

THE COMPLAINANT IN COMPETITION CASES: A PROGRESS REPORT

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1. Introduction

Just over two years ago, this journal published an article by Judge Vesterdorf¹ describing the position of the complainant in relation to an alleged infringement of Article 85 or 86 EC. In particular Judge Vesterdorf identified and examined five key questions: (i) must complaints from *everyone* be considered? (ii) must *every complaint* be examined and treated in detail? (iii) is there a *right to be heard* and a *right of access to relevant documents*? (iv) has the complainant a *legal right to a decision* on the part of the Commission? and (v) what *legal remedies* does the complainant have with regard to the Commission's handling of the complaint and to its decision? The answers to these questions are no less important today. The purpose, however, of this article is not to revisit all those issues or to rehearse the arguments and points made by Judge Vesterdorf. There is no substitute for the original and the reader is referred to the earlier article. The present article started life as a review² of the approach of the Commission and the Court of First Instance (hereafter: CFI) to the application of the principles laid down in *Automec II*,³ looking especially at the situation where investi-

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1. "Complaints concerning infringements of competition law within the context of European Community law", 31 CML Rev., 77.

2. In the context of a public lecture given in the Institute of European Law, University of Birmingham, 1 March 1996.

3. Case T-24/90, *Automec Srl v. Commission*, [1992] ECR II-2223.

gation of a complaint could justifiably be refused on the grounds that it was not in the Community interest to pursue it. That subject remains the centrepiece. But the Community Courts and the Commission have been active in relation to other matters affecting the complainant and the opportunity will therefore be taken to describe and comment on other developments.

2. Background

Complaints remain an important feature of the enforcement of the competition rules. Each year some one hundred and forty or more complaints⁴ are made to the EC Commission alleging a breach of Article 85 and/or 86 EC. They cover a wide spectrum of circumstances and industrial and commercial sectors. Not all involve David taking on Goliath, although some do. It is noteworthy how large firms continue to turn to the Commission for help or support.⁵

The maintenance and growth of the number of complaints made to the Commission has to be seen against a background in which parties have been, and are likely to continue to be, encouraged to seek redress before national courts and competition authorities. This encouragement has come from a number of directions. In June 1993 the Commission issued its Notice on co-operation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty⁶ (the Cooperation Notice). This gave a clear signal to potential complainants that the Commission might be more selective as to which cases it took up and that other avenues of redress were to be

4. The Commission's *XXVth Report on Competition Policy (1995)* shows that the number of complaints continues to grow. There were 83 in 1991, 110 in 1992, 111 in 1993, 140 in 1994, and 145 in 1995. Between 1 Jan. 1992 and 1 Jan. 1995 some 260 of these came from the United Kingdom: Hansard 6 Dec. 1995, col. 67.

5. For example, American Express complained to the Commission about certain changes to Visa's internal operating rules which would have the effect of restricting member banks ability to offer more than one kind of card. Amex claimed that banks would not be allowed to distribute American Express cards if they already issue Visa cards. *European Report* 24 Jan. 1996, III-3.

6. O.J. 1993, C 234/89.

explored, in particular by the enforcement of Community law through the national courts.⁷ An equally, if not more, important factor has been the build-up of the case law of the Court of Justice on the remedies for breach of Community law coupled with an ever-increasing reference to and reliance on Community law in national courts. Injured parties are encouraged to invoke Community law when seeking redress, including the award of damages, in the national court. As regards redress for breach of the competition rules various issues remain outstanding. Clear impetus to resolve them has been given by Advocate General Van Gerven in *Banks*:⁸ Community law, he said, should provide the answers in the absence of national laws. In the meantime a number of major cases, where applicants are seeking compensation by way of damages, are underway in the domestic courts.⁹ The Commission may be able to give assistance, by the provision of information. The recent decision of the CFI in the *Postbank*¹⁰ case demonstrates that the CFI will construe Community legislation so as to facilitate the enforcement of Articles 85 and 86 in the national court.

There have also been developments affecting national competition laws and enforcement authorities. Several Member States have modelled their domestic regime on Articles 85 and 86. Others are currently considering such a change. In an increasing number of cases national competition authorities are applying the Community rules in conjunction with national rules. At Community level attention has focused on the possibilities for the decentralization of the enforcement of Arti-

7. The Notice also referred to the possibility of enforcement of Community competition law by the national competition authorities but the detail of this was to await a separate notice on this subject. The Commission has now published a draft notice, discussed below.

8. Case C-128/92, *H.J. Banks & Co. Ltd v. British Coal Corporation*, [1994] ECR I-1209.

9. They are raising a number of interesting legal issues. See e.g. the recent decision of the English High Court in *Iberian U.K. Ltd v. BPB Industries PLC and British Gypsum Limited*, [1996] 2 CMLR 610. At issue was the extent to which the applicants could rely, as proof of infringement of Arts. 85 and 86, on the decision of the Commission and the rulings of the Community Courts in the *Plasterboard* cases.

10. Case T-353/94, *Postbank NV v. Commission*, Judgment of 18 Sept. 1996 nyr, discussed below.

cles 85 and 86. The Cooperation Notice refers to the possibility of national competition authorities dealing with complaints but, being primarily concerned with the role of the national courts, does not go into any detail on this aspect of the enforcement of the competition rules. Most recently the Commission has published, for consultation purposes, a draft Notice on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Article 85 or 86¹¹ (the Draft Notice). The Draft Notice deals with the implementation of Articles 85 and 86 by national competition authorities and addresses the issues of the allocation of cases and practical cooperation between the Commission and national authorities. The starting point is the shared responsibility of the Commission and the national authorities.¹² This sharing of responsibility can be seen most clearly in Article 9(3) of Regulation 17/62, which provides that as long as the Commission has not initiated any procedure in a particular case, whether in response to a complaint, on a notification for an exemption or on its own initiative, “the authorities of the Member States shall remain competent to apply Articles 85(1) and 86 in accordance with Article 88 of the Treaty”.¹³ Both the Commission and

11. Information of the European Commission on cooperation between the national authorities and the Commission. O.J. 1996, C 262/5. The Draft Notice is one of a number of proposals resulting from the deliberations of an *ad hoc* working party composed of representatives of the national authorities and the Commission) set up to identify obstacles to the effective operation of the competition rules. The working party looked at a variety of issues including the decentralization of enforcement and concluded “the effectiveness of the competition rules could be increased by involving the national authorities more closely in their application and by improving Community procedures”. XXIVth Competition Report, point 40.

12. The role of the national authorities is clearly stated in Art. 88 EC, which provision is not, despite its appearance, solely a transitional one. The scheme of the Council implementing regulations (made under Art. 87) has been to retain for Member States, through their national authorities, the ability to apply Arts. 85 and 86.

13. The implementing regulations do not lay down any rules or procedures for Member States’ action under Art. 88. This is a matter for national law – Art. 88 speaks of the authorities in Member States ruling on agreements, etc. “in accordance with the law of their country” – and must mean, it is submitted, the procedural rules of the Member State concerned. To interpret it otherwise would produce a result

the national authorities, the Draft Notice says, “act in the public interest in performing their general task of monitoring and enforcing the competition rules”. Its adoption and application will have implications for the handling of complaints in future and accordingly reference will be made to it in the discussions below. The text of the Draft Notice, albeit by definition not final, helps to show the latest thinking of the Commission on a number of important issues.

3. The complainant – *locus standi*

Regulation 17, the principal implementing regulation for the purposes of the application and enforcement of Articles 85 and 86 by the Commission, does not use the word “complaint” or expressly require decisions on complaints to be taken, although the (later) implementing regulations applying the competition rules to the transport sectors do.¹⁴ Article 3 of Regulation 17, however, provides that the Commission may “upon application or upon its own initiative” find that there is an infringement and require its termination. “Application” under Article 3 can be made by Member States¹⁵ or “natural or legal persons who claim a legitimate interest”. The parties to the agreement or practice in question clearly have such an interest but the position of third parties is less certain. Something more than a general interest in having the law upheld is, it is submitted, required. There is, moreover, a nexus between Article 3 of Regulation 17 and Article 173 EC. The Court of Justice has

contrary to the need to have a consistent and uniform application of Arts. 85 and 86 across the Community.

14. See e.g. Arts. 10 and 11 of Reg. 4056/86 (maritime transport).

15. The number of recorded instances where a Member State has made a complaint to the Commission are few. See e.g. *Union Interprofessionnelle des Semences Fourrageres* [1976] 1 CMLR D95, and *Cewal, Cowac and Ukwal* O.J. 1993, L 34/20. More recently, in November 1995, the United Kingdom’s Office of Fair Trading referred a complaint by British personal computer manufacturers (the Personal Computer Association) to the Commission. The complaint concerned Microsoft’s pricing policies, the PCA alleging that its members had to pay up to 60% more for some Microsoft products than US-owned competitors with outlets in Ireland.

recognized¹⁶ that it is in the interests of a satisfactory administration of justice and of a proper application of the competition rules that a person who is entitled under Regulation 17 to request the Commission to find an infringement should be able, if the request is dismissed, to institute proceedings to protect his legitimate interests. The particular interests should, therefore, be sufficient to demand that degree of protection.¹⁷ In practice the Commission is inclined to interpret “legitimate interest” following the approach of the Court in defining the requirement of “direct and individual concern” in relation to the admissibility of applications under Article 173.¹⁸ Such an approach is arguably restrictive but has the effect of removing the possibility, mentioned by Judge Vesterdorf,¹⁹ that the CFI might dismiss an action on the ground that the complainant was not directly and individually concerned by the Commission’s decision. It does not, however, necessarily create a loophole for wrongdoers. If a good case is brought to the attention of the Commission the latter is not precluded from commencing an investigation into the alleged infringement on its own initiative. This said, in the light of the CFI’s recent judgment in *Metropole*,²⁰ actual or potential competitors denied access to the market by the party or parties alleged to be infringing Articles 85 or 86 are almost certain to be regarded as having a sufficient interest.

Two recent cases are interesting in showing the Commission’s and CFI’s approach to the standing of representative bodies as complainant. In *BEMIM*,²¹ a trade association (BEMIM) representing discothèque

16. In Case 26/76, *Metro SB-Grossmarkte GmbH & Co.KG v. Commission*, [1977] ECR 1875 and again in Case 210/81, *Demo-Studio Schmidt v. Commission*, [1983] ECR 3045.

17. The author has argued elsewhere that any person who can show that he is suffering, or is likely to suffer, injury or loss directly from the illegal infringement should be regarded as having a “legitimate interest” for the purposes of Art. 3 of Reg. 17. See Kerse, *EC Antitrust Procedure*. 3rd ed. (Sweet & Maxwell, 1994) para 2.29.

18. Ortiz Blanco, *European Community Competition Procedure* (Oxford, 1996), at p. 245.

19. *Op. cit.*, at p. 82.

20. Cases T-528/93, T-542/93, T-543/93 and T-546/93, *Metropole Television SA and Others v. Commission*, Judgment of 11 July 1996, nyr.

21. Case T-114/92, *BEMIM v. Commission*, [1995] ECR II-147.

operators alleged breach of Articles 85 and 86 by SACEM, the French copyright management society.²² BEMIM challenged the Commission's refusal to act on its complaint. The Commission, in its defence, questioned BEMIM's interest in bringing the proceedings, arguing that any adverse effect which might result from its refusal to act on the complaint would not affect the trade association but the discothèque owners which made up its membership. The CFI rejected this, holding that

“an association of undertakings may claim a legitimate interest in lodging a complaint even if it is not directly concerned, as an undertaking operating in the relevant market, by the conduct complained of, provided however that, first, it is entitled to represent the interests of its members and, secondly, the conduct complained of is liable adversely to affect the interests of its members”.²³

Having examined BEMIM's constitution the CFI concluded that it was entitled to represent its members. It should be noted that here as elsewhere²⁴ in Community law the CFI will apparently be concerned to see that formal legal authority exists and has been properly given. The issue, however, is arguably not simply one of legal propriety. A body's constitution may delegate substantial decision-making powers to its officers and it may be necessary to ascertain not just that there has been compliance with internal procedural rules but also that in acting the body is truly reflecting and presenting the views and interests of its members. To some extent this is the subject of the CFI's second condition. In *BEMIM*, the CFI took the view, on the basis of the documents before it, that the conduct in question was of such a kind as to harm

22. The facts and issues in this and the related case of *Tremblay* are discussed below.

23. Judgment, at para 28. The Court adopted a similar approach in Cases T-447-9/93, *AITEC and Others v. Commission*, [1995] ECR II-1971, when considering the position of complainants in proceedings relating to Art. 93.

