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Floris Vogelaar\*

# Modernisation of EC Competition Law, Economy and Horizontal Cooperation between Undertakings

Around the turn of the Twentieth into the Twenty-first Century, competition policy rules in the EU display a new élan. And this in almost all areas of competition law! In the ongoing and seemingly uphill battle against illegal state aid - leading to undesired competition between (the economies of) Member States - the Commission finally succeeded in 1999 in persuading the Member States to bind themselves to detailed procedural rules which hopefully will contribute to an increased self-discipline in non-distorting the level playing-field any further than may be strictly necessary.<sup>1</sup> Earlier, by mid-1998, the Council adopted on proposal by the Commission a regulatory framework for the implementation of group exemption regulations for certain types of aid. Soon thereafter, the Commission adopted group exemption rules for "de minimis"-aid as well as for aid to be granted to small and medium sized business (SME) and for training and education purposes.<sup>2</sup>

In the field of implementation and enforcement of the competition rules, the changes and new initiatives are even more spectacular. Roughly thirty years after the first publications of the "Chicago school", the Commission now seems to have adopted - without mentioning any overt gratitude or recognition to "Chicago" though - the prime importance of economic analysis in competition law enforcement as their leading principle. This has brought about a vast change in the competition law landscape over the last four to five years. First, it started with the publication of the Notice on the definition of the relevant market

in 1997.<sup>3</sup> Then followed a major overhaul of the EC Concentration Control Regulation early 1998<sup>4</sup> and, hand in hand with that reform, the publication of the Notice on the notion of "Full-Function Joint Ventures".<sup>5</sup> With these new Notices and the amendments in the Regulation, much emphasis was laid on the structurally and economically beneficial effects of certain transactions, and in particular of structural joint ventures.

These events triggered a rapid sequence of further "economisation" of the EC competition rules, events that were helped by the imminent periodical expiration of many of the Group Exemption Regulations in the field of both vertical and horizontal agreements. The new élan seemed to have done away with the phenotypical approach, hitherto unknown, towards the assessment of contracts, contract clauses and transactions frequently occurring in the market. The Green Book discussion on a new approach vis-a-vis vertical restraints culminated in the adoption of the new Group Exemption Regulation 2790/1999<sup>6</sup> and the publication of the directly related Guidelines on Vertical Restraints in 2000.<sup>7</sup> One year later, the economisation spread out to horizontal agreements as well, as may be witnessed by the intro-

<sup>1</sup> Council Regulation 659/1999, OJ EC 1999, L 83/1.

<sup>2</sup> Regulation 994/98, OJ EC 1998, L142 and the subsequent three group exemption regulations as published in OJ EC 2001, L10/20.

<sup>3</sup> OJ EC 1997, C 372/3.

<sup>4</sup> By Council Regulation 1310/97, OJ EC 1997, L 180/1, amending Regulation 4064/89.

<sup>5</sup> OJ EC 1998, C66/1.

<sup>6</sup> OJ EC 1999, L 336/21.

<sup>7</sup> OJ EC 2000, C 292/1.

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duction of the two new group Exemption Regulations for Specialisation Agreements and Research & Development Projects<sup>8</sup> immediately followed by the rather encompassing Guidelines on Horizontal Co-operation.<sup>9</sup> These Guidelines replaced the previous joint venture guidelines of 1993 as well as some of the older publications of the Commission on the co-operation between small and medium-sized undertakings that dated back to 1968 and which were plainly outdated.

### Competition Enforcement Efforts in the Member States during the 1990s

During the 1990s and at the level of the Member States, a major effort was made to modernise the national competition rules. Within the EU, all fifteen Member States now have a Competition Act of their own.<sup>10</sup> In all Member States, the system of competition law is more or less based on or inspired by the competition rules of the EC Treaty. In some countries, this was brought about by the adaptation or amendment of already existing legislation. In most Member States, however, new law was created and the deliberate choice was made to converge the rules thereof with those of the Community system. In that manner a sort of voluntary Community-wide harmonisation of law emerged in the last ten to twelve years. In fourteen Member States *ex ante* concentration control has been installed as well. In all Member States save one (i.e. Austria, where the competition rules are essentially of a criminal law nature) the enforcement of competition law is ruled by administrative law. The introduction on a wide scale of national competition law in all EU Member States in addition to the EC rules on the subject indicates that the Members of the EU are now convinced that an open market economy with free competition<sup>11</sup> without strict enforcement rules would remain Utopia as it would eventually also be to the detriment of their national economies. Moreover, strict competition rules are likely to better prepare the various national industries for their role in the rapidly developing global trade economy.

