From *Ex Ante* to *Ex Post* Enforcement of Article 81: Efficiency, Legal Certainty and Community Enlargement

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for Didzis

I. Introduction

The establishment of a system of undistorted competition was one of the primary tasks of the European Community (EC).[1] Therefore, the initial Member States had to agree upon the content of the rules securing competition. The cartel prohibition envisaged in Article 81 of the Treaty Establishing the European (Economic) Community (hereinafter the 'Treaty') was one of the first competition provisions debated and drafted.[2] In addition, the Member States managed to draft specific measures prohibiting the abuse of dominant positions, measures dealing with public undertakings and state aids, as well as those controlling mergers having an EC dimension.[3] Consequently, it may be argued that the approach to competition issues in the EC gradually transformed into a *sui generis* policy and a legal system differing from the counterpart in the United States (U.S.) and excelling worldwide.[4] However, the development of the EC has now come to a point where the Member States, EC institutions and private parties, who have rights and obligations under EC law, are once again engaged in a discussion about the cartel

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1 See Article 3(g) of the Treaty.

2 For example, see G. Marenco, *Does a Legal Exemption System Require an Amendment of the Treaty?* http://www.iue.it/RSCAS/Research/Competition/2000/ Marenco_1a.pdf, at pp. 8-18, showing how the would-be Member States of the European Economic Community attempted to agree upon the text of Article 81. Note also that discussion and adoption of an EC merger control regime took twelve years.

3 See Articles 81, 82, 86 and 87 of the Treaty, respectively. See also Council Regulation 4064/89, OJ 1990 L 257/13, as amended by Council Regulation 1310/97, OJ 1997 L 180/1 and Proposal for Council Regulation, COM (2002) 711, OJ 2003 C 20/6.

4 See D. Gerber, *Modernizing European Competition Law: A Developmental Perspective*, 4 European Competition Law Review (ECLR) 2001, pp. 122-130, at p. 129. See also S. E. Foster, *While America Slept: the Harmonization of Competition Laws Based Upon the European Union Model*, 15 EmILRev 2001, pp. 467-500, at pp.468-473. Finally, see D. Hildebrand, *The European School in EC Competition Law*, 25 World Competition 2002, pp. 3-23, 10-23

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prohibition of Article 81. This time the debate concentrates on the enforcement of Article 81 of the Treaty.

The discussion started when the Commission proposed to relinquish its much of its power of enforcement of Article 81 in favour of the national authorities of the Member States. Unsurprisingly, the idea has generated a broad range of comments of points of view: 'Some question whether the proposed reform is lawful … Others question the conceptual underpinnings of the Commission's proposal … Yet others are concerned about the practical operation of the new regime.'[5] With due regard to the different opinions presented by others, this paper attempts to add another perspective on the proposals of the Commission.

In order to carry out this task, the paper first recalls the structure and aims of Article 81 of the Treaty. Secondly, it describes the initial enforcement regime of Article 81 and to what extent it succeeded in achieving the policy goals of Article 81. Then the paper shows how the enforcement regime of Article 81 gradually perished. Subsequently, it turns to the proposed reform and attempts to establish the developments and improvements the Commission has envisaged for it. Having done so, the paper starts an aim-result analysis of the reform in order to prove that the reform envisaged by the Commission and accepted by the Council does not correspond to the aims and results promised. Nevertheless, instead of completely rejecting the reform, the author attempts to make suggestions for improvement so that Article 81 would not lose its appeal and usefulness for the unfinished project of European integration. As promised, the analysis starts with resort to the cartel prohibition of the Treaty itself.

II. Article 81 of the Treaty and Its Implementation

The structure of Article 81 is threefold. Article 81(1) prohibits undertakings from concluding restrictive agreements, decisions and concerted practices[6] affecting trade between Member States. Article 81(2) makes such agreements void. Nevertheless, Article 81(3) states that the prohibition in Article 81(1) may be declared inapplicable if the agreement satisfies two positive and two negative criteria. The main aims of Article 81 are also threefold.

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5 P. Craig and G. de Burca, *EU Law: Text, Cases and Materials*, 3rd ed., Oxford 2003, pp. 1062-1087, at p.1064.

6 The terms 'agreement,' 'decision' and 'concerted practice' are substituted by the term 'agreement' in this paper.

A. The Aims of Article 81 of the Treaty

Article 81 served as a tool to promote competition, to integrate the Common Market and to balance the policies of the Treaty.[7] Firstly, Article 81 had to secure competition within the Common Market.[8] Aggressive interpretation of the wording of Article 81(1) has led to effective prohibition of anti-competitive behaviour, well able to deal even with theoretical restrictions.[9] Secondly, Article 81 ensured that undertakings could not prevent economic integration via replacement of publicly abolished barriers with privately concluded agreements.[10] The policies that the Treaty envisages in Articles 25, 28, 29 and 95 would have been largely useless if economic operators could divide the Common Market between them. In addition, the aim of preventing the segmentation of the Common Market made Article 81 different from national cartel laws. Thirdly, the Article 81(3) criteria allowed weighting of the aims of competition promotion and reduction of private barriers against other policies envisaged by the Treaty.[11] Thus, Article 81 also balanced the overall aims of the Treaty.[12] The need to promote competition and to fight against fragmentation of the Common Market could be balanced with social or environmental policies. Obviously, this third aim of Article 81 is, perhaps, less visible and surfaces only in specific cases. Nevertheless, the apparent need to establish a culture of competition and secure the functioning of the Common Market were important factors taken into account when the Council adopted Regulation 17, implementing, *inter alia*, Article 81.[13]

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7 For a summary of the aims of Article 81, see C. W. Bellamy, G.D. Child, V. Rose (ed), *Common Market Law of Competition*, London 1993, pp. 33-37, at pp. 33-35.

8 After the signing of the Single European Act, OJ 1987 L 169/1 – the Single Market.

9 While the extension of the concept of restriction of competition and the effect on trade between Member States will be dealt with later, it is worth mentioning here that the ECJ worked hard to establish broad definitions for the concepts of agreement and undertaking – see A. Jones and B. Suffrin, *EC Competition Law: Text, Cases and Materials*, Oxford 2001, pp. 85-136, at pp. 89-119.

10 See C. D. Ehlermann, *The Contribution of EC Competition Policy to the Single Market*, 2 CMLR 1992, pp. 257-282, at pp. 264-268, explaining how the Commission used Article 81 to promote integration of the Single Market.

11 See XXIII[rd] Competition Report from the Commission - 1993, COM (1994) 61, para. 190, where the Commission stated that only itself could ensure balance between competition policy and other objectives of the Treaty.

12 See the Opinion of Advocate General van Gerven delivered on 11 October 1990, in *Case C-234/89 Stergios Delimitis v Henninger Bräu AG*, [1991] ECR I-935, para. 5, where the Advocate General recalls that: 'The issue of such an exemption is an *act of policy* (emphasis added) which falls within the exclusive competence of the Commission.' When considering possibilities of reform of competition policy, this argument has been used against the establishment of a European Cartel Office, an independent body conducting investigations. It would not be able to contrast the aims of Article 81 concerning competition with other policies of the Treaty. See A. J. Riley, *The European Cartel Office: a Guardian Without Weapons?*, 1 ECLR 1997, pp. 3-16, at pp. 5-7. See also C. D. Ehlermann, *Competition Policy*, supra n. 10, at p. 282.

13 Council Regulation 17, OJ 1962 13/204.

B. Regulation 17

The legal basis of Regulation 17 was Article 83 of the Treaty. By virtue of this article, implementing measures had to ensure compliance with Article 81(1) as well as lay down rules for the application of Article 81(3). According to Article 83(2) (b), effective supervision of compliance had to be pursued along with the greatest possible simplification of administration.[14]

1. The Notification System and the Powers of the Commission

The Council saw notification of agreements falling under Article 81 as the means to ensure a balance between supervision and simplicity of administration. According to Article 1 of Regulation 17, agreements falling within the ambit of Article 81(1) were prohibited with no prior decision being required. However, according to Article 4(1) of Regulation 17, undertakings were *obliged to notify* to the Commission, agreements prohibited under Article 81(1) but capable of satisfying the requirements of Article 81(3). Agreements not notified would have been void by virtue of Article 81(2) except for those enjoying provisional validity.[15] Furthermore, Article 4(2) served as an exception to Article 4(1) and reduced the amount of agreements susceptible to obligatory notification, thus leaving the undertakings a choice to notify.[16] However, only notification of an agreement secured undertakings against fines that the Commission could impose.[17] Interestingly or ironically, the text of Regulation 17 admitted that undertakings could notify so many agreements that it would be impossible to examine them. Consequently, the realistic prediction was that some more flexible mechanisms dealing with agreements less prejudicial to the Common Market could be necessary.[18]

Nevertheless, the Council used Article 9(1) of Regulation 17 to delegate to the Commission *the sole power* to declare Article 81(1) inapplicable if the agreement

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14 When analyzing this requirement, one should bear in mind that Article 85(1) of the Treaty entrusts the Commission with the task to ensure application of *principles* established by Article 81. Thus, no matter how the arrangements of effective supervision are balanced with simplification of administration, the Commission derives its power to oversee the enforcement of Article 81 directly from the Treaty.

15 See the Judgment of 6 April 1962 in *Case 13/61 Kledingverkoopbedrijf de Geus en Uitdenbogerd v Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn* (*de Geus*) [1962] ECR 45, p. 52.

16 For amendments of Article 4(2), see Council Regulation 2822/71, OJ 1971 L 285/49 completing Article 4(2) of Regulation 17 and Council Regulation 1216/1999, OJ 1999 L 148/5 amending Article 4(2) of Regulation 17. Note that the Council adopted Regulation 1216/1999 when preparing for the reform of policy towards vertical restraints. See Communication from the Commission on the Application of the Community Competition Rules to Vertical Restraints - Follow-up to the Green Paper on Vertical Restraints, COM (1998) 544, OJ 1998 C 365/3, section IV, part 5.

17 See Article 15(5) and 15(6) of Regulation 17.

18 See preamble of Regulation 17, paras. 4, 5.

satisfied the requirements of Article 81(3). National authorities[19] could apply only Article 81(1) and only as long as the Commission had not exercised its discretion[20] and initiated proceedings pursuant to Articles 2, 3 or 6 of Regulation 17.[21] Nevertheless, the European Court of Justice (ECJ) did not hesitate to announce about Article 81 when it was still known as Article 85 that: '…the text of Article 85(2) … seems to regard Articles 85(1) and 85(3) as forming an indivisible whole…' and that in each case an assessment under both Article 81(1) and 81(3) must be conducted.[22] However, in contrast to Article 81(1), the ECJ has not ruled upon the direct effect of Article 81(3).[23] Furthermore, bearing in mind the precedence of Community law, the ECJ limited the right of national authorities to apply national laws concurrently with Article 81.[24] Thus, in essence, the Council attempted to ensure effective supervision and administrative efficiency through bilateral action. On the one hand, through imposition of an obligation of notification on the undertakings. On the other hand, via delegating to the Commission the monopoly over granting Article 81(3) exemptions and considerable powers of enforcement of Article 81(1). Several reasons and goals justified the imposition of the obligation to notify as well as centralization of the application of Article 81.

