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A Practitioner's Guide to Due Process in EEC Antitrust and Antidumping Proceedings

For years the defense bar in Europe—and, needless to say, their clients—has been lamenting the lack of due process in EEC antitrust and antidumping proceedings. Most complaints stemmed from the combined role of prosecutor and judge played by the EEC Commission in these administrative proceedings. Much to the surprise of many a Cassandra, the Commission reacted positively to this wave of criticism. The Commission is currently implementing a series of procedural improvements which tend to be more generous than the rulings of the Court of Justice, the European Communities' Supreme Court, which has traditionally followed a rather restrictive view of the rights of defense.

This article will describe this welcome development in order to see whether the new measures effectively improve the situation, or whether further efforts are required.

I. Antitrust

The application of the competition rules of the EEC, embodied in Articles 85 and 86 of the Rome Treaty, is in the first instance the task of the Commission. However, since the Commission's actions and policy are subject to scrutiny by the Court of Justice, the latter's attitude toward due process and its practical implications need likewise to be examined.

A. THE COMMISSION

UNICE, i.e., the European Manufacturers' Association, the International Bar Association and other legal and business circles have over the

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years voiced strong criticism about the way in which the EEC Commission handled competition cases. Initially, these bitter complaints were shrugged off by the responsible Commission Member as being "excessively harsh and biased."¹ Gradually, however, as pressures, notably from the European Parliament and U.K. House of Lords, continued to rise, the Commission became willing to discuss some of the flaws in the system. As a result of this soul-searching, the Commission has published in its Eleventh, Twelfth and Thirteenth Reports on Competition Policy a number of suggested improvements which are being implemented. They are essentially designed to alleviate shortcomings in the discovery procedure and in the organization of the hearing. In addition the Commission is pursuing a policy of speeding up its various procedures.

1. *The Discovery Procedure*

The Commission's powers of discovery essentially consist of the right to send a request for information and to carry out on-the-spot investigations. Defendants are granted access to the Commission's files.

a. Request for Information

In instances of suspected infringement of Article 85 or 86, the Commission may seek to obtain all "necessary" information from the companies involved, from third parties and from the national authorities of the Member States.² A two-step procedure is involved: a formal Commission decision compelling the addressee to supply certain information must be preceded by a simple request for information which he may, but need not, answer.

The Commission's power to send out questionnaires, of course, has never been disputed. As a result, case law on the subject tends to deal only with fine points rather than with the broad principle. Some of these issues are nevertheless worth mentioning. For example, the Commission has ruled that questions raised in a request for information must be answered in good faith and in their proper context. In other words, a legalistic approach will not do and fines will apply if significant facts are being concealed.³ Furthermore, in the *Telos* case the Commission defined "incorrect" information as being:

any statement . . . which gives a distorted picture of the true facts asked for, and which departs significantly from reality on major points. Where a statement is thus

1. Reply to Written Question 840/80, O.J. EUR. COMM. (No. C 283) 41 (1980)

2. Art. 11 of Reg. 17, O.J. EUR. COMM. spec. ed. 1959-62, p. 57.

3. National Panasonic (Belgium), Comm'n Dec. of 11 Dec. 1981, O.J. EUR. COMM. (No. L 113) 18 (1982) National Panasonic (France), Comm'n Dec. of 11 Dec. 1981, *as amended* by Comm'n Dec. of 21 June 1982, O.J. EUR. COMM. (No. L 211) 32 (1982); Comptoir Commercial d'Importation, Comm'n Dec. of 17 November 1981 O.J. EUR. COMM. (No. L 27) 31 (1982) *Telos* Comm'n Dec. of 25 Nov. 1981, O.J. EUR. COMM. (No. L 58) 19 (1982).

false or so incomplete that the reply taken in its entirety is likely to mislead the Commission about the true facts, it constitutes incorrect information within the meaning of Article 15 (1)(b)⁴

Therefore, if the question is ambiguous, as sometimes happens, the answer had better be drafted in clear terms to avoid any misunderstanding later.

As discussed later, the Commission is actively encouraging private enforcement. In this connection, a complainant in a Commission proceeding, or an intervener in a Court proceeding, has access to the nonconfidential part of the Commission's file. Hence, the reply given to a questionnaire may be subject to discovery. Thus, a complainant or intervener can obtain documents which could later be used as evidence in a damage suit before a national court. When preparing the answer to a questionnaire it is therefore essential to clearly mark as "confidential" whatever information is supplied which constitutes a business secret.

The question of whether the Commission's power to request information extends to companies located outside the EEC has not yet been ruled upon. However, in the *Commercial Solvents* case, the Commission apparently sent an informal request for information to CSC in New York which remained unanswered.⁵ Needless to say, if the information requested from a company inside the EEC is embodied in documents located outside the EEC—even though such documents ought normally to be kept at the company's offices in the EEC—the Commission is likely to order the production of such documents by imposing a daily penalty for non-compliance on the company located in the EEC. In this connection the following paragraphs from the Commission's CSV decision are of interest:

The reason given by CSV for refusing to comply with the request is unacceptable. The information requested concerns the business activity of the Dutch firms belonging to CSV and of CSV itself. The information is available within the Community and the Commission is entitled to call for it. The Commission's staff may not disclose any information acquired if it is covered by the obligation of professional secrecy.

Part of the information has also been supplied to an international combine established in Switzerland. However, the fact that information has been supplied to a body governed by Swiss law does not mean that it can no longer be supplied to the Commission. Nor are the Commission and its staff released from their obligation of professional secrecy simply because the information has been supplied to the combine based in Switzerland.

Even if Swiss law could be interpreted to mean that the supply of information to the Commission amounted to unlawful disclosure, this would still not warrant delaying the performance of obligations imposed by the Commission in order to enforce the rules of competition.⁶

4. Telos, *supra* note 3 at para. 21.

5. Zoja/CSC-ICI, Comm'n Dec. of 14 Dec. 1972, J.O. EUR. COMM. (No. L 299) 51 (1972).

6. Centraal Stikstof Verkoopkantoor (CSV) Comm'n Dec. of 25 June 1976, O.J. EUR. COMM. (No. L 192) 27 (1976).

Last, under what circumstances might the addressee of a questionnaire consider refusing to give any information until required to do so by way of a formal decision? Such a refusal could be of particular interest if: the disclosure of certain information would run afoul of local law or might incriminate others;⁷ the scope of the inquiry lacks precision or if it is not clear whether the information is really "necessary";⁸ or the addressee of the questionnaire wants to reserve the right to file an appeal with the Court of Justice against the request for information.

b. On-the-Spot Investigations

In a case of suspected infringement of Article 85 or 86, the Commission may undertake all necessary investigations into companies and trade associations (including third parties).⁹ This right of inspection by Commission officials includes the right to: enter any premises, land and means of transport of undertakings; examine the books and other business records and to take copies of same; and ask for oral explanations on the spot.

As in the case of requests for information, there is no sanction for refusing to submit to an investigation unless and until the Commission adopts a formal decision to that effect, which is subject to review by the Court of Justice. However, unlike requests for information, the Commission is not required to seek voluntary compliance first; it may immediately adopt a decision compelling a company to submit to an investigation.¹⁰

Until a few years ago companies in need of time to prepare for an investigation had a clear interest in refusing voluntary compliance because it would take the Commission many months to adopt a formal decision. Today this time factor is no longer present because the Commissioner in charge of competition matters has been delegated the power to make the decision on behalf of all his colleagues. Hence, the delay involved has become a matter of days rather than months.¹¹ Since an on-the-spot investigation, especially when carried out by surprise (often referred to as a "dawn raid"), constitutes a dramatic intrusion into privacy, it is only natural that the increasing

7. CSV, *supra* note 6.

8. *E.g.*, RAI/UNITEL, Comm'n Dec. of 26 May 1978, O.J. EUR. COMM. (No. L 157) 39 (1978) Fire Ins. (D), Comm'n Dec. of 9 Dec. 1981, O.J. EUR. COMM. (No. L 80) 36 (1982) Castrol Vertriebsgesellschaft mbH, Comm'n Dec. of 10 Jan. 1983, O.J. EUR. COMM. (No. L 114) 26 (1983).