Consequently, it can safely be said that competition law enforcement is now solidly embedded in the

economic policy of the Member States. This is also witnessed by the energetic co-operation by the representatives of the Member States in the "Advisory Committee" both advising the Commission on issues of EC competition enforcement, on the making of new and more effective and pragmatic competition rules in the context of the "modernisation" discussion mentioned hereafter and discussing amongst themselves in the forum called ECA<sup>12</sup> the cooperative network which ought to make the modernisation plans work on the national level.

### "Economisation" and Modernisation of Competition Law Policy

"Economisation" of competition law policy is also the central theme of these plans to modernise the enforcement system of the Articles 81 and 82 of the EC Treaty as initiated by the Commission in the so-called White Paper<sup>13</sup> and the subsequent Commission proposal for a new procedural "Regulation 17".<sup>14</sup> "Economisation" may be construed to have a double meaning here. Literally speaking, because the Commission expects to achieve through this modernisation of the rules to get their hands free to pursue important tasks of enforcement esteemed to be more urgent than the burden of dealing with (too) many notifications, tasks like the unravelling of international hard core cartels.<sup>15</sup> Metaphorically speaking, because these plans will lead to the introduction of a system of direct applicability of Article 81 of the EC Treaty as a whole and the resulting abolishing of the notification system as well as of the Commission's monopoly to issue individual exemption decisions pursuant to Article 9(1) of Regulation 17/62.<sup>16</sup> Under the new system, Article 81 is to be applied in its entirety - thus including section 3 thereof dealing with exemptions of the general prohibition laid down in section 1 of the article - by

<sup>11</sup> As mentioned in article 4(1) of the Treaty.

<sup>12</sup> The informal network of European Competition Authorities.

<sup>13</sup> OJ EC 1999, C 132/1.

<sup>14</sup> Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending certain sector specific Regulations, Brussels, OJ EC 2000, C365/1.

<sup>15</sup> On 21st November 2001, the Commission imposed a record high fine of in total € 855 million on the members of the so-called "vitamins cartel". The main orchestrator of this cartel, the Swiss company Hoffmann-La Roche fetched an individual record high of € 462 million, or some 2.6% of its worldwide annual turnover. At the time of writing of this contribution, the public version of the decision was not yet published in the OJ.

<sup>16</sup> See also Articles 4 through 6 of the proposed Regulation.

<sup>8</sup> Commission Regulations 2658/2000 on Specialisation Agreements, OJ EC 2000, L 304/3; and 2659/2000 on R&D agreements, OJ EC 2000, L 304/7.

<sup>9</sup> OJ EC 2001, C 3/2.

<sup>10</sup> For a full review thereof cf. F.O.W. Vogelaar, J. Stuyck and B.L.R. Van Reeken (eds): Competition Law of the EU, its Member States and Switzerland, two volumes, Kluwer International 2000 and 2001.

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the Commission, the national Competition Authorities (NCAs) and the national courts alike. Since there will no longer be the possibility to notify agreements, one can also no longer obtain immunity from fines during the period of investigation of the notification by the Commission. This modernisation will inevitably lead to an increased duty (or: burden?) of self-assessment of their competition-conform status by the business community.

The intensified "economisation" of competition law should be acclaimed. In the earlier years, European competition law concentrated largely on the enforcement of certain forms of contract or stereotypical clauses occurring therein and market behaviour. The new "economisation" will bring us an assessment of restrictive behaviour on the basis of economy-oriented analytical notions such as market position or market power, effect on the market, market structures and the likely impact of certain types of transactions on the market. In fact, it seems that only now full credit is being given to the early case law of the Court of Justice in which it was already held that in European Competition Law no *per se* prohibitions exist and that all agreements had to be assessed in their factual, legal and economic context.<sup>17</sup> Today, we also know that the Luxembourg Court of First Instance holds the view that within the system of application of article 81(1) there is no room for a European equivalent of the US-type "rule of reason". Any assessment of the economic balance of an agreement or concerted practice holding a restriction of competition is to take place within the context of the analysis under article 81 (3).<sup>18</sup> Deciding that issue was carefully avoided by the Court of Justice in the past, though hotly debated and speculated upon in literature at the same time. Thus, the economic analysis of article 81 consists of two parts: first, there is the rather abstract definition of restrictions of competition in article 81(1), and once an (appreciable) restriction of competition has been determined, there is, second, the economic balancing act of article 81(3). It should be analysed whether the economic advantages objectively outweigh the restrictions of competition found with the result that an exemption can be obtained from the general prohibition to restrict competition.