24. In *AITEC*, *supra* note 23, the Court also carefully scrutinized the association's statutes (judgment, para 61). See also e.g. Case 289/83, *G.A.A.R.M. v. Commission*, [1984] ECR 4295. Practitioners submitting agreements under form A/B for exemption under Art. 85(3) will be aware of the requirements of Reg. 27 where applications are signed by representatives for the undertakings concerned.

the interests of the discothèques making up the membership.²⁵ That the status of the association as complainant should, in the absence of proof of injury to itself, be dependent on the position of its (or some of its) constituent members is consistent with earlier case law of the Court of Justice and, in relation to competition cases, the approach of Advocate General Lenz in *CICCE v. Commission*.²⁶ A trade association is thus, in the absence of a particular interest in acting (which the Court has recognized in some state aid cases),²⁷ put in no better position than any other body or individual for the purposes of Regulation 17 or Article 173. A trade association may, however, prove to be a better complainant from various standpoints.

In *BEMIM*, the CFI expressly recognized that permitting a trade association to bring a complaint had a practical advantage. It could avoid the situation where the Commission might otherwise receive a large number of individual complaints from member undertakings. Other benefits can be identified. Where several undertakings are affected, the trade association may be able coordinate the grounds of complaint, the factual evidence and the relevant legal and economic arguments. It may have and be able to employ more resources than the individual member or members. A legitimate complaint might therefore be made which otherwise might not. The material provided may be more comprehensive and contain market information and statistics which the individual firm might not possess or would have difficulty in obtaining.²⁸ A word of caution has, however, to be injected. The trade association must not overstep the mark as regards the application of Article 85(1) to its own

25. Judgment, at para 29.

26. Case 298/83, [1985] ECR 1105, at 1109. The Commission did not take the point of admissibility in that case. For earlier (general) case law see e.g. Case 207/86, *APESCO v. Commission*, [1988] ECR 2151.

27. In a small number of state aid cases, the Court has held that representative bodies of producers have had standing where the association in question has “a particular interest in acting especially because its negotiating position is affected by the measure which it seeks to have annulled”. Case T-380/94, *AIUFASS and AKT v. Commission*, Judgment of 12 Dec. 1996, nyr, at para 50, referring to Cases 67, 68 & 70/85, *Van de Kooy and others v. Commission*, [1988] ECR 219 and Case C-313/90, *CIRFS and Others v. Commission*, [1993] ECR I-1125.

28. Similar advantages were identified by the Court in *AITEC*, *supra* note 23.

activities. The collective handling of complaints should not become an excuse for the exchange of information between, or other coordination of market behaviour of, member undertakings.

In the second case, *BEUC*,²⁹ a complaint had been made by three consumer bodies alleging that an agreement between SMMT, a British motor traders association, and JAMA, a Japanese motor manufacturers association, restricted exports of Japanese cars to the UK contrary to Article 85(1). The Commission rejected the complaint and two of the consumer bodies, BEUC and the NCC, challenged the rejection before the Court. The CFI described BEUC as a non-profit-making association

“whose objective is in particular to group consumer organizations in the Community and other European countries in order to promote, defend and represent the interests of consumers in relation to Community institutions”.

The NCC had been “set up by the United Kingdom Government ... to identify the interests of consumers and to represent those interests to central and local government, public utilities, business, industry and the professions”.³⁰ The Commission defended the rejection of the complaint vigorously and took various points on the admissibility of the application. But it did not challenge the standing of BEUC or the NCC. Nor did the CFI itself take the point.³¹ They accepted, it would appear, that both bodies had a sufficient interest to bring proceedings under Article 173 and a “legitimate interest” under Article 3 of Regulation 17. Whether the consumer bodies, BEUC and the NCC, would satisfy the two conditions laid down by the CFI in *BEMIM* is by no means certain and indeed one might question whether in practice the same test should apply to consumer organizations as to trade associations.

Community law, in particular in relation to Article 173 as interpreted and applied by the Court of Justice, has sometimes been criticized for

29. Case T-37/92, *Bureau Europeen des Union de Consommateurs and National Consumer Council v. Commission*, [1994] ECR II-285.

30. *Ibid.* at para 1.

31. Noted by Judge Lenaerts in his *General Report: Procedures and Sanctions in Economic Administrative Law*, 17. F.I.D.E. Congress Berlin 1996, Vol. III, at p. 562, footnote 298.

taking too strict an approach to the question of the standing of individuals and those bodies who purport to represent them collectively. Even where Community legislation expressly grants to representative bodies certain rights, for example, to be heard during the Commission's procedure, little if any guidance is given in determining whether a body is qualified and thus entitled to exercise those rights.³² There is no general test in Community law as to what attributes a body must have to be regarded as suitably representative, and not all have fared so well. Greenpeace, for example, was denied standing in order to challenge, in pursuit of the interests of its members in the protection of the environment, the grant of state aid for the construction of certain power stations in the Canary Isles.³³ The CFI found that Greenpeace could not establish any interest other than that of its members and that individual applicants did not have any interest which differentiated them from anyone else living or working in the area concerned: on the basis of the established case law, they were not therefore "individually concerned". The CFI was also unimpressed by the argument that in matters relating to environmental protection before national courts *locus standi* might

32. So e.g. in dumping cases "users and consumer organizations" are given an express right to provide information, etc. – see Arts. 5(10) and 6(7) of Reg. 384/96, O.J. 1996, L 56/1 – but no definition of such a body is given or of the extent of their rights. In relation to merger control, Reg. 4064/89 accords to "recognized representatives" of the employees of the undertakings concerned the right to be heard in the Commission's procedure. As regards state aids, the Court itself established that "concerned parties" for the purposes of Art. 93(2) EC extended beyond the recipients of the aid and included "the persons, undertakings and associations whose interests might be affected by the grant of aid, in particular competing undertakings and trade associations": Case 323/82, *Intermills v. Commission*, [1984] ECR 3809, at para 16.

33. Case T-585/93, *Stichting Greenpeace Council and Others v. Commission*, [1995] ECR II-2205 (subject to appeal, Case C-321/95P). The Court took a similar approach in relation to the challenge of the Commission's failure to intervene in the French nuclear testing in the Pacific. See Case T-219/95R, *Danielsson and others v. Commission*, [1995] ECR II-3051. Contrast the approach advocated by the Commission in its recent (22 Oct. 1996) Communication, *Implementing Community Environmental Law*, at para 40. However, pending the appeal in the *Greenpeace/Canary Isles* case, the Commission has shied away from explaining its position on the *locus standi* of NGOs in environmental matters: see answer to Written Question E-1677/96, O.J. 1996, C 365/83.

depend on bodies having a “sufficient interest”: that was not the same as being “directly and individually concerned” within the meaning of Article 173. The conduct complained of in the *BEUC* case, the limiting of supplies of cars on the UK market, could adversely affect consumers’ interests. But to what extent it could be said that any of the members of BEUC or the NCC were affected any more than any other consumer in the Community or the UK is extremely doubtful. What one might say is that the Commission seems to be more tolerant of the position of representative/consumer bodies in relation to competition matters. This may explain why, for example, BEUC seems to have fared better before the Community institutions than, say, Greenpeace. An informed and responsible consumer voice may be valuable in competition cases and, it should be added, elsewhere. There is, however, a strong policy argument for allowing responsible individuals or bodies standing to represent the environment, local or global, which cannot of course speak for itself.³⁴

There may, it is suggested, be (good) policy reasons for treating consumer and similar representative bodies differently from trade associations. There is, however, no *actio popularis* in Community law and although there have been signs that the Court has become less restrictive in its approach to issues of *locus standi*³⁵ and while the courts in some Member States may be more tolerant of representative bodies challenging the actions and decisions of public bodies,³⁶ the wording of the Treaty would preclude the Court of Justice taking too radical an approach to the question of standing, and the position of such bodies in particular, under Articles 173 and 175. The Court is also sensitive

34. It was, e.g., a conscious decision to omit any requirement that an individual or body demonstrate sufficient interest before gaining access to information on the environment under Directive 90/313/EEC. O.J. 1990, L 158/56.

35. E.g. in such cases as Case C-152/88, *Sofrimport*, [1990] ECR I-2477; Case C-358/89, *Extramet*, [1991] ECR I-2501; and Case C-308/89, *Cordonieu*, [1994] ECR I-1853. The development of the Court’s approach is described and critically analysed in Albors-Llorens, *Private Parties in European Law* (Oxford, 1996).

36. In the UK, e.g., the emphasis and approach has shifted away from examining the constitution and representative character of the body bringing the action, towards an evaluation of the substance of the matter and the issues being raised. See Wade and Forsyth, *Administrative Law*, 7th ed. (Oxford, 1994), pp. 708–718.

to criticism of its extending its jurisdiction and in any event might not relish wading further into the more politically sensitive areas of decision-making. If, therefore, standing is to be accorded to a representative body independently of the need for it or one or more of its members to be "individually concerned" it is legitimate to ask what characteristics such a body should have and what, if any, conditions it should meet in order to entitle it to represent others, a section of the public or even the public at large, and to be generally recognized as having the authority to do so. That a body is truly representative, is responsible and is regarded as such, should be objectively demonstrable: if an individual does not have *locus standi* why should standing be given to two individuals coming together and calling themselves an association. In some instances the Court and the Commission seem prepared, in the absence of general Community rules, to refer the matter back to national law. So a body recognized under national law as having authority to represent the interests of a class or section of the public may be accorded standing for certain purposes in Community law. Such an approach can be seen in the judgments of the CFI in the *Perrier* cases, under the Merger Control Regulation.³⁷ It can also be seen, for example, more recently in the Commission's proposed Directive on cross-border injunctions in consumer matters.³⁸ But, as mentioned above, the CFI was not impressed in the *Greenpeace/Canary Isles* case by the argument that standing before a national court in relation to certain matters was sufficient to meet the express criteria of Article 173. Leaving aside special circumstances (as in the state aid cases referred to above) the CFI should, it is submitted, seek to identify criteria for determining whether a particular body is clearly representative and responsible. In that context, it might have regard to such factors as the degree of independence of the body in question (a matter almost certainly related to

37. See Case T-96/92, *Comité Central d'Entreprise de la Société Générale des Grandes Sources and Others v. Commission*, [1995] ECR II-1216, and Case T-12/93, *Comité Central d'Entreprise de la Société Anonyme Vitell and Others v. Commission*, [1995] ECR II-1247. Noted by Arnall 33 CML Rev., 319.

38. Proposal for a Council Directive on the co-ordination of the laws, regulations and administrative provisions of Member States relating to injunctions for the protection of consumers' interests. COM (96) 712.

the conditions and composition of its membership, its constitutional rules and funding), its qualifications to represent and the degree and extent to which it has exercised that function (what role it plays in the legal and administrative processes affecting the interests which it seeks to safeguard). It might well be guided by the Commission's practice.³⁹

4. Commission's three-stage procedure

It may be helpful at this juncture to describe briefly the Commission's procedure for the handling of complaints. For the convenience of explanation and analysis, the CFI has identified three successive stages in the procedure.⁴⁰ Typically in the first stage the Commission, having received the complaint, collects information in order to decide what action it will take on the complaint. There may be an informal exchange of views between the Commission and the complainant in order to clarify the factual and legal issues and to enable the complainant to expand on its allegations in the light of the Commission's initial reactions. The Commission may exercise its investigatory powers (particularly its power under Article 11 of Regulation 17⁴¹) to obtain information from the parties and also other third parties. During this stage, however, the Commission has taken no formal position on the complaint – there is nothing which the complainant can attack before the Court.

Stage two introduces certain formal legal steps. Where the Commission is minded not to pursue the complaint it may indicate, in a communication (sometimes referred to by the Court as a "notice" but more commonly known as an "Article 6 letter") to the complainant, the reasons why it does not intend to proceed and must offer the com-

39. See e.g. the eligibility and selection criteria set out in the Commission's Call for the submission of proposals for the promotion of representative European organizations working in the field of the environment, O.J. 1996, C 71/21.