2. Justification of the Centralized Enforcement and Notification System

The establishment of the notification system was based on experience and future considerations about the Common Market. Firstly, Article 65 of the European Coal and Steel Treat (ECSC Treaty) contained provisions similar to Article 81 of the Treaty and expressly reserved the power to declare the respective provisions inapplicable to the

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19 See the Judgment of 18 March 1970 in *Case* 43/*69 Brauerei A. Bilger Söhne GmbH v Heinrich Jehle and Marta Jehle*, [1970] ECR 127, para. 9, stipulating that the concept of 'national authorities' includes national courts.

20 See the Judgment of 18 October 1979 in *Case 125/78 GEMA, Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte, v Commission of the European Communities* (*GEMA*) [1979] ECR 3173, para. 18, stating that the Commission is not bound to adopt a decision on the existence of an infringement of Article 81. Further, see the Judgment of 18 September 1992 in *Case T-24/90 Automec Srl v Commission of the European Communities* (*Automec II*) [1992] ECR II-2223, paras. 76-86, where the CFI held that the Commission was not obliged to start investigations and could assess if there was sufficient Community interest to pursue the case. No doubt, Community courts would still evaluate the reasons stated by the Commission. Nevertheless, the Commission may refer the complainant to the national courts, if the applicant enjoys sufficient protection of his rights there.

21 Article 9(3) of Regulation 17.

22 See, *Case 13/61 de Geus*, p. 52.

23 See judgment of 30 January 1970 in *Case 127/73 Belgische Radio en Televisie v SV SABAM and NV Fonior* (*SABAM*) [1974] ECR 51, para. 16, where the ECJ held: 'As the prohibitions of Articles 85(1) and 86 tend by their very nature to produce direct effects in relations between individuals, these Articles create direct rights in respect of the individuals concerned which the national courts must safeguard.'

24 See the Judgment of 13 February 1969 in *Case 14/68 Walt Wilhelm and others v Bundeskartellamt (Walt Wilhelm),* [1969] ECR 1, paras. 3-9.

High Authority.[25] Secondly, the Member States had very little experience with competition rules. Germany and the United Kingdom were the only Member States having competition rules and authorities functioning in reality, whereas France had a theoretical, but rarely enforced prohibition of restrictive agreements accompanied by a willingness to see a centralized system.[26] It was only after the adoption of Regulation 17 that the Member States started to evaluate whether their systems of competition enforcement suited the requirements of Article 81.[27] However, even if the Member States had had the authorities and expertise with competition rules, the goal of Common Market integration would have nevertheless called for a uniform application and interpretation of Article 81. Consequently, the Commission appeared to be the best placed authority to enforce Article 81. Moreover, Article 81(3) contained an exception that, if applied broadly, could be most prejudicial to the aim of market integration.[28] On the one hand, the Commission had the task to establish a culture of competition and respect for prohibition of cartels within the EC.[29] On the other hand, this function required expertise and information. Consequently, the establishment of a notification requirement was also a way for the Commission to gather information about the economic situation in the Common Market.[30] Last, but not least, the centralized notification and exemption

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25 See Article 65 of the European Coal and Steal Community Treaty. However, see also C. D. Ehlermann, *The Modernization of EC Antitrust Policy: a Legal and Cultural Revolution*, 37 CMLR 2000, pp. 537-590, at pp. 539-540, arguing that the EEC Treaty intended a less centralized structure of competition policy than the ECSC.

26 See H. Ullrich, *Harmonization Within the European Union*, 3 ECLR 1996, pp. 178-184, at p. 178; and Ehlermann, *EC Antitrust Policy*, supra n. 25, at p. 540.

27 See A. Deringer, *The Distribution of Powers in the Enforcement of the Rules of Competition Under the Rome Treaty*, 1 CMLRev 1963-64, pp. 30-40, at p. 33, explaining how the Member States initially dealt with enforcement of the prohibition under Article 81(1) and compare it with the situation described by A. Haslam-Jones, *A Comparative Analysis of the Decision-taking Process in Competition Matters in Member States of the European Union, the European Commission and the United States*, 3 ECLR 1995, pp. 154-180, at pp. 158-180.

28 Soon, however, calls for enforcement of Article 81(3) in national courts surfaced. See S. Kon, *Article 85, Para 3: a Case for Application by National Courts*, 4 CMLRev 1982, pp. 541-561, at p. 544, citing R. Joliet, *The Rule of Reason in Antitrust Law*, The Hague 1967, p. 174. There, the argument is that the substantive provisions of Article 81(3) were interpreted in light of a procedure established by Regulation 17. Instead, the procedure should be adjusted to allow for enforcement of Article 81(3) in national courts.

29 If English commercial law was for a long time based on the *caveat emptor* doctrine, then the doctrine of European competition law could be said to have been based on a doctrine of 'let the undertakings beware.'

30 There have been arguments that no notification system could serve the aim of detecting hard-core cartels as those are never notified, but instead information gathering accompanied with the exemption of agreements in the so called 'grey area' are the inherent reasons behind the notification system. See also U. Böge, *The Discussion on the Modernization of EC Antitrust Policy: An Update on the Bundeskartellamt's Point of View*, http://www.iue.it/RSCAS/Research/Competition/2000/Boege_1.pdf, at p. 2, discussing the merits of the notification system from the Bundeskartellamt's point of view.

system should have provided undertakings with a sufficient degree of legal certainty. This was attained by means of 'negative clearance' certifications pursuant to Article 2 of Regulation 17, i.e. binding statements that Article 81 was not applicable, and individual exemptions, both aimed at clarifying the position of undertakings. However unfortunate or predictable it might have been, the system of exemption and notification soon started to show its drawbacks.

3. Drawbacks of the Centralized Enforcement System

Although theoretically sound, the centralized system for enforcement of Article 81 produced several flaws, occurring as a chain-reaction in practice. The number of notifications was so large that the Commission was not able to deal with them in a timely manner.[31] In addition, undertakings found it hard, burdensome and costly to gather the required information to notify an agreement.[32] In some cases, undertakings notifying their agreements subjected themselves to procedures, which the Commission might not have initiated otherwise.[33] Also, an argument that very few prohibition decisions were taken following notifications has been used to show the inefficiency of centralized enforcement. No doubt, the list of drawbacks presented here is not exhaustive. Nevertheless, the Commission's inability to cope with the task entrusted to it seems to be the principal drawback of the centralized enforcement system.

This drawback, however, has resulted from the inherently contradictory justifications of centralized application and the aims of Article 81. There is always a risk of imbalance between providing legal certainty to undertakings on the one hand and ensuring integration of the Common Market as well as competition within it on the other. The wording of Article 81 accompanied by the Commission's willingness to send the undertakings a message that there may be no privately erected borders to the movement of goods within the Common Market initially created a very broad field for the application of Article 81.[34] Consequently, many agreements were notified in the hope of en

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31 See F. Montag, *The Case for Radical Reform of the Infringement Procedure under Regulation 17*, 8 ECLR 1996, pp. 428-437, at p. 433, discussing the duration of the proceedings.

32 For requirements towards the information contained in the notifications, see Commission Regulation No. 27, OJ 1962 35/1118 and Commission Regulation 3385/94 OJ 1994 L 377/28 repealing Commission Regulation No. 27. See also the comment on form A/B in *House of Lords Select Committee Appointed to Consider European Union Documents and Other Matters Relating to the European Union*, Fourth Report: Reforming EC Competition Procedures, 15 Feb 2000, http://www.parliament.the-stationery-office.co.uk/pa/ld199900/ldselect/ldeucom/ldeucom.htm, para. 25.

33 A. Brown, *Notification of Agreements to the EC Commission: Whether to Submit to a Flawed System*, 4 ELRev 1992, pp. 323-342, at pp. 335-336.

34 See Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law, OJ 1997 C 372/5 and note that the criteria listed there to define the relevant market have evolved in a painstaking battle between the Commission wanting to define the relevant markets as narrowly as possible and the ECJ adopting a more realistic assessment. Further see the early case law, e.g., the Judgment of

suring legal certainty either *vis-à-vis* the Commission as enforcement authority or *vis-à-vis* other parties to the agreement or even to prevent national authorities of the Member States from interfering.[35] Thereby, the integrationist aim of fostering a wide application of Article 81 created the desire among undertakings to ensure legal certainty, which in turn led to the malfunctioning of the notification system. The Commission attempted to secure itself from drowning in floods of notifications via the following measures.

4. Main Escape Routes of the Commission

In order to provide a remedy for its increasing inability to deal with the notifications promptly and effectively, the Commission sought both formal and informal escape routes. At the very beginning of the history of the notification system, the Council adopted Regulation 19/65[36] and granted the Commission the power to exempt agreements falling under the prohibition of Article 81(1) by block exemption regulations.[37] Later, the Council adopted Council Regulation 2821/71, thereby extending the Commission's

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13 July 1966 in *Joined Cases 56&58/64 Établissements Consten and Grundig-Verkaufs-GmbH v Commission of the European Economic Community (Consten and Grundig)* [1966] ECR 229, p. 341; and the Judgment of 30 June 1966 in *Case 56/65 Société Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 235, p. 249, where the ECJ agrees to a broad interpretation announcing that Article 81 embraces all agreements that: '…may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.' Then in the Judgment of 31 May 1979 in *Case 22/78 Hugin Kassaregister AB and Hugin Cash Registers Ltd v Commission of the European Communities (Hugin)* [1979] ECR 1869, para. 17, the ECJ gave the following interpretation and, in effect, also drew a line in the application of national and Community law:

> '…Community law covers any agreement or any practice which is capable of constituting a threat to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between the Member States, in particular by partitioning the national markets or by affecting the structure of competition within the common market. On the other hand conduct the effects of which are confined to the territory of a single Member State is governed by the national legal order.'

35 For reasons why undertakings notify agreements that might be contrary to Article 81 see A. Brown, *Notification of Agreements to the EC Commission*, supra n. 33, at p. 333-335.

36 OJ 1965 036/533. Para. (3) of the Preamble of this regulation explicitly recognizes that it is a procedural way for the Commission to cope with the enormous amount of notifications submitted to it.

37 See Article 1 of Regulation 19/65, OJ 1965 No. 036/533. For general criticism on the way the Commission framed the block exemption regulations see M. Siragusa, *The Millennium Approaches: Rethinking Article 85 and the Problems and Challenges in the Design and Enforcement of the EC Competition Rules*, Fordham Int'l L.J. 1998, pp. 650-665, at p. 657 and I. Forrester, *Modernization of EC Competition Law*, Fordham Int'l L.J. 2000, pp. 1028-1088, at pp. 1042-1043.

right to adopt block exemption regulations.[38] Finally, the Council granted the Commission the right to adopt sector-specific block exemption regulations.[39] Furthermore, instead of either granting negative clearances or exempting the notified agreements, the Commission resorted to issuing 'comfort letters' indicating that the Commission did not intend to open any proceedings with regard to the agreement in question.[40] Although comfort letters provided a degree of legal security *vis-à-vis* the Commission itself, they were no safeguards against other parties to the agreement or national competition authorities since they were not legally binding.[41] In addition, responding to notifications via comfort letters decreased the transparency of the decision-making process as no requirements for publication applied to them. No doubt, lack of transparency at least theoretically created a situation where the Commission designed enforcement of Article 81 behind closed doors and substantially diminished the body of decisions and case-law interpreting Article 81.