So, the present "economisation" is indeed full of substance! On the strength of economic arguments and analyses, it should be assessed in each case what will be the most likely reactions of competitors, suppliers, purchasers and consumers, of the undertakings concerned and third parties - in short: of the

"market" - before any case may be decided. For example, in the context of joint ventures this analysis should consider factors like the degree of transparency of the market, cost structures, 'the homogeneity of the offer, the elasticity of demand, the technological positioning of the parties involved and the existence of barriers to entry. The Notice on the definition of the Relevant Market may serve as a first road-map, the respective Notices on Vertical Restraints and Horizontal Co-operation may provide their users with firmer ground beneath their feet than their respective predecessors. Of course, in the past these factors were also taken into account in some form or other, but then the clause, contract and behaviour driven, approach of "competition restriction-thinking" dominated the discussion on enforcement. One only has to think of the entirely clause driven approach in the previous Group Exemption Regulations concerning vertical agreements like exclusive distribution, exclusive purchase and franchising<sup>19</sup> in contrast to the "safe harbour" approach - save for certain "hard core" infringements and its market share cap of 30% - of Regulation 2790/1999. The shift in emphasis from "clauses" to a "market effect" has obviously not come overnight. It came about in a series of smaller steps, as evidenced in the sequence of Notices published over the last decade and mostly related to concentration control. The Commission seems to have progressed in its thinking, in its method of research and in the ways things ought to be executed. It is all about being more articulate, more transparent and more coordinated, and that is something which should be welcomed very much.

One aspect, though, that I personally do not welcome wholeheartedly, is the fact that the Commission proposes to (also) put the delicate economic balance analysis needed for the assessment of the criteria under Article 81(3) in the hands of the national courts - specialists in the construction of "law" - and thus (also) outside the hands of institutions that have developed special legal and economic skills to apply proper market analyses to complicated competitive contexts. This consequence of the reform proposals of the Commission occurs to me to be in direct contradiction to the Commission's overt desire to "economise" the

<sup>17</sup> ECJ judgment in *Volk/Vervaecke*, case no. 5/69, ECR. 1969, p. 295.

<sup>18</sup> CFI judgment in *Metropole Television and others v. Commission*, case no. T-112/1999 of 18 September 2001, not yet reported.

<sup>19</sup> The now discarded Regulations 1983/83, 1984/83 and 4087/88.

enforcement of competition law as evidenced by the shift in enforcement emphasis explained in the many recent notices and guidelines mentioned above. It is on this aspect of the reform proposals that I will focus my contribution in particular.

### The Present Horizontal Group Exemption Regulations

Having explained briefly the trends and backgrounds of development of competition law today, let us now turn to horizontal agreements and to what actually is the present state of the art. Unlike the present situation in respect of vertical agreements, horizontal agreements have to do without an overall safe harbour group exemption regulation. Only two specific categories of agreements are group-exempted, i.e. Specialisation agreements in Regulation 2658/2000 and Research & Development agreements in Regulation 2659/2000. The system of those regulations is equivalent to the system of the safe harbour regulation for vertical restraints. There is common ground to be found in a market share cap for their application<sup>20</sup> and there is the "hard core restriction" approach.<sup>21</sup> Within the respective category, the safe harbour approach prevails to the extent that "anything goes" as long as the relevant market cap is not exceeded and there are no hard core restrictions.

The Group Exemption system relies largely on self-assessment by the business community and on the private enforcement thereof, should a problem arise in practice. In this context, national courts play an important role in the enforcement of the group exemption rules.<sup>22</sup> These courts are perfectly placed to decide whether the terms and conditions of such regulations apply in a given case, since they can act within a given economic framework, carefully defined by the Commission. The borderlines of the application of article 81 (3) for that specific type of contract have been set. This is usually done by the Commission after extensive economic analysis of the type of contract involved, as is also witnessed in the present two sets of Guidelines for vertical restraints and horizontal co-operation agreements. The market share cap in the new regulations should not put this civil law analysis in jeopardy either, since the national courts may ask clarification on that issue from the Commission on the basis of the Notice on co-operation between the Commission and the national courts in competition cases.<sup>23</sup> The Commission in turn has assembled an impressive knowledge of almost anything around "relevant markets" in the context of

the concentration control rules. In the more than twelve years of their existence virtually all thinkable markets have been looked at by the Merger Task Force at least once, from which all other competition law enforcing institutions, including the national courts, could benefit. Hence, cross-fertilisation may occur between the Commission's vast pool of knowledge and the needs of the national courts.<sup>24</sup>