9. Art. 14 of Reg. 17.

10. National Panasonic (UK) Ltd. v. Commission, 136/79, 1980 E. Comm. Ct. J. Rep. 2033, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8682.

11. *N.b.*, voluntary compliance by a company does not entitle it to submit to the investigation less "fully" than if it were acting under a formal order. FNICF, Comm'n Dec. of 27 Oct. 1982, O.J. EUR. COMM. (No. 319) 12 (1982).

use by the Commission of this power has given rise to difficult situations and stirred up a lot of debate.¹²

Commission's Memorandum. In an attempt to clarify the issues, the Commission has issued an "explanatory memorandum," for attachment to the inspectors' warrants, defining the powers of the officials and the rights of the companies concerned. Unfortunately, this document is rather short, and it does not go as far as the European Parliament wished, since it does not contain the internal rules of procedure and instructions to which the inspectors are subject.¹³

Nevertheless, the Commission's memorandum constitutes a step in the right direction. It confirms the company's right to have its counsel present, provided the inspection is not unduly delayed as a result. The explanatory memorandum also establishes the company's right to obtain from the inspectors a signed inventory of the copies taken and a copy of the minutes, if any, drawn up regarding oral explanations given on the spot. Furthermore, the memorandum stresses the importance for the company of drawing the inspectors' attention to any "favorable" factors. Admittedly, fairness requires that the inspectors should listen to whatever exculpating factors the company subject to the investigation is able to adduce. However, this presupposes that the company knows what it is all about. More often than not this is not the case. A copy of the complaint, if any, is usually given much later in the proceedings. Human nature being what it is, one may expect the inspectors to be tempted to obtain a maximum of information from the company with a minimum of disclosure from their side. As stated by an experienced Commission inspector:

[I]t is not appropriate to expect the authorisations to provide a great deal of detail, since the Commission officials, before beginning the investigation, give the business the opportunity to request explanations on the object of the investigation.

Such explanations should neither get bogged down in general discussion of the applicability of Articles 85 and 86 of the EEC Treaty to the particular case, nor

12. According to a Commission inspector:

Until 1979 the Commission has used its powers to order decisions only on rare occasions. In general visits by appointment with the inspectors acting under authorisations proved an adequate fact-finding method. Even when surprise was considered essential visits were usually made under the non-compulsory procedure. Decisions were taken only where there had been a refusal to co-operate on a voluntary basis.

This policy has undergone a marked change in the last few years. Since January 1, 1979, investigations by decision have been made at 67 undertakings. In almost all cases there was no prior warning.

J.M. Joshua, *The Element of Surprise*, in (1983) EUR. LAW. REV. at 4. Reply to Written Question 677/79, O.J. EUR. COMM. (No. C 310) 30 (1979).

13. Para. 53 of resolution on the Twelfth Report, Minutes of proceedings of the sitting of 24 Oct. 1983, at 34.

should they result in the Commission officials as it were *laying their cards on the table*, in a way that could jeopardize the purpose of the investigation, before business decides whether or not it is prepared for the investigation. (emphasis supplied)¹⁴

In other words, notwithstanding the Commission's effort to increase the standards of fairness, it seems unavoidable that there will always remain a "cops and robbers" aspect in every on-the-spot investigation.

Right of Entry v. Right to Search. It is unfortunate that the memorandum of the Commission does not offer any practical guidance on how the investigation should actually be organized. Whereas in law the officials have a right of entry, but not a right to search, this distinction may be hard to apply in practice:

Nevertheless, the fact that the Commission does not have a right of search cannot mean that the Commission officials must sit waiting in some conference room in the business to see whether any of the documents requested are going to be produced to them and, if so, which ones.

Rather, in order to attain the purpose of the investigation, it may be necessary for the Commission officials, in accordance with their right of entry, to see for themselves whether certain records are available.¹⁵

Therefore, depending on the circumstances, it may prove to be difficult to prevent an inspector from rummaging through the files, though in principle this ought to be resisted in order to avoid the inspection exceeding its precise scope and degenerating into a fishing expedition. The executive in charge of "welcoming" the Commission's inspection team will in most instances be hard pressed to find a compromise solution between the inspectors' interest in keeping "eye-contact" with the relevant filing cabinets (to avoid possible removal or destruction of pertinent documents) and the company's interest in limiting the intrusion to a minimum so that the exercise does not become too "open-ended" and disruptive of the company's operations.

Duty to Assist. Furthermore it is to be noted that the company must do more than passively undergo the inspection. In the Italian glass case, the Commission made it clear that the company is under a positive duty to assist the inspectors in their quest for certain documents:

The argument that Fabbrica Pisana has satisfactorily fulfilled its obligations by generally putting all its files at the investigator's disposal must be rejected, since the obligation on undertakings to supply all documents required by Commission inspectors must be understood to mean not merely giving access to all files but actually producing the specific documents required.

Nor can the argument that the Commission's inspectors did not examine the business records of the administration department be accepted, as none of the undertaking's representatives has told them that the documents requested were,

14. H.W. Kreis, *EEC Commission Investigation Procedures in Competition Cases*, 17 THE INT'L LAW. (1983) at 36.

15. *Id.* at 44; Joshua, *supra* note 12 at 11.

or might be, kept in that department and where there was otherwise no reason to suppose that documents of that nature might be found there.¹⁶

The absence of a "right to search" on the part of inspectors, therefore, is in any event compensated by a "duty to find" imposed on the company concerned.

Oral Explanations. Another problem area on which the memorandum is regrettably silent concerns the inspectors' right to ask for "oral explanations on the spot." It is generally accepted that the inspectors have no right to "interrogate" company officers or employees and that the questions they are entitled to ask must, one way or another, be related to the books and records that are being examined. However, it may be difficult in practice to draw the line between a question properly arising from an examination of the books and records and a question that lends itself better to a written request for information.¹⁷

The question of "who" within the company should provide the oral explanation is not dealt with in the Commission's memorandum. While legal arguments can be found in favor of restricting the supply of oral explanations to persons who are duly authorized to represent the company, there may be situations where the inspector will want to hear the information "from the horse's mouth."

It would thus appear eminently reasonable for the Commission officials to ask the author of the document or anyone else who can provide an explanation. Indeed refusal to let the inspectors see the persons who can most easily provide explanations could in an extreme case so obstruct the investigation as to amount to a refusal to submit.¹⁸

So again, this is an area where in the heat of the debate conflicting views may well emerge.

Legal Privilege. One last point in connection with the Commission's powers of discovery is the Commission's latest stand on the thorny issue of legal privilege. The Commission, when interpreting the *AM&S* case in its Twelfth Report on Competition Policy, made the following comments:

The inspectors may no longer have access to written communications between an independent lawyer entitled to practice his profession in one of the Member States and an undertaking for the purposes and in the interests of the latter's right of defence, i.e., all written communications exchanged after the initiation of administrative enquiries and all earlier written communications which have a rela-

16. *Fabbrica Pisana*, Comm'n Dec. of 20 Dec. 1979, O.J. EUR. COMM. (No. L 75) 30 (1980).