Then, recognizing its own inability to cope with the enforcement of Article 81, the Commission started efforts to share the burden. The Commission used such informal means as notices to invite national courts and later national competition authorities to enforce Article 81.[42] However, the attempts of the Commission remained largely un-

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38 See Article 1 of Council Regulation 2821/71, OJ 1971 L 285/46, providing that Regulation 2821/71 covers agreements with regard to application of standards and types, research and development and specialization.

39 See Article 1 of Council Regulation 3976/87, OJ 1987 L 374/9, providing that the Commission may adopt block exemption regulations relating to agreements in the air transport sector. See Article 1 of Council Regulation 1534/91, OJ 1991 L 143/1, providing that the Commission may adopt block exemption regulations relating to agreements in the insurance sector. See Article 1 of Council Regulation 479/92, OJ 1992 L 55/3, providing for the Commission's power to adopt block exemption regulations in the liner shipping sector. Note, however, that the transport sector was exempted from the application of Regulation 17 by virtue of Article 1 of Council Regulation No. 141, OJ 1962 124/2751.

40 See e.g. P. Hoeller and M. O. Louppe, *The EC's Internal Market: Implementation, Economic Consequences, Unfinished Business*, OECD Economics Department Working Paper, http://www.oecd.org/pdf/M00001000/M000011083.pdf, at p. 49, showing the trends for exemption decisions and comfort letters in 1988-1992.

41 From the viewpoint of legality, comfort letters do not provide absolute legal certainty to undertakings concerned. See the Judgment of 10 July 1980 in *Case 37/79 Anne Marty SA v Estée Lauder SA* [1980] ECR 2481, paras. 9-10, stressing that the comfort letter constitutes neither a decision nor a negative clearance, and that national courts may apply Article 81 to the agreement in question in a way different from that envisaged by the Commission's letter. Finally, the ECJ added that national courts could take comfort letters into account in examining the compatibility of an agreement with Article 81.

42 See Commission Notice on Co-operation Between National Courts and the Commission in Applying Articles 85 and 86 of EEC Treaty, OJ 1993 C 039/6 and Commission Notice on Co-operation Between National Competition Authorities and the Commission in Handling Cases Falling Within the Scope of Articles 85 and 86 of EC Treaty, OJ 1997 C 113/3.

successful.[43] A common viewpoint was that neither the courts, nor the national competition authorities would be willing to participate in enforcement of Article 81 if the Commission retained its monopoly to grant exemptions under Article 81(3). Being unable to apply Article 81 in full, the national authorities and courts generally preferred not to apply it at all and instead resorted to application of their national competition laws. Finally, the Commission used its discretionary powers and started prioritizing among the notified agreements to prevent distraction of national proceedings via notification.

5. A Deadlock Faced by the Commission

It may have been the Commission's own inability to act or the inherent imbalance between strict enforcement of Article 81 and legal certainty that killed the exemption system. In addition, inherent drawbacks of the notification and exemption system or, perhaps the gradual enlargement of the EC may have created a deadlock at the end of each escape route used by the Commission. Another explanation also discussed was the possibility that the Commission was exaggerating its workload due to its inherent bureaucratic tendencies.[44] The answer to the question whether any one problem was greater than the others would require value judgments about the history of European integration and the role of Article 81 in promoting it. Some, indeed, attempted to make such value judgments.[45] Others, in contrast, proposed substantive solutions aimed at placing Article 81 within the framework of the established Single Market.[46] The Commission on its part proposed a revolutionary option of reform and adopted its White Paper on Modernization of the Rules Implementing Articles 85 and 86 of the EC Treaty (hereinafter the 'White Paper'), outlining objectives as well as substantive elements of reform.[47]

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43 See J. H. J. Bourgeois, *Decentralized Enforcement of EC Competition Rules by National Competition Authorities: Some Remarks on Consistency, Coherence and Forum Shopping*, http://www.iue.it/RSCAS/Research/Competition/2000/Bourgeois_2.pdf, at pp. 4-5, summarizing the response of national competition authorities about enforcement of EC competition rules.

44 See A. Riley, *EC Antitrust Modernization: The Commission Does Very Nicely – Thank you! Part One: Regulation 1 and the Notification Burden*, 24 ECLR 2003, pp. 604-615, at pp. 614-615 attempting to prove that in practice many undertakings perceived the notification as a hopeless manoeuvre and, therefore, the Commission could not have suffered from an overload.

45 For example see I. Forrester, *Modernization of EC Competition Law*, Fordham Int'l L.J. 2000, pp. 1028-1088, at pp. 1037-1037, submitting that the Commission itself must take the blame for making the notification system irrational.

46 See in particular R. Wesseling, *The Commission Notices on Decentralization of EC Antitrust Law: In for a Penny, Not for a Pound*, 2 ECLR 1997, pp. 94-97, at pp. 95-96.

47 Commission Programme 99/027, OJ 1999 C 132/1.

C. The Proposal for Reform

Broadly, the White Paper envisaged two main reforms. First, the Commission proposed abolition of the notification and exemption system. Article 81(3) was to become a legal exception to Article 81(1). Previously, the exemption monopoly of the Commission led to a discussion whether Article 81(3) was capable of producing direct effects and whether the introduction of a system of legal exception would require an amendment of the Treaty.[48] Also, interestingly, while proposing to abolish the exemption system, the Commission did not suggest any changes in the concept of block exemptions. Secondly, the White Paper sought decentralization of the full enforcement of Article 81, i.e. encouragement of national authorities and national courts to enforce Article 81.[49] The Commission dismissed any other options for reform.[50] Furthermore, the Commission argued that if procedural safeguards against inconsistency and diverging interpre-

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48 While this paper is based on views expressed by K. Holmes, *The EC White Paper on Modernization*, 23 World Competition 2000, pp. 51-79, at p. 58, and the discussion about the legality of the reform arose out of general disagreement with the reform, it is nevertheless useful to examine initial arguments of, e.g. *German Monopolies Commission*, Special Report: Cartel Policy Change in the European Union? On the European Commission's White Paper of 28th April 1999, http://www.monopolkommission.de/sg_28/text_e.htm, paras. 13-20, arguing that the reform is exceeding the limits of competence of secondary legislation. For an opposing view see J. F. Appeldoorn, *Are the Proposed Changes Compatible with the Treaty*, 9 ECLR 2001, pp. 400-403, at p. 403. So far, the ECJ has not officially expressed a viewpoint about the reform, thus, at least theoretically, there exists an option for an action for annulment.

49 See Commission Programme 99/027, at paras. 69-100.

50 See Commission Programme 99/027, at paras. 55-73, for the Commission's discussion of possible solutions. The Commission analyzes and rejects several options that might improve the authorization system. Firstly, the Commission argues that the proposed interpretation of Article 81 and shifting of the assessment of pro- and anti-competitive effects on competition to Article 81(1), to some extent practised by the Commission and supported by the ECJ, would cast aside Article 81(3) on the whole. Only an amendment of the Treaty could do that. Moreover, interpretation of Article 81 would make the reform dependent on the decisions of the Commission and the Community judiciary. Secondly, the Commission sees the possibility of decentralization of the right to grant exemptions as merely redistributing the number of notifications submitted between itself and national authorities. According to the Commission, there are no criteria for distribution of cases. The Commission rejects 'the centre of gravity' option as too vague and the turnover threshold as too rigid since it would not take into account the 'effect on trade between Member States'. Thirdly, the Commission dislikes the option of broadening the scope of Article 4(2) of Regulation 17 as only enhancing legal certainty for undertakings, but not relaxing supervisory powers of the Commission and thereby preventing it from focusing on the most serious infringements. Fourthly, the Commission saw both simplification of procedures and increased reliance on opposition as changes encouraging undertakings to notify instead of reducing the workload. However, a careful evaluation of the Commission's arguments begs the question why the Commission discusses the options in a mutually exclusive way.

tations of Article 81 were to accompany the two main reforms, the overall enforcement reform of Article 81 would achieve several long-term aims.

1. Aims of the Reform

Overall, the Commission announced that the reforms of the White Paper would ensure a proper balance between the requirements laid down in Article 83 (2) (b) of the Treaty. On the one hand, abolition of notifications and decentralization would ensure effective supervision. On the other hand, the proposed reforms would simplify the administration of the system.[51] The Commission did not hesitate to express the need for maintenance of a proper balance and its pursuit via more tangible, hierarchical relations.

No doubt, efficiency is an aim behind the White Paper.[52] The Commission will be able to focus on *ex post* control of the most serious infringements. At the same time, the national authorities will be able to act in cases where they are better equipped to do so, either because they are better acquainted with national markets, or because they simply have comparatively larger human or financial resources. In addition, the national courts will be able to use their advantage of granting fast interim measures and damages to litigants using courts as *fora* for private enforcement of Article 81.[53] The Commission will still act as a watchdog and shepherd for national competition authorities and as a consultant for national courts.[54] Finally, decision-making in the sphere of Community competition law is supposedly going to take place nearer to the Community citizen.[55] In short, the Commission proposed a co-ordinated system with itself at the top of the hierarchy and national authorities and courts acting as its agents. In the eyes of the Commission, only such a system will be workable after the 2004 enlargement of the EU.

The White Paper explicitly announced that centralized enforcement would not be workable after the enlargement of the EU. Ironically, the Commission sees decentralization of enforcement to national authorities of accession countries as a means to strengthen enforcement of the cartel prohibition under Article 81.[56] In addition to the

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51 See Commission Programme 99/027, paras. 41-42.

52 See Commission Programme 99/027, paras. 43-45. See also M. Todino, *Modernization from the Perspective of National Competition Authorities: Impact of the Reform on Decentralized Application of EC Competition Law*, 8 ECLR 2000, pp. 348-358, at p. 349. However, note A. O. Salord, *Concurrent Application, The April 1999 White Paper and Future of National Laws*, 2 ECLR 2000, pp. 128-141, at p. 128, asserting that instead of efficiency promotion the Commission uses the modernization project as a political tactic to reduce the competence of Member State authorities. For generally similar ideas see S. Kingston, *A 'New Division of Responsibilities' in the Proposed Regulation to Modernize the Rules Implementing Articles 81 and 82 EC? A Warning Call*, 8 ECLR 2001, pp. 340-350, at pp. 344-345.

53 Commission Programme 99/027, paras. 46-47.

54 See Commission Programme 99/027 paras. 104-107 suggesting provisions for the sharing of information and assistance.

55 See A. Klimisch and B. Krueger, *Decentralized Application of EC Competition Law: Current Practice and Future Prospects*, 5 ELRev 1999, pp. 463-482, at p. 463.

56 Commission Programme 99/027, para. 7.

objectives of creation of efficient enforcement both within the current and acceding countries, the White Paper aims at removing the constraints of notification from undertakings.

The Commission concurs to the opinion that the notification system imposes excessive administrative constraints not indispensable to legal certainty and effective supervision. According to the Commission, a sufficient body of decisions and case law interpreting Article 81 has been established. Provided the Commission continues to give guidelines for the application of Article 81 and ensures that national authorities make decisions according to those guidelines, the undertakings should be able to assess themselves whether their agreements comply with Article 81 or not.[57] Self-assessment should save significant resources previously invested in the preparation of notifications.[58] In general, the Commission decided that it was time to treat the undertakings of the Member States as grown-ups, able to assess their own conduct.