Similarly, some of the Member States have provisions in their national Competition Acts that provide the national courts with the opportunity to obtain equivalent information from their respective NCAs, which seems equally practical where such NCA has also assembled a pool of relevant market knowledge as a result of the application of national concentration control rules. Once the relevant product or services market for the specialisation or R&D contract concerned has been determined in this manner, the parties to the litigation are probably best placed either to inform the court of their market shares or to contest such information. So, for the national judge, the application of this aspect of the new group exemption regulations should not pose too high a hurdle as there are relatively few discretionary powers involved.

Moreover, the national courts do not have to worry about facts and circumstances that would trigger the withdrawal of the group exemption benefits for specialisation or R&D contracts, since this remains the prerogative of the Commission.<sup>25</sup> Thus, the system as a whole brings us legal certainty since the economic analysis that may be required in some of the cases remains with the institution that is best geared and placed for it, i.e. the Commission. For the national courts, the enforcement of the group exemption regulations thus remains within the borders of legal analysis, and that is a task for which these institutions are best equipped. The system as explained by the European Court in the *Delimitis*-case thus remains intact in a cohesive manner. In those cases where there is uncertainty either as to the relevant market shares or to the possibility that the

<sup>20</sup> 20% for Specialisation agreements and 25% for R&D.

<sup>21</sup> Cf. article 5 of Reg. 2658/2000 and articles 3 and 5 of Reg. 2659/2000.

<sup>22</sup> As clearly set out in ECJ judgment in *Delimitis/Henninger Brau*, case C-234/89, [1991] ECRI-935.

<sup>23</sup> OJ 1993, C39/6.

<sup>24</sup> See also, F.O.W. Vogelaar in "Marktwerving moet!", at p. 15 et seq., Inaugural Address held on April 19, 2000 and published by Vossiuspers AUP, Amsterdam, 2000.

<sup>25</sup> There is no role for the NCAs in this respect, unlike the situation with vertical restraints. Cf. also articles 6-8 of Regulation 2790/1999.

group exemption benefits could be eligible for withdrawal, the national court could stay the proceedings and require the parties, to address themselves to the Commission, either through a formal notification or by means of a complaint. Either of these steps may eventually lead to clarification of the situation by the Commission, resulting either in an individual exemption or in a formal decision to withdraw the group exemption benefits. With that result in hand, the national proceedings may then be brought to a conclusive end.

### **The Proposed "Directly Applicable Exception System"**

If the modernisation plans become law and the system of direct applicability of article 81 in its entirety becomes the prevailing rule, the horizontal landscape as described above will change drastically. Not only will the national courts have to decide on the applicability of the two group exemption regulations as such, but these courts will also be largely on their own in the appreciation of those cases where the exemption benefits do not prevail. Assuming that no hard core restrictions are at issue,<sup>26</sup> the courts will have to assess the compatibility with article 81 in its entirety (thus including section 3 thereof) of those specialisation or R&D contracts which exceed the market share cap limits. In doing so they may still rely on the guidance of the Commission as set out in the above-mentioned Notice on co-operation, but here more than before the guidance of the Commission as laid down in the Guidelines on horizontal co-operation agreements may come into play. Its special sections on specialisation or R&D contracts may not be of much help here, since these explanations rather focus on the applicability of the group exemption regulations as such, whereas they remain rather inconclusive on the possibilities for exemption once the market share cap is exceeded. It is mainly the other (con)text of the Guidelines that should be the special source of wisdom for the national judge, and in particular the introductory chapter thereof in which the general principles of application of article 81 to horizontal agreements is explained.<sup>27</sup>

Article 6 of the Commission's proposal for a new "Regulation 17" reads:

"Powers of the national courts

National courts before which the prohibition in Article 81(1) of the Treaty is invoked shall also have jurisdiction to apply Article 81(3)."

The text seems to have been cautiously phrased as

if the national courts still have the discretionary choice to either apply article 81 (3) or not. There is no doubt as to their task in applying article 81(1), as summarised in Delimitis, but it remains to be seen whether they also will find it suitable to apply the section 3 thereof. As there is no talk of "must apply", the national judge seemingly has the option to stick to his present practice and to decide to stay proceedings in order to refer the matter to either the Commission or his NCA. If that should develop as the prevailing practice, the Commission may not achieve much of its objective envisaged by the modernisation process, i.e. to cut down the workload in individual exemption cases. Also, the NCAs will risk to be frequently approached with questions on article 81(3) appraisals.