17. In *Panasonic*, *supra* note 10 the Court, in a dictum, has stated that the inspectors may ask questions "arising from the books and business records which they examine". According to an authoritative scholar this would mean that the Commission is entitled "to ask questions about the conduct under investigation as opposed to simply the books or their *contents*, provided such questions arise from the examination of such books" (C.S. KERSE, EEC) ANTITRUST PROCEDURE, 82 (1981). Admittedly, this is still a grey area.

18. *Joshua*, *supra* note 12 at 12.

tionship to the subject matter of those enquiries. The Commission is, however, entitled to inspect all other pages.¹⁹

This position has since evolved in that the Commission, while maintaining the view that in-house counsel cannot qualify for any legal privilege, is prepared to extend legal privilege to independent lawyers from outside the Community by way of bilateral agreements on the basis of reciprocity:

In the interest of international equity and to avoid any deterioration of relations between the Community and countries in which the same professional ethics are respected, the Commission believes that it may be useful for the Community to conclude bilateral international agreements with interested third countries, on the basis of reciprocity, with the aim of extending legal privilege to the lawyers of these countries. These agreements would be an addition to the existing Community rules in this domain and would therefore not require an amendment of Regulation 17.²⁰

c. Access to the File

Except for certain documents regarded by the Commission as "confidential" and hence not accessible (documents containing other companies' business secrets; internal Commission documents such as notes, drafts or other working papers; any information disclosed to the Commission subject to an obligation of confidentiality), companies "involved in a procedure" are now entitled to inspect the file on their case.²¹

A defendant's right of access to the file is the single most important procedural innovation introduced by the Commission. Under the Court's consistent case law, the Commission was hitherto only obliged to disclose all documents on which it chose to rely. As a result a number of documents in the Commission's file which might have been favorable to the defendant's position remained inaccessible. It is remarkable that the Commission has on its own initiative agreed to introduce greater transparency into its procedure without having been ordered by the Court to do so: the prosecutor has proven to be more generous than the judge.

Although the right of access to the files is a major breakthrough in the field

19. EEC Commission, Twelfth Report on Competition Policy, at point 33.

20. Thirteenth Report on Competition Policy, point 78. For a comprehensive article on the various considerations that have influenced the Commission in reaching the position it did, see H.W. Kreis, *The AM&S Judgment of the European Court of Justice and Its Consequences within and outside the Community*, SWISS REVIEW OF INTERNATIONAL ANTITRUST LAW, at 3, n. 20, (1984).

21. Twelfth Report on Competition Policy, point 34. As to the right of access to the file by complainants, the Commission clarified their status as follows in its Thirteenth Report on Competition Policy:

Although complainants do not automatically have a right to see the file during the course of the examination of the complaint by the Commission, the Commission in practice ensures that a complainant receives the replies and observations regarding the complaint, sometimes in summary form, submitted by the undertaking(s) against which the complaint was lodged. (Point 75)

of due process, it is capable of further improvement. Indeed, there is still something wrong with the timing. The Commission is only prepared to grant access as of the moment that the Statement of Objections against the defendant is issued. In a number of instances this may be too late. Since years often elapse between the Commission's factfinding and the release of the Statement of Objections in a particular case, it may become increasingly difficult to verify or refute certain facts. In addition, the danger exists that in the meantime more Commission officials have built their conviction on elements which the inspector perhaps has misunderstood but which the defendant has been unable to "nip in the bud."

It remains to be seen how broadly or narrowly the Commission will construe the confidentiality exception. In this connection, for example, it is interesting to note that the Commission in its Thirteenth Report on Competition Policy has agreed to release the purely factual reports drawn up by the inspectors after an on-the-spot investigation but not their "final assessment reports."²² Perhaps, the Hearing Officer's scope of duties, discussed later in this article, should be widened to include his intervention whenever a dispute arises concerning the confidentiality exception.

2. *Organization of the Hearing*

In view of the monolithic structure of the Commission, within which the prosecutorial role tends to prevail over the adjudicatory function, it was generally felt by defense counsel that hearings were not a very meaningful exercise because they had to plead their client's case in front of a chairman who had been responsible for bringing the action in the first place. In order to remedy this situation the Commission has, within its antitrust administration, created a new post, that of "Hearing Officer."

The tasks entrusted to the Hearing Officer are to ensure that the hearing is properly conducted, that the rights of defense are respected and that in the preparation of the subsequent decision due account is taken of all the relevant facts, "whether favourable or unfavourable to the parties concerned."²³ Specifically, the Hearing Officer has responsibility for: (1) organizing preparations for the hearing (fixing the date, duration and place as well as the issues on which the presentations ought to focus); (2) conducting the hearing (e.g., determining which new documents may be submitted, whether witnesses may be heard, etc.); and (3) submitting, after the hearing, comments to the Director-General for competition on the continuation of the procedure (e.g. need for additional information, withdrawal of certain objections or filing of an additional statement of objections).

22. *Id.* at point 74b.

23. Article 2 of the Terms of Reference of the Hearing Officer, Thirteenth Report on Competition Policy, at 272.

One should not expect miracles from this procedural innovation because the Hearing Officer is supposed to work in close liaison with the Director responsible for investigating the case. Nevertheless, it is clear that the presence of the Hearing Officer is bound to create a better atmosphere because it is not only important that justice be done but also that justice be seen to be done. Furthermore, the involvement of the Hearing Officer reduces the "shadow boxing" aspect of Commission hearings in that the Hearing Officer will have a direct line of access to the Commission Member in charge of competition matters. So, while the real judges, i.e. the fourteen members of the Commission, remain "invisible," the parties are at least pleading their case before a chairman who in turn has access to one of the judges.

In the Commission's own words: "It is the Hearing Officer's duty to ensure that the rights of the defence are respected, not only during the oral hearing itself but also in the stages leading up to and following the hearing."²⁴ Hence, it is to be expected that interested parties will be able to call on the Hearing Officer whenever disputes arise with the Commission's staff in connection with a defendant's right of access to the file and the presentation of witnesses at the hearing.²⁵

3. *Acceleration of Procedures*

The Commission has become increasingly aware that the backlog of pending cases and unprocessed notifications has reached unacceptable proportions. It blames staff shortages, the necessary translation work and the requirements of due process for slowing down the administrative process.²⁶ The Commission proposes to remedy this state of affairs by the more frequent adoption of interim measures; by issuing more block exemptions and by including so-called "opposition procedures" in such block exemptions; by a more widespread use of comfort letters; and by encouraging more settlements and private enforcement.

a. *Injunctive Relief*

If need be, the Commission can act swiftly. Ten weeks after the receipt of a complaint alleging the abuse of a dominant position, i.e., the charging of predatory prices, the Commission adopted interim measures ordering the defendant to return to price levels in effect before the threat of selective price cutting was made.²⁷ This short time-frame is quite an achievement if

24. Thirteenth Report on Competition Policy, Point 75.

25. In Cases 43/82 and 63/82, VBVB v. Commission (not yet reported) the Court ruled in para. 18 of its judgment that under Art. 7 of Reg. 99/63 the Commission enjoys a reasonable amount of discretion when it has to decide the question whether to hear or not to hear a given person as a witness at the hearing.