40. It did this first in *Automec I*, Case T-64/89, *Automec v. Commission*, [1990] ECR II-367, at paras. 45–47, and has repeated it on a number of occasions since then, e.g. in Case T-37/92, *BEUC supra* note 29, at para 29.

41. See e.g. Case T-34/93, *Société Générale v. Commission*, [1995] ECR II-545.

plainant the opportunity to submit any further comments within a given time limit. This procedure is provided for by Article 6 of Regulation 99/63⁴² and is the principal means by which the complainant can exercise the right to be heard before the Commission reaches its decision on the complaint. Whilst the Article 6 letter is not itself a decision or other legal act challengeable before the Court⁴³ a complainant can, by an action under Article 175, compel the Commission to send it such a letter.⁴⁴ During the third stage the Commission takes note of the complainant's observations in response to the Article 6 letter. Although neither Regulation 17 nor Regulation 99/63 expressly provide for the possibility, the third stage may end with a final decision of the Commission rejecting the complaint, which decision can be challenged. Article 190 EC requires that decision, like all other decisions, to be properly reasoned. As will be seen, this provides an important check on the Commission's employment of the notion of "Community interest" when rejecting complaints.

But the above description may be misleading in its simplicity. The position is somewhat more complicated for at least two reasons. First, the Commission's preference is to deal with complaints, including where appropriate their rejection, on an informal basis.⁴⁵ Not all cases will run the three stages, and the complainant may need to be demanding if a formal decision on the complaint is required. The wish and practice of the Commission to terminate complaint proceedings informally (and close its file at the end of stage one) is not necessarily to be criticized. The Commission has limited resources and if a complainant does not want or need a decision it should not be necessary to proceed to stages two and three. Second, a distinction may need to be made between cases where the Commission has conducted an extensive enquiry of the circumstances before reaching the conclusion that it will proceed no further (because, for example, the facts do not show a breach of

42. There are equivalent provisions in the transport implementing regulations. See Reg. 1630/69, Art. 6; Reg. 4260/88, Art. 10; Reg. 4261/88, Art. 9.

43. Case T-64/89, *Automec I*, *supra* note 40.

44. This is implicit in the approach taken by the Court in a number of cases, starting perhaps with Case 125/78, *GEMA v. Commission*, [1979] ECR 3173.

45. See Ortiz Blanco *op. cit.* note 18 at p. 252.

Article 85 or 86 or the necessary burden of proof cannot be discharged) and cases where the complaint is rejected at an early stage. For example, Judge Vesterdorf, in his article, suggested that a refusal to examine a complaint on the ground that the complainant had failed to demonstrate the necessary legitimate interest in the complaint could be made simply by way of a letter without following the procedure set out in Article 6 of Reg 99/63.⁴⁶ Where the complaint is rejected because there is insufficient Community interest for the matter to be taken further, it is by no means certain that the Commission is formally obliged to go through stage two and issue an Article 6 letter, although in practice it will obtain the complainant's reactions before dismissing the complaint and send an Article 6 letter where requested. Two recent cases are relevant here.

In *SFEI*, the CFI took the view that a letter from the Commission closing the file on a complaint was merely a preliminary document giving the Commission's initial reaction. By implication it was not even an Article 6 letter. The Court of Justice, however, reversed the finding of the CFI as to the legal classification of the document and took the view that it constituted a decision, having the effect of rejecting the complaint.⁴⁷ It did not matter that the letter gave no reasons: that went to the question not whether there was a decision but to whether the Commission had discharged its obligation to give reasons. In *BEUC*,⁴⁸ the CFI was called upon to construe an exchange of correspondence between BEUC and the Commission, which the latter claimed was contained in the first stage of the complaint proceedings and therefore did not involve any challengeable act. The Court held that notwithstanding the lack of certain formal requirements the last letter in the exchange bore the characteristics of a decision rejecting the complaint and said that the preceding letter had all the hallmarks of an Article 6 letter. The Community Courts have thus proceeded on the basis that where the complainant has a decision from the Commission which amounts to a rejection of the complaint it does not matter for the purposes of the

46. Op. cit. *supra* note 1, at 79, footnote 2.

47. Case C-39/93P, *SFEI and Others v. Commission*, [1994] ECR I-2681.

48. Case T-37/92, *BEUC supra* note 29.

review by the Court that it was not preceded by an Article 6 letter or a communication from the Commission formally designated as such. The Commission should, however, provide the complainant with the opportunity to give its views prior to the adoption of the decision on the complaint.⁴⁹

5. Rejection of complaints – complainant’s right to a decision

Before looking at when the Commission can reject a complaint, in particular on the grounds of lack of a sufficient Community interest to pursue the case, some consideration must be given to the question whether the complainant is entitled to be given a definitive and appellable explanation by the Commission as to why it will not pursue the complaint. In short, at stage three or possibly earlier as mentioned above, is the complainant entitled to a decision on the complaint which may be subject to review by the Court? Community subordinate legislation is not consistent here. In transport cases the position has always been clear: the implementing regulations expressly provide that if the Commission concludes that on the evidence before it there are no grounds for intervention “it shall issue a decision rejecting the complaint as unfounded”.⁵⁰ Regrettably, the text of Regulation 17 is again silent

The issue has been the subject of much academic debate over the years. Judge Vesterdorf himself acknowledged this and took the view that “sound arguments are presented by those ... who take the view that the Commission should be required (at least in cases where the complainant has directly expressed to the Commission its wish in that

49. In Case 17/74, *Transocean Marine Paint Association v. Commission*, [1974] ECR 1063, the Court of Justice acknowledged that there is a general rule of Community law that a person whose interest is perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known (para 15).

50. Reg. 1017/68, Art. 11(3); Reg. 4056/86, Art. 11(3); Reg. 3975/87, Art. 4(2). These provisions make no reference to cases alleging breach of Art. 86, but there seems no justification for treating such cases differently.

regard or it is otherwise apparent from the reply to the Article 6 notification that the complainant does not agree with the Commission's assessment of the matters complained of) to close the procedure within a reasonable period by way of a final letter or decision".⁵¹ Only slowly, however, has progress been made in the precise definition of the complainant's rights in this respect and the Court of Justice has been most cautious in its definition and description as to whether and when a complainant is entitled to a decision rejecting its complaint. In *Metro*,⁵² and again in *Demo-Studio Schmidt*,⁵³ the Court said that it is in the interests of a satisfactory administration of justice and of a proper application of the competition rules that a person who is *entitled* under Article 3(2)(b) of Regulation 17 to request the Commission to find an infringement should be able, if the request is dismissed, to institute proceedings in order to protect his legitimate interests. This stopped short of saying that the complainant is entitled to a final decision on his complaint and it has been interesting to see that in later cases, despite the opinions of Advocates General,⁵⁴ both the Court of Justice and the CFI appeared reluctant, at least until recently, to take a definitive view on this. So, for example, in *Automec II*, the CFI said: "The Court of Justice has held on several occasions that the Commission *may* adopt a final decision to reject the complaint and close the file".⁵⁵

There have been several important developments. First, in *SFEI*, the Court of Justice said:

"an institution empowered to find that there has been an infringement and to inflict a sanction in respect of it and to which private

51. Op. cit. note 1, at 100. Judge Vesterdorf also elaborated the circumstances where the complainant would have standing to challenge a final decision (on the infringement) of the Commission once made. See in particular his analysis of the judgment of the CFI in the *Rendo* case (at 102–104). It is not proposed to return to those aspects of the complainant's position in this article.

52. Case 26/76, *supra* note 16.

53. Case 210/81, *supra* note 16.

54. E.g. in Cases 142 and 156/84, *BAT and Reynolds v. Commission*, [1987] ECR 4487; Case T-28/90, *Asia Motor France SA and Others v. Commission*, [1992] ECR II-2285; and *Automec II* *supra* note 3.

55. Case T-24/90, *supra* note 3 at para 47, emphasis added.

persons may make complaint, as is the case with the Commission in the field of competition, necessarily adopts a measure producing legal effects when it terminates an investigation initiated by a complaint by such a person”.⁵⁶

The Court continued: “A decision to close the file on a complaint cannot be described as preliminary or preparatory ... [it] is the final step in the procedure; it cannot be followed by any other decision amenable to annulment proceedings”.⁵⁷ Where, therefore, the Commission has manifestly terminated its examination of the complaint and/or acknowledged that it has closed its file, the complainant should be able to have that decision scrutinized by the Court if unsatisfied with the reasons given or if no reasons are given. There remains, at least theoretically, the problem where the Commission is hawing or is simply inactive, the file not having been formally closed. The Article 175 procedure, it is established, can be used to extract an Article 6 letter, but beyond that only if the complainant is entitled to a final decision on its complaint can Article 175 come to the complainant’s aid.

In *Guerin*, the opportunity arose for the CFI to indicate that there should be no gap in the complainant’s legal protection under Regulation 17. The CFI said:

“it should be emphasized that, having submitted within the time stipulated ... comments in response to the Article 6 notification, *the applicant is henceforth entitled to obtain a definitive decision from the Commission on its complaint*; and the decision may, if the applicant sees fit, be challenged in an action for annulment before this court”.⁵⁸

In support of this proposition the CFI referred to the opinion of Judge Edward acting as Advocate General in *Automec II*. It seems clear that the CFI was conscious that it was marking progress and wanted, characteristically, to make this quite transparent. Finally, returning to the Court of Justice, in the appeal in *Rendo*, the Court said:

56. Case C-39/93P, *SFEI*, *Supra* note 47, at para 27.

57. *Ibid.* at para 28.

58. Case T-186/94, *Guerin Automobiles v. Commission*, [1995] ECR II-1753, at para 34, emphasis added.

“where an investigation is terminated without any action being taken, the Commission is required to state reasons for its decision in order to enable the Court of First Instance to verify whether the Commission committed any errors of fact or of law or is guilty of a misuse of powers”.⁵⁹

These words come immediately before a repetition of what the Court had said in *SFEI* as regards the necessary adoption of a measure producing legal effects on termination of an investigation of a complaint. They were reiterated most recently by Advocate General Jacobs in his opinion on the appeal in *Tremblay*.⁶⁰

Although the Court of Justice has been less explicit than the CFI, the picture, after some delay and initial hesitation, would now seem to be complete. If the Commission does not proceed with a complaint then the complainant is entitled to know why, and, where the Commission rejects the complaint, to have a decision from the Commission giving its reasons. The position of the complainant under Regulation 17 is in this respect substantially the same as under the transport implementing regulations. General principles of Community law have again⁶¹ filled a gap left by the legislator.

6. Community interest – *Automec II* applied

6.1. *The test*

A number of recent judgments of the Court are instructive as regards the circumstances when the Commission can reject a complaint on the ground that it lacks a Community interest. It will be recalled that this is the criterion which the CFI examined and described in *Automec*

59. Case C-19/93P, *Rendo NV and Others v. Commission*, [1995] ECR I-3319, at para 27.

60. Case C-91/95P. In the context of certain preliminary observations concerning the position of the complainant under Reg. 17. See para 25.

61. An earlier example can be seen in Case 155/79, *AM & S Europe v. Commission*, [1982] ECR 1575, where the Court held that communications between lawyer and client were protected from disclosure to the Commission.

II. The CFI there held that the Commission is entitled, first, to accord different degrees of priority to examining the complaints it receives and, second, to refer to the Community interest in order to determine the degree of priority to be accorded to the different matters before it.⁶² A preliminary point should be made. The CFI is not referring here simply to the definition of priorities in a limited sense of putting one case before another. In *Tremblay*, the argument was advanced that *Automec II* was only authority for the Commission being entitled to rely on the Community interest in this way. Advocate General Jacobs rejected this, following what he believed to be the approach taken by the CFI.⁶³ The Commission is entitled to take account of the Community interest not just in relation to the determination of priorities in handling cases but also to justify a decision not to pursue a complaint at all. In practice the Commission frequently refers to the absence of Community interest when rejecting complaints and the CFI commonly refers back to its ruling in *Automec II* when reviewing the exercise of the Commission's discretion in such circumstances.⁶⁴

Importantly, the Commission has also sought to develop and publish policy guidelines, to help identify situations where complaints may lack sufficient Community interest. In its Co-operation Notice, the Commission interpreted *Automec II* as meaning that it was *obliged* to establish priorities and said: "The Commission intends, in implementing its decision-making powers to concentrate on notifications, complaints and own-initiative proceedings having particular *political, economic or legal significance for the Community*".⁶⁵ This phrase is not, however, defined. In its recent Draft Notice (cooperation with national competition authorities) the reference to political significance appears to have been dropped⁶⁶ but the Commission has offered some brief indication of when cases may have legal or economic significance. The former "includes cases which raise a new point of law, i.e. those which have not yet formed the subject matter of a Commission decision or

62. *Supra* note 3 at paras. 83–85.