Moreover, it is to be expected that the national court may find that interim injunction proceedings may not be primarily suitable for the exemption appraisal process, thus potentially leading to long-drawn proceedings under the respective Member States' civil proceedings rules as far as litigation on the merits is concerned. This is a tendency, which already today one may detect in the applicability of the articles 81(1) and 82 (or their national competition law equivalents), where national judges frequently seem to hold that the assessment of these Treaty articles involves the analysis of complicated economic issues like "the relevant market" which are deemed to be too time-consuming to fit within the practice of awarding interim or injunctive relief. It may be their (national judges') fear of cold water, but I think that there may be more to it. It may be the underlying dislike to apply legal norms that imply too much of an (economic) discretionary appraisal of an uncertain factual nature, in a field where experience for each individual judge may not be overwhelming anyway.

The introduction of the directly applicable exception system and its extension to the national courts may indeed be premature.<sup>28</sup> It may need a longer period of first enhancing private enforcement of competition law and the resulting increase of enforcement experience with the national courts.<sup>29</sup> It may also need an intensified training programme for national judges first so as to familiarise them more

<sup>26</sup> Since these may be relatively easy to detect and bring the contract outside the scope of the relevant group exemption anyway.

<sup>27</sup> Cf. in particular nos. 1-38 and 78-100 of the horizontal Guidelines.

<sup>28</sup> Cf. strongly in that sense: R. "Wesseling: The draft-regulation modernising the competition rules: the Commission is married to one idea, in (2001) 26 E.L.Rev., p.357 et seq. I fully concur with this analysis.

thoroughly with the thinking and the intricacies of competition law enforcement. This would not only apply to the judges of the national commercial courts in the present Member States, but also to the judges of the future Member States for whom the task of familiarising themselves with the principles of private enforcement of EC competition law would seem even more formidable to start with. It would also mean an intensified and continuous training of new judges given the practice in many Member States' courts that judges should periodically rotate to serve in different areas of the law (commercial, bankruptcy, family, criminal, administrative law and the like).

### **Concerns in Relation to the "Directly Applicable Exception System"**

Thus, for the moment, there is no overall safe harbour approach for horizontal co-operation agreements. This means that national courts may have to do quite a bit of pioneering as far as co-operation agreements are concerned that are not covered by either of the two group exemption regulations. The kind of concerns to be experienced may best be exemplified by looking at some of the individual decisions under article 81(3) taken by the Commission in the past and by then trying to assess the task of the national courts had these cases been brought before one of them under the directly applicable exception system. This might for example be done by a complainant or result from one of the parties to the co-operation wanting to withdraw from the co-operation alleging that it runs contrary to article 81(1) and contending that it is not in compliance with article 81(3).

### **Exemptions for a Specified Period of Time**

Together with the loss of the notification system, the exemption decision practice including the effects of article 8(1) of Regulation 17/62 will also disappear. This means that the Commission will no longer take any exemption decisions for a specified period of time. Furthermore, pursuant to article 8(2) of Regulation 17/62, exemption decisions may be renewed on application once their period starts to expire. Within the present system, that provision made sense in that it allowed the Commission to check whether after a number of years the prevailing

market conditions would still warrant exempting the co-operation. In the past, we have seen decisions in which the Commission implicitly made it clear that an exemption could be granted only once as the joint venture was likely to have a decisive influence on the structure of the market.<sup>30</sup> Also, if the joint venture were to exist for too long a period there would be the risk of foreclosure of the market, especially where third parties would be denied access for a longer period to the co-operating parties' know-how.<sup>31</sup> Furthermore, it was made clear in another case, that the parties were expected to start competing on their own again once the specified term of the exemption was over.<sup>32</sup> On the other hand, it has also been seen that the Commission after a thorough investigation of the then prevailing market conditions by decision renewed the duration of an exemption.<sup>33</sup>

In the directly applicable exemption system, judgments of the national courts declaring an agreement compatible with article 81 as a whole will be of a declaratory nature. Also, the judgments will have *erga omnes* effect only. National courts will not normally have the power to make this declaration of compatibility valid for a specified period of time only. Would this now mean that the parties who obtained such declaratory judgment would have to assess the effects thereof periodically in order to see whether the conditions for article 81 (3) were still being met? And when in doubt after a while, should they then go back to the court and ask for a new declaration of law that the conditions for exemption were (still) being met? Co-operating parties seem to be manoeuvred in an awkward position under the new system, since we also know from older case law of the ECJ that a situation may first be exempt (or rather not falling within the prohibition in the first place) for a certain period of time and then become an infringement of article 81 (1).<sup>34</sup> In particular, now that the Commission has announced that it will use article 10 of the proposed regulation for landmark cases only, whereas it does not seem the Commission's intention to develop something like a "business review" practice, there seems to be no other option for the business community seeking legal certainty for their co-operation agreements.