26. Thirteenth Report on Competition Policy, Point 71.

27. ESC/AKZO, Comm'n Dec. of 29 July 1983, O.J. EUR. COMM. (No. L 252) 13 (1983).

one takes into account the fact that the Commission has to send inspectors down for an on-the-spot investigation, and that the interim decision has to be translated into all six Community languages.

b. Block Exemption

It will be recalled that companies in doubt about possible EEC antitrust objections to a given agreement for practice may request the Commission to issue a decision ("negative clearance") whereby, based on the facts in its possession, the Commission declares that there are no grounds under Article 85(1) or Article 86 of the EEC Treaty for action on its part against the agreement or practice in question.²⁸

An agreement or practice which clearly restricts competition and thus would be illegal under Article 85(1), may nevertheless escape prohibition provided it receives the benefit of an exemption pursuant to Article 85(3). This exemption is available when the Commission finds that the restrictive effects of the agreement are offset by the advantages derived from it. Applications for negative clearance are usually combined with a notification of the practice to seek an exemption under Article 85(3), because only by filing a notification does one secure immunity from fines—in respect to activities subsequent to the date of notification—in case the application for a negative clearance fails.²⁹

Since the early days of EEC antitrust enforcement, the Commission has preferred to regulate business under Article 85(3) instead of adopting a more realistic interpretation of the required restrictive effect on competition under Article 85(1) as first advocated by the Court in *Société Technique Minière*.³⁰ As a result of this policy the Commission's premises have been literally flooded with notification papers. Indeed, if virtually everything is deemed to be restrictive of competition under Article 85(1) and if a "rule of reason" treatment is generally only applied by the Commission under Article 85(3), business has little choice but to file individual notifications. This flurry of notifications has been compounded by the fact that the Commission has not refrained from imposing fines for infringements which could only be established by developing or stretching the law further than in its earlier interpretation,³¹ and by the fact that in the recent *Pioneer* case the

28. Art. 2 of Reg. No. 17.

29. Art. 4(1) of Reg. No. 17.

30. Case 56/65 *Société Technique Minière v. Maschinenbau Ulm GmbH*, (1966) E.C.R. 235.

31. For example, the Michelin case (*Bandengroothandel Frieschebrug BV/NV Nederlandse Banden-Industrie Michelin*, Comm'n Dec. of 7 Oct. 1981, O.J. EUR. COMM. (No. L 353) 33 (1981) on appeal Case 322/81, decided on 9 November 1983, not yet reported) where the Commission condemned a yearly bonus system as an "abuse" even though its features did not squarely fall within the concept of a "loyalty bonus" as defined in the *Hoffmann-La Roche* case, case 85/76, E. Comm. Ct. J. Rep. 461, [1978-1979 Transfer Binder] COMMON MKT. REP. (CCH) 9T 8527.

Court gave the Commission "carte blanche" for its tougher fining policy.³² In order to stem the rising tide of notifications, the Commission has issued block exemptions.³³ In principle, they do away with the need for filing individual notifications and hence alleviate the burden on the Commission staff.

Unfortunately, however, the recently enacted block exemptions on exclusive dealing and purchasing, for example, contain so many "ifs and buts" that within months of their publication the Commission felt obliged to issue a set of clarifying guidelines.³⁴ This goes to show that legal certainty is not necessarily enhanced by the block exemptions issued by the Commission. Hence, it is to be feared that the rhythm of individual notifications will rise rather than fall, thereby increasing the workload of the Commission staff and further burdening the Commission's process. To reduce some of this burden, the Commission is currently revising the format of Form A/B, i.e., the form used for filing individual notifications. The revised form is expected to require the disclosure of much more detailed information, notably on market shares, than the form which is currently being used. As a result more time and skill will be required to properly file a notification, thus adding to the red tape involved in the exercise.

c. Opposition Procedure

An interesting development is the fact that the Commission has introduced a so-called "opposition procedure" in the proposed block exemptions on patent licensing and on research and development agreements, and in the proposed amendment of the block exemption on specialization agreements. The opposition procedure provides that agreements, about which the Commission has been notified, are deemed acceptable to it if the Commission has not objected to any of its provisions within a period of six months. This procedure is designed to cover agreements which do not squarely fall within the terms of the block exemption.

d. Comfort Letters

Another means devised by the Commission to dispose more expeditiously of the backlog of pending notifications is the informal procedure called "comfort letters". Under this administrative procedure, letters indicating that a notified agreement is found unobjectionable by the Commission are

32. Thirteenth Report on Competition Policy, Points 62-66.

33. Currently block exemptions exist for certain exclusive dealing O.J. EUR. COMM. (No. L 173) 1 (1983) and purchasing O.J. EUR. COMM. (No. L 173) 5 (1983) agreements and for certain specialization agreements O.J. EUR. COMM. (No. L 292) 23 (1972). It is anticipated that further block exemptions will be issued in the near future covering certain patent licenses, research and development agreements, and dealership agreements in the automobile sector.

34. O.J. EUR. COMM. (No. C 101) 2 (1984).

sent to the companies. "Comfort letters" are thus the informal equivalent of a decision of negative clearance. In its 1980 *Perfume* judgments,³⁵ the Court of Justice upheld this procedure and stated that, while comfort letters are not a bar to private suits before national courts, they can (but need not) be taken into account by national courts in their assessment of the compatibility of the agreement concerned with Article 85 (i.e., the same effect as a formal decision of negative clearance).

In order to enhance the legal value of comfort letters, the Commission has decided to publish a notice in the Official Journal stating the essential contents of agreements for which it intends to issue comfort letters (i.e., the procedure normally used when the Commission intends to issue a favorable decision) so as to give third parties an opportunity to make known their views. This new procedure was used for the first time in *Europages*.³⁶ Cases closed by a comfort letter will henceforth be listed in the Commission's annual Report on Competition Policy.

While this new procedure arguably increases the legal value of comfort letters, it also takes away an important advantage of the previously completely informal procedure—the absence of publicity. Now that even cases disposed of by a comfort letter are the subject of a notice in the Official Journal, it is increasingly likely that every agreement notified to the Commission will sooner or later be on public record (in the past, publicity was restricted to the twenty or so cases per year disposed of by way of a formal decision). The Commission is aware of this "side effect" and it seems that notifying parties may request the Commission that, as in the past, no notice be published prior to the issuance of a comfort letter.³⁷

e. Settlements

The Commission also reduces the workload of its staff by encouraging defendants to settle rather than try their cases. From Commissioner Andriessen's reply to a question raised by a member of the European Parliament, it is clear that the Commission is considering the possibility of reducing the fine in cases "where enterprises actively assist the Commission in establishing the facts against them, thereby saving time and expense for all concerned . . .".³⁸

f. Private Enforcement

The Commission has no enforcement monopoly regarding the EEC anti-trust rules. Any national court may likewise apply these rules. In order to

35. 1980 E. Comm. Ct. J. Rep. 2327, [1979–1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8712.

36. O.J. EUR. COMM. (No. C 343) 5 (1982).

37. Thirteenth Report on Competition Policy, point 72.

38. Answer to Written Question No. 2006/82, O.J. EUR. COMM. (No. C 118) 21 (1983).

reduce its workload, the Commission is actively encouraging private enforcement before national courts, including the possibility of claiming (single) damages:

In practice . . . private individuals considering themselves the victim of conduct by undertakings that is (sic) contrary to Article 85 or 86 may directly apply to a national court for an injunction on the grounds of such breach. The machinery for enforcing Community competition law is thereby to some extent decentralized, the availability of relief more evenly distributed geographically and the place where justice can be obtained brought closer to the individuals seeking it. . . . The Commission is currently studying how to encourage actions before national courts for enforcement of the prohibitions contained in Article 85 and 86. It is looking in particular at what steps could be taken to facilitate damages actions. Improved and more intense contacts between national courts and the Commission would also help to tighten up enforcement of the prohibitions in these Articles.