63. Case C-91/95 P, Opinion, at para 31.

64. See e.g. Case T-114/92, *BEMIM supra* note 21, at para 85.

65. *Supra* note 6, at para 14. Emphasis added.

66. It reappears, however, in the Commission's press release No. WE/32/96.

a judgment of the Court of Justice or the Court of First Instance”. As between the Commission and the national competition authorities the Commission, having the principal enforcement and coordination role, might justifiably claim priority in such circumstances. It does not, however, follow that novelty is a reason for not leaving a matter to be dealt with by the national court. Subject to the national rules of procedure the Commission can always make its views known to the national judge on the legal position and, more importantly, the national court, unlike the Commission, has direct access (via Article 177) to the Court of Justice to obtain a definitive ruling. As regards economic significance, the Draft Notice says that the existence of such significance does not mean the case cannot as a rule remain within the purview of the national authority but, the Commission adds, “the Commission may, however, intervene where important interests of firms from other Member States are at stake”. It is unclear whether this is intended to guard against particular protective or chauvinistic measures being taken by a Member State or is, more likely, merely an expression of the general approach of the Draft Notice, that national authorities should deal with “mainly national” cases: if firms in more than one Member State are involved the case can better be handled by the Commission.

In the discussion which follows particular attention will be paid to how the CFI has supervised the Commission’s application of the test laid down in *Automec II*. But the opportunity will also be taken, where appropriate, to comment on the guidance offered by the Commission in its two cooperation Notices.

6.2. *No short cut*

What is clear from the decided cases is that, as the CFI indicated in *Automec II*,⁶⁷ the Commission cannot simply assert lack of sufficient Community interest, as an excuse for not proceeding with an investigation into the conduct the subject of the complaint. The Commission, the CFI said, must take account of the circumstances of the

67. *Supra* note 3, at para 85: “The Commission cannot merely refer to the Community interest in isolation”.

case and in particular the matters of fact and law to which the complaint draws attention. This requires the Commission to examine the complaint before taking a view and to be able to support its decision with adequate reasoning.

The Court has, on a number of occasions, said that the Commission must exercise a duty of care and diligence on receipt of complaints.⁶⁸ It must examine impartially the facts and legal arguments put forward. The mistake is in construing this to mean that the Commission must investigate and pursue each case to a conclusion. Although a complainant is not, as the Court of Justice has made clear, entitled to a ruling on the existence or otherwise of an infringement of Article 85 or 86,⁶⁹ the Commission must exercise a certain degree of care and diligence in its examination and consideration of a complaint even where it is minded, and ultimately decides, to reject the complaint, without holding an investigation, on the grounds of lack of Community interest. As will be seen in more detail below, the Commission must take account of the circumstances of the complaint and be able to give adequate reasons for not taking up the case. This requires the Commission "to examine carefully the facts and points of law brought to its notice by the complainant in order to decide whether they disclose conduct liable to distort competition in the Common Market and affect trade between Member States".⁷⁰

The recent ruling of the CFI in *Sytraval* would suggest that in some circumstances the Commission may be under positive obligations to use its investigatory powers. The CFI acknowledged that it may be very much more difficult for the complainant to gather the information and evidence needed in order to verify the validity of a com-

68. See e.g. Case 210/81, *Demo-Studio Schmidt*, *supra* note 16, at para 19.

69. Case 125/78, *GEMA v. Commission*, [1979] ECR 3173. The position may be different where the subject matter falls within the exclusive competence of the Commission, such as in the case of the withdrawal of an Art. 85(3) exemption: *Automec II*, at para 75. But not, it seems, the application of Art. 90(2): see Case C-19/93P, *Rendo v. Commission*, [1995] ECR I-3319.

70. Case T-575/93, *Koelman v. Commission*, [1996] ECR II-1, at para 39, referring in turn to *Automec II*, at para 79.

plaint.⁷¹ The complainant may have to obtain confirmation of its objections from the very authorities whom it suspects of having infringed the Community rules. The Commission, on the other hand, has at its disposal more effective and appropriate means of gathering the information necessary for a detailed and impartial investigation. *Sytraval* concerned an alleged breach of the rules prohibiting state aids, where the complainant alleged breach of the Treaty by a Member State. But a complainant alleging breach of Article 85 or 86 may, it is submitted, be in no, or little, better position. For example, the victim of a collective boycott or a refusal to supply by a dominant firm may be able to demonstrate the resultant consequences but have no power or opportunity to reveal the true cause. The use of its investigatory powers (under Articles 11 and 14 of Regulation 17) does not preclude the Commission reaching the conclusion that a complaint displays insufficient Community interest. What is necessary in any particular case for the Commission adequately to perform its duty is inevitably dependent on the particular circumstances. There are no hard and fast rules. So, as the *La Cinq* case shows, the Commission may need to be particularly vigilant where interim measures are requested.⁷² It should, however, be recognized that in many cases the discharge of the Commission's duty of care and diligence may not be as demanding where it rejects a complaint early on for lack of Community interest as in the case where a complaint is taken up by the Commission. Nonetheless, it is still right, it is submitted, to speak in terms of the Commission being under a duty⁷³ in these circumstances.

Not only must the Commission examine the complaint before reaching any decision on whether to take it up, it must also weigh up the merits of the case. In particular, as the CFI said in *Automec II*, the Commission must, in its consideration of individual complaints, balance the significance of the alleged infringement as regards the functioning of the common market, the probability of its being able to establish the

71. Case T-95/94, *Sytraval v. Commission*, [1995] ECR II-2651, at para 77.

72. Case T-44/90, *La Cinq SA v. Commission*, [1992] ECR II-1.

73. But not a "duty to investigate", this term being reserved for cases where the Commission has decided to take up the case.

existence of the infringement and the extent of the investigative measures required for it to perform, under the best possible conditions, its task of ensuring compliance with the competition rules.⁷⁴ Although the wording of the Commission's Draft Notice might suggest otherwise, this is arguably not an exhaustive list of factors to which the Commission should or can have regard. The possibility, therefore, of the Court overturning a decision of the Commission on the grounds that it had not had regard to other relevant factors cannot be ruled out. The Commission, on the other hand, is not prohibited from developing a policy and setting out guidelines as, for example, in its cooperation Notices. But, as in other matters subject to Community administrative law, the existence of policies and guidelines does not absolve the Commission from a proper consideration of the merits of the individual case before it.⁷⁵ In the present context this general principle of administrative law underlies, it is submitted, the concern of the Court, evident in nearly all the cases discussed herein, that the Commission has good grounds for rejecting complaints for lack of Community interest.

6.3. *Giving adequate reasons*

Not only is it incumbent on the Commission to examine the factual and legal bases of the complaint, where it rejects a complaint the Commission must give adequate reasons, in accordance with Article 190 EC. The purpose is twofold. In *BEMIM* the CFI, summarizing established jurisprudence, said

“the statement of reasons on which a decision adversely affecting a person is based must, first, be such as to enable the person concerned to ascertain the matters justifying the measure adopted so that, if necessary, he can defend his rights and verify whether the decision

74. *Supra* note 3, at para 86.

75. The application of this general principle of administrative law can be seen, e.g., in *Automec II*, in relation to the handling of cases by the national court: *supra* note 3, at para 88. It can also be seen most vividly in the recent decision of the Court in the *Carvel* case, Case T-194/94, *John Carvel and Guardian Newspapers Ltd. v. Council*, [1995] ECR II-2765.

is well founded and, secondly, enable the Community judicature to exercise its power of review as to the legality of the decision".⁷⁶

This does not mean that, in rejecting a complaint, the Commission necessarily has to deal at length with every argument put forward by the complainant. It is sufficient if it sets out the facts and legal considerations having decisive importance in the context of the decision.⁷⁷ This said, the rigour with which the Court is in complaint cases prepared to police the requirement to give sufficient reasons is especially noteworthy. *BEUC* is a good example.

As mentioned above, the subject of the complaint in the *BEUC*⁷⁸ case was the compatibility with Article 85(1) of an alleged agreement restricting the export of cars from Japan to the UK. The Commission gave three reasons for not proceeding: first, that in view of the then imminent entry into force of a commercial consensus reached between the Community and Japan the agreement would soon cease to have any effect and any investigation would therefore relate to past events; second, that the agreement had the approval of the national authorities in the UK who with the advent of the commercial consensus would no longer be able to give such approval; and, third, the conduct in question did not primarily affect trade between Member States. The first two grounds were specific to the particular circumstances. The third raises a more general point, which is considered separately below.⁷⁹ When the Commission had to defend its position as regards the significance of the commercial consensus⁸⁰ between the Community and Japan it

76. *Supra* note 21, at para 41.

77. *Asia Motor France III*, Case T-387/94, *Asia Motor France SA and Others v. Commission*, Judgment of 18 Sept. 1996, nyr, at para 104 (referring to *Asia Motor France II*, at para 31). It is noteworthy that in *Sytraval*, a state aids case, the CFI said that the Commission should give a reasoned answer to each point raised in the complaint. The Court accepted, however, that the Commission could refer where appropriate to the *de minimis* rule where the point is so insignificant as not to warrant the Commission spending time on it. *Sytraval*, *supra* note 71, at para 62.

78. *Supra* note 29.

79. Under the heading "Cases of essentially national interest".

80. The consensus was agreed between the Community and Japan in July 1991. On the EC side it was agreed that national restrictions on imports of Japanese cars

encountered a difficulty. This arose from the fact that the consensus was not recorded in writing and was not a formal common commercial policy instrument made under Article 113 EC.⁸¹ The Commission, therefore, sought to rely on a variety of secondary sources (some quite extraordinary in evidential terms⁸²) in order to substantiate its position. Upon close scrutiny, the CFI found the Commission's evidence not to be sufficient to demonstrate that the consensus "would necessarily cause the alleged agreement ... to come to an end" by the time the Commission had said it would.⁸³

The second of the Commission's grounds related to the position of the UK authorities: they would no longer be able to acquiesce in or permit the alleged agreement. Before the CFI the Commission sought to take the position that it was not taking a view as to the legality of any such conduct by the Member State but that, when the question was one concerning direct exports from a third state, there was an issue of commercial policy and that the Commission could rely on the fact that the alleged agreement had been permitted by the UK authorities for reasons of commercial policy. The CFI gave this argument short shrift. The agreement in question was not a national measure but an agreement between trade associations. The CFI found it to be settled case law "that the fact that the conduct of undertakings was known, permitted or even encouraged by national authorities is, in any event, irrelevant to the question whether Article 85 or possibility Article 86 applies".⁸⁴

would be removed. Japan agreed to a transitional period (extending to end 1999) during which exports would be monitored and progressive increases based on national forecasts pending full liberalization.

81. Stroud describes the consensus as an *ultra vires* act of the Commission, not adopted as a formal measure under Art. 113 because of doubts as to compatibility with the GATT. She records that the consensus was notified under GATT and cleared as a permitted exception to the new Agreements on Safeguards. See Stroud, *Automec II Revisited: BEUC v. Commission of the European Communities* (1994) ECLR 272.

82. E.g. an extract from the report of a House of Commons debate. See paras. 52 and 54 of the Court's Judgment.

83. Judgment, at para 57.

84. Judgment, at para 69, the Court referring to Case 229/83, *Leclerc v. Au Ble Vert*, [1985] ECR 1; Case 231/83, *Cullet v. Leclerc*, [1985] ECR 305; and Case T-7/92, *Asia Motor France v. Commission*, [1993] ECR II-669.