<sup>29</sup> Interesting suggestions in this respect have been made by W. van Gerven: Substantive remedies for the private enforcement of EC antitrust rules before national courts, the author's general report on the situation at EU level regarding Substantive Remedies submitted to the 2001 EU Competition Law and Policy Workshop on Effective Enforcement of EC Antitrust Law, held at the European University Institute in Florence in June 2001.

<sup>30</sup> Commission decision re KSB/Goulds/Lowara/ITT, OJ EC 1991, L19/25.

<sup>31</sup> *Ibid.*

<sup>32</sup> Commission decision re United Reprocessors, OJ EC 1975, L51/7.

<sup>33</sup> Commission decision re De Laval/Stork II, OJ EC 1988, L59/32.

<sup>34</sup> As in case 42/84 Remia et al. v. Commission, [1985] ECR 2545.

### Obligations and Conditions

In quite a number of decisions, obligations and/or conditions are imposed by the Commission to ensure that the parties are given no scope to "abuse" the exemption or to make sure that the conditions for exemption continue to be met strictly. These obligations frequently take the shape of reporting obligations. This occurs mostly in what the Commission itself sometimes names "borderline cases" for exemption, i.e. cases that only just seem to qualify for exemption. The already mentioned decision re KSB/Goulds/Lowara/ITT is a good example hereof.<sup>35</sup> Another example may be found in the Exxon/Shell decision<sup>36</sup> which was an interesting case in itself since it was started at the Commission's initiative, the parties themselves not having been aware of any infringement of article 81(1) as regards their joint production agreement in the first place. Consequently, this agreement had not been notified to the Commission to start with!

National courts will not normally have the power to impose conditions or obligations to monitor the compatibility with article 81(3). And even if they had, who would then monitor the compliance with these conditions or obligations? To whom should the parties report periodically? Or would the Commission now suddenly hold the view that conditional decisions were no longer necessary? In this context it should also be pointed out that the NCAs will be of no help since these institutions are not to have rights similar to the Commission's rights under article 10 of the proposed regulation.

### Hearing of Third Parties

Under the present provisions of Regulation 17/62, a major aspect of the work of the Commission when analysing the merits of a notification consists of hearing third parties. Known competitors or customers of the notifying parties may be approached for their views and allegations made by the parties may be checked in that way. Once the Commission decides that the notification potentially merits the granting of an exemption, the essential parts thereof are published in the OJ pursuant to article 19(3) of Regulation 17/62. In the subsequent decision, the Commission quite often mentions that comments have come in from third parties as a result whereof certain amendments to the agreement were implemented or obligations had to be imposed. In the new system, this routine of course will disappear. In civil proceedings, the national courts cannot of their own

motion call in third parties to comment on the direct applicability aspects under article 81 (3). Therefore, the parties and their expert witnesses have to be heard and believed on their own strength, which seems to do away with the objective reliability potential of the declaration of compatibility to be issued.

### Negotiating Amendments to Qualify for Exemption

It has frequently occurred that after due notification, the Commission and the notifying parties have negotiated certain amendments to the agreements notified in order to pave the way for an exemption. In the decision re De Laval/Stork I, the Commission required the notifying parties to include in their co-operation agreement that, whenever the agreement would be terminated, they would be put in a situation in which they could resume competing with each other in the field of their co-operation.<sup>37</sup> In the Optical Fibres case, such negotiations were drawn out over a period of almost seven years before the Commission was even inclined to issue an exemption.<sup>38</sup> A national court, faced with an agreement that would carry some potential under article 81(3) should it be amended, cannot normally within the rules of civil procedure suggest to the parties to the agreement that they perhaps should amend their agreement to benefit from a declaration of compatibility. This would go against the judges' neutrality and, in most cases, also against the interests of the complaining party in the litigation. The result is that the court concerned will have no alternative than to declare the agreement to fall within the scope of the prohibition of article 81(1). This does not seem to be a satisfactory result in cases where the parties might have been willing to amend their co-operation but simply were not aware of the need to do so or of the type of amendments for which to look.