Another definite step forward in the enforcement of Community competition law by national courts would be to further develop the existing practice whereby the court asks the Commission to give an opinion on issues arising from the case before it, since such clarifications could only be conducive to a good administration of justice.³⁹

It seems highly doubtful whether decentralized enforcement will actually reduce the burden of the Commission. Quite to the contrary, companies may file even more notifications to the Commission in order to seek protection against national enforcement. In addition, the Commission's propaganda for national enforcement is likely to turn the EEC into a paradise for lawyers and into a nightmare for industry. Indeed, forum shopping—depending, *inter alia*, on local rules of discovery, the method of calculation of damages and the possible reimbursement of lawyers' fees,—and, sooner or later, the application of national blocking statutes could all become part of the trade.

4. Summary

It is, of course, too early to draw any meaningful conclusion about the merit of the various procedural innovations which the Commission is in the process of implementing. The important thing is that the Commission has been willing to do something, demonstrating that the Commission is open to suggestions and accepts that its procedures could be improved.

B. THE COURT OF JUSTICE

It is anomalous that the EEC Commission, notwithstanding its prosecutorial role, has, over the years, proven to be more liberal than the Court on issues of due process. In appeal proceedings before the Court, it would seem that the rules of evidence followed by the Court are less geared to its own

39. Thirteenth Report on Competition Policy, point 217–218.

independent factfinding than to a review of the legality of the decision adopted by the Commission.

1. *Due Process*

In almost all competition cases the Court dealt with on appeal arguments of due process have been raised. Except for one case of relatively minor significance,⁴⁰ the court has refused to quash the Commission's decision. Usually, the Court's reasoning is to the effect that even in the absence of any infringement of a principle of due process by the Commission, the outcome of the case would not have been different.⁴¹ The Court appears to be of the opinion that the administrative nature of the proceedings before the Commission implies that lesser standards of care and fairness apply than in a judicial proceeding.⁴² This restrictive view of due process by the Court is in sharp contrast with the sometimes sweeping rulings of the same Court on substantive issues where it has not hesitated to assume legislative powers as in the *Continental Can* judgment, for instance⁴³ (whereas in the *Quinine* and *Dyestuffs* judgments the same Court refused to read into the law a statute of limitations in favor of the defendants).⁴⁴

2. *Rules of Evidence*

Although the Court's powers of review are very wide, encompassing both the facts and the law, it has generally been reluctant to scrutinize discretionary decisions in the antitrust field. It is fair to say that from the outset the Court has seen its role more as that of a constitutional or Supreme Court dealing with legal issues than as a true Court of Appeals with plenary jurisdiction. As early as its judgment in *Consten and Grundig v. Commission*, the Court drew attention to the fact that

40. Case 17/74, *Transocean Marine Paint Association v. Commission*, 1974 E. Comm. Ct. J. Rep. 1063.

41. See case law cited in Advocate General Warner's Opinion in case 30/78, *Distillers Company Limited v. Commission*, 1980 E. Comm. Ct. J. Rep. 2229, 2290, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8612.

42. In joined Cases 100-103/80, *Pioneer v. Commission*, not yet reported, the Court made the following statement:

MDF maintains that the contested decision is unlawful by the mere fact that it was adopted under a system in which the Commission combines the functions of prosecutor and judge, which is contrary to Article 6(1) of the European Convention for the Protection of Human Rights. (para. 6).

That argument is without relevance. As the Court held in its judgments of 29 October 1980 in Cases 209 to 215 and 218/78 (*van Landewyck v. Commission* (1980) E.C.R. 3125), the Commission cannot be described as a "tribunal" within the meaning of Article 6 of the European Convention for the Protection of Human Rights. (para. 7).

43. Case 6/72, *Europemballage Corporation and Continental Can Company Inc. v. Commission*, (1973) E.C.R. 215.

44. Case 41/69 *ACF Chemiefarma v. Commission*, 1970 E. Comm. Ct. J. Rep. 661. Case 48/9 *ICI v. Commission*, 1972 E. Comm. Ct. J. Rep. 619.

[T]he exercise of the Commission's powers necessarily implies complex evaluations on economic matters. A judicial review of these evaluations must take account of their nature by confining itself to an examination of the relevance of the facts and of the legal consequences which the Commission deduces therefrom. This review must in the first place be carried out in respect of the reasons given for the decisions which must set out the facts and considerations on which the said evaluations are based.⁴⁵

The Court's limited interest in the facts is confirmed by the little use it has made thus far of its formal powers of investigation. Only in one competition case has the Court ever appointed expert witnesses and their report, though generally favorable to the defendant's thesis, was not even granted the benefit of a discussion in the Court's reasoning which went in favor of the Commission's point of view.

A reading of the Court's recent judgment in the *Pioneer* case,⁴⁶ indicates that, even though competition cases can be said to be quasi-criminal proceedings, especially when high fines are inflicted, the standards imposed by the Court relating to the kind of evidence that the Commission must adduce to properly establish an infringement are not as high as those typically applied in national criminal courts, where the accused is presumed to be innocent until proven to be guilty, rather than the other way around: "in dubio pro Commissione".⁴⁷ Consider the circumstantial evidence on which the Court relied to confirm the Commission's findings against two of the defendants, Pioneer Electronic (Europe) and C. Melchers & Co. The Commission's evidence in support of its finding that Pioneer Electronic (Europe) had participated in a concerted practice consisted mainly of the fact that this company had organized a two-day meeting of its distributors on its premises at which some of them had complained about parallel imports and that it had forwarded information about such parallel imports to one of its distributors. The Court did not accept Pioneer's contention that it was in no position to have any control over the conduct of its independent distributors. Instead, the Court reasoned as follows:

Even if those activities do not necessarily confer on Pioneer a decisive influence on the conduct of each of the distributors, that does not alter the fact that, on account of its central position, it was obliged to display particular vigilance in order to prevent concerted efforts of that kind from giving rise to practices contrary to the competition rules.⁴⁸

As to Melchers, the other defendant in *Pioneer*, the Commission relied on statements made to Commission inspectors by Mr. Schreiber, the employee of wholesaler Gruoner, who had placed the order which had allegedly been

45. Joined Cases 56-58/64, (1966) E. Comm. Ct. J. Rep. 299, at 347.

46. *Supra* note 42.

47. V. Korah, *The Pioneer Case in the European Court*, EUR. REV. 339 (1983).

48. Para. 75.

refused.⁴⁹ Even though Mr. Schreiber, under cross-examination by the Court, had admitted under oath that he had lied to the Commission inspectors to cover up a calculation error he had made in the prices he had quoted, the Court nevertheless decided to endorse the Commission's version of the facts. To that effect the Court based its judgment on circumstantial evidence which the Commission in its decision had clearly regarded as being less important than Mr. Schreiber's statements. The Court disposed of the issue by stating as follows:

The foregoing considerations suffice for a finding that the Commission has satisfactorily shown that Melchers refused to perform Gruoner's order on account of the destination of the goods, without it being necessary to come to a decision on the question of the credence to be given to the successive statements by Mr. Schreiber or the question of Mr. Schreiber's conduct in transactions involving hi-fi equipment of other makes, which, according to the applicants, was similar to his conduct in the present case.⁵⁰

Likewise disconcerting is a statement made in the same case by the Advocate General who commented as follows on the credibility of Mr. Schreiber as a witness:

Mr. Schreiber proved himself to be an unreliable witness and has changed his explanation more than once. Nevertheless, I consider that on this point and on this occasion the Commission was entitled to conclude that Mr. Schreiber was telling the truth.⁵¹

One would have thought that once a witness has proven to be unreliable, it would be extremely hazardous to pick and choose certain bits and pieces from his testimony.