The recent ruling of the CFI in *Asia Motor France III*⁸⁵ would suggest, however, that whilst the law on the relationship between State measures and Article 85(1) may be well-established its application in particular circumstances may not be trouble-free for the Commission. In that case the Commission, in defence of its rejection of a complaint alleging collusion between importers of Japanese cars into France, failed to establish that the contested decision was based “on objective, relevant and consistent evidence such as to show that the French authorities unilaterally brought irresistible pressures to bear on the undertakings in question to adopt the conduct criticized in the complaints” as regards imports into mainland France.⁸⁶

What both *BEUC* and *Asia Motor France III* show and what is especially noteworthy in the present context is, first, the preparedness of the Court to probe the Commission’s reasons in detail and, second, the extent of the proof expected of the Commission. Whereas the Court may be (rightly) reluctant to interfere with the exercise of a discretion given to the Commission, it is becoming clear the Court considers that procedural conditions precedent and the factual elements and legal considerations underlying the exercise of the Commission’s discretion can be subject to the most thorough review.⁸⁷

The CFI’s thoroughness can also be seen in the *BEMIM* and *Tremblay*⁸⁸ cases. In France, as in most other Member States, there exists a national copyright society (SACEM) serving to license use of copyright materials and to collect and distribute royalties on a collective basis. The complainants, who represented the operators of discothèques, alleged breach of the competition rules in three respects: (a) the sharing of the market between the copyright-management societies of the various Member States by means of the conclusion of reciprocal representation contracts; (b) the charging of excessive and discriminatory rates

85. Case T-387/94, *supra* note 77.

86. The Court accepted that the Commission had made out its case as regards the complaint relating to imports into Martinique. It is instructive to compare the Court’s analysis of the positions in the two different geographical locations.

87. See generally Lenaerts *op. cit.* note 31, at pp. 572–576.

88. Case T-114/92, *supra* note 21, and Case T-5/93, *Roger Tremblay and Others v. Commission*, [1995] ECR II-185.

of royalties by SACEM; (c) SACEM's refusal to allow discothèques to use only foreign repertoire. The complaint had been made in 1986. Allegations relating to the activities of copyright societies were not new to the Commission. It had received a number of complaints between 1979 and 1988. In response to the complaint by BEMIM and Tremblay the Commission undertook investigations but halted these when the French courts submitted requests for preliminary rulings to the Court of Justice on questions related to the subject of the complaint. The Court held, in *Tournier and Lucazeau*,⁸⁹ that Article 85 prohibits

“any concerted practice by national copyright-management societies of the Member States having as its object or effect the refusal by each society to grant direct access to its repertoire to users established in another Member State”.

Article 86 prohibits a national copyright-management society holding a dominant position from imposing unfair trading conditions “where the royalties which it charges to discothèques are appreciably higher than those charged in other Member States, the rates being compared on a consistent basis”.⁹⁰

Following those judgments the Commission recommenced its investigation of the complaint, concentrating on the different levels of royalties in the Member States. Having conducted a survey it drew up a report which concluded that SACEM accorded to French discothèques different treatment which might fall within Article 86, and found that there were differences in the rate of royalties charged and in the conditions under which discounts were granted. At this point the complainants formally requested the Commission under Article 175 to define its position. The Commission issued an Article 6 letter indicating its intention to reject the complaint, substantially on the ground

89. Case 395/87, *Ministère Public v. Tournier*, [1989] ECR 2521 and Joined Cases 110/88, 241/88 and 242/88, *Lucazeau and Others v. SACEM and Others*, [1989] ECR 2811.

90. That would not, however, be the case if the copyright management society in question were able to justify such a difference by reference to objective and relevant dissimilarities between copyright management in the Member State concerned and copyright management in the other Member States.

that the matter was essentially a national one, there was no Community interest involved and the matter was before the French courts. The Commission promised to forward its report to the French courts. The complainants' response did not persuade the Commission to alter its view and, by letter from the Competition Commissioner, it definitively rejected the complaint. The complainants appealed to the CFI, arguing *inter alia* that the Commission's decision did not deal adequately with the three elements of the complaint.

The CFI characterized the three elements of the complaint as follows. The first, the sharing of the market by way of the conclusion of reciprocal representation contracts, the CFI said, should be regarded as being based on Article 85(1). By contrast, the second and third, concerning the excessive and discriminatory nature of the rates of royalties charged and the refusal to allow discothèques to use only the foreign repertoire respectively, the CFI characterized as being based on Article 86.⁹¹ The CFI found that although the Commission had rejected the complaint in its entirety⁹² it had failed to give consideration to the alleged infringement of Article 85(1) and, therefore, the statement of reasons for the contested decision did not properly apprise the applicants of the grounds for rejecting their complaint. By only dealing with two out of the three allegations the statement of reasons did not meet the requirements of Article 190. On appeal, the Court of Justice rejected the argument that there was a contradiction, itself contrary to Article 190, in the CFI accepting that there was insufficient Community interest for the Commission to deal with the complaints relating to Article 86 whilst annulling the decision as regards the part relating to Article 85.⁹³

A practical point might usefully be made here. Where the complainant wants the Commission to investigate the alleged infringement under both Articles 85 and 86 it should make this clear and support it

91. Judgment, at para 42.

92. Judgment, at para 43. This point was critical to the findings of the Court which followed.

93. Case C-91/95 P, *Roger Tremblay and Others v. Commission*, Judgment of 24 Oct. 1996, nyr, at paras. 32–33.

by evidence and argument. In *Viho*⁹⁴ the CFI refused, in the context of an application by the complainant to annul a Commission decision based on Article 85(1), to entertain a plea of infringement of Article 86. Not only had there been no precise submissions by the applicant as to the market positions etc. but, the CFI said

“the Commission was not obliged to carry out an investigation regarding a possible collective dominant position of manufacturers of office equipment, since the applicant’s complaint of 22 May 1991 does not contain anything which would require the Commission to conduct such an investigation”.⁹⁵

It will not, however, suffice to refer to Articles 85 and 86 without some justification and substantiation on the facts. *Koelman* (mentioned above) shows this. That case also raised a question as to the adequacy of the complaint as it concerned an alleged infringement of Article 86, in this instance relating to the terms of standard form contracts for the retransmission of television and radio programmes through cable networks which had been negotiated by the Dutch collecting society, Buma. The complainant contended that the effect of its royalty provisions was to enable Buma to abuse its dominant position on the market for copyrights in musical works in order to gain a similar position on related markets. The Commission had refused to investigate on its own initiative without precise and specific evidence from the complainant. The CFI looked at the text of the complaint and subsequent documents from the complainant and took the view that the assessment by the Commission was not manifestly wrong.⁹⁶ The CFI itself noted that the only evidence submitted by the complainant was a “rather vague argument”, which the CFI then proceeded to dismiss on its merits.⁹⁷

94. Case T-102/92, *Viho v. Commission*, [1995] ECR II-17. On appeal, the Court of Justice rejected a plea concerning Art. 86 on the grounds that it repeated the pleas and arguments previously submitted to the CFI and as such was inadmissible: see Case C-73/95P, *Viho Europe BV v. Commission*, Judgment of 24 Oct. 1996, nyr.

95. Judgment of CFI, at *ibid.* para 71.

96. It is well-established that the Court will not interfere with the exercise of discretion unless there has been a manifest error of appraisal. See e.g. Case 42/84, *Remia and others v. Commission*, [1985] ECR 2545.

97. Case T-575/93, *supra* note 70, at para 69.

6.4. *The time factor*

On receipt of a complaint the Commission has, as already mentioned, a duty of vigilance. It must examine the facts and legal arguments put forward by the complainant to see whether they disclose behaviour indicating an infringement of the competition rules. Depending on the circumstances this may take time. Indeed in some cases the Commission may have conducted fairly extensive enquiries before it decides to stop. Is there any time limit on the Commission's ability to reject a complaint on the basis of a lack of Community interest? Regulation 17 is again silent and it is necessary to see what approach has been taken in the Community Courts. As the *Tremblay* case shows, the Commission is entitled to reject a complaint for lack of Community interest, not only before commencing an investigation, but also after taking investigative measures if that course seems appropriate to it at that stage of the procedure.⁹⁸ In that case, the Commission had investigated the matter over a substantial period of time (some 14 years) and not previously raised the issue of lack of Community interest. But in the absence of the Commission giving the complainant some reason to believe that it would proceed to adopt a decision finding an infringement of Article 85 or 86 the complainant will not be able to assert the principle of the protection of legitimate expectations. This is because, as already mentioned, the complainant has no right to obtain from the Commission a decision finding an infringement of Articles 85 and 86 by the party complained of except where the subject-matter falls within the exclusive competence of the Commission. It will be recalled that the logic of the position developed by the CFI in *Automec II* is that as the Commission cannot be compelled to terminate an infringement so it cannot be compelled to commence an investigation upon a complaint. Finally, again as *Tremblay* shows, the duty of vigilance does not mean that the Commission cannot suspend temporarily its examination of the complaint where the complaint raises novel legal issues which are also the subject of proceedings before the Court of Justice, pending the outcome of those proceedings.

98. Case C-91/93P, Opinion of A.G. Jacobs, para 23.

6.5. *Cases of essentially national interest*

To come within the terms of Article 85 or 86 there must be an effect on trade between Member States. This requirement draws the line between Community and national regimes. It does not mean, however, that a case with such an effect cannot be essentially a national one. A glance at the reports of the Community Courts and the list of the Commission's decisions will show how many cases involve parties all from one Member State or conduct solely within one Member State. *BEMIM* and *Tremblay*, described above, were cases which had their centre in one Member State, France. As the CFI said in *BEMIM*, "the fact that a course of conduct or a practice is liable to affect trade between Member States, within the meaning of Article 86 of the Treaty, does not of itself prevent the effects of that conduct being confined essentially to the territory of a single Member State".⁹⁹ However, if the Commission is to be able to justify its rejection of a complaint on the absence of Community interest on the grounds that the case is essentially a national one it must be able to substantiate its argument. *BEUC* is again instructive.

It will be recalled that *BEUC* and two other consumer organizations sought to have the Commission take action against the arrangement between *SMMT* and *JAMA* restricting the number of Japanese cars to be exported to the British market. One of the reasons advanced by the Commission as to why there was not a Community interest in the Commission pursuing the complaint was that the conduct in question did not primarily affect trade between Member States. The Commission argued that where the effect of conduct on trade between Member States is likely to be small, it is justified in assuming that there is insufficient effect on the functioning of the common market to justify pursuing the matter. The CFI took the view that as the alleged agreement involved measures restricting imports into the Community and affecting the

99. Case T-114/92, *supra* note 21, at para 83. The complainant must nevertheless persuade the Commission that trade between Member States has been or is likely to be affected. Note the Commission's response to the complaint against W.H. Smith for removal of certain publications (including the *Tribune*) from sale. O.J. 1996, C 217/123.

entire territory of a Member State it was liable to interfere with the natural movement of trade and therefore impair the functioning of the common market.¹⁰⁰ In these circumstances the Commission could not simply reject the complaint on the basis that the alleged infringement did not primarily concern trade between Member States. It was common ground that the Commission's decision rejecting the complaint did not specify the scale of the effects of the alleged infringement on trade. Nor did it give the Commission's reasons why it considered those effects not to be of sufficient magnitude to justify pursuing the complaint.¹⁰¹ The decision was therefore found by the CFI to be defective because it was insufficiently reasoned.

In laying down guidelines for the Commission rejecting a complaint for lack of Community interest with a view to referring the matter to a national competition authority, the Draft Notice draws heavily on the case law of the CFI (in particular *Automec II* and *BEMIM*). The Commission identifies two criteria, both of which have to be satisfied. First, "the centre of gravity of the alleged infringement must clearly be situated in a single Member State, within whose territory its effects are mainly felt", and, second, "referral to that authority must fully safeguard the rights of the complainant". It will be appreciated, from the description and analysis given above, that there is some common ground and similarity with the position as regards the national court. This said, as to the first criterion ("mainly national effects"), the Commission appears to take a fairly restricted view. The Draft Notice gives as an example cases that would need not to be notified to the Commission because they fall within indent (1) of Article 4(2) of Regulation 17, i.e. agreements, decisions or concerted practices where the only parties

100. The Court of Justice has said on a number of occasions that practices restricting competition which extend over the whole territory of a Member State by their nature have the effect of reinforcing the compartmentalization of markets on a national basis thereby obstructing the economic interpenetration which the Treaty is intended to bring about. See Case 42/84, *Remia and others v. Commission*, [1985] ECR 2545, at para 22, and, more recently Case C-70/93, *BMW v. ALD Autoleasing D GmbH*, [1995] ECR I-3439, at para 20. For a recent example, see *Dutch cranes* O.J. 1995, L 312/79.