Unfortunately, the Commission seems to have forgotten that the undertakings of the new Member States are far from having grown-up and received their first education, experience and bruises in the playing field of competition law. The same could be said of the courts and national competition authorities of those countries.[59] However, neither the position of the accession countries, nor the divided response from the 'domestic' industry of the 15 old Member States created doubts about the sufficiency of legal certainty under the system of direct exception. Consequently, the Commission went on to prepare a regulation replacing Regulation 17 with unconvertible belief in the system of legal exception under Article 81(3), accompanied by decentralization.[60]

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57 See *Competition DG*, White Paper on Reform of Regulation 17 – Summary of the Observations, 29 February 2000, http://www.europa.eu.int/comm/competition/antitrust/others/wp_on_modernisation/summary_observations.html#_TOC477242196. Part 4 of this document reveals that undertakings and lawyers are not onehundred percent willing to accept the abolition of the notification system.

58 Commission Programme 99/027, paras. 50-51. With regard to resource allocation see W. P. J. Wils, *The Modernization of the Enforcement of Articles 81 and 82 EC: A Legal and Economic Analysis of the Commission's Proposal for a New Council Regulation Replacing Regulation No. 17*, 24 Fordham Int'l L.J. 2001, pp. 1655-2005, at p. 1662, arguing that competition law risks are no different from other risks relating to investment.

59 See A.Riley, *EC Antitrust Modernization: The Commission Does Very Nicely – Thank You! Part Two: Between the Idea and the Reality: Decentralization Under Regulation 1*, 24 ECLR 2003, pp. 657-672, at p. 662 and p. 667, where the author states than even the competition authorities of a small region, such as the Baltic States, have failed to cooperate with each other and draws attention to the problem of incompetence of the judiciary.

60 See Proposal for a Council Regulation COM (2000) 582, OJ 2000 C 365/284 adopted as Council Regulation 1/2003, OJ 2003 L 1/1.

2. The New Enforcement Procedure

In a nutshell, the new Regulation 1/2003 supposedly introduces such benefits as *(1) efficient application* of Article 81, *(2) preparation for enlargement*, *(3) bringing the Community closer to the citizen* and, finally, *(4) granting undertakings legal certainty*. Although the objectives of the reform are largely compatible and complementary, they are also contradictory to some extent. Thus, the desire for enforcement optimization via decentralization accompanied by bringing the Community closer to the citizen may jeopardize the introduction of proper enforcement of Article 81 in the acceding countries. Finally, there always remains the inherent contradiction of securing the current level and future progress of market integration and providing legal certainty to undertakings.[61] Nevertheless, Regulation 1/2003 attempts to accomplish the objectives via involvement of the Member States in application of Article 81 within the framework of subsidiarity and proportionality.[62]

a. General Measures

Regulation 1/2003 attempts to accomplish the objectives defined in the White Paper through the following general measures. Firstly, application of Article 81(3) does not require any prior decision.[63] Consequently, agreements falling under Article 81(1) but capable of fulfilling the criteria of Article 81(3) are valid from the very beginning. Secondly, the application of Article 81 is decentralized in full. Thus, national competi-

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61 See Opinion of the Economic and Social Committee on the 'White Paper on Modernization of the Rules Implementing Articles 81 and 82 of the EC Treaty – Commission Programme No 99/027' OJ 2000 C 51/15, part 2.3.6.1.

62 See Preamble of Regulation 1/2003, para. 34. Contrast the notion of subsidiarity envisaged by Regulation 1/2003 with, for example, P.V. Bos, *Towards a Clear Distribution of Competence Between EC and National Competition Authorities*, 7 ECLR 1995, pp. 410-416, at pp. 412-413, arguing that subsidiarity means mutual exclusivity of Community and national competition laws. See also R. Wesseling, *The Draft-Regulation Modernizing the Competition Rules: the Commission Is Married to One Idea*, 4 ELRev 2001, pp. 357-378, at p. 342, arguing that Regulation 1/2003 does not satisfy the requirements of proportionality and that the ECJ has started to emphasize the protection of the Member States against Community institutions encroaching upon their spheres of competence. Finally, see the Opinion of Advocate General Jacobs delivered on 20 June 1996 in *Case C-91/95 Roger Tremblay, Harry Kestenberg and Syndicat des exploitants de lieux de loisirs (SELL) v Commission of the European Communities* [1996] ECR I-5547, para. 20, where the Advocate General states that: 'where Community competition law is applied by national authorities it is clearly not a case of subsidiarity in the sense that national authorities apply national law…'

63 See Article 1 of Council Regulation 1/2003 and contrast it with Article 1 of the Proposal for a Council Regulation COM (2000) 582. In contrast to the Proposal for a Council Regulation COM (2000) 582, there is Article 1(2) in Regulation 1/2003 stipulating that agreements satisfying the criteria of Article 81(3) are valid without any prior decision. Thereby, Article 1(2) or Regulation 1/2003 emphasizes abolition of the exemption system.

tion authorities and national courts[64] may now apply Article 81(3).[65] What is more, Regulation 1/2003 imposes an obligation upon national competition authorities and national courts to apply Article 81 together with national law. However, application of national law cannot result in the prohibition of agreements affecting trade between the Member States but compatible with Article 81(1) or satisfying the criteria of Article 81(3) unless national laws: '… *predominantly pursue an objective different*[66] from that pursued by Articles 81 and 82…'[67] Thirdly, Regulation 1/2003 contains provisions for horizontal and vertical co-operation and supervision.[68] One should note, however, that the suspension and termination of proceedings is mandatory only on the vertical, national competition authority – the Commission level – while remaining optional on the horizontal level.[69] The same applies to investigations carried out by national competition

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64 Note that Article 2 of Regulation 1/2003 provides that the party alleging the benefit of Article 81(3) must prove that the criteria are satisfied. Thus, Article 2 defines the burden of proof.

65 See Articles 5 and 6 of Council Regulation 1/2003.

66 Emphasis added.

67 See Article 3 of Regulation 1/2003 and contrast it with Article 3 of the Proposal for a Council Regulation COM (2000) 582, where the Commission proposed that national and Community competition law should apply in a mutually exclusive way.

68 See the preamble of Regulation 1/2003, para. 15, calling for establishment of a network of authorities enforcing Community competition rules.

69 Article 11 of Council Regulation 1/2003 stipulates that the Commission and the competition authorities of the Member States shall provide each other with information about the proceedings they commence. Furthermore, competition authorities of the Member States must inform the Commission about infringement decisions, acceptance of commitments and withdrawals of block exemptions they intend to adopt. The competition authorities may also consult the Commission about cases under investigation. Finally, the Commission may initiate its own proceedings and thereby deprive national competition authorities from continued investigation and resolution of a case. Furthermore, Article 12 provides for exchange of evidence, including confidential information. Interestingly, under certain circumstances national competition authorities may use the evidence in national proceedings. This changes the situation after the Judgment of 16 July 1992 in Case *C-67/91 Dirección General de Defensa de la Competencia v Asociación Española de Banca Privada and others (Spanish Banks)* [1992] ECR I-4785, paras. 33-37, where the ECJ held that the requirement of professional secrecy prohibited usage of information that the Commission transmits to national authorities. Article 13 oversees horizontal co-ordination between national competition authorities and suggests that national authorities *may* suspend proceedings or reject a complaint if an authority of another Member State is dealing with it. Furthermore, if the Commission or national competition authority receives a complaint in a case already dealt with by a different authority, it *may* reject it. Article 14 requires that the Commission consults with the Advisory Committee on Restrictive Practices and Dominant Positions consisting of the representatives of the competition authorities of the Member States. Whereas Articles 15 and 16 deal with the relationship between the Commission, national competition authorities and national courts. Those provisions stipulate the provision of information *vis-à-vis* national courts, national competition authorities and the Commission. In addition, Member States must inform the Commission about the decisions of their judiciary in applying Article 81. The national competition authorities

authorities.[70] While Regulation 1/2003 defines the investigatory powers of the Commission, there is no procedural harmonization concerning investigations carried out by national competition authorities and courts.[71] Apart from changing the way Article 81(3) is applied as well as the relationship between the authorities responsible for its enforcement, the Regulation also alters the decision-making powers of the Commission.

b. Decision-Making Powers of the Commission

Regulation 1/2003 changes the types of decisions that the Commission may adopt. Although the Commission has logically lost its power to grant exemptions, it can still adopt infringement decisions and impose behavioural and structural remedies.[72] The power to grant structural remedies might alarm undertakings. Furthermore, the Commission has power to withdraw the benefit of exemption regulations.[73] In addition, the Commission can impose fines and periodic penalty payments.[74] Regulation 1/2003 inherits from Regulation 17 the provision that the ECJ has unlimited jurisdiction in reviewing the fines and periodic penalty payments.[75] Note, however, that now undertakings may appeal decisions of the Commission to the Court of First Instance (CFI).[76] Moreover, Regulation 1/2003 seems to inherit a conceptual stance regarding commitments offered by undertakings from the exemption system. Within the exemption system, the Commission made such commitments legally binding in its decision exempting certain agreements. Similarly, Regulation 1/2003 grants the Commission power to

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as well as the Commission may act as *amicus curiae* in national courts. Finally, Article 16 corrects the mistake of the Proposal for a Council Regulation COM (2000) 582 and incorporates the Judgment of 14 December 2000 in *Case C-344/98 Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369, para. 60, prohibiting national courts from taking decisions contrary to Commission decisions.

70 See Article 22 of Regulation 1/2003.

71 See Chapter V, which concerns only investigations and hearings carried out by the Commission, of Regulation 1/2003. Only Article 22 concerns investigations by national competition authorities providing that they *may* assist each other on the horizontal level and that they *must* co-operate with the Commission on the vertical level. Nevertheless, arguments for procedural harmonization have been present even before proposals for reform. For one of the early and alternative suggestions see V. Power, *Competition Law in the EU: Should There Be a Convention?* 2 1995 ECLR, pp. 75-77, at p. 76. However, see also P.-V. Bos, *Distribution of Competence Between EC and National Competition Authorities*, at p. 415, responding to V. Power that procedural harmonization would have an impact on national administrative law that the Member States may be unwilling to accept.

72 Article 7 of Regulation 1/2003.

73 See Article 29(1) of Regulation 1/2003.

74 See Articles 23, 24, 15 and 26 of Regulation 1/2003.

75 See Article 31 of Regulation 1/2003.

76 Article 225 of the Treaty provides that the CFI will hear and determine proceedings referred to in Articles 230, 232, 235, 236 and 238, with the exception if the proceedings are brought by the Member States, Community institutions and the European Central Bank – see Article 51 of the Protocol on the Statute of the Court of Justice, OJ 2002 C 326/167.

adopt specific decisions making the commitments offered by undertakings legally binding upon them. Supposedly, such decisions on commitments replace infringement decisions.[77] It seems possible that under the regime of Regulation 1/2003, the Commission will adopt commitment decisions without making formal findings as to the agreement's compatibility with Article 81.[78] Nevertheless, practice will have to reveal whether the application of Article 9 of Regulation 1/2003 will require absolute certainty that undertakings do not infringe Article 81, or whether the Commission will be able to adopt such decisions more flexibly, without a full inquiry into the compatibility of an agreement or conduct, making them more achievable for the undertakings.[79] Furthermore, the text of Article 10 of Regulation 1/2003 says: 'Where the *Community public interest*[80] *… so requires, the Commission, acting on its own initiative*, may by decision find that Article 81 of the Treaty is not applicable to an agreement…' This type of decision is similar to a negative clearance under Regulation 17.[81] In contrast to a negative clearance, however, the Commission may now exercise complete discretion when choosing the agreement. Nevertheless, uniform interpretation of the *'Community public interest'* requirement could limit the discretion of the Commission. Finally, under Article 8 of Regulation 1/2003, the Commission is empowered to adopt interim measures.

