The Commission White Paper proposes to transfer to national and Community judges a significant part of the responsibility for the implementation of EC competition law and policy. This paper seeks to identify, from the standpoint of a Community judge, some of the questions that need to be asked and problems that need to be faced if such a transfer is to be effective and useful.

Two caveats are necessary at the outset. First, the purpose of the paper is to raise questions and identify problems. This may give the impression that the writer opposes the Commission proposal. That is not the intention: the writer is sceptical but undecided. Second, the paper contains many generalisations about courts and their procedures. Please read most sentences as if they began with 'Broadly speaking . . .'.

Competition law can arise in the courts in three ways:

• In proceedings for judicial review of administrative decisions;
• In private law actions between private parties;
• In criminal prosecutions or quasi-penal proceedings brought against a private party in a court of law by a public prosecutor or other public authority.

In Europe we have substantial experience of the first category, rather less experience of the second, and little or no experience of the third.

In this respect, European experience is different from US experience. In particular, we have no procedure analogous to the antitrust proceedings brought against Microsoft in the US Federal Courts by the Department of Justice. The only ‘trial courts’ available in the EC for competition cases are the civil and commercial courts of the Member States.

Two other differences between the US and Europe should also be stressed. First, la judiciarisation de la vie is second nature to most Americans, but it is much less part of the European culture. Second, political and public opinion in the US is more ready to accept competition as a good in itself than opinion in most European countries.

The procedures for judicial review of administrative decisions and the criteria applied by the courts are broadly similar throughout the Community. This is not surprising, since in most countries the judge’s function in such cases is solely to assess the lawfulness, and not the merits, of the administrative decision. Where the administrative decision has been taken under powers conferred by competition legislation, the competition law issue will be the only issue in the case and will be more or less clearly defined (and confined).

In the context of judicial review of administrative action, competition law can be treated as a specialist subject, to be dealt with by specialised tribunals
(e.g. a specialised chamber of the CFI). By contrast, private law suits are heard in courts of general jurisdiction. The procedures and criteria applied in these courts differ widely between the Member States, particularly as regards the concept of ‘evidence’ and how it is provided.

In this respect also, US experience is not a safe guide. The US is procedurally and linguistically homogeneous; the EC is not. Moreover, in a private law suit, the competition law issue may not be the only issue with which the judge has to deal with. Typically, Article 81 or 82 will have been raised as a defence to an action for performance of a contract or to prevent the marketing of particular goods. But the issues in the case may extend more widely, and some of them may have nothing to do with EC law, far less competition law.

The judge(s) dealing with the case may have little knowledge or experience of EC law and little or none of competition law. Consequently, courts of general jurisdiction dealing with private law suits are likely, to a greater extent than specialist tribunals, to need the help of the Commission and/or of the Court of Justice through Article 234 procedure. Help must be provided as quickly as possible so that the action as a whole can be decided within a reasonable time.

These considerations have a bearing on the Commission’s proposal in three respects:

First, the extent to which and the way in which the Commission could help national courts or intervene in national proceedings will differ considerably from one Member State to another. For example, in the UK it will be important to determine whether, and if so in what form (written, oral or both), the Commission would provide ‘evidence’; if so, whether the Commission witness would be open to cross-examination; and whether the Commission evidence would be treated as ‘expert evidence’. The answers to these questions could have profound procedural consequences in the UK (and also, presumably, in Ireland). The questions would not (and perhaps could not) arise in that form in other Member States, but the same would be true, mutatis mutandis, of procedural problems in those states.

Second, even at present, Article 234 references do not normally come to the ECJ neatly packaged as ‘competition law references’. For example, the Bosman case (C-415/93 Union Royale Belge des Sociétés de Football Association and Others v Bosman and Others [1995] ECR I-4921) raised questions of discrimination on grounds of nationality, free movement of workers and competition law. Very often, the referring judge asks whether a particular national situation is compatible with a whole series of Treaty rules, including, but not confined to, Articles 81 and 82.

In any event, Articles 81 and 82 have to be read in the wider context of the Treaty as a whole. The ‘Rules on Competition’ cover public undertakings and state aids. They appear in a Title that also covers taxation. That Title, in turn, forms part of the scheme for creating and maintaining the internal market for goods, persons, services and capital.

Since Maastricht, the four freedoms are no longer ‘The Foundations of the Community’, but rather an aspect of ‘Community Policies’. These policies
cover a wide range of topics, including social policy, consumer protection, industry, economic and social cohesion, research and technological development and environment.