101. Case T-37/92, *supra* note 29, at para 75.

are undertakings from one Member State and the agreements, decisions or practices do not relate either to imports or to exports between Member States. The history of this provision, particularly as it may apply to tied house/beer supply agreements and other exclusive distribution arrangements, shows that its scope of application is not without uncertainty and difficulties can arise in practice. It is necessary to assess the importance of the agreement in the Member State concerned, its extent and significance on the market.¹⁰² Article 4(2) does not, it is submitted, provide a particularly helpful example or good reference point. The reader is thrown back to more general words in the Draft Notice identifying cases having mainly national effects:

“Where the relevant geographic market is limited to the territory of a single Member State and the agreement or practice is applied only in that State, the effects of the agreement or practice must be deemed to occur mainly within that State. As a rule, these agreements or practices involve businesses which all have their registered office in the same Member State”.

6.6. *Proceedings before national courts*

In some cases the Commission may be justified in leaving the complainant to pursue its cause in the national court. It is well-established that Articles 85 and 86 have direct effect and therefore may be relied upon in proceedings in national courts.¹⁰³ The CFI took the view, in *Automec II*, that the fact that a national court was already dealing with the case in relation to Articles 85 and 86 was a factor which the Commission could take into account in evaluating the Community interest in taking up the complaint.¹⁰⁴ There is, as the Court has acknowledged, a major difference between the Commission and the national courts as regards the enforcement of the Community competition rules. The Commission, unlike the civil courts, can decide not to proceed with a complaint through lack of Community interest. National courts must

102. See the discussion of Art. 4(2) in *Kerse*, *op. cit.* note 17, at pp. 53–55.

103. Case 127/73, *BRT v. Sabam*, [1974] ECR 51.

104. *Supra* note 3, at paras. 87–94.

safeguard the individual rights of private persons in their relations *inter se*.¹⁰⁵ When it is considering the Community (public) interest in taking up a complaint, what consideration should the Commission give to the existence or possibility of proceedings in the national courts or national competition authorities?

A useful starting point is the Commission's reaction to *Automec II* as set out in the Cooperation Notice. The Commission said it "considers that there is *not normally* a sufficient interest in examining a case when the plaintiff is able to secure *adequate protection* of his rights before the national courts".¹⁰⁶ In this context it is noteworthy, although not unexpected having regard to its objective, that the Commission's Notice confines itself to identifying certain potential advantages of proceeding in the national court:

- (a) the Commission cannot award damages or other compensation for loss;
- (b) national courts may be quicker than the Commission in ordering the termination of infringements and adopting interim measures where necessary;
- (c) before national courts, it is possible to combine a claim under Community law with one under national law;
- (d) the national court may have power to award costs to the successful complainant.

These are valid points but there are contrary arguments and considerations. A first is that although the Commission cannot award damages, the full extent, in national law, of remedies for breach of Articles 85 and 86 has yet to be ascertained. For example, the better view is that damages are most probably obtainable under English law. But although there have been a number of cases where settlements have been reached there has so far been no successful claim and award of damages. In any event, as Advocate General Jacobs indicated in *Tremblay*, the fact

105. Judgment, at para 85. See also the opinion of A.G. Jacobs in Case C-91/95P, *Tremblay*, at para 22.

106. Commission's Notice *supra* note 6, at para 15, emphasis added. As already noted, such general policy guidelines do not absolve the Commission from making an assessment in the particular circumstances of whether the complainant could secure adequate protection in the national court.

that only national courts can award damages is not in itself justification for the Commission to reject a complaint. The question is whether, in the particular case, litigation would be commenced at national level in order to obtain damages.¹⁰⁷

As regards the Commission's second point, concerning the question of interim relief (a matter which may be particularly important for the individual complainant), it should be said that although the national court may be able to act more quickly than the Commission, litigation may involve more risk and cost to the complainant. This might arise, for example, from the long-established practice of the English courts of requiring an applicant seeking an interim injunction to give a cross-undertaking as to any loss/damages consequently suffered by the defendant.¹⁰⁸ Where the effect of a domestic procedural rule is to render the application of Community law impossible or extremely difficult, Community law may, as the Court of Justice has recently held, preclude the application of that rule.¹⁰⁹ Moreover, procedural rules which discriminate on grounds of nationality are precluded by virtue of Article 6 EC.¹¹⁰

The Commission's Notice seems to suppose that the proceedings in the national court will be commenced by and therefore will, to a greater

107. Case C-91/95P, Opinion, para 42.

108. The applicant, as a condition for obtaining an interlocutory injunction, is normally required to give an undertaking to the court to the following effect: "If the court finds that this order has caused loss to the defendant, and decides that the defendant should be compensated for that loss, the plaintiff will comply with any order the court may make". See e.g. Practice Direction [1994] 4 All E.R. 42. There is, however, authority for the view that the court should not deny an applicant an interlocutory injunction to which he would otherwise be entitled on the ground that the cross-undertaking would be of limited value. The essential justice of the case should prevail: see *Allen v. Jambo Holdings Ltd.* [1980] 2 All E.R. 502. Nonetheless the possibility of having to give a cross-undertaking may be a serious deterrent to a David taking on a Goliath.

109. Case C-312/93, *Peterbroeck, Van Campenhout & Cie SCS v. Belgium*, [1995] ECR I-4599, Cases C-430-431/93, *Van Schijndel and Van Veen v. Stichting Pensioenfonds Voor Fysiotherapeuten*, [1995] ECR I-4705.

110. Case C-43/95, *Data Delecta Aktiebolag and Ronny Forsberg v. MSL Dynamics Ltd.*, Judgment of 26 Sept. 1996, nyr, finds rules relating to the giving of security for the costs of judicial proceedings to come under this prohibition on discrimination.

extent at least, be under the control of the complainant. This will not always be the case. In *Automec II*, litigation was commenced by BMW Italia to prevent the unauthorized use of the trademark before Automec started its action seeking to maintain the contractual relationship with BMW. The *Lucazeau* and *Tournier* cases arose from criminal and civil proceedings brought against the discothèque owners to protect the copyright holders. The situation can be complicated. As the *BEMIM* and *Tremblay* cases demonstrate, a number of actions, in different courts,¹¹¹ may be underway at the same time. But as those cases also show, the fact that there are several actions pending does not necessarily preclude the Commission from leaving the matter to the national courts. Moreover, applying Articles 85 and 86 to particular facts may be a novel or rare experience for the national judge. Unlike the Commission the vast majority of, if not all, national courts do not deal daily with such matters, which may involve difficult, and not infrequently mixed, questions of law and economics. The Commission, on the other hand, is familiar with the law and has a procedure which can accommodate detailed economic argument. What seems clear, however, is that the problem of novelty or difficulty with the law is not necessarily a sufficient reason for the Commission to take up the case in the Community interest as opposed to the matter being dealt with in the national court. As the CFI said in *BEMIM* and *Tremblay*,

“the fact that the national court might encounter difficulties in interpreting Article 85 or 86 of the Treaty is not, in view of the possibilities available under Article 177 of the Treaty, a factor which the Commission is required to take into account in appraising the Community interest in further investigation of a case”.¹¹²

A contrary approach would, of course, cut deeply into the notion of direct effect. But while questions of law may be resolved by a reference to the Court of Justice the same cannot be said for difficulties and problems arising in the handling and examination of the economic

111. Sometimes in different jurisdictions. See e.g. *Quantel International-Continuum/Quantel SA*, O.J. 1992, L 235/9.

112. Case T-114/92, *supra* note 21 at para 88. Case T-5/93, *supra* note 88, at para 67.

analysis and reasoning. And a question has to be raised as to the extent to which the national court's rules of procedure and evidence are, at least at present, appropriate for such economics based litigation.¹¹³ But, as the Court of Justice indicated in the appeal in *Tremblay*, the fact that it might be easier for the Commission to pursue an investigation does not in itself oblige the Commission to do so.¹¹⁴ The Commission, as *Automec II* says, has to look at a number of factors, including the significance of the alleged infringement for the functioning of the common market

Turning next to the reach of the national court's powers and orders, it has to be recognized straightaway that the Commission has extensive powers of investigation which, within the Community, are not limited by national boundaries. This could be particularly important in a true cross-border situation. As the CFI itself recognized in the *BEMIM* and *Tremblay* cases:

"The Court considers ... that the rights of a complainant could not be regarded as sufficiently protected before the national court if that court were not reasonably able, in view of the complexity of the case, to gather the factual information necessary in order to determine whether the practises criticized in the complaint constituted an infringement".¹¹⁵

In the event the pleas based on the inability of the national court to deal adequately with the complainant failed in both *BEMIM* and *Tremblay*. As regards the limb of the complaint relating to the refusal to allow French discothèques to use only the foreign repertoire, the CFI noted the failure of the applicant to adduce argument that the French courts could not gather the necessary factual information.¹¹⁶ The CFI, it will be recalled, had taken a similar approach in *Automec II*, rejecting the argument that the dispute between Automec and BMW Italia could

113. In the UK one hears differing views on this.

114. Case C-91/95 P, *Tremblay*, *supra* note 93. The point was also made most clearly by A.G. Jacobs in his Opinion, at para 39.

115. Case T-114/92, *supra* note 21, at para 88. Case T-5/93, *supra* note 88, at para 68.

116. Case T-114/92, *supra* note 21, at para 92.

not satisfactorily be dealt with by the Italian Court. The CFI said: “the applicant has produced nothing to indicate that Italian law provides no legal remedy which would enable the Italian court to safeguard its rights in a satisfactory manner”.¹¹⁷ What must the complainant establish? Recently, in *Koelman*, the CFI appeared to impose a high burden of proof on the complainant. The complainant sought to argue that the Commission’s refraining from dealing promptly, within three months of submission, with the complaint prejudiced the complainant’s ability to obtain effective relief in the national court. He also complained about the extremely high costs of bringing an action there. The CFI appears to have been somewhat unsympathetic. It reiterated that the Commission was entitled to determine its priority in investigating complaints, and said: “Moreover, the applicant has not shown that it would actually be impossible for him to bring an action before the national court to challenge the alleged abuse of a dominant position”.¹¹⁸ This reaction of the CFI may be explicable by reference to the fact that the CFI had sought detailed information on the point from the complainant’s lawyer at the hearing but had been met with the response that he would prefer not to have any further questions put to him in view of the comprehensive nature of the written submissions. The practical lesson is clear. If the complainant wishes to rely on the argument that the national court cannot deal adequately with the complaint it needs to adduce cogent evidence to this end.

Returning to the *BEMIM* and *Tremblay* cases and the limb of the complaint concerning the rates of royalties charged by SACEM, it will be recalled that the Court of Justice in *Tournier* and *Lucazeau* had held that Article 86 could be infringed by a national copyright-management society charging royalties appreciably higher than those charged in other Member States without objective justification. As already mentioned, following that ruling the Commission, using its power to request information under Article 11 of Regulation 17, compiled a report containing a comparison of the levels of royalties charged by copyright-management societies in the various Member States. The

117. Case T-24/90, *supra* note 3, at para 94.

118. Case T-575/93, *supra* note 70, at para 70.

Commission made this report available to the French courts. The CFI therefore concluded that the French courts were in a position to determine whether the level of royalties charged by SACEM constituted an abuse of a dominant position under Article 86.¹¹⁹ On appeal, the Court of Justice also accepted this.¹²⁰

Two observations might usefully be made at this point. First, while the provision of information by the Commission to the national court is a good example of the practical cooperation expressly contemplated in the Cooperation Notice¹²¹ there may be limitations. The Commission does not accept an open-ended or unrestricted obligation to supply such materials. This said, as the CFI emphasized in *Postbank*,¹²² the principle of sincere cooperation inherent in Article 5 EC requires the Commission to give active assistance to any national court dealing with an infringement of Community rules. Such assistance may require the Commission to disclose documents acquired by it in the discharge of its duties. There may, however, be circumstances where Community law imposes restrictions on the Commission, in particular as regards the protection of confidentiality (including the need to safeguard business secrets). This was not a problem in *BEMIM* and *Tremblay*. The CFI noted the absence of any such restriction on disclosure of the Commission's report to the French courts.¹²³ The issue was, on the other hand, a matter of some contention in *Postbank*. There the complainants had been supplied by the Commission with copies of the statement of objections which the appellant claimed contained business secrets and should not have been disclosed. The CFI took the view that confidentiality should not in general prevent disclosure to the national court for the purposes of its proceedings:

119. Case T-114/92, *supra* note 21, at para 90. Case T-5/93, *supra* note 88, at paras. 71 and 74.

120. Case C-91/95 P, *supra* note 93, at para 42.

121. Para 40 of the Notice says that "national courts can obtain information from the Commission regarding factual data; statistics, market studies and economic analyses".