In addition to introducing changes in the decision-making pattern of the Commission, Regulation 1/2003 prescribes what decisions national competition authorities can adopt.

c. Decision-Making Powers of National Competition Authorities

Regulation 1/2003 grants to the national competition authorities narrower decision-making powers than to the Commission. They may order interim measures as well as adopt commitments and infringement decisions or decide that there are no grounds for action on their part.[82] Moreover, national competition authorities may withdraw the benefit of block exemptions. Note that national competition authorities will be able to withdraw the benefit of a block exemption only with regard to: '*…the territory of a Member State, or in a part thereof,*[83] which has all the characteristics of a distinct geographic market…'[84] Furthermore, concerning fines and periodic penalty payments, Regulation 1/2003 contains the following text: 'imposing fines, periodic penalty pay-

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77 See Article 9 of Regulation 1/2003. Although Article 9 does not explicitly state that decisions on commitments replace infringement decisions, Article 9(2) implies that the file has been closed without an infringement decision.

78 See P. Groves, *The Reform of EC Competition Law*, 24 BLR 2003, pp. 254-256, at p.255.

79 For an analysis of Article 9 of Regulation 1/2003 see J. Temple Lang, *Commitment Decisions Under Regulation 1/2003: Legal Aspects of a New Kind of Competition Decision*, 24 ECLR 2003, pp. 347-356, at pp. 349-353.

80 Emphasis added.

81 See Article 2 of Regulation 17.

82 See Article 5 of Regulation 1/2003.

83 Emphasis added.

84 See Article 29(2) of Regulation 1/2003.

ments or any other penalty *provided for in their national law*.'[85] Thus, Regulation 1/2003 does not include any harmonization of sanctions.[86] Moreover, in contrast to the Commission, national competition authorities would not be able to adopt non-applicability decisions.[87] However, while Regulation 1/2003 envisages that national competition authorities have fewer powers than the Commission, the ECJ does not seem to follow exactly the same perspective.

Recently, the ECJ added to the powers of national competition authorities under Regulation 1/2003. In so doing, the ECJ to some extent disregarded the submission of Advocate General Jacobs who had recommended that in a decentralized system of EC competition law the powers of the national authorities should mirror the tasks delegated to the Commission. Instead, in *Case C-198/01 CIF*, the ECJ ruled that national competition authorities were *not only* under an obligation to disapply national law that is incompatible with Article 81. In addition, the ECJ held that the national competition authorities were entitled to penalize undertakings which continued to observe the national law after the decision envisaging its disapplication.[88] On the one hand, the judgment clearly indicates that the ECJ is throwing its weight behind the message of Regulation 1/2003, i.e. that national competition authorities should be used to the extent possible to ensure proper application of Article 81. On the other hand, the submission of the Advocate General that the powers of national authorities should be similar to those of the Commission begs the question whether the Community will be able to find and utilize all possible benefits of decentralization. No doubt, the judgment also reveals a practical problem, namely whether national law allows national competition authorities to initiate constitutional review procedures of national law they deem incompatible with Article 81. Hopefully, they will find such options in cooperation with Member State courts.

d. Competencies of Member State Courts

By virtue of Article 35 of Regulation 1/2003, Member States may designate courts to fulfil the functions of national competition authorities.[89] Thus, in Member States choosing that path, national courts would have the same decision-making powers as national competition authorities. Whereas in other Member States, national courts would be under an obligation, subject to supervision under Article 234, to apply Article 81(3) in

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85 Emphasis added. Article 5 of Regulation 1/2003.

86 Supposedly those would be subject to the principles of equivalence and effectiveness.

87 In contrast to the arguments of, e.g. C. D. Ehlermann, *EC Antitrust Policy*, at pp. 569-571, competition authorities should also be able to grant infringement decisions; it seems rather logical that national competition authorities do not have power to grant non-application decisions since the Commission seems to be suited better to determine when the Community public interest requires adoption of such decisions.

88 See the Opinion of Advocate General Jacobs delivered on 30 January 2003 in *Case C-198/01 Consorzio Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Mercato*, para. 54, as well as the Judgment in that Case of 9 September 2003, at para. 58, not yet published in the ECR.

89 See Article 35 of Regulation 1/2003.

proceedings brought before them.[90] Here, one should note that the Treaty now allows the Statute of the ECJ to define areas in which the CFI has jurisdiction to hear and determine questions under Article 234.[91] Thus, there might come a time when national courts would be obliged to submit Article 234 references in Article 81 cases to the CFI.

3. Preliminary Conclusions About Regulation 1/2003

In essence, Regulation 1/2003 implies that national competition authorities and courts of the Member States honour Article 10 of the Treaty and apply EC law in a spirit of co-operation, while remaining under the supervision of the Commission. Therefore, Regulation 1/2003 attempts to establish an overarching structure for the enforcement of Article 81. It provides for the relationship between national and Community laws, defines powers of the Commission, national competition authorities and courts, and describes the network of co-operation among the supranational and national enforcement authorities. In theory, such co-operation, consultation, mutual assistance and positive comity should bring positive results.[92] However, in practice the Council and the Commission seem to have forgotten that the more complex the system, the less likely it is to function efficiently, predictably and simultaneously. The efficiency of Regulation 1/2003 and the decentralization it envisages will depend on the good will of the Member States. The prospect of EC enlargement poses even more problems of which the Commission and Council pretend to be unaware or are too optimistic about.[93] Overall, the impression is that what might at first sight appear revolutionary, novel and promising not only in procedural but also in substantive and even constitutional terms is unlikely to bring the desired results when examined closely. Therefore, this paper will seek to prove the following thesis:

Regulation 1/2003 alone will neither deliver efficiency without the administrative burdens of Article 81 enforcement, nor secure legal certainty, especially in light of EU enlargement.

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90 See Article 6 of Regulation 1/2003.

91 See Article 225(3).

92 See P. B. Marsden, *Inducing Member State Enforcement of European Competition Law: A Competition Policy Approach to Antitrust Federalism*, 4 ECLR 1997, pp. 234-241, at pp. 236-240, discussing federalist and antitrust approaches to concurrent enforcement of competition law. Marsden suggests that potential competition between enforcers must exist to provide efficient enforcement and proposes that the Commission induces such competition between national competition authorities where agreements affect trade and the relevant markets are larger than one Member State.

93 For a discussion of problems concerning competition law in Central and Eastern Europe see F. Emmert, *Introducing EU Competition Law and Policy in Central and Eastern Europe – Requirements in Theory and Problems in Practice*, 27 Fordham Int'l L.J. 2004, pp. 642-678.

III. Efficiency in the Enforcement of Article 81

Only some parts of the reform of enforcement of Article 81 make the enforcement more efficient or effective.[94] While saying that Regulation 1/2003 renders the enforcement system of Article 81 totally inefficient would amount to an unjustified accusation, the workability of the system remains in doubt on the vertical as well as the horizontal level.

A. Likely Efficiency Problems on the Vertical Level

Regulation 1/2003 does not reduce the administrative workload of the Commission. According to the Commission, the floods of notifications caused inefficiency in enforcement of Article 81. Enormous numbers of notifications paralyzed the work of the Commission and prevented it from detecting infringements of Article 81. Although there will be no floods of notifications under Regulation 1/2003, the system under Regulation 1/2003 will neither decrease the workload of the Commission nor of the ECJ and CFI.[95]

1. Redirection to National Competition Authorities

Despite the fact that theoretically the Commission shifted the burden of infringement detection to national competition authorities, in practice, the Commission may have to enforce this shift upon national competition authorities. Firstly, the approach of Regulation 1/2003 seems to forget the judgment of the ECJ rejecting the application of Article 81 to agreements confined merely to one Member State and not affecting interstate trade in a significant way.[96] The result of this limitation of the application of Article 81 will

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94 Here the Commission's understanding of the efficiency could be similar to that of the subjects of competition law – all need the cases to be resolved promptly and the costs of enforcement to be kept as low as possible – see D. P. Wood, *User-Friendly Competition Law in the United States*, in P. J. Slot and A. McDonnell (eds), *Procedure and Enforcement in EC and US Competition Law*, London 1993, pp. 6-18, at pp. 14-15.

95 See R. Wesseling, *The Draft-Regulation Modernizing the Competition Rules*, at pp. 372-373.

96 See the Judgment of 21 January 1999 in *Joined Cases C-215&216/96 Carlo Bagnasco and Others v Banca Popolare di Novara (C-215/96) and Cassa di Risparmio di Genova e Imperia SpA (C-216/96)* (*Italian Banks*) [1999] ECR I-135, paras. 48-53, where both the Commission and the Court rejected the application of Article 81 to standard bank conditions imposed in Italy. For comparison, see the Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 15 January 1998 in that Case, in particular paras. 39-44, finding an infringement of Article 81. Finally see J. S. Venit, *The Decentralized Application of Article 81: Italian Banks, Cohabitation, Private Enforcement and Other Issues Raised by the White Paper*, http://www.iue.it/RSCAS/Research/Competition/2000/Venit_2.pdf arguing that *Joined Case*s *C-215&216/96* constitute parallel means of achieving decentralization by reducing the scope of application of Community law.

be the application of Article 81 primarily to agreements involving two or more Member States.[97] This raises a question as to how many of these cases will require enforcement by the Commission by satisfying the 'sufficient Community interest criteria.' In its Notice on Co-operation Between National Competition Authorities and the Commission, the Commission indicated that it would reserve for itself only cases that (1) raise a new point of law, (2) involve significant impediment of access to the relevant market by firms of other Member States, (3) involve Article 86.[98] However, the Commission also announced that national authorities should investigate only cases where the relevant geographic markets as well as effects of the agreements are limited to one Member State.[99] Thus, on the one hand, the Commission tends to dispose of investigating any agreement that does not satisfy the criteria. On the other hand, the Commission itself undermined the criteria by referring to the relevant geographic market constituting one Member State. In addition, the ECJ, concurring with the Commission, reduced the scope of Article 81. Consequently, the Commission may very often have to exercise its power to refer the examination of an agreement to certain national competition authorities, which in turn may resist having cases pushed onto them in this way and may simply not pursue the investigation very vigorously. Alternatively, the Commission itself will have to devote resources to clarify the contradictory situation outlined and to explain the case allocation mechanism by guidelines and notices.[100] Perhaps, analysis of the pattern of decisions that the Commission has adopted formally, instead of sending a comfort letter, could help. Nevertheless, Dr. Riley has rightly submitted that even adoption of such notices would not change the actual interpretive pattern given to, e.g. the notion of 'trade between Member States.'[101] Moreover, note that even if the Commission manages to shift some of the enforcement to national competition authorities, there will always remain the problem of resources.[102] The House of Lords Select Committee concluded that: 'If enforcement of the Competition Rules is to be improved more resources would

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97 This also undermines the viewpoint expressed by the Commission in its Notice on Co-operation Between National Competition Authorities and the Commission, para. 12, namely that the national competition authorities have better knowledge of relevant markets and the undertakings concerned. National competition authorities would have to evaluate markets in several Member States and may fail to assess the implications on the Community market.