3. Summary

The Court of Justice has a heavy workload in a number of fields, several of which could be deemed more important than competition cases.⁵² It is therefore not surprising that the Court has not felt a great desire to engage in any substantial independent factfinding on its own in order to doublecheck

49. Pioneer Hi-Fi Equipment, Commission Decision of 14 December 1979, O.J. EUR. COMM. (No. L 60) 21 (1980):

(b) there was no obvious reason for Mr. Schreiber to misrepresent the truth in internal company memos or notes;

(c) the statement by Mr. Schreiber, who is now Melchers' biggest customer, is more likely to be true, as it was given by him while being against his interest, whereas Mr. von Bonin could only find advantage in presenting after the event a different interpretation of the facts. (para. 69)

50. *Id.* at para. 60.

51. Page 42 of mimeographed version.

52. Notably some of the Court's "constitutional" functions, e.g., actions against Member States for failure to comply with Treaty obligations, actions brought by Member States regarding the legality of acts of Community institutions, referrals by national courts on matters involving the interpretation of the Treaties.

or improve upon the Commission's findings. Such attitude is also reflected in a memorandum which the President of the Court presented to the Presidents of the Council of Ministers and of the Commission in the summer of 1978. Therein a proposal was made to set up a tribunal of first instance to hear staff cases against whose decision an appeal could be filed with the Court on questions of law only. The memorandum, indeed, mentions the possibility that in the future some other categories of cases like competition and antidumping cases, for instance, could likewise be the subject of a similar arrangement. According to the Court's proposal:

Such a reform would have the advantage not only of bringing the Community judicial system more into line with those of all Member States but also—and above all—of making the Court to a large extent the judge of questions of law rather than of fact, so concentrating its activities on what is its true and main role within the framework of the Community.⁵³

II. Antidumping

Although the aims pursued by the EEC antidumping policy are quite different from—at times even in conflict with—the aims of its antitrust policy, the procedures involved lend themselves to a comparison. At the EEC Commission level, antidumping procedures are more informal, quicker and more political than in the antitrust field and the Commission enjoys greater discretion. At the Court of Justice, the admissibility hurdle has recently been overcome. Hence, it is to be expected that a body of case law will develop which, as time goes by, may set some constraints to the discretionary powers of the Commission.

A. THE COMMISSION

After a review of the procedural safeguards contained in the EEC Antidumping Regulation,⁵⁴ the general characteristics of an EEC antidumping proceeding will be discussed.

1. *Procedural Safeguards*

The EEC Antidumping Regulation provides in essence for three procedural safeguards: access to the file; the right to comment in writing and orally; and the right to be informed of the essential facts and considerations.

a. The Discovery Procedure

The Commission has the right to seek and verify all information it deems necessary and to carry out on-the-spot investigations to that effect, including

53. "EUROPE" Documents No. 1034 of December 20, 1978, at 4.

54. Council Regulation (EEC) No. 3017/79, O.J. EUR. COMM. (No. L 339) 1 (1979) hereafter referred to as "the Regulation."

in third countries, provided that the companies concerned and the government in question have been officially notified and raise no objection.⁵⁵ In the event an interested party or a third country refuses to submit to the investigation, the Commission may base its preliminary or final findings "on the basis of the facts available."⁵⁶ For this reason most parties find it to be in their interest to actively cooperate with the Commission's investigation team since otherwise the Commission is entitled to simply rely on the allegations set forth in the complaint. This atmosphere of cooperation tends to be in contrast with the general attitude of mutual distrust usually prevailing during an antitrust investigation.

In parallel to the Commission's powers of investigation, the parties concerned—i.e., the complainant and the importers and exporters involved, as well as the diplomatic representatives of the exporting country—may inspect the Commission's file to the extent that it is relevant to the defense of their interests and used by the Commission in the investigation.⁵⁷ Confidential documents and internal documents prepared by the EEC authorities or its Member States are not accessible. Confidential information is defined as information the disclosure of which "is likely to have a significantly adverse effect upon the supplier or the source of such information."⁵⁸ However, if in a particular situation a request for confidential treatment is not warranted and the supplier is unwilling to authorize its disclosure in generalized or summarized form, the EEC authorities may simply disregard the information in question.⁵⁹ In the author's experience there have been a few instances where the confidentiality protection afforded by the Commission has been broader than necessary to protect business secrets. The result was that the rights of the other parties to the investigation were unduly restricted. In this connection it is appropriate to refer to a Resolution of The European Parliament recommending that "the confidentiality provisions of Article 8 should be interpreted as narrowly as possible."⁶⁰ In this connection, the Commission is considering amending the Regulation so that information submitted will likewise be disregarded if the supplier is unwilling to submit a non-confidential summary.

b. Written and Oral Submissions

When the Commission, after consulting the Advisory Committee (a committee composed of representatives of the Member States), finds that an antidumping complaint properly establishes a *prima facie* case of dumping,

55. Art. 7.2(a) & (b) of the Regulation.

56. Art. 7.7(b) of the Regulation.

57. Art. 7.4(a) of the Regulation.

58. Art. 8.3 of the Regulation.

59. Art. 8.4 of the Regulation.

60. EP Resolution on the Community's Anti-Dumping activities, O.J. EUR. COMM. (No. C 11) 37 pt. 9 (1982).

it publishes a notice of initiation of a proceeding in the Official Journal, inviting all interested parties to file their written comments within a fixed time period, usually 30 days, and to apply for an oral hearing.⁶¹

The written comments are ordinarily filed in the form of a reply to a standard questionnaire which the Commission sends out to the parties known to be involved. However, the parties are free to add whatever information they find useful and will often prepare a detailed rebuttal of the allegations made in the complaint. In practice the Commission staff has proven to be flexible by frequently granting extensions of the deadline for filing the written comments and by not objecting to the submission of further information on an ongoing basis, as long as such actions are not interpreted as an attempt to filibuster the proceedings.

As to the right of interested parties to be heard orally, the Regulation provides for two kinds of hearings, an oral hearing, i.e., an *ex parte* meeting between a given party and the Commission staff, and a so-called confrontation meeting, i.e., a hearing attended by all sides and presided over by a Commission official.⁶² Oral hearings are more often applied for than confrontation meetings. At times confrontation meetings produce more animosity than practical results. In any event, parties cannot be forced to attend such meetings.⁶³ Incidentally, the Commission does not make any official transcript of the hearings it organizes. Needless to say, the absence of an official record may constitute a serious handicap if later in the proceedings the parties would like to rely on certain statements made at the hearing.

c. Disclosure of Essential Facts and Considerations

Under the Regulation the exporters and importers concerned and, in the case of subsidization, the representatives of the country of origin, are entitled to be informed of the essential facts and considerations on the basis of which definitive measures are intended to be recommended.⁶⁴ This fundamental right was introduced in 1979,⁶⁵ as a result of the first judgment of the Court of Justice in the antidumping field, the *Japanese ballbearings* case.⁶⁶ In this landmark case, the Advocate General expressed his indignation about the lack of disclosure of essential information by the Commission to the parties concerned:

61. Art. 7.1(a) of the Regulation.

62. Art. 7.5 & 6 of the Regulation.

63. Art. 7.6 of the Regulation.

64. Art. 7.4(b) of the Regulation.

65. Regulation (EEC) No. 1681/79, O.J. EUR. COMM. (No. L 196) 1 (1979) amending the then applicable Antidumping Regulation 459/68, O.J. Spec. Ed. 1968 (1), at 80.

66. Cases 113/77, 118-121/77, NTN Toyo Bearing v. Council, 1979 E. Comm. Ct. J. Rep. 1185, [1978-1979 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8574; for a comment on the due process aspects of this case, see I. Van Bael, *Ten Years of EEC Anti-Dumping Enforcement*, J.W.T.L. 395 (1979).

