Notification and authorisation

In his speech to the European Parliament in January, to which we referred in last month's "Comment", the Commissioner responsible for Competition Policy, Mr Monti, made a point which confirms the suspicions of many practitioners in the field of EC competition law. "Serious restrictions are never notified," he said. "The Commission has prohibited only 9 agreements in 35 years on the sole basis of a notification." Although notification of a restrictive practice is a duty under the rules on competition, the sanctions for a breach of the duty, though quite real, are in some respects less pressing than the draftsmen of the rules may have intended. Consequently, notification has been seen by many corporations and their advisers as largely a matter of tactics, rather than of obligations. Moreover, in the determination of the tactics to be adopted in any given case, one of the biggest factors to be taken into account is whether the risk of sanctions may be offset by the disadvantages of publicity. Notification makes a potentially anti-competitive situation public; and publicity may lead to objections and complaints. Legal advisers therefore rightly warn their clients about the dangers of failing to notify a restrictive practice but also warn them of the dangers to which unwelcome publicity may lead. Mr Monti clearly recognises that the procedure for notification and authorisation is not working. This is borne out by the large increase in recent years in the number of formal complaints about competitors' behaviour.

Meanwhile, the Commission is considering the scores of submissions on the proposals contained in last year's White Paper on reforming the competition rules. The debate has focused on the alternatives of a system of authorisation and a system of "legal exception". The Commission's Deputy Director-General for Competition has expressed the matter in this way. "Two kinds of system [for the application of the rules on competition] were conceivable: a system of authorisation similar to the one in the ECSC Treaty or a system of legal exception. Under a system of authorisation, agreements have to be notified to an administrative authority which grants or refuses the benefit of an exemption. Under a system of legal exception, any judge or competent authority before whom a complaint is brought can and must examine whether a restrictive agreement does or does not fulfil the conditions imposed by the Treaty." (Article in "Competition Policy", October, 1999; our translation from the French.) The latter system would mean that "agreements restricting competition ... under Article 81(1) would be lawful *ab initio* to the extent that they met the conditions imposed by Article 81(3)". Thus, neither notification nor authorisation would continue to be necessary. It remains to be seen whether the Commission has received enough support to proceed with this approach. ■