122. Case T-353/94, *supra* note 10.

123. Case T-5/93, *supra* note 88, at para 13. This was not challenged in the appeal – see Case C-91/95P, *supra* note 93, at para 37.

“there is a presumption that the national courts will guarantee the protection of confidential information, in particular business secrets, since, in order to ensure the full effectiveness of the provisions of Community law in accordance with the principle of cooperation laid down in Article 5 of the Treaty, these authorities are required to uphold the rights which those provisions confer on individuals”.¹²⁴

Certain safeguards are, it appears, nevertheless necessary. Whilst it becomes the national court’s responsibility to guarantee protection of business secrets and other confidential information, the Commission must take precautions in the transmission of documents to the national court, and in particular inform the latter of the documents or passages within documents which contain such material. The Commission must, adopting the procedure established in *Akzo*, give the undertakings concerned the opportunity both to point out the passages in the documents of which the transmission to the national court might cause it damage if no precautions were taken, and to indicate the nature and scope of that damage.¹²⁵ Although, therefore, confidentiality should not be an obstacle to the national court receiving information from the Commission, it should be noted that the Court accepted that in some instances even the adoption of the above-mentioned precautions might not adequately protect third parties or the Communities.¹²⁶

Second, the status as evidence in the national proceedings of any material supplied by the Commission to the national court remains essentially a question for that court and its rules of evidence. In *BEMIM*, as mentioned above, the CFI seemed to assume that contents of the report could be used as evidence in the national proceedings. Nor, in *Tremblay* on appeal, was this questioned by the Court of Justice.¹²⁷ But it is by no means certain what weight, for example, an English court

124. Case T-353/94, *supra* note 10, at para 69, referring in turn to Case C-213/89, *Factortame and Others*, [1990] ECR I-2433, at paras 18–21.

125. *Ibid.* at paras 90–91.

126. *Ibid.* at para 93. The identity of an informant might e.g. need to be protected: Case 145/83, *Adams v. Commission*, [1985] ECR 3539.

127. See the Court’s discussion of the Commission’s report, *supra* note 93, at paras. 35–43.

would give to such a document. Whilst that court will in the interests of the maintenance of Community law and of justice respect the Commission's findings in a formal decision¹²⁸ made under Regulation 17 and at the end of the procedure provided therein, the position of other instruments/documents from the Commission is almost certainly different. In *Gottrup-Klim*, a Danish court had sought guidance from the Commission about the status of certain changes made to the constitution of a co-operative purchasing association. The Commission replied that the amendment was not caught by Article 85(1). What is noteworthy is the high value which the Court of Justice, responding to questions from the national court on its application of the competition rules in the circumstances,¹²⁹ seems to put on the Commission's reply to the Danish court. There may, however, be some reluctance by a national court to accept statements of fact and assessments made by the Commission to which the parties have not been able to respond fully or which are themselves not final.¹³⁰ As a matter of Community law they are not binding on a national court. In *Koelman*, the CFI held that the Commission's assessment of the position of an agreement or practice under Article 85 or 86 which does not entail a definitive decision on the issue whether there has been an infringement of the competition rules has the same status as a comfort letter which, as the Court of Justice held in the *Perfumes* cases,¹³¹ is not binding on the national court but is a factor which the national court may take into account. It makes no difference if such an assessment is contained in a challengeable measure (such as a decision rejecting a complaint).¹³² In *Postbank*, where the Commission's views were contained in a statement of objections,

128. See *Iberian Industries Plc v. BPB Industries Plc and British Gypsum Ltd*, *supra* note 9.

129. Case C-250/92, *Gottrup-Klim v. Dansk Landbrugs Grovvarereselskab AmbA*, [1994] ECR I-5641. The Court held, consistent with *Delimitis*, that a national court can rule on the lawfulness of a notified agreement "where that court considers that the conditions for application of Art. 85(1) are clearly not satisfied".

130. See e.g. the approach of the English Court in *Fyffes v. Chiquita Brands*, [1993] E.C.C. 193.

131. Joined Cases 253/78, 1-3, 37 and 99/79, *Procureur de la République v. Giry and Guerlain and Others*, [1980] ECR 2327.

132. Case T-575/93, *supra* note 70, at paras. 41-42.

the CFI noted that the national court might take account of the provisional nature of the opinion expressed by the Commission in such a document.¹³³

Looking, finally, at the position as regards the referral of complaints to the national competition authorities, the considerations are not dissimilar. The second criterion set out in the Draft Notice relates to the effectiveness of the national procedures and, like the position in relation to national courts, is concerned with whether the complainant's interests can be adequately protected without the Commission's direct involvement. The Draft Notice acknowledges that not all Member States have in place the necessary procedural rules to apply Articles 85 and 86 by virtue of their powers and responsibilities under Article 88. Indeed, few examples can be given of Member States actually doing so.¹³⁴ The Notice recognizes that the ability of national authorities to act is dependent on national law conferring the necessary powers on them and that not all Member States have taken the necessary measures. There is no indication, however, whether the Commission is taking steps to remedy this situation. What the Draft Notice does is to set a standard for such national rules. The Commission acknowledges that, just as in the case of rejection of a complaint where a matter is being dealt with in a national court, the Commission must be satisfied, before rejecting a complaint in favour of it being dealt with by a national competition authority, that the national authority will be able to deal effectively with it. The Draft Notice indicates that the Commission will measure the potential effectiveness of the national authority by reference to its powers of investigation, its ability to order interim measures in an emergency and the penalties it can impose on firms found to have infringed

133. Case T-353/94, *supra* note 10, at para 72.

134. Recently the UK Government introduced regulations to empower the UK competition authorities to act under Art. 88 and to assist the Commission when acting under Art. 89. See the EC Competition Law (Arts. 88 and 89) Enforcement Regulations 1996. SI 1996 No. 2199. The Regulations were introduced to enable the UK authorities to investigate, under Community law, the proposed alliance between British Airways and American Airways. DTI Press Notice P/96/587.

the competition rule.¹³⁵ In determining whether the national authority is able fully to safeguard the complainant's rights the Commission will pay special regard to whether interim measures would be available if requested by the complainant. The Commission's own procedure for interim measures has not proved to be particularly expeditious and presumably the Commission will be expecting something better from the Member States. In practice, in the UK at least, the national courts may be able to provide interim relief most speedily.

7. The Commission's exclusive competence – Article 85(3)

The Commission has exclusive competence to apply Article 85(3) and, according to the CFI, that exclusivity confers on the parties to a notified agreement the right to obtain from the Commission a decision on the substance of the request for exemption.¹³⁶ The question arises as to the extent of a national court or competition authority's ability to proceed with the examination of an alleged infringement where the agreement or practice has been notified to the Commission. For the national court or competition authority, for example, to go ahead and rule on the applicability of Article 85(1) and apply the prohibition (i.e. automatic nullity under Article 85(2) and any other consequences flowing from the illegality under national law) to the agreement in question would frustrate the Commission's application of Article 85(3). The national proceedings could thus be dependent on the Commission's reaction to the notification.

As regards the position of the national court, the Court of Justice has addressed the question of the interaction of proceedings in the national court and those of the Commission on several occasions, principally

135. The author has noted the weakness of the new UK Regulation (*supra* note 134) in all three respects. See Kerse, *Enforcing Community competition policy under Articles 88 and 89 of the EC Treaty – New Powers for UK competition authorities*, (1997) ECLR, 17.

136. Case T-23/90, *Peugeot v. Commission*, [1991] ECR II-653, at para 47.

in the *Brasserie de Haecht No 2*¹³⁷ and *Delimitis*¹³⁸ cases. There are a number of factual situations which can arise. For present purposes it is sufficient to deal with the case where proceedings are before the national court in relation to an agreement or practice which has been notified to the Commission for the purposes of an exemption under Article 85(3). In this situation the Court has said that where the position of the agreement is uncertain (i.e. it could be the subject of an exemption decision) the national court may stay its proceedings pending a decision of the Commission or adopt interim measures pursuant to its national rules of procedure.¹³⁹ On the other hand, where the agreement's incompatibility with Article 85(1) is beyond doubt and, regard being had to the block exemption regulations and the Commission's previous decisions, the agreement would on no account be the subject of an exemption decision under Article 83(3), the national court may continue the proceedings before it and rule on the agreement in question.¹⁴⁰ Where there are doubts as to the position of the agreement assistance can, subject to the national rules of procedure, be obtained from the Commission, which is, as mentioned above, under a duty to cooperate with the national court.

The Commission has applied this reasoning in its Draft Notice to deal with the case where a national competition authority is dealing with an agreement which is then notified to the Commission. The Commission's starting point is that national authorities can deal with complaints which do not involve the application of Article 85(3) because, for example, they do not involve a notified agreement or because they concern Article 86. Complaints, therefore, which relate to a notified agreement or otherwise concern matters falling within the Commission's exclusive jurisdiction, such as a request to withdraw an exemption, would not be referred to a national authority. Where a national authority is investigating a complaint and the parties notify the agreement or practice in question (the implication is that at least in some cases such notifi-

137. Case 48/72, *Brasserie De Haecht v Wilkin Jansen*, [1973] ECR 77.

138. Case C-234/89, *Stergios Delimitis v. Henninger Brau AG*, [1991] ECR I-935.

139. *Ibid.* at para 52.

140. *Ibid.* at para 50.

cation may a tactical ploy to prevent action by the national authority condemning and prohibiting the agreement) the Commission says that it “considers itself justified in not examining it as a matter of priority”.

Where does this place the national authority and the parties? The Draft Notice proposes a practical procedure designed to enable the national authority to proceed with its investigation except in cases where, in the light of the Commission’s opinion or the national authority’s own view, there is a likelihood that the agreement could be exempted on its merits. The Commission will give a provisional opinion on the agreement as quickly as possible after notification. Where that concludes that exemption is unlikely the parties and the national authority will be so informed and told that further investigation of the case will not be a Commission priority. The parties retain immunity from fine under Article 15(5).¹⁴¹ The national authority is then free to continue its investigation to conclusion, including finding infringement of Article 85 or 86. If, however, the national authority finds during its investigation that it may reach a conclusion which would differ from the Commission’s provisional opinion the national authority must contact the Commission. The Commission retains the power, under Regulation 17, to commence its own enquiry¹⁴² and thus deprive the national authority of its ability, under Article 88 EC, to apply the competition rules. The Draft Notice indicates that the Commission is unlikely to do this except “in quite exceptional circumstances”. It seems clear, therefore, that merely notifying an agreement to the Commission does not prohibit the national court or a national competition authority from continuing with the proceedings before it.

8. Complaints combining Articles 85 and 86 with Article 90

Increasingly, more cases are coming forward where the complaint concerns the conduct of a public undertaking or is otherwise related to the exercise of powers or authority by a Member State. Articles 85 and 86

141. This is limited in effect to acts taking place after notification and falling within the limits of the activity described therein.