One of the major issues in these cases arises from the fact that the Commission did not consider itself bound to disclose (its dumping) calculations, or anything about them, to anyone; and did not do so. . . .

There is, of course, first and foremost, the glaring fact that, to this day, none of the Applicants (nor this Court) knows what actual margins of dumping the Commission, as a result of its investigations preceding the adoption of Regulation No. 1778/77, found to have been practised by each of the Big Four nor whereabouts in the Community it found those margins to have been practised. Much less do any of the Applicants (or we) know how, precisely, those margins were calculated. Then there is the fact, which I dealt with under my last subheading, that, not until the Commission lodged its Rejoinders in Cases 119/77 and 120/77, was anyone told that domestic prices had been "constructed" by the addition of a notional profit. Nor did anyone know, until those Rejoinders were lodged, that the Commission had up-dated the domestic prices, but not export prices, to January 1977.

The Commission reacted swiftly to this criticism. It caused the Council to enact a special Regulation immediately, rather than waiting a few more months until the entire Antidumping Regulation had to be amended to bring it in line with the results of the Tokyo Round.

Under the new EEC Antidumping Regulation, the practicalities of the right to request disclosure of essential information are laid down as follows:⁶⁷ the request must be made in writing to the Commission and specify the issues on which information is needed; in cases where a provisional duty has been applied, the request must be filed with the Commission not later than one month after publication of the imposition of the duty; the Commission's reply may be given orally or in writing, "normally" no later than 15 days prior to the submission by the Commission of any proposal for definitive measures; comments made by the interested parties upon receipt of the Commission's reply shall be taken into consideration if they are received before the deadline set by the Commission (such deadline should allow for a response time of at least ten days).

In addition to the improved transparency of EEC antidumping proceedings for the parties concerned, the Commission has for a few years made an effort to make the proceedings somewhat more transparent for outsiders as well. Today the Commission publishes considerably more information in the *Official Journal*, compared to the sketchy, boiler plate type of reasoning typically used in the early days of EEC antidumping enforcement.

2. General Characteristics

The speed of the procedure, the discretion enjoyed by the Commission in shaping the remedy and the role of mediation played by the Commission in the face of diverging interests are three main features of EEC antidumping enforcement.

67. Art. 7.4(c) of the Regulation.

a. Speed

Compared with antitrust cases, antidumping proceedings are fast. Under the Regulation, proceedings should normally be concluded within one year from their initiation.⁶⁸ The Commission has interpreted this requirement as meaning one year from the formal opening of the proceeding even though the date of receipt of the initial complaint would seem to be more in line with the objectives of the system.

b. Discretion

The Commission enjoys a wide discretion under the Regulation. Not only is it one and the same agency that deals with both the dumping and injury requirement, but in addition it must apply a public interest test. Indeed, definitive action is only warranted if "the interests of the Community call for Community intervention."⁶⁹

Compared to the situation in the United States, the Commission has also more room to maneuver when determining the existence of dumping. For example, if for one reason or another the domestic price cannot be used to establish normal value, the Commission invariably opts for a constructed value calculation which offers greater flexibility to the enforcer than the third country price approach which is preferred in the United States. By the same token, when the Commission is doing a constructed value exercise, it is not bound by any 8 percent profit or 10 percent general expenses rule.

Similarly, the Commission has considerable discretion in deciding whether to move for a price revision undertaking or an antidumping duty. Furthermore, the Commission enjoys great flexibility when it determines the level of the price revision or of the duty. Indeed, under the Regulation the amount of the duty need not be equal to the dumping margin, "it should be less if such lesser duty would be adequate to remove the injury."⁷⁰ In addition it is important to realize that in the EEC duties are not fixed on a per transaction basis as in the United States but prospectively. Again, this leaves great freedom to the Commission regarding the practicalities involved in assessing the duty (e.g., duties can be set in reference to a floor price; as a percentage *ad valorem*; on the basis of the weighted average of different products; or as variable duties depending on the types of products or the producers involved).

Needless to say, this great amount of discretion enjoyed by the Commission encourages all interested parties to cooperate with the Commission. For example, when exporters are negotiating with the Commission over the terms of a price revision undertaking after the Commission has already

68. Art. 7.9 of the Regulation.

69. Art. 12.1 of the Regulation.

70. Art. 13.3 of the Regulation.

imposed a provisional antidumping duty, they are, in effect, negotiating "with their backs against the wall." If the offer of a price revision undertaking is rejected and the provisional duty made final, the extra duty will enhance the Community budget rather than the exporter's pocket.

c. Role of Mediation

Whereas in EEC antitrust proceedings the Commission's role is above all perceived as prosecutorial, antidumping proceedings are characterized by the role of mediator assumed by the Commission staff between pressures from local industry and the wider "community interest." This may be due to the fact that the Community's antidumping policy is enforced in a more political environment than its antitrust policy. After all, under the EEC Antidumping Regulation important powers are reserved to the Advisory Committee, composed of representatives of the Member States, and to the EEC Council of Ministers.

3. Summary

During the first ten years of EEC antidumping enforcement the Commission tended to pay little attention to issues of due process. Things have changed as a result of the Court's judgment in the *Japanese ballbearings* case, however. The Commission has since made a real effort to improve the transparency of its procedure. The fact that the Commission is currently proposing that the Council of Ministers adopt a further series of amendments to the applicable Regulation shows that further refinements are in the offing.⁷¹

B. THE COURT OF JUSTICE

Until recently it was doubtful whether antidumping measures of the EEC could be subject to judicial review. The EEC Antidumping Regulation is silent on the matter. Hence, the question had to be examined under Article 173(2) of the EEC Treaty. For a person, other than a Member State or a Community institution, to be entitled to challenge the legality of a Community Regulation under Article 173(2), he must be able to demonstrate that: the act, though in the form of a regulation, instead of being of general application is really *ad hominem*, i.e., affects particular persons because of their own conduct; and the act is of direct and individual concern to him.

71. Amidst the proposed amendments, two would seem to be of particular interest: the introduction of a "sunset provision," according to which final measures shall automatically lapse after five years unless the need for their continued existence has been established, and the introduction of a requirement that the investigation cover a period of not less than six months immediately prior to the initiation of the proceeding.

In the *Japanese ballbearings* case, the first antidumping measure which gave rise to an appeal before the Court of Justice, the EEC Council and Commission maintained that the regulation under attack constituted a genuine generally applicable measure of a legislative nature. Antidumping duties being an instrument of commercial policy, so the argument ran, the regulation had to apply to all actual or potential importers whether or not they were known or identifiable when the measures were adopted.

The Court, however, ruled in favor of the Japanese exporters. It noted the essential relationship between the suspension of the final anti-dumping duties and the price undertakings entered into by the four major producers:

[A]lthough drafted in general terms, Article 1 in fact concerns only the situation of the major Japanese producers, . . . who are directly and individually concerned by reason of the undertakings which they have given to raise their prices.⁷²

Similarly, the Court found the collection of the provisional duty a matter of direct and individual concern to certain importers:

Although the collection of the amounts secured by way of provisional anti-dumping duty is *per se* of direct concern to any importer who has imported the products in question subject to such duty, the special feature of Article 3 which sets it apart is that it does not concern all importers but only those who have imported the products manufactured by the four major Japanese producers named in that article.⁷³

Thus, in essence the Court held that the appeal was admissible because the challenged Council Regulation was "a collective decision relating to named addressees."⁷⁴

In addition to winning on the admissibility issue, the Japanese exporters also received a favorable ruling on the substance of the case. The Court annulled the Council Regulation, holding that the Commission and Council cannot have it both ways:

[I]t is unlawful for one and the same antidumping procedure to be terminated on the one hand by the Commission's accepting an undertaking from the exporter or exporters to revise their prices at the same time as, on the other, by the imposition on the part of the Council, at the proposal of the Commission, of a definitive anti-dumping duty.⁷⁵

Notwithstanding the favorable outcome of the first appeal filed by *exporters* against an EEC antidumping measure, considerable doubts continued to linger for a number of years about the likelihood of success of other appeal proceedings in view of the Court's admissibility test focusing on the wording of the antidumping relief, i.e., the crucial question being whether the addressees of the measures are expressly named or not, rather than examin-

72. NTN Toyo Bearing, *supra*, note 66 at 1327, para. 13.

73. *Id.* at 1327, para. 14.

