Common Market Law Review **30**: 681–686, 1993.

EDITORIAL COMMENTS

The Commission's Notice on Cooperation between National Courts and the Commission in applying Articles 85 and 86 EEC

In its Thirteenth Report on Competition Policy (1984), the Commission outlined the important role that national courts could play in the effective enforcement of Community competition law. Two years later, in the Fifteenth Report (1986), the Commission renewed and expanded its pleading, saying that application of Articles 85 and 86 EEC by national courts would make Community competition law part of the "living law" in each Member State. Given the physical and psychological proximity of national courts, domestic litigation in easy cases could be a more efficient and a speedier instrument for enjoining competitive behaviour than lodging a complaint with the Commission. At the same time, it would lead to a reduction in the workload of the Commission, which body would in turn be enabled to concentrate on the more complex cases. In an informal study, conducted in 1985, the Commission came to the conclusion that roughly half of the complaints that had reached it could have been satisfactorily dealt with by a national court.

To be sure, the Commission is aware of the manifold reasons that may account for the preference of companies to take the matter to Brussels instead of bringing a private action in a domestic court, and for the somewhat hesitant attitude of national judges about applying Community competition law. Nevertheless, in its long-awaited "Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty", issued on 12 February 1993,[1] the Commission takes a further step to encourage decentralized application of Community competition law by national courts.

1. O.J. 1993, C 39/6.

The Notice covers four issues.

First, the Commission addresses the power of national courts to apply Community competition law, dealing with direct effect of Articles 85(1) and 86, the effect of Article 85(2) on the applicable civil law, the application of block exemption regulations, and the binding nature of an individual exemption decision. The main point stressed by the Commission is that individuals and companies will have access to all procedural remedies provided for by national law on the same conditions as would apply if a comparable breach of national law were involved. As a consequence, parties should have access to provisional measures (i.e. injunctions) and to compensation for damages suffered in cases of infringement of Community competition rules, where such remedies are available in national law (para 11).

On this basis the Commission, *secondly*, makes a policy statement as to the exercise of its powers under Regulation 17/62. The Commission, serving the Community's general interest, has to establish priorities, and therefore intends to concentrate on proceedings which have particular political, economic, or legal significance for the Community. If such features are absent, the Commission will deal with a notification by means of a comfort letter. And a complaint will not be regarded to trigger sufficient Community interest when the plaintiff is able to secure adequate protection of his rights before the national courts (para 14).[2]

Third, the Commission deals with the way in which national courts will meet their obligation to directly apply Articles 85(1) and 86, with due regard to the Commission's powers under Regulation 17/62, in order to avoid decisions that could conflict with those taken or envisaged by the Commission. This analysis basically draws on the case law of the Court of Justice (*de Haecht II*; *BRT*; *Delimitis*), encouraging national courts to take decisions, opinions, or other official statements of the Commission into account as factual information (para 20). In cases where the Commission has already started a procedure, national courts may, in order to avoid conflicting decisions, stay proceedings, to await the outcome of the Commission's action, but also seek the

2. This position has been backed by the Court of First Instance, Case T-24/90, *Automec II*, Judgment of 17 Sept. 1992, para 77 nyr.

Commission's views on relevant issues (para 22).

With regard to Articles 85(3), the Notice states that national courts are not competent to apply Article 85(3) (para 8), but, of course, have to apply a block exemption regulation and are bound by an individual exemption decision. With regard to a comfort letter stating that the conditions for applying Article 85(3) have been met, the Commission's position seems to be deliberately fuzzy. National courts "may take account of these letters as factual elements" (para 25). It is hard to explain (and, in a Notice, should have been explained!) why and in what manner a national court which may not apply Article 85(3) shall nevertheless consider such a comfort letter as relevant to its proceedings at all. The Commission apparently assumes that a national court may refrain from applying Article 85(1) without "applying" Article 85(3) – a position that can hardly be squared with the *Delimitis* judgment.[3]

In a case where a "new" agreement[4] has been duly notified (or where there is no obligation to do so) and the Commission has not yet acted, the national court should assess the likelihood of an exemption being granted in the case in question – and, as a consequence, either apply Article 85(1) or suspend the proceedings awaiting the Commission's decision. In the latter case the judge may adopt interim measures (para 30), as provided for in national law. Here again the Notice takes a fuzzy position. The Commission obviously proceeds on the assumption that the interim measure may be based on the likelihood of an exemption being granted – which amounts to an application of Article 85(3) by the national judge. Query: can a national judge ever expect an exemption to be granted if the Commission's policy is to issue not individual exemption decisions but just comfort letters?

