suggested by the White Paper do not only concern national judges and courts. They affect also the EC Courts in Luxembourg. Their implementation will lead to an increase of the actions before the Court of First Instance, if the Commission adopts more formal decisions, in particular more prohibition decisions. (Negative decisions are more likely to be attacked than positive ones). The reform will also increase the workload of the Court of Justice, both through a greater number of appeals, and through more requests for preliminary rulings by national courts, the latter reviewing national competition authorities decisions or adjudicating claims between undertakings.
155. It is regrettable that the increase of cases will enhance the difficulties that the EC Courts in Luxembourg have to face already. These difficulties are, however, by no means an argument against the reform. They are the price to be paid for a more efficient enforcement of EC competition rules. And they are not in any way specific to the competition field. The internal market in general requires not only well performing administrations. It also needs efficient judiciaries at EU and at national level.

²⁰¹ See paragraph 45 above.

²⁰² See paragraph 67 above.

CONCLUSION

156. The White Paper is an extremely important step in the direction of a major reform of the institutional framework of EC competition policy. Though coming somewhat as a surprise, even before the Green Paper on Vertical Restraints had been implemented, it has opened a debate which will certainly lead to a modernisation of Regulation No. 17/62 after almost 40 years since its adoption.
157. There is consensus that the actual system, based on the exemption monopoly of the Commission, does not work satisfactorily. There is widespread agreement that the monopoly has to be abandoned. Opinions diverge whether it should be shared with other, i. e. national competition authorities, or whether the principle of prior administrative exemption should be abandoned altogether and replaced – as proposed by the White Paper – by a system in which Article 81 (3) becomes directly effective. The second step is more radical and more courageous. The Commission has apparently chosen it to because it considers it to present less risk for the coherence and the consistency of EC competition policy than the model of the shared exemption monopoly. At first sight, this position seems to be hardly logical. However, seen together with the fundamental opposition of the Commission against positive individual decisions, that would replace the traditional exemption decisions, and against their substitute, the so-called comfort letters, this choice makes sense.
158. The preceding analysis has shown, however, that the Commission's aversion against positive individual decisions is problematical. This aversion is based on the assumption that, after almost 40 years of active EC competition policy and practice, the concerns of business for legal security are exaggerated, and that they can be satisfied by other means (like block exemptions, notices, guidelines and – very exceptionally - positive individual decisions). However, this position may well to be too extreme, so that more positive individual decisions (and their possible substitute, a new type of comfort letter) are required. In that situation, the White Papers approach to positive individual decisions taken by national competition authorities becomes problematical. Is it really justified to deny national authorities the right to grant such decisions, because of the risks of diverging results? Is this refusal compatible with the perception of the Commission and the national authorities constituting together a network? Would it not be preferable to reinforce, instead, the mechanisms for information, cooperation and coordination, in order to minimise the dangers flowing from decisions taken by national authorities? The White Paper suggests mechanisms that are relatively “soft”. For the system

envisaged by the White Paper, this approach seems to be wise. In a different system, in which national competition authorities are entitled to take positive individual decisions, “harder” coordination mechanisms might be appropriate.

159. The substitution of the existing system of prior administrative exemption decisions by one in which Article 81 (3) acquires direct effect will increase in particular the responsibilities of courts. The White Paper shows - implicitly – great confidence in the capacity of judges, and the appropriateness of judicial procedures, to cope with these new responsibilities. The approach taken by the White Paper is right, even if it might appear to be somewhat optimistic. However, with respect to competition authorities and courts in the future new Member States, the expectations of the White Paper seem unrealistic. For these authorities and courts, transitional arrangements appear to be indispensable.
160. The preceding remarks have shown that the White Paper can be criticised, but that it is fundamentally right. I, therefore, fully subscribe to the broad lines to the reform, and would like to see them implemented rapidly.
161. The White Paper is not only a radical, but also a remarkably courageous step. It demonstrates that the Commission is convinced that it will be able to exercise a leading role in the further development of EC competition policy even without the traditional exemption monopoly under Article 81 (3). If only for this conviction, the Commission and its DG Competition should be congratulated.

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