The consequences of putting all these matters on the same footing in the Treaty have still to be fully worked out. It has already affected the Court’s approach to some aspects of the traditional jurisprudence on free movement of goods. To a much greater extent than before, the claims of free movement of goods have to be balanced against other policy considerations, such as consumer and environmental protection. Similarly, in *Albany International* (Case C-67/96 *Albany International v Stichting Bedrijfepensioenfonds Textilindustrie* [1999] ECR I–0000), the claims of free competition in the provision of occupational pension schemes had to be balanced against other social objectives set out in the Treaty.

For all these reasons, ‘competition law references’ cannot be treated, *a priori*, as a pre-defined category capable of being assigned to a specialised chamber of the CFI (or some other specialised tribunal). The division of competence between the ECJ and the CFI in the field of state aids has already led to considerable problems and a good deal of avoidable delay. It would therefore be necessary to define with some precision what would, and what would not, be transferred to the CFI or other specialist tribunal. The desire for ‘specialised’ treatment of competition law must not lose sight of the latter’s place in the scheme of the Treaty as a whole.

Third, the resources of information, assistance and guidance promised by the White Paper, which would be necessary for the courts (national and Community) to perform their new function, must be made available *within a reasonable time and in a usable form*. The proposed reforms may relieve the Commission of the task of applying Article 81(3), but that does not mean that the task will have disappeared—it will simply have been moved elsewhere in a different form.

It should be recognised that the courts of all the Member States, as well as the ECJ and CFI, are already suffering from severe overload, and that this situation is unlikely to change in the near future, if at all. If the proposed new system is to depend on the Commission providing national and Community courts with advice and assistance, the Commission cannot be allowed to plead lack of time, resources or manpower as a reason for not doing so. In that connection, it is disturbing that the Commission has already suggested, in a different context, that it should no longer submit observations in all Article 234 references.

The principal reason for the writer’s scepticism about the current proposal is indeed that the Commission has, over the past forty years, found it impossible to provide more than comfort letters in response to the overwhelming majority of individual notifications. What then are the grounds for believing that it will be able not only to monitor the decisions of national courts from Tallinn to Lisbon and from Cork to Larnaka, but also to provide those courts *and* the ECJ or CFI with the assistance they need to apply Article 81(3) in concrete cases?
If the already overloaded courts will be left to their own devices, it would be more honest to say so, rather than promise what cannot be delivered.

An alternative approach would be to make national competition authorities primarily responsible for assisting national courts, allowing them to call on the help of the Commission when required. This would be in keeping with the spirit of subsidiarity and could work in parallel with the well-established system of co-operation between national courts and the ECJ under Article 234.

‘Balancing’ of competing interests has, to an increasing extent, become a feature of Article 234 references. This is, in one sense, an argument in favour of the Commission’s proposal. It shows that national courts applying Community law can reasonably be called on to balance non-legal considerations. There is no reason why the considerations mentioned in Article 81 (3) should be inherently more difficult to balance than the competing claims of ‘commercial’ human rights, consumer and environmental protection, social protection, racial and gender equality, etc. especially since the ‘rule of reason’ approach to Article 81 (1) already involves some degree of balancing.

On the other hand, it is envisaged that Article 81 (3) would have to be interpreted and applied in the light of Community competition policy, the definition of which the Commission proposes to reserve to itself. This raises a number of questions, for example:

- How would the relevant ‘policy’ be made known?
- Would it be promulgated in binding legal instruments, in recommendations, or in some even softer form of law?
- How would changes of policy be brought about and promulgated (for example, a new approach to vertical restraints)?
- What would be the effect of any change of policy on the validity of existing agreements, particularly those that were already the subject of litigation?

From the point of view of legal certainty and judicial operability, these are questions to which the answers cannot be left to be solved ambulando.

It will be essential to define how, under the new dispensation, the three paragraphs of Article 81 are to be applied. There seem to be two possible approaches.

In the first approach, any agreement, decision or practice falling within the scope of Article 81 (1) would be prima facie unlawful and therefore void. It would then be for the party seeking to uphold the validity of the agreement, decision or practice, to prove positively that it qualified for exemption because it met the criteria of Article 81 (3). Failing such proof, Article 81 (2) would apply.

In the second approach, the court would weigh up simultaneously, on the one hand, the anti-competitive effects of the contested agreement, decision or practice (Article 81 (1)) and, on the other, its beneficial effects (Article 81 (3)). Depending on how the balance tipped, the result would be nullity (Article 81 (2)) or exemption (Article 81 (3)).