98 See Commission in Notice on Co-operation Between National Competition Authorities and the Commission, paras. 34-36.

99 See Commission in Notice on Co-operation between National Competition Authorities and the Commission, para. 28. Also see J.H. Maitland-Walker, *Commission Notice on Co-operation between National Authorities and the Commission in Handling Cases Falling Within the Scope of Articles 85 and 86 of the EC Treaty*, 2 ECLR 1998, pp. 124-126, at p. 125.

100 See Opinion of the Economic and Social Committee on the White Paper, part 2.3.5.8. calling for a precise definition of 'sufficient Community interest.'

101 See A. Riley, *EC Antitrust Modernization*, Part Two, 24 ECLR 2003, at p. 664.

102 See L. Idot, *A Necessary Step Towards Common Procedural Standards of Implementation for Articles 81&82 EC Without the Network*, http://www.iue.it/RSCAS/Research/Competition/2002/200207CompIdot.pdf, at p. 3, drawing attention to the fact that the national competition authorities of some Member States have few resources and this would directly influence the efficiency of enforcement.

almost certainly have to be made available by the Member States irrespective of whether or not there is decentralization.'[103] Moreover, there has not been any assessment of how the dissolution of the Merger Task Force will affect resource allocation within the Directorates General responsible for antitrust issues.[104] At the very least, dissolution of the Merger Task Force will lead to a situation that antitrust divisions will have to deal with the Article 81 analysis of notifications for full-function joint ventures.[105]

In addition to, in effect, having to distribute cases between national competition authorities, the Commission will still have to conduct its own investigations and adopt decisions in cases satisfying the 'sufficient Community interest criteria.'

2. Decisions of the Commission

While changing the types of Commission decisions, Regulation 1/2003 will not reduce the amount of decisions. Firstly, the Commission will have to find resources and capacity to discover the most serious infringements of Community law and either adopt infringement decisions or withdraw the benefit of block exemptions. Note that the criteria set in Regulation 1/2003 for the withdrawal of block exemptions are such that the Commission will have to intervene in every case where the geographic market is larger than the territory of one Member State. The Commission will also not benefit any longer from information about the position off different players in the markets so far supplied through notifications.[106] Furthermore, liberalization of previously state-controlled sectors is likely to create markets with only a few strong undertakings and high barriers to entry. No doubt, undertakings will form cartels in such markets and the Commission will have to deal with them since market liberalization presumably should fall within the 'sufficient Community interest.'

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103 See *House of Lords Select Committee*, Reforming EC Competition Procedures, para. 100.

104 See F. Guerrera and B. Jennen, *Radical EU Reforms End Mergers Watchdog*, Financial Times, 21 March 2003, for description of the reform for dissolution of the Merger Task Force.

105 See Commission Notice on the Concept of Full-Function Joint Ventures under Council Regulation (EEC) No. 4064/89 on the Control of Concentrations Between Undertakings, OJ 1998 C 66/1.

106 Concerning the usefulness of notifications, the Commission contradicts itself. Contrast the suggestions of the White Paper outlined with the Commission Green Paper on Vertical Restraints in EC Competition Policy, COM (1996) 721, para. 188, where the Commission makes the following statement:

> 'The notification system provides the Commission with a steady source of information about transactions, including vertical agreements. A substantial portion of the Commission's decisions are triggered by notifications. This indicates that many contractual provisions deserving careful scrutiny have been brought to the Commission's attention through notifications. They also provide the basic material for the Commission to determine the necessity and scope of block exemptions.'

Secondly, before the adoption of a decision that makes commitments binding, the Commission will at least informally have to consult with undertakings offering such commitments.

Thirdly, the frequency with which the Commission will have to adopt non-applicability decisions depends on the interpretation of the 'Community public interest' criteria envisaged by Article 10 of Regulation 1/2003. On the one hand, the Commission runs the risk that the ECJ and CFI may be willing to see the Commission conducting an assessment under Article 81(3) and thereby interpreting the law and using its discretion.[107] On the other hand, a broad interpretation of the 'Community public interest' criteria would lead to inequality among subjects of Community competition law since some of the undertakings would technically benefit from the non-applicability decision.[108] This may lead to non-applicability decisions in essence becoming voluntary notifications by the most prominent undertakings.[109] Such decisions may nevertheless be indispensable in cases involving large investments or irreversible structural modifications.[110] Apart from making decisions, the Commission will also have to prepare block exemptions.

3. Adoption of Block Exemptions

Overall, the concept of block exemptions sits uneasily within the system of legal exception. The initial justification for block exemptions was that they would decrease the workload of the Commission by reducing the number of notifications.[111] Now this objective is not valid anymore. Instead, the usefulness of block exemptions for undertakings conducting a self-assessment of compliance with Article 81 will have to justify their continued existence. Again, there is a magic circle. On the one hand, block exemp-

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107 However, see K. Holmes, *The EC White Paper on Modernization*, at p. 60, suggesting that the 'Community public interest' should refer only to agreements including new points of law.

108 For protests about a lack of clear criteria, see *Competition DG*, White Paper on Reform of Regulation 17 – Summary of the Observations, parts 6.2 and 6.3.

109 See C. D. Ehlermann, *EC Antitrust Policy*, at pp. 568-569. See also K. Holmes, *The EC White Paper on Modernization*, at p. 60, suggesting that there should be a difference between non-applicability decisions and opinions. The Commission would adopt the former acting *ex oficio* while the latter could respond to applications of undertakings.

110 See Opinion of the Economic and Social Committee on the 'Proposal for a Council Regulation on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 (Regulation Implementing Articles 81 and 82 of the Treaty),' OJ 2001 C 155/14, part 2.8.2.5.

111 However, they did not justify the hopes laid upon them. See R. Subiotto and F. Amato, *Preliminary Analysis of the Commission's Reform Concerning Vertical Restraints*, 23 World Competition 2000, pp. 5-26, at p. 25, suggesting that right after realizing that the reform on vertical restraints envisaged by Commission Regulation 2790/99, OJ 1999 L 36/21, would not decrease the workload of the Commission to the level desired, the Commission decided to pursue the reform.

tions could help undertakings to conduct a self-assessment and gain new freedom from notification. On the other hand, old block exemptions have been criticized for their rigidity that induces undertakings to tailor their agreements exactly as provided in the of block exemptions rather than in the best interest of their business dealings. Consequently, the Commission pursued a reform of block exemptions and will have to continue to conduct an analysis of how the new approach works. In the meantime, the Commission also sees itself as a participant in proceedings before national courts.

4. *Amicus Curiae* Intervention Before National Courts

While providing another safeguard against diverging interpretations of Article 81, *amicus curiae* participation will hardly produce efficiency in proceedings. Firstly, the text of Article 15(3) suggests that the Commission would exercise its right to *amicus curiae* in a discretionary and selective manner. Thus, officials of the Commission would have to scrutinize information about court proceedings to decide in which case they should submit observations. Surprisingly, the Commission can submit oral observations only with permission of the national court, while it can always submit written observations.[112] Presumably, Article 15(3) means that the Commission would generally submit written briefs and occasionally – and additionally – also appear with an agent in the oral hearing before the national court.[113] The proper functioning of the *amicus curiae* system would probably require the ECJ to impose an obligation upon national courts under Article 10 of the Treaty, first of all to accept *amicus curiae* observations by the Commission (and by their national competition authorities), and secondly to consider them. For this to happen, one would probably have to wait until some national court makes a preliminary reference to the Community court about the meaning and relevance of *amicus curiae* observations. Moreover, from the point of view of procedural efficiency, *amicus curiae* observations will only be really useful if they resolve the problem of correct interpretation of Community competition law and prevent the national courts from making preliminary references to the ECJ. At the very extreme, one could imagine that the ECJ declines questions submitted by a national court if they were already properly answered by the Commission.[114] In reality, *amicus curiae* observations could make national courts

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112 See Article 15 of Regulation 1/2003.

113 See *House of Lords Select Committee*, Reforming EC Competition Procedures, para. 87, expressing doubts about the compatibility of *amicus curiae* observations with judicial systems of the Member States, especially those with Anglo-Celtic legal systems. See also *Competition DG*, White Paper on Reform of Regulation 17 – Summary of the Observations, part 5.3, where Member States express reservations about the compatibility of *amicus curiae* briefs with the independence of the national judiciary.

114 However, considering this option would require further development of the case law about requests of preliminary references – see the Judgment of 6 October 1982 in *Case 283/81 Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3451, paras. 13-21.

that are not of the last instance[115] less likely to request preliminary references since they will already have an opinion from a quasi-judicial Community institution. This might slightly decrease the number of preliminary references since parties might also decide not to pursue their case with further appeals all the way up to the highest level. At the same time, the ECJ and CFI might see such a tendency as encroaching upon their duty to ensure observance of the law via uniform interpretation of the Treaty.[116] One should not forget in this context that an amicus curiae brief in a national court proceedings will receive little if any attention outside of the actual parties involved and will not contribute nearly as much to the development of case-law as an Article 234 judgment of the ECJ.

Moreover, a question arises whether the submission of *amicus curiae* observations to a national court binds the Commission not to change its views if and when the case reaches the ECJ following a request for a preliminary ruling. The option of changing observations would result in repeated preparation of opinions, which, of course, would not be an efficient approach. Thus, the only way *amicus curia* observations could contribute to efficiency instead of making enforcement more complicated is through a certain reduction of preliminary ruling requests in competition cases. That would involve tradeoffs in the separation of judicial and administrative powers. However, if that does not happen, the reform in Regulation 1/2003 might actually contribute further to the overload of the ECJ.

5. Overload of the ECJ and CFI

The application of Regulation 1/2003 may actually lead to an increase in the workload of the ECJ and CFI. The prognosis is that there will be more requests for preliminary rulings as well as more actions for annulment of decisions of the Commission before the CFI, also resulting at least in some appeals to the ECJ.[117] One should note that the Treaty now provides for a three tier judicial system comprised of the ECJ, the CFI and judicial panels.[118] Moreover, under Article 225(3), the CFI will now be able to entertain preliminary rulings once the Statute of the Court defines the realm where it could do so. Apparently, from all the options to diminish the workload of the ECJ, the Member States chose a path already used – shifting the workload to the CFI.[119] So far, there have not been any changes in the delimitation in preliminary ruling judgments between the

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115 See Article 234 making preliminary reference compulsory only for courts of last instance.

116 See Article 220.

117 C. D. Ehlermann, *The Modernization of EC Antitrust Law: Consequences for the Future Role and Function of the EC Courts*, 2 ECLR 2002, pp. 72-80, at p. 72.

118 For a nutshell evaluation and discussion of the judicial reform see P. Craig and G. de Burca, *EU Law*, pp. 86-102, at pp. 90-94.