Fourth, the Notice deals with the cooperation between national courts and the Commission. National courts are, within the limits of their national procedural law, invited to ask the Commission for relevant information as to the notification of an agreement, whether a decision has been issued, a comfort letter sent out, or when a decision will

3. Case C-234/89, [1991] ECR I-935, 994, para 55.

4. "New" agreements are those which did not yet exist at the time of entry into force of Regulation 17/62 or at the time of accession of a new Member State.

be taken. Most important, taking up a hint in the *Delimitis* judgment,[5] a court may ask the Commission to provide it with an interim opinion on the question whether a certain (notified) agreement may qualify for an exemption (para 38). In case such an exemption decision is unlikely to be issued, the national judge may rule on the validity of the agreement. But what in case of a positive interim opinion of the Commission? Again the Notice should have been more explicit. May (or even should) the national judge apply Article 85(3) when it comes to provisional measures?

An appraisal of the Notice should start with the observation that (despite considerable research in the field[6]) we still know very little about the actual intensity of "enforcement" of Community competition law by national courts. There are indications that in civil suits it is usually defendants who rely on and refer to Community competition law, using it as a defence against an action based on breach of contract or infringement of an industrial or intellectual property right. Cases in which plaintiffs have relied on Community competition law seem to be rare – a fact that may be explained by two reasons. Plaintiffs who have to establish the relevant facts for the application of Articles 85 and 86 run into potentially surging expenses and carry a high risk accordingly. Moreover, it is to be presumed that at least in some Member States plaintiffs prefer to rely on national competition law in settings where Community law is also applicable because the relevant facts are easier

5. Para 63.

6. For an in-depth analysis of two national jurisdictions (United Kingdom and Italy) see now Behrens (Ed.), *EEC Competition Rules in National Courts, Part one: United Kingdom and Italy* (by Josephine Shaw and Aldo Ligustro); for France see Behrens and Korb-Schikaneder, "Europäisches Wettbewerbsrecht vor französischen Gerichten", 48 RabelsZ (1984), 457; Berlin, "L'application du droit communautaire de la concurrance par les autorités françaises", (1991) RTDE, 379; for Germany see Hintermayer, *Beitrag der deutschen Rechtsprechung zu Art. 85 und 86 EWG-Vertrag* (1984); Pietrek, "Durchsetzung des EG-Kartellrechts durch deutsche Gerichte, Recht der Internationalen Wirtschaft" RIW (1990), 611; Roth "The application of Community law in West Germany: 1980–1990", 28 CML Rev. (1991), 137, 168–176; for an overview on a comparative basis, Steindorff, "Europäisches Kartellrecht und Staatenpraxis", 142 *Zeitschrift für Handels- und Wirtschaftsrecht* (1978), 525; Steindorff, "Europäisches Kartellrecht vor staatlichen Gerichten 1971–1978", 146 *Zeitschrift für Handels- und Wirtschaftsrecht* (1982), 140; Steindorff, "Europäisches Kartellrecht vor staatlichen Gerichten, Teil I: 1958–1970", in *Festschrift für Kutscher* (1981), 437.

(and cheaper) to establish. It may be argued that by applying national competition law the aims of Community competition law are furthered at the same time.

The Commission's basic proposal to file a complaint in a case where adequate protection before national courts can be secured (para 14) seems to be basically sound as long as the Commission does not misjudge the burdens and risks that go along with a civil suit. Moreover, experience shows that business partners who want to keep up their relationship hesitate to institute civil proceedings based on a failure to comply with competition law. In these settings effective enforcement of Community competition law can be expected only by administrative authorities.

A different matter is the Commission's treatment of the comfort letter concerning the application of Article 85(3). In a Notice that deals with the cooperation between national courts and the Commission, one would have expected the Commission to take a clear position as to the relevance of the comfort letter in a civil suit. The Notice rather tends to misinform national courts as to their respective powers.

Whether and to what extent the Notice will contribute to a more intensified (and enlightened) application of Community competition law by national courts remains to be seen. However, it is suggested that the real issues of an effective enforcement of Community competition law lie somewhere else. If it is to be accepted as a sound policy that the Commission's limited resources shall be used only to deal with cases of Community interest, it is not only application of Community law by national courts, but also its enforcement by *national competition authorities* which is called for. Such decentralized enforcement of European competition law presupposes that the Member States give their national authorities not only all the powers required for such an effective enforcement, but also that the national authorities will be staffed in a way that they can adequately fulfill their duties. The future lies in a close cooperation between the Commission and the national authorities, based on a reform of Regulation 17/62. Such a reform may provide for a referral procedure in cases in which the Commission denies a Community interest that would justify its own action, giving the national authorities also the power to issue exemption decisions – perhaps

according to specific guidelines set forth by the Commission. Such a referral procedure should work with reasonable time limits that will put pressure on the national authorities to act, and thereby ensure the effective enforcement of European competition law.