From a judicial point of view, the first approach, relying on well-established criteria of onus of proof, would be easier to operate. The Cassis de Dijon...
jurisprudence as developed by the ECJ has adopted a similar approach: restrictions on free movement are prima facie unlawful unless they are shown to be objectively necessary and proportionate to achieve a legitimate public purpose.

On the other hand, the second approach, involving the simultaneous balancing of all relevant considerations, would be more appropriate for an economic rather than a strictly legal assessment. It would make it unnecessary to decide whether, and to what extent, a rule of reason should be built into the interpretation of Article 81 (1), rather than Article 81 as a whole.

Arbitrators are already deciding cases under Articles 81 and 82, and the Court has recently held that, at least where there is judicial control of arbitral decisions, the competition rules must be treated as d'ordre public. However, it is well established that arbitrators cannot make Article 234 references (see Case 102/81 Nordsee v Reedei Mond [1982] ECR 1055).

Arbitration and Alternative Dispute Resolution (ADR) are being promoted as desirable alternatives to resort to the courts. On 13 April 2000, the Council approved the creation of a European network of national bodies for extrajudicial settlement of consumer disputes, and on 29 May 2000 the Ministers of Justice of the Member States initiated discussions at EC level on alternative methods of settling disputes under civil and commercial law.

If Article 81 (3) is to have direct effect, arbitrators and other ‘voluntary’ tribunals will be called on to apply it. Does the Commission intend to monitor arbitral decisions and, if so, how? If not, why?

Would it be feasible and/or desirable to make specific provision for arbitrators and mediators to make Article 234 references? If so, this should be done in the context of the current IGC. But the potential consequences for the effectiveness of arbitration and ADR, as well as the workload of the ECJ, cannot, at this stage, be foreseen.

If Article 81 (3) is to be applied by the civil courts, giving interested parties a full right of appeal on the merits, the question will inevitably arise whether the residual powers of the Commission to take decisions in individual cases can continue to be exercised through an administrative procedure subject only to limited judicial review under Article 230. Ex hypothesi the cases dealt with directly by the Commission will be cases of major importance, possibly giving rise to very substantial fines. Would it be compatible with the principles of judicial protection that, in such cases, the enterprises concerned should have no right of appeal on the merits of their case?

The same issue between the same parties may arise in parallel proceedings before the courts of different Member States. For example, the validity of a standard form of exclusive distribution agreement may be challenged by aggrieved distributors or competitors in several countries at the same time, although the nature and scope of the proceedings in each country may be different in other respects (see point 3 above).

The courts of each country would undoubtedly have jurisdiction under the Brussels Convention. But they might well reach conflicting decisions as to the validity or enforceability of what is, essentially, the same agreement.
The rules of the Brussels Convention would not resolve the problem. Since at least one of the parties before the courts of the countries concerned (e.g. the local distributor) would be different, a decision by the courts of one country would not be *res judicata* before the courts of any other country. Articles 21 and 22 of the Brussels Convention (*lis pendens*) would not assist, since the parties to the actions would not be the same, the cause of action would not necessarily be the same and it is very doubtful whether the actions could be said to be 'related'.

It would therefore be desirable to devise a more detailed mechanism than the existing rules of the Brussels Convention to avoid multiple proceedings and conflicting decisions.
First of all, I am happy to say that there is no disagreement between the two European Courts. I entirely agree with John Cooke, and would repeat what Mr Kist said yesterday: do not jeopardise this enterprise by inadequate preparation and do not underestimate the seriousness of the problems that were pointed out yesterday and will be raised today. It is absolutely futile to proceed with the reform on the assumption that it is just the self-interested lawyers who create problems. If you do not face up to these problems now, they will come back to haunt you later.

Second, I endorse entirely what John Cooke said about using the potential of the national competition authorities. The great 'secret' of the Community legal system, is that the Treaty uses national bodies as enforcers of Community law,
and there is absolutely no reason why national competition authorities should not be used as enforcers of Community competition law. This is absolutely in line with the Community principle of subsidiarity, which was in the Treaty from the very beginning; subsidiarity was not invented in Maastricht, it was invented back in 1957 with the use of the national courts as primary enforcers of Community law.