119 While discussion of the general options for judicial reform is not the task of this paper, the article of P. Craig, *The Jurisdiction of the Community Courts Reconsidered*, 36 TILJ 2001, pp. 555-590, at. pp. 570-582, deserves attention for its analysis of options to limit the caseload coming to the ECJ from requests for preliminary rulings.

ECJ and the CFI. However, it is most likely that the Council shifts preliminary rulings in competition matters from the ECJ to the CFI if there is an upsurge of cases.[120] Note, however, that shifts within the EC judicial system – with the Commission as a quasi-judicial part – would not really solve the shortage of staff and resources. Consequently, there come be a day when the Member States will not only have to grant additional financing for the expansion of their national competition authorities, but also have to make additional contributions to the ECJ, CFI and possible judicial panels for competition matters to function. While efficiency on the vertical level is problematic because the Commission and the ECJ will remain overloaded with tasks and cases, insufficient co-operation and lack of understanding will decrease efficiency on the horizontal level.

B. Efficiency Deficits on the Horizontal Level

Even if the Commission manages to induce national authorities and courts to engage increasingly in the full application of Article 81, the application will not result in an increase in efficiency. While the Commission may not regain its ability to manoeuvre due to the enormous amount of remaining tasks, the national authorities and courts may not deliver efficient enforcement, mainly because of the lack of a strict obligation to co-operate.

1. Co-operation Between National Competition Authorities

Regulation 1/2003 does not provide safeguards to ensure that the competition authority of one Member State does not re-open an investigation already closed by the competition authority of another Member State. Article 11 of Regulation 1/2003 does not impose any obligation upon national competition authorities to inform the Commission when they are closing an investigation without adopting a decision about infringement, commitments or withdrawal of the benefit of the block exemption. In addition, treatment of the complaints and the remedies may differ among the Member States.[121] Nevertheless, national authorities are not obliged to inform the Commission when they reject complaints. On the one hand, Article 11(1), which states that the Commission and competition authorities of the Member States must apply Article 81 in 'close co-operation,' could suggest such obligations.[122] On the other hand, the flow of information envisaged by the system is cumbersome and bureaucratic enough for national competition authorities unlikely to be willing to accept additional obligations not explicitly written down in Regulation 1/2003. At the very least, there will be delays in the infor-

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120 C. D. Ehlermann, *The Modernization of EC Antitrust Law*, at p. 78.

121 Contrast this situation with the Judgment of 27 June 1995 in *Case T-186/94 Guérin Automobiles v Commission of the European Communities* [1995] ECR II-1753, para. 34, where the CFI held that: '…the applicant is henceforth entitled to obtain a definitive decision from the Commission on its complaint and that decision may, if the applicant sees fit, be challenged in an action for annulment before this court…'

122 See Article 11 of Regulation 1/2003.

mation flow about closing of files without formal decisions. In addition, nowhere is it specified exactly what kind of information, in what language and within what time frame the national competition authorities should insert in the Intranet proposed to speed up the information flows.[123]

Thus, theoretically a situation could arise that the competition authorities of two Member States A and B start investigations shortly one after another and inform the Commission. Although it is unclear in what way the competition authorities of different Member States receive information that enable them to suspend proceedings or reject a complaint under Article 13(1) of Regulation 1/2003, the authority of Member State A could suspend proceedings letting the authority of Member State B deal with the case. For the purposes of our hypothetical case, let us assume that the competition authority of Member State B closes the file. There would not be any problems if no infringement exists. However, if there were a breach of Article 81, the competition authority of Member State A would have lost time while the competition authority of Member State B would have wasted resources. One can hardly call this an efficient enforcement. What is more, even if an infringement decision exists, it is not binding upon the national competition authorities of different Member States. Thus, national competition authorities would have to decide to what extent they take into account infringement decisions of other competition authorities. The Commission has not explained why the infringement decisions cannot have a territorial scope covering the whole Community like the decisions of national authorities in the insurance and banking sectors as well as customs authorities.[124]

Furthermore, even more problems may show up when a competition authority investigates a case in one Member State and a private party initiates proceedings in the court of another Member State.

2. Possibility of Infringement Proceedings and Private Litigation in Different Member States

Under Regulation 1/2003, national courts are not obliged to take into account decisions of national competition authorities of other Member States or suspend proceedings to await the results of an investigation. Thus, there may be situations where the competition authority of Member State A conducts investigations in parallel to either enforcement proceedings or a damages claim in a court of Member State B with regard to the same agreement where Article 81(3) is invoked. Note that while the court may apply Article 81 *ex officio* due to public policy reasons, the initiative and, thus, submission of evidence in private litigation depends largely on the parties themselves.[125] Consequent

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123 See *House of Lords Select Committee*, Reforming EC Competition Procedures, para. 78.

124 See Council Directive 88/357, OJ 1988 L 172/1, Council Directive 89/646, OJ 1989 L 386/1, and Council Regulation 2913/92, OJ 1992 L 302/1, Article 250.

125 Note that problems regarding submission of evidence are more exacerbated in common law countries. See S. Kon and A. Maxwell, *Enforcement in National Courts of EC and New UK Competition Rules: Obstacles to Effective Enforcement*, 7 ECLR 1998, pp. 443-454, at p. 445-448. For the duty of a national court to apply Community law *ex officio* see the Judgment of 14 December 1995 in *Joined Case*s *C-430&431/93 Jeroen*

ly, the court in Member State B may assess the facts differently from the way the national competition authority of Member State A treats them. Of course, either the national competition authority of Member State B – but not the competition authority of Member State A – or the Commission could submit *amicus curiae* observations to the court in Member State B.

That, however, would involve a complicated procedure. Thus, either the national competition authorities of Member States A and B would have to co-operate or the Commission would have to analyze the information from the competition authority in Member State A and then transmit it via its *amicus curiae* brief. In the alternative, the national court may submit the case to the Community court under the preliminary ruling procedure. Then there arises a question whether the national competition authority of Member State A should suspend proceedings until the Community court delivers its judgment. Neither the case law nor Regulation 1/2003 directly imposes such an obligation upon national competition authorities. Nevertheless, according to Article 220 of the Treaty, the ECJ and CFI are responsible for the final interpretation of Community law. Consequently, if the national competition authority of Member State A does not suspend proceedings there may be two scenarios.

Firstly, it may decide that an agreement satisfies the criteria of Article 81(3) and close the file. If the Community court decides that the agreement in question does not satisfy Article 81(3), the national competition authority would have to reopen the investigation to adopt a decision imposing sanctions. Secondly, the national competition authority may adopt an infringement decision and impose sanctions and afterwards the Community court may decide that the agreement in question conforms to the legal exception of Article 81(3). Since judgments of the Community court apply *ex tunc* and *erga omnes* unless otherwise specified, the infringement decision of the national competition authority would be invalid. Moreover, undertakings concerned might be entitled to damages from the Member State.

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van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten (van Schijndel) [1995] ECR I-4705, at para. 15, where the ECJ held that: '…it is for the national court to apply Articles3 (f), 85, 86 and 90 of the Treaty even when the party with an interest in application of those provisions has not relied on them, where domestic law allows such application by the national court.' However, at para. 21 the ECJ acknowledged that this obligation of the national court may be limited by a duty to keep to the subject matter of the dispute and base its decision on the facts put before it since: 'in a civil suit, it is for the *parties to take the initiative* (emphasis added), the court being able to act of its own motion only in exceptional cases where *the public interest requires its intervention* (emphasis added).' Following that, in its Judgment of 1 June 1999 in *Case C-126/97 Eco Swiss China Time Ltd v Benetton International NV (Eco Swiss)* [1999] ECR I-3055, at para. 41, the ECJ held that the national court was bound to grant an appeal against an arbitral award if there had been a breach of Article 81 at least where: '…its domestic rules of procedure require it to grant an application for annulment founded on failure to observe *national rules of public policy* (emphasis added).' See also para. 39 where the ECJ stated that Article 81 was a 'matter of public policy within the meaning of the New York Convention [of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards].'

Notwithstanding the loss of legal certainty, such scenarios would lead to inconsistent application of Article 81 as well as a loss of time in enforcement proceedings. The duration of parallel proceedings may be even longer in the following cases. Firstly, an arbitrator may initially deal with court proceedings. If the arbitrator does not satisfy the criteria set out for a court or tribunal that may make a preliminary reference under Article 234 of the Treaty, an ordinary national court may have to review the judgment and submit a preliminary reference.[126] Secondly, the undertaking concerned may appeal the decision by the national competition authority. The appeal may continue all the way until it reaches the court or tribunal of last instance obliged to make an Article 234 reference. Thus, at some point there may be parallel court proceedings going on in different Member States – again a waste of resources. The outlined problems of diagonal enforcement, however, may remain hidden due to a lack of resort to private enforcement.

3. Lack of Incentives for Increased Resort to Private Litigation

Both the White Paper and Regulation 1/2003 envisage national courts as playing an essential part in the application of Community competition rules.[127] However, the official view of the Commission and the Council embodied in Regulation 1/2003 has to be contrasted with 'unofficial' statements of its officials submitting that private enforcement of Article 81 is not even desirable within the boundaries of EC competition law. There has been a submission that public enforcement of Article 81 will always be more effective because public authorities have more investigatory and sanctioning powers, their investigations do not diverge from public interest and are less costly.[128] Noting that the diverging institutional and personal opinions only seem to prove the case that the reform was not meant to fulfil its aims, this paper proceeds with an analysis of possibilities for enhanced private enforcement of Article 81.

At least theoretically, and provided there are resolution mechanisms for possible conflicts in enforcement of Article 81 by national competition authorities and courts, enforcement on both public and private levels could ensure efficiency, for

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126 See the Judgment of 23 March 1982 in *Case 102/81 Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG* (*Nordsee*) [1982] ECR 1095, paras. 14-15. See also the Judgment of 27 April 1994 in *Case C-393/92 Municipality of Almelo and others v NV Energiebedrijf Ijsselmij* [1994] ECR I-1477, paras. 22-23.

127 See the preamble of Regulation 1/2003, para. 7 as well as the Commission Programme 027/99, paras. 99-100.

128 See W. P. J. Wils, *Should Private Antitrust Enforcement Be Encouraged in Europe?* 26 World Competition 2003, pp. 473-488, at pp. 480-488 stating that 'There is not even a case for a supplementary role of private enforcement.' While not arguing about better investigatory and sanctioning powers of public authorities, the author of this paper would like to question the public interest motive as well as cost-saving advantage of public enforcement. Especially enforcement costs are no doubt in many cases shifted to tax payers.

example concerning 'grey zone' agreements.[129] However, in practice, increased resort to private litigation in national courts or tribunals is unlikely since such enforcement is time and resource consuming and may end the business relationship between the parties.[130]

a. Scenarios for Litigation

No doubt, the courts would now be able to assess compliance with Article 81 in full. Neither provisional validity of the agreement, nor an exemption monopoly of the Commission would prevent the national courts from assessing whether an agreement in question complies with Article 81 or whether it breaches Article 81(1) but satisfies the criteria of Article 81(3). Simply speaking, there are two situations where parties having finally decided to resort to litigation may use Article 81(3). Firstly, in cases where one party stops performance under the agreement considering that it breaches Article 81, the other party may sue first and demand either performance of the obligations under the contract or damages for non-performance. Then the defendant can use Article 81(1) as a shield and claim that the agreement is void under Article 81(2). Of course, that can only happen if the defendant manages to prove that the agreement breaches Article 81(1). However, if the plaintiff proves that the agreement satisfies the criteria under Article 81(3), it can be used as a shield against the allegation of the defendant that the agreement is void due to a breach of Article 81(1). Secondly, a party to an agreement or a third party may consider that the agreement is in breach of Article 81(1), thus void under Article 81(2), and sue to obtain a declaration of nullity and/or damages. Once the plaintiff has established that the agreement breached Article 81(1), the burden of proof would shift to the defendant willing to establish that the agreement satisfied the criteria of Article 81(3).