74. *Id.* at 1205, para. 12.

75. *Id.* at 1207, para. 17.

ing the nature of the procedure. In other words, it was feared that appeal proceedings brought by exporters would only be held admissible insofar as the applicants were subject to a specific duty and therefore individually named in the operative part of the antidumping measure.

As a matter of fact, this fear proved to be well-founded since in 1982, in *Alusuisse*, the first action brought by *importers* failed to clear the admissibility hurdle. The Court was of the opinion that "as regards independent importers who, in contrast to exporters, are not expressly named in the regulations", regulations imposing antidumping duties are true regulations "because they apply to objectively determined situations and entail legal effects for categories of persons regarded generally and in abstract."⁷⁶

The impracticability of the Court's formalistic admissibility test became obvious when the Court in *FEDIOL* dealt for the first time with an appeal brought by a *complainant*.⁷⁷ Indeed, the complainant who triggered the antidumping or antisubsidy investigation will never be individually named in the operative part of the antidumping or antisubsidy measure, yet, his individual interest can hardly be disputed. Faced with this dilemma, the Court, rather than depriving the complainant of his right to apply for judicial review of the Commission's action or inaction has preferred to change the emphasis of its admissibility test. Instead of examining only the specific wording of the relief, the Court this time concentrated on the nature of the procedure. The Court noticed that the EEC Antidumping Regulation provides for a number of rights to which a complainant is entitled and drew the conclusion

that, in the spirit of the principles which lie behind Articles 164 and 173 of the Treaty, complainants have the right to avail themselves, with regard both to the assessment of the facts and to the adoption of the protective measures provided for by the regulation, of a review by the Court appropriate to the nature of the powers reserved to the Community institutions on the subject.

It follows that complainants may not be refused the right to put before the Court any matters which could facilitate a review as to whether the Commission has observed the procedural guarantees granted to complainants by Regulation No. 3017/79 and whether or not it has committed manifest errors in its assessment of the facts, has omitted to take into consideration any essential matters of such a nature as to give rise to a belief in the existence of subsidization or has based the

76. Case 307/81 *Alusuisse v. Council and Commission* 1982 E. Comm. Ct. J. Rep. 3463, 3472 at para. 9 [1981-1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8869. See also *Allied Corporation v. Commission*, Joined Cases 239/82 and 275/82, judgment of 21 Feb. 1984, not yet reported, where the Court held that an importer, Demufert, had no standing because he "was not directly concerned by the verifications concerning the existence of a dumping practice" (at para. 15).

77. Case 191/82, *FEDIOL v. Commission*, of 4 Oct. 1983, not yet reported.

For a discussion of the significance of this case see J.-F. Bellis, *Judicial Review of EEC Anti-Dumping and Anti-Subsidy Determinations After Fediol: The Emergence of a New Admissibility Test*, 3 CML REV. (1984).

reasons for its decision on considerations amounting to a misuse of powers. In that respect, the Court is required to exercise its normal powers of review over a discretion granted to a public authority, even though it has no jurisdiction to intervene in the exercise of the discretion reserved to the Community authorities by the aforementioned regulation.⁷⁸

The Court's more realistic approach in *FEDIOL* on the admissibility issue is, of course, a most welcome development. It was subsequently confirmed in the *Allied* judgment in which the Court stated that exporters are allowed to file an appeal even though they were not individually named in the relief challenged, provided that they have been the subject of the "preparatory investigation."⁷⁹ Hence, for the time being, only the situation of importers remains unsatisfactory. They cannot file an appeal to the Court of Justice. Their only redress is to challenge the collection of antidumping duties before national courts on the ground that the Regulation imposing the duty is illegal. It is to be hoped that the Court will eventually give them also the benefit of judicial review under Article 173 of the EEC Treaty.

Although it is clear that the Court is likely to leave considerable discretion to the Commission, rather than engaging in factfinding on its own, it is nevertheless important that the principle of judicial review has been firmly established. It will definitely have a restraining influence on the Commission and thus pave the way to both a careful and reasonable exercise of the Commission's discretionary powers.

III. Conclusion

Until a few years ago, the critical comments from legal and business circles regarding the Community's procedures in the antitrust and antidumping field tended to be brushed aside as if the requests for more due process were the expression of a decadent society. This attitude has changed. The Community authorities have realized that their procedures must become more transparent in order not to lose credibility. The Commission is in the process of improving the administrative proceedings in competition cases; and the Court of Justice, by allowing appeals to be filed in antidumping cases, seems prepared to supervise the Commission's discretionary powers in the antidumping field.

Notwithstanding this improved climate, the fact remains that the proceedings before the Commission are administrative in nature. It is not an adversary type of judicial procedure since the Commission combines the functions of prosecutor, judge and jury. Hence, it is to be expected that there will always be something "Kafkaesque" about the Commission's procedures.

78. Para. 29-30.

79. Alusuisse *supra* note 76 at para. 12.

After all, the real judge, the Commission as a collegiate body, is not seen to participate in the proceedings: the judge is invisible and the defendant's fate is sealed in an *ex parte* meeting. Furthermore, the Commission is not a tribunal but a political agency. As a result its decisions are not made on purely legal grounds but emerge in a political context.⁸⁰

A system of checks and balances is required when so much power is vested in the EEC Commission as enforcer of antitrust and antidumping laws. The "one shot" appeal before the Court of Justice is clearly insufficient to guarantee an exhaustive analysis of the facts. Therefore, it is submitted that, whatever further improvements the Commission is able to bring to its administrative procedures, the need for a Court of first instance to try the facts remains paramount. The Commission, the Court of Justice and the European Parliament all support the creation of such a court.⁸¹ Since the establishment of a court of first instance would require the EEC Treaty to be amended, it is suggested that the projected accession of Spain and Portugal provides a good opportunity to that effect because the accession requires the Treaty to be amended any way.

In any event, the fact that institutional changes are a lengthy process should not discourage the drive to improve procedures. Indeed, the enforcement of economic policy decisions under the Community's antitrust and antidumping policy can only be successful for the consumers if the underlying facts have been properly established. This in turn requires open and exhaustive procedures allowing the defendants to put all their cards on the table in the context of a fair debate.

80. A simple examination of a table of EEC competition cases shows that remarkably few Italian and French companies have felt the rigors of EEC antitrust enforcement. Is it because they are more law-abiding corporate citizens or is it because the Italian and French Governments support their industry more vigorously in Brussels? Furthermore, why is it that non-EEC companies tend to attract the higher fines? By the same token a number of antidumping proceedings have been terminated because of the conclusion of a voluntary restraint agreement. A recent example of this political solution can be found in the V.C.R. (Japan) case O.J. EUR. COMM. (No. L 86) 23 (1983).

81. See, *supra* note 52; Commission: Eleventh Report on Competition Policy, Point 16; Commission: Thirteenth Report on Competition Policy, Point 20; European Parliament: *supra* note 13.