Third, taking further a comment that John Cooke made before, it is perfectly true that the national courts will be dealing with disputes between party A and party B about their contract, but one of the most pernicious elements in competition law is the ‘network’ of identical contracts between party A and parties B, C, D, and E. From a legal point of view, each is a separate contract, and each is justiciable separately. From the economic point of view, competition is distorted by the network of agreements as a whole. So, do not say we do not need to bother about the Brussels Convention because the dispute is just between party A and party B. If the contract between parties A and B was subject to a court decision in one country, what is the effect of that court’s decision in another country and with respect to a contract concluded on identical terms between party A and party C? And in particular, what happens when parallel proceedings between one party and several different parties are started in the courts of different Member States, but all concern the same terms of identical contracts in the ‘network’? The same question arises in arbitration: arbitration proceedings may involve two parties, but the effect of the arbitral decision might have a knock-on effect on identical contracts with other parties.

Fourth, I agree with John Cooke that Article 81 (3) is justiciable. Analogous balancing problems occur in other areas of Community law as well, and the need to balance different Treaty provisions is ever increasing. Under the Treaty of Rome, the main provisions to be considered were those on the free circulation of goods and competition, but social developments and successive Treaty amendments have brought about several new legal and policy considerations to be balanced against each other (fundamental rights, trade marks and designations of origin, environment, consumer protection, biodiversity, drugs and terrorism, and so on). In the old days, the judge was operating a sort of on-off switch: he looked for the norm to apply, and he applied it. Nowadays the judge is operating a synthesizer, that has a number of pulses coming through, so he must assess the strength of these different pulses or considerations, adjust them, and find a solution whereby several considerations come through together, and not simply one norm of positive law. This exercise is new for many judges, and some are afraid of it, particularly in the national courts. Some judges simply resist doing it, as you can see from the evidence of Mr Justice Ferry and Mr Justice Laddy before the House of Lords. They just do not like the idea that this is what they have to do. So, do not underestimate the potential for judicial resistance to what you are expecting them to do under the new enforcement system.

Having said that, unlike political institutions, the courts are not in a position to choose what they want to do. In Europe at least, they cannot just say ‘This
case is unattractive, or uninteresting, and we are not going to deal with it. The courts have to take the case and, what is more, they also have to decide it. The consequence of this is that if you devolve enforcement powers to national courts, you will get decisions, and many of them might be unattractive from your point of view. They will be decisions from overloaded national judges, and not necessarily those in London, Brussels, or Paris, but also those in Rochester, Yorkshire, Santiago de Compostela, and any town in Finland. These will be the judges who decide Community competition law issues and, please, distinguish between specialised courts dealing with the judicial review of administrative decisions, and ordinary courts that do not deal with competition law aspects only, but which mix competition law aspects with other civil law considerations in the same case.

So, the real question is not whether the judges can do it, but what will be the quality of the decisions that you will get from them. As I see it, this quality will depend on the manpower of the national courts, the training of the judges, and the availability of 'back-up' (for example, libraries, access to information, and the help that the judge can get generally). In many countries, the judge depends extensively on the lawyers to present the court with the evidence. This means that the Bar must be brought into this training and information operation as well. But above all, as John Cooke said, there must be clarity as to what is expected of the national judges: clarity as to the burden of proof, clarity as to what has to be taken into account, and what does not. Do not underestimate the magnitude of the need for training and guidance. Equally importantly, do not underestimate the burden the reform will place on the European Court of Justice. At the moment, both the Court of First Instance and the European Court of Justice are overloaded. The European Court of Justice in particular is seriously overloaded with requests for preliminary rulings, so do not underestimate the difficulties with using the Community Courts as a modality to ensure coherence in the enforcement of Community competition law, unless substantial additional resources are provided to them.

My next comment goes back to another point made by John Cooke: please respect the separation of powers. The Commission cannot have it both ways: if you want the judges to do it, the judges will do it, but the Commission cannot start interfering on an administrative basis with what the judges will do.

With respect to procedural issues: do not be misled by parallels with the US system. The US is procedurally homogeneous, Europe is not. We must take account of the fact that procedures in the national courts differ considerably from one Member State to another, and—as someone said yesterday—it is often the procedure that decides the substance of the case.