In both situations, reliance upon Article 81(3) is conditional upon satisfaction of the burden of proof under Article 81(1) and the ability of the party to bear the burden of proof under Article 81(3). Both case scenarios are most likely to be used by parties to burdensome and costly agreements wanting to either escape further performance or obtain damages for losses suffered. Third parties trying to obtain damages would have to resort to the second scenario. Furthermore, the first type of scenario clearly does not

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129 There exists an assumption that parties to a hard-core agreement would not resort to private litigation to enforce the agreement or claim damages, because they would want to do everything possible to hide their agreement from public authorities. Moreover, since protection of rights conferred under Community law is conditional only upon principles of equivalence and effectiveness, litigation in case of some agreements may be precluded by the fact that the agreement does not satisfy the formal criteria of contract law of the respective Member States.

130 See Editorial Comments, *The Commission's Notice on Co-operation between National Courts and the Commission in Applying Articles 85 and 86 EEC*, 4 CMLR 1993, pp. 681-686, at pp. 684-685, where the author explains that according to research about the application of Community law in the Member States, parties usually rely on Article 81 as a shield. Note that plaintiffs do not use Article 81 because of the high costs associated with proving the case. Furthermore, the author cautions that many parties are hesitant to litigate because they are unwilling to spoil ongoing business relationships.

respond to the aim of increased private litigation. Here, the plaintiff would not opt for commencing litigation as soon as it understands that there are weak prospects of proving that the criteria of Article 81(3) are satisfied. Consequently, we are likely to see more of the second type of case with the plaintiff relying upon Article 81(1) directly to claim a declaration of nullity and/or damages. Also, in many cases the parties to a contract will resort to arbitration. Consequently, the national courts would remain *fora* for third parties trying to obtain compensation of losses suffered because of an alleged breach of Article 81. Thus, incentives for suing should outweigh litigation investments.[131]

b. Remedies Obtainable

In other words, liability for breach of Article 81 should give rise to effectively enforceable rights and remedies to parties suffering from such breach.[132] The Treaty itself clearly grants only one remedy for infringement of Article 81 – nullity.[133] If neither the party to an agreement nor a third party submit that the agreement is void, the respective national court would be obliged to do it of its own motion.[134] However, a declaration of nullity may not be sufficient to make good infringements of rights under Article

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131 See also J. Basedow, *Who Will Protect Competition in Europe? From Central Enforcement to Authority Networks and Private Litigation*, European Business Organization Law Review 2001, pp. 443-468, at pp. 465-466.

132 For an overview of remedies that parties may obtain in private litigation before the courts of the Member States see W. van Gerven, *Substantive Remedies for the Private Enforcement of EC Antitrust Rules Before National Courts*, at http://www.iue.it/RSCAS/Research/Competition/2001(papers).shtml. Note that at p. 2 the author defines rights as legal positions enforceable through remedies: 'that is classes of action … intended to make good the infringements of the right concerned.' Thus, the relationship between remedies and rights can be best understood as intertwined. Note also that defining the relationship between the two is of more interest to common than civil law.

133 Note that in the Judgment of 30 June 1966 in *Case 56/65 Société Technique Miniere v Maschinenbau Ulm GmbH* [1966] ECR 235, at p. 248, the ECJ stated that: 'The automatic nullity in question only applies to those parts of the agreement affected by the prohibition, or to the agreement as a whole if it appears that those parts are not severable from the agreement itself. Consequently any other contractual provisions which are not affected by the prohibition, and which therefore do not involve the application of the Treaty, fall outside Community law.' Thereby, the ECJ developed the doctrine of severance that allowed to uphold those provisions of the agreement not contrary to Article 81.

134 For an obligation of national courts to apply Article 81 of their own motion see *Joined Cases C-430&431/93 van Schijndel*, at paras. 15,21-22 and *Case C-126/97 Eco Swiss*, at paras. 39-41. With regard to third parties see the Judgment of 25 November 1971 in *Case 22/71 Béguelin Import Co. v S.A.G.L. Import Export* [1971] ECR 949, at para. 29, where the ECJ stated: 'Since the nullity referred to in Article 85(2) is absolute, an agreement which is null and void by virtue of this provision has no effect as between the contracting parties and cannot be set up against third parties.'

81(1).[135] Using the words of A. Winterstein: 'If the effective enforcement of EC competition rules before national courts, which are under a duty to ensure the full effectiveness of Community law, is to be more than mere rhetoric, then the possibility of obtaining damages as a matter of Community law is indispensable.'[136] Similarly, Advocate General van Gerven argued that damages under Community law should complement the deterrent effect of fines imposed upon undertakings for breaches of Article 81 and that thereby Community competition law would become 'more operational.'[137] Consequently, the ECJ finally developed a Community right to damages for loss suffered from breach of Article 81. Nevertheless, the existence of such a right and the way the ECJ chose to define it ends neither the lack of class actions and contingency fees for lawyers nor possible problems with proof and assessment of compensation and restitution due to the plaintiff.[138] It would also not introduce extensive pre-trial discovery options for the courts of the EC.[139] In addition, a right to damages will not solve the inherent

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135 See opinion of Advocate General van Gerven delivered on 27 October 1993 in *Case C-128/92 H. J. Banks & Co. Ltd v British Coal Corporation (Banks)* [1994] ECR I-1209, para. 44, where the Advocate General explicitly announces that the declaration of nullity: '… is not capable of making good the loss and damage (already) suffered by a third party.' While a declaration of nullity might relieve the contracting parties from their obligations under an agreement that is contrary to Article 81, in no way does it provide for restitution or damages. Similarly, the fact that a national court issues a judgment declaring that the agreement is null and cannot be invoked against third parties does not automatically mean that the third parties obtain compensation for the losses they have suffered due to the existence of the restrictive agreement.

136 See A. Winterstein, *A Community Right in Damages for Breach of EC Competition Rules?* 1 ECLR 1991, pp. 49-52, at p. 52.

137 See the Opinion of Advocate General van Gerven in *C-128/92 Banks* paras. 37, 44, where the Advocate General submits: '… the award of damages is, in particular, essential for the enforcement of the Community rules on competition, especially since it acts as *a deterrent to unlawful behaviour by undertakings* (emphasis added).' Furthermore, it is submitted that the Commission cannot ensure observation of Community competition rules alone and has to rely on the help of national courts. However, contrast the opinion of Advocate General van Gerven with the opinion of Advocate General Mischo delivered on 21 March 2001 in *Case C-453/99 Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2001] ECR I-6297, para. 58, explicitly announcing that the right to damages is one of the implications created by the direct effect of Article 81 instead of being a deterrent factor in competition enforcement.

138 However, see K. Schmidt, *Procedural Issues in the Private Enforcement of EC Competition Rules: Considerations Related to German Civil Procedures*, http://www.iue.it/RSCAS/Research/Competition/2001/Schmidt.pdf, p. 11-12, on the availability of collective actions in Germany.

139 For a summary of comparative US and EC perspectives see M. Paulweber, *The End of a Success Story? The European Commission's White Paper on the Modernization of the European Competition Law*, 23 World Competition 2000, pp. 3-48, at p. 29. See also J. Lever, *Substantive Remedies: The Viewpoint of an English Lawyer*, http://www.iue.it/RSCAS/Research/Competition/2001/1-lever.pdf, pp. 6-7, on documentary discovery.

European unwillingness to litigate instead of resorting to public authorities as well as the probable unwillingness of the courts to grant damages.[140]

c. A Community Right to Damages for Breaches of Article 81: Yes, But?

The ECJ developed a Community right to damages resulting from liability for breach of Article 81 in *Case C-453/99 Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*. The ECJ stated that: 'The full effectiveness of Article 85 [Article 81] of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85(1) [Article 81(1)] would be put at risk if it were not open to *any individual to claim damages for loss caused to him*[141] by a contract or by conduct liable to restrict or distort competition.'[142] Thus, the ECJ announced that individuals should be entitled to damages for breaches of Community law on a horizontal level. To some extent, *Courage* is comparable to *C-6&9/90 Andrea Francovich and others v Italian Republic*, where the ECJ defined liability for breaches of Community law on the vertical level.[143] The ECJ draws the same conclusions as in *Francovich,* namely that the effectiveness of Community law would be impaired in the absence of a right to damages.[144] However, in contrast to *Francovich*, the ECJ conditions liability for horizontal breaches of Community law upon direct effect of the provisions breached.[145] In addition, the ECJ does not go as far as in *Francovich* and avoids stating that the Community right to damages for breach of Article 81(1) is 'inherent in the system of the Treaty.'[146] The ECJ concludes that it is for the domestic legal system to safeguard rights conferred upon

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140 See B. Hawk and J. D. Veltrop, *Dual Antitrust Enforcement in the United States: Positive or Negative Lessons for the European Community*, in P. J. Slot and A. McDonnell (eds), *Procedure and Enforcement*, pp. 21-31, at p. 27. For the situation prevailing in Spanish civil courts, see C. Fernandez, *Actions for Damages Based on Community Competition Law: New Case Law on Direct Applicability of Articles 81and 82 by Spanish Civil Courts*, 4 ECLR 2002, pp. 163-171, at p. 169, announcing that so far Spanish courts have been unwilling to entertain actions for damages.

141 Emphasis added.

142 See the Judgment of 20 September 2001 in *Case C-453/99 Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others (Courage)* [2001] ECR I-6297, para. 26.

143 See the Judgment of 19 November 1991 in *Joined Cases C-6&9/90 Andrea Francovich and others v Italian Republic (Francovich)* [1991] ECR I-5357, paras. 31-37. See also A. P. Komninos, *New Prospects for Private Enforcement of EC Competition Law: Courage v. Crehan and the Community Right to Damages*, 3 CMLR 2002, pp. 447-487, at pp. 468-469 commenting upon the correlation between efficiency of enforcement of Article 81(1) and right to damages as a matter of Community law.

144 See *C-453/99 Courage*, paras. 26 and 34.

145 See *C-453/99 Courage*, para. 23 where the ECJ states: '… it should be borne in mind that the Court has held that Article 85(1) of the Treaty … produce direct effects in relations between individuals and create rights for the individuals concerned which the national courts must safeguard…'

146 See *C-6&9/90 Francovich*, para. 35. See also A .P. Komninos, *Private Enforcement of EC Competition Law*, at pp. 469-470.

individuals by Article 81, subject to principles of equivalence and effectiveness.[147] Thus, the ECJ conditioned the Community right to damages upon national law. On the one hand the ECJ has complemented the reform initiated by Regulation 1/2003 via the introduction of a Community right to damages for breaches of Article 81. On the other