### Correction of the Number of Parties Involved

A co-operation concerning the production and marketing of polyurethane foam in a period of structural overcapacity for the product was notified to the Commission by three parties to the agreement. Because of the structure of the market and the lack of sufficient residual competition left in the market as a result of the co-operation at hand, the Commission

<sup>35</sup> As in nos. 34-35 thereof.

<sup>36</sup> Commission Decision, OJ EC 1994, L144/20.

<sup>37</sup> Commission decision re De Laval Stork I, OJ EC 1977, L215/11.

<sup>38</sup> Commission decision re Optical Fibres, OJ EC 1986, L236/30.

only accepted the co-operation after one of the original parties was forced to withdraw from the co-operation.<sup>39</sup> Such withdrawal cannot be forced in national civil law enforcement proceedings, and is also not likely to be offered by the defending parties. The result may then be a right-out prohibition of the agreement pursuant to article 81(1) which may not always be in the Community's interest either, certainly not in cases where structural overcapacity already haunts the market.

### **Recession-driven Co-operation Agreements**

An economic recession may prompt certain types of co-operation agreements that aim at combating the detrimental effects of structural overcapacity or the restoration of the balance between supply and demand in a manner that is acceptable from a competition law point of view.<sup>40</sup> All decisions involved have far-reaching effects on international markets and have, in the previous recession period, required the Commission to analyse the residual competitive structure in the relevant markets with great care. The agreements involving recession type of article 81(3) defences have been bilateral as well as multilateral. It seems hardly conceivable that this type of article 81 assessment may be done in a satisfactory manner by national courts, who then inevitably would have to assess community-wide or even global markets, the effects of a recession on those markets and the place of the parties concerned in that economic environment. Decisions as to the compatibility with article 81 in its entirety may become too unpredictable to be left to national courts who lack the thorough economic training and background that it takes to decide on such delicate issues. Competition enforcement may only be effective indeed, when the outcome of enforcement procedures are sufficiently transparent and predictable to the business community.

### **Sector-wide Agreements**

In the Guidelines on Horizontal Co-operation, at the very end,<sup>41</sup> an example is given of a sector-agreement which has been exempted for its redeeming qualities for the environment.<sup>42</sup> The co-operation was concerned with the introduction of a new generation of washing-machines that need less electricity and water to operate. There also was agreement amongst competitors to gradually phase out of the market certain machines with older, less environmentally friendly technology. In this decision, the Commission after a thorough economic analysis of the likely effects

of the agreement on the market reaches the conclusion that an exemption may be granted because of the on balance strong positive economic effect of the co-operation on the European environment as a whole. The co-operation was deemed to lead to significant economies in the use of electricity and water community-wide. It seems hard to conceive that in a similar situation a national court would declare an environmental co-operation agreement compatible with article 81 (3) because of its alleged overwhelmingly positive effect on the Community's environment as a whole. And if it does, this might carry the risk of an over-enthusiastic appraisal of the effects of such an agreement that might surpass the competence of this particular court.

### **The Notion of "Economic Progress" in Article 81 (3)**

The examples described above may trigger the question as to what exactly should be incorporated or comprised in the notion of "economic progress" which is one of the positive factors to be assessed in the context of article 81 (3). From case law of both the Commission and the ECJ, we already know that other arguments (of an economic nature) that are not specifically mentioned in the wording of article 81(3) may nevertheless also be included in this notion.<sup>43</sup> Such arguments seem to include elements of industrial policy. Now that the environmental policy should be taken into account in competition cases as a result of the introduction by the Maastricht Treaty of the principle that is now laid down in article 6 of the EC Treaty, this may be clear today for environmental issues. For other issues, like the ones stemming from the social cohesion article 16 in the EC Treaty, this may seem less obvious. Case law of the ECJ shows the interpretative struggle in this context.<sup>44</sup>

Ideally, article 81 should be interpreted on the basis of competition arguments only. Economic progress should thus only include elements showing the direct economic relationship between the parties involved or the direct economic effects that derive from such co-

<sup>39</sup> Commission publication ex art. 19(3) of Regulation 17/62 re PRB/Shell, OJ EC 1984, C189; see also XVIIth Competition Report, at no. 74

<sup>40</sup> Good examples of the Commission's balancing act in these circumstances can be found in the Commission decisions re Enichem/ICI, OJ EC 1987, L50/18; Bayer/BP, OJ EC 1988, L150/35; and Dutch Brick, OJ EC 1994, L131/15.

