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Notification and Exemption

In our October issue, we carried a short report about the Commission's plans for a new regulation to replace Regulation 17 of 1962, which sets out many of the principles and procedures for the enforcement of the EC rules on competition. The Commission has since published the text of its proposed regulation, together with an Explanatory Memorandum; and, in a series of three or four reports, starting with the present issue, we shall be covering the memorandum and text of what is bound to be a profoundly important development in the way in which competition is promoted in the European Union.

There are several important respects in which the legal scene will change. Probably the most important is in the proposal for abolishing the notification of restrictive agreements and for introducing the principle that exemption should be "directly applicable" and no longer subject to a formal procedure. In other words, there is to be a presumption that agreements are lawful. They are presumed either to escape the prohibition under Article 81(1) of the EC Treaty or, if they are covered by Article 81(1), to be covered by the exemption provisions of Article 81(3). The presumption may be rebutted; and the responsibility for deciding whether the presumption is to be rebutted or upheld will in future be shared between the national competition authorities, the national courts and the Commission. Thus, exemption will no longer be the exclusive prerogative of the Commission; and the assessment of the legality or illegality of an agreement will lie in the first place with the parties to it and not be a matter for prior administrative decision. A greater responsibility for compliance will therefore rest on the undertakings concerned; and a wider share of jurisdiction will go to the Member States' tribunals.

From the Commission's point of view, the proposal makes good sense. "Experience in the last decades has shown that notifications do not bring to the attention of the Commission serious violations of the competition rules. The handling of a large number of notifications prevents the Commission from focusing on the detection and the punishment of the most serious restrictions such as cartels, foreclosure of the market and abuses of dominant positions. In the proposed system, the abolition of the notification and authorisation system will allow the Commission to focus on complaints and own-initiative proceedings that lead to prohibition decisions, rather than establishing what is not prohibited." (In referring to abuses of a dominant position, the Commission is not suggesting that, under existing rules, these have to be notified; they do not. On the contrary, the Commission is at pains to point out that the new proposals will bring the Article 81 procedure more closely in line with the procedure for dealing with cases under Article 82.) ■