My final point is one that I made very briefly at the end of my paper: if the national courts' decisions are subject to appeal on the merits of the case, and therefore under the new system we will have full judicial review of national court decisions in individual competition law cases, then you must also consider whether it is tolerable to continue with Commission administrative decisions that are subject only to limited judicial review. Is it tolerable that a small
contract—between small private parties, if you like—be open to complete review on the merits of the case and, if necessary, also open to a reference to the European Court of Justice, while major contracts concerning important market players are subject to administrative decisions and judicial review on legality aspects only? People have now been making this point for years and years and years. Even at a very simple level, what will be the status of the hearing officer and his report under the new system? Will the report be made available to the parties? And so on. We should therefore consider the knock-on effect of judicialising part of the Community’s competition law enforcement while continuing with a limited administrative procedure in the Commission’s own backyard.
important constitutional problems.

DAVID EDWARD—In relation to a question addressed to me earlier on by Emil Paulis: it is very important to distinguish, for judicial purposes, between Commission acts that have legal effect, and Commission soft law pronouncements that, as far as courts are concerned, may influence the approach in the application of the law, but cannot be binding. Moreover, according to the
Treaty, even Commission decisions are binding only on those to whom they are addressed. Therefore, an individual Commission decision, however significant it may be, does not bind a court in another issue. In addition, we should make a distinction between concurrent jurisdiction, which is what Giuliano Marenco was talking about, and the notion of administrative reversal of a judicial decision, which is what John Cooke was talking about. Please, bear in mind that, according to Article 81 (2)—a provision that we have mentioned here very little—an agreement or a practice that infringes Article 81 (1) is void—in French nul et non avenu—as if it never existed. Now, if a court decides that an agreement is valid, and the Commission takes later an administrative decision in the sense that the agreement it is not compatible with Article 81 (1), what is then the significance of Article 81 (2)? Has the agreement become nul et non avenu, or what has happened to it? The Commission must be clear on this. All I ask of you is to bear the distinction in mind and be clear about what your answer is.

Second, on the issue of forum shopping: I entirely agree with Judge Spiritus-Dassesse, we will never be able to avoid forum shopping. Yet forum shopping is only one aspect of the conflict of laws, and there are other aspects to be considered too. One is competence or jurisdiction of the Court, and that is what affects forum shopping and, broadly speaking, is already dealt with by the Brussels Convention. But a second case of conflict of law is when two courts are competent, but one has to give priority to another. The Brussels Convention deals with that simply where you have the same issues between the same parties, and the Court has said in the recent Drouot case⁶ that ‘same parties’ means same parties, and not parties with a like interest.

My illustration here is that of a standard contract entered into by a manufacturer with a number of suppliers. It is clear that the contract between A and B is not the same as the contract between A and C: it may have the same subject, but it is not between the same parties. You have to consider whether you need new rules, not on jurisdiction, but on lis alibi pendens—or on suspending or yielding the case to another court already seized with the same question, and then distinguish between conflicts of competence, and conflicts with respect to the effects of court decisions. For instance, what are the effects of one court’s judgment with respect to the judgment of another court? This issue is completely different from the one of conflicts of jurisdiction. It goes back to the question of what is the effect of a Commission decision, which according to the Treaty is only binding between the parties. Is the decision of the Spanish Court on a dispute between the manufacturer and the distributor in Spain binding on a dispute in France between the manufacturer and the distributor in France? And to what extent is the decision of any of these Courts binding on the Commission? These are legal questions to consider.

Last point: Giuliano Marenco said he has the impression that the European Court of Justice would like to transfer jurisdiction and competition cases to the

Court of First Instance. The European Court of Justice has no position on
that, and certainly my personal position is that it is up to the political institu-
tions of the Community to decide who shall do what. But please make the rules
of allocation of competence clear, and do not create conflicts of competence.
We already have difficulties of the kind in state aid cases. When challenged by
a company, a Commission decision on state aid goes to the Court of First
Instance, whereas when challenged by a Member State the same Commission
decision comes to the European Court of Justice. Please do not add to the
length of time taken to deal with cases a conflict of jurisdiction between the
European Court of Justice and the Court of First Instance or some other spe-
cialised court.

Finally, Dan Goyder said that two years is too long to wait for an ECJ deci-
sion. Let me give you a precise example in this sense. Last week, as Rapporteur,
I agreed in the Fifth Chamber on two judgments, and in the plenary three more.
I have four other drafts with the lecteurs d'arrêts. I have already signed off ten
judgments this year. Of the five judgments agreed last week, three will be
pronounced on the 4th of July, and two on the 14th of September, and that is
because we do not have enough translators. That is, four months of delay sim-
ply because there are not enough translators. Now, you can transfer everything
you like to the Court of First Instance, but unless you have the resources to
make the system work, you will not get the results in the time you want.