<sup>41</sup> At no. 198

<sup>42</sup> Commission decision re CECEDEC, OJ EC L187/47, 2000.

<sup>43</sup> Like in the CECEDEC-decision of the Commission or the ECJ re Metro v. Commission, [1977] ECR 1875.

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operation for third parties. Here, especially foreclosure effects should be mentioned. Elements of other policies of the Community should, strictly speaking, not be assessed within this framework. Such elements should be addressed by other Treaty provisions. Yet, environmental elements nowadays have to be incorporated. Social elements were already accepted by the ECJ years ago. Industrial policy aspects have frequently played a decisive role in the Commission's exemption decisions practice. That being the case, the question is justified whether the national courts should be burdened-with all those elements as well.

Now that the CFI in its judgment re *Metropole Television* denies the existence of a rule of reason in the context of article 81(1), this implies that the arguments that hinge on the "economic balance" of an agreement are to be taken into account in the context of article 81(3) only.<sup>45</sup> In that same judgment, the CFI recalls that "it is settled law that the exercise of the Commission's powers under article 85(3) of the Treaty *necessarily involves complex evaluations on economic matters*, which means that judicial review of these evaluations must confine itself to an examination of the relevant facts and of the consequences which the Commission deduces from them", (author's own emphasis).<sup>46</sup>

The language used by the CFI is not very supportive of the proposed reform system. It may be feared that as far as the civil law enforcement of horizontal co-operation agreements is concerned, the new system may lead either to unacceptably broad judgments of the national courts holding compatibility with article 81(3) in an attempt to decide important matters expediently or to an unacceptably longer duration of civil law proceedings together with higher procedural costs for all parties involved. This longer duration may be triggered by national courts relying on external reports to be written by economic experts or by such courts simply referring more cases to the ECJ in Luxembourg pursuant to article 234 of the Treaty. In the latter case, the competition workload is, unintentionally though expectably, shifted from the Commission in Brussels to the Court in Luxembourg.

This should be considered an unfortunate and not very practical side-effect of the Commission's proposals to modernise the implementation of the articles 81 and 82.

### Conclusion

From both the Commission's explanatory comments to the proposal for the new "Regulation 17" and the new approach towards horizontal co-operation agreements as witnessed in the Guidelines and the two group exemption regulations, it seems abundantly clear that the Commission holds the view that the time is not yet ripe for an overall safe harbour approach for horizontal co-operation agreements. That being the case, there would have been no objection - if only for an intermediate step and until the moment that the horizontal market would be ripe for an overall safe harbour approach - to the introduction of a notification system for such horizontal agreements similar to the one applicable for vertical restraints by virtue of Regulation 1216/1999.<sup>47</sup> This would have considerably alleviated the Commission's workload as far as reducing the number of and dealing with notifications is concerned. If this system had been combined with the sharing of the exemption powers by the Commission with the NCAs - which would have been a truly appropriate and proportional signal regarding the application of the principle of subsidiarity - this would have left the complicated economic assessment under article 81(3) where it belongs, i.e. with the administrative authorities that would be best placed (and trained) to perform this task. The national courts could then continue to concentrate on their tasks as defined by the ECJ in *Delimitis*, with the result that these institutions would also be doing exactly that for which they are best placed and trained, i.e. the application of the legal norms provided for in article 81(1) and (2) and article 82. The proposals of the Commission are deemed to be premature - at least in the view of this author - in the light of the forthcoming enlargement of the EU, the enforcement puzzles as described above, the monitoring of the cohesion of Community competition law and all the problems of training that come with it. The Commission's workload is likely to increase as a result of all this, and not just for an intermediate period of time but expectedly forever.

<sup>44</sup> Only to mention recent judgments of the ECJ like C-67/96 *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie*, [1999] ECR I-5751; C-115/ 97 en C-117/97 *Brentjens v. Pensioenfonds voor de Bouwnijverheid* [1999] ECR I-6025; C-219/97 *Maatschappij Drijvende Bokken BV v. Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven*; C-180/98 *P.Pavlov e.a. v. Stichting Pensioenfonds Medische Specialisten*, 12-9-2000, not yet published; C-222/98 *H. van derWoude v. Stichting Beatrixoord* 21-9-2000, not yet published.

<sup>45</sup> At recitals 72-29.

<sup>46</sup> At recital 156.

<sup>47</sup> Regulation amending Council Regulation 17/62, OJ EC 1999, L148/5.