142. By formally initiating proceedings. See Art. 9(3) of Reg. 17.

refer simply to “undertakings”, which term encompasses both private and public undertakings. Article 90, it will be recalled, contains special rules relating to public undertakings. Article 90(1) provides that in the case of public undertakings and undertakings to which Member States grant special or exclusive rights Member States must not enact or maintain in force any measure contrary to the rules in the Treaty, including the competition rules.¹⁴³ Art. 90(2) provides a limited derogation from the competition rules for undertakings entrusted with the operation of general economic interest.¹⁴⁴ Art. 90(3) enables the Commission to address appropriate directives or decisions to Member States to ensure the application of Art. 90. The position where the complaint is directed at a public undertaking and/or a Member State raises a number of issues. It is well-established that a private party cannot compel the Commission to commence proceedings under Article 169 EC against a Member State for breach of the Treaty.¹⁴⁵ The Commission has the right, but not a duty, to bring infraction proceedings before the Court under Article 169. The procedure under Article 175 (the action for failure to act) is, therefore, not available to the complainant in these circumstances. Nor is the complainant in any better position where the Commission is requested to take remedial action against a Member State under Article 90(3). The CFI held, in the first *Ladbroke* case, that the Commission has a wide margin of discretion under Article 90(3) and the exercise of the power to assess the compatibility of Member State measures with the Treaty competition rules is not coupled with an obligation on the Commission to take action. Therefore, as is the position in relation to Article 169, complainants who request the Commission to act under Article 90(3) are not entitled to bring an action under Article 175 for

143. The mere creation of a dominant position by the granting of an exclusive right within the meaning of Art. 90(1) is not, however, as such incompatible with Art. 86. As the Court of Justice has said, a Member State contravenes the two Articles only if, in merely exercising the exclusive right granted to it, the undertaking in question cannot avoid abusing its dominant position. Case C-387/93, *Banchemo*, [1995] ECR I-4663 at para 51.

144. On which the Commission recently issued a Communication: Services of General Interest in Europe, COM (96) 443 final.

145. See e.g. Case 247/87, *Star Fruit Company SA v. Commission*, [1989] ECR 291.

failure to act.¹⁴⁶ Nor, consequently, do they have the right to bring an action against a decision of the Commission refusing to use the powers it has under Article 90(3).¹⁴⁷

As already mentioned, *Automec II* established that the Commission has a discretion to determine the relative priority to be accorded to the different cases pending before it. In the second *Ladbroke* case, the CFI added that the inclusion of an allegation of infringement of Article 90 along with Articles 85 and 86 does not prejudice the Commission's liberty to determine the priority to be given to the complaint in the light of the Community interest.¹⁴⁸ This said, as between a matter being taken up by the Commission or being referred to a national competition authority, the Draft Notice clearly indicates that cases involving alleged anti-competitive behaviour by a public undertaking or an undertaking referred to in Article 90(1) or 90(2) may be considered "as displaying particular Community interest" and thus will remain to be dealt with by the Commission even where most or the existing or foreseeable effects of the behaviour in question are confined to one Member State. The Commission, not unnaturally, wishes to retain control over the application of Article 90 (although the Commission does not have exclusive rights over its application¹⁴⁹). This, moreover, makes practical sense. It would inevitably be more difficult for a national competition authority to act in such circumstances.

Where a complaint is levelled not just at the conduct of an undertaking or undertakings but also at a Member State other priority issues may arise, in particular as to the extent the Commission can and should investigate the conduct of the private party or parties without first having addressed the question of the compatibility of the position of the Member State with the Treaty. This is not just a political or administrative question, but also a legal one. It has arisen in two recent cases. In

146. See Case T-32/93, *Ladbroke Racing Ltd v. Commission*, [1994] ECR II-1015.

147. Case T-84/94, *Bilanzbuchhalter v. Commission*, [1995] ECR II-101.

148. Case T-548/93, *Ladbroke Racing Ltd v. Commission*, [1995] ECR II-2565, at para 44.

149. National courts may e.g. apply the first sentence of Art. 90(2). Case C-260/89, *ERT*, [1991] ECR I-2925, at paras. 33–34. Case T-16/91, *Rendo and Others v. Commission*, [1992] ECR II-2417, at para 99.

Rendo (the facts were set out in Judge Vesterdorf's article) the CFI suggested that as between proceedings under Article 169 EC and Article 3 of Regulation 17 the former should take precedence.¹⁵⁰ The CFI argued that the Commission cannot, with a view to terminating an infringement of Article 85(1), require undertakings to adopt conduct which is contrary to national law without assessing that law in the light of Community law:¹⁵¹ the proper procedure for the Commission to deal with questions involving national public policy interests was that provided by Article 169 EC.¹⁵² This would indicate an order of priority which requires the Commission to address the possible infringement of the Treaty by the Member State before examining that by the undertakings under the competition rules. But on appeal¹⁵³ the Court of Justice held that the CFI had not sought to establish an order of priority as between the procedure provided for in Regulation 17 and that under Article 169. Those procedures concern separate persons and separate acts. The CFI, the senior Court said, had held that the Commission was entitled to take the view that in the instant case the most appropriate procedure for examining the question whether the national law underlying the conduct complained of was consistent with the Treaty was the initiation of proceedings under Article 169.¹⁵⁴ Thus in so far as the CFI might have been moving in the direction of laying down an order of priority, giving precedence to Article 90 issues, the Court of Justice seemed to be rejecting any such scheme, leaving the Commission free to deal with cases as they come and in the most appropriate way in all the circumstances.

The CFI, however, returned to this priority issue in the second *Ladbroke* case.¹⁵⁵ Ladbroke, a UK firm providing betting services, sought to extend its business to include taking bets on horse-races taking place in France. It found that "off-course totalizator betting" was the subject of certain regulations and agreements the effect of which was that

150. Case T-16/91, *supra* note 149, at para 111.

151. *Ibid.* at para 106.

152. *Ibid.* at para 107.

153. Case C-19/93P, *Rendo*, *supra* note 59.

154. *Ibid.* at para 23.

155. Case T-548/93, *supra* note 148.

the ten main racing companies in France had the exclusive rights to organize such betting both on-and off-course, and that those companies had granted Pari Mutuel Urbain (PMU) exclusive rights to manage and organize off-course betting on races controlled by those companies. It also appeared that the racing companies had given PMU the authority to extend its activities to other Member States. Ladbroke complained to the Commission alleging breaches of various Treaty Articles including 85, 86 and 90(1). The objects of the complaint were the French Republic, the racing companies and PMU. Following the dismissal, mentioned above, by the CFI of Ladbroke's action under Article 175 for failure to act on those aspects of its complaint concerning Article 90(1), the Commission informed Ladbroke that as regards its complaint based on Articles 85 and 86 it did not envisage granting it a favourable outcome and by a subsequent letter the Commission rejected the complaint. Ladbroke's appeal raised the question whether the Commission could definitively reject the complaint as regards Articles 85 and 86 *before* it had completed its examination of the position and complaint as regards Article 90(1).

In its defence the Commission submitted that the competition issue raised by Ladbroke's complaint could be resolved only by examining the compatibility of the underlying French legislation concerning the PMU's statutory monopoly with the Treaty and by the Commission taking any appropriate action under Article 90(3). The Commission's investigation into this, which was in fact ongoing, was therefore a priority. The CFI agreed but rather than finding that this constituted a good defence concluded that the Commission had consequently erred in law. The CFI held that the Commission could not be regarded as having carried out its duty to examine carefully the factual and legal issues brought to its attention by the complainant by definitively rejecting the complaint under Articles 85 and 86 without having first completed its investigation of the question of the compatibility of the French legislation with the Treaty. The CFI's reasoning was as follows. The examination of the national legislation was a priority because its results would have implications for the agreements of the racing companies. If the French law was found to be consistent with the Treaty, then conduct by the undertakings in compliance with that legislation would

not involve an infringement of the competition rules. Conduct not in compliance with the national legislation could bring Articles 85 and 86 into play. If, on the other hand, the national legislation was not consistent with the Treaty, the Commission would have to consider whether the conduct of the undertakings concerned involved infringements of Articles 85 and 86.¹⁵⁶

So while, in the *Rendocase*, the Court of Justice appeared concerned to preserve the freedom of action of the Commission to deal with complaints even where they involved alleged breach of Article 90, the second *Ladbroke* case indicates quite clearly that the question of the order of dealing with the different aspects of alleged infringements of Articles 85, 86 and 90 may not be immaterial and, in some circumstances at least, the Commission may not be able to reach a decision to reject a complaint relating to Articles 85 and 86 because legal logic may require precedence to be given to the analysis and consideration of position under Article 90. It follows that the Commission may be able to defer proceeding with the investigation of a complaint under Articles 85 and 86 pending resolution of any questions concerning Article 90.

9. Conclusions

The present article began life as a review of developments in the position of the complainant in competition cases in the last three years. Those developments have on examination been such that they can, it is suggested, justifiably be collated under the style of a progress report. In summary, the following should be noted.

Firstly, substantial progress has been made on the definition of the rights of the complainant. It is now clear that a complainant is entitled to a decision from the Commission rejecting its complaint. The Community Courts have closed any lacunae in Regulation 17 in this respect.

Any fear there may have been, following the CFI's judgment in *Automec II*, that the Commission would be able to dismiss complaints

156. *Ibid.* at paras. 48 and 49.

by simple invocation of the Community interest, or absence of it, has been dispelled. The Commission must explain and be able to justify its reasons for not taking up a complaint. The Commission can, the Court has said, decline to deal with a case where it is in the Community (public) interest to do so. The exercise of that discretion is subject to review by the Court and while the Court will, in the absence of manifest error, not substitute its judgment for that of the Commission,¹⁵⁷ the experience is that the CFI has been most thorough (almost painstaking) in its examination of the adequacy of the Commission's reasoning relating to the Commission's exercise of that discretion in the particular circumstances.

A clear policy has emerged from the Commission that more cases should be dealt with in national fora, whether before the national court¹⁵⁸ or before the national competition authority. As regards proceedings in the national court, the Commission's policy would appear to be supported by the Court of Justice in such rulings as *Postbank*, and before that *Delimitis*, facilitating the exercise of rights given by directly applicable and effective Community law. Those advising a complainant will need to consider all the avenues open to it and, if the Commission's assistance is being sought, to identify clearly the "Community interest". The exclusive jurisdiction of the Commission in relation to Article 85(3) is not necessarily an obstacle to the prosecution of a complaint in the national forum: in particular, notification of agreements does not preclude *ipso facto* the action or enquiry proceeding there.

The Commission's Cooperation Notice gives positive encouragement to complainants to bring cases in national courts, seeing private prosecution of some cases as a means to enable the Commission to concentrate its resources on cases having "particular political, economic or legal significance for the Community". Where a complainant alleges

157. Or any other Community institution exercising a discretion (e.g. law making by the Council) as the recent Working Time decision of the Court of Justice clearly indicates: Case C-84/94, *United Kingdom v. Council*, Judgment of 12 Nov. 1996, nyr.

158. A radical proposal to hand much of the Commission law enforcement work over to national courts was floated by the Commission in the Spring of 1996 and received a critical response: see *European Voice* 25 April 1996. See also the proposals contained in *Implementing Community Environmental Law*, *supra* note 33.

breach of Article 90, the Commission may be less eager to refer the case to a national authority. In some circumstances, the Commission may not be able to determine the scope of application of Articles 85 and 86, and therefore whether to take up or reject a complaint, without first clarifying the allegations under Article 90. However, while the Commission may, in appropriate cases, be entitled to leave complainants to pursue their cause in the national court or before another national authority this may not give much comfort to the complainant. As Judge Vesterdorf noted, if the Commission takes up the complainant's case the risk and expense associated with the conduct of such proceedings is avoided.¹⁵⁹ The policy of the Commission should, it is submitted, seek to avoid having the effect of restricting, and possibly in some cases in practice removing, the complainant's access to redress, albeit in the good cause of promoting the better use of the scarce resources of the Community.

The draft Notice on cooperation with national competition authorities takes decentralization of enforcement a step further. If national authorities can be persuaded to enforce Community competition law, where appropriate in conjunction with national competition law, this would be a positive (and politically significant) step. The Draft Notice indicates, however, that not all Member States have the necessary powers and gives no indication as to whether the Commission intends to take any action to remedy this. For the complainant, having its case taken up by the local competition authority may well be preferable to resorting to litigation. The potential involvement of the national competition authorities is therefore generally to be welcomed.

159. *Op. cit.*, note 1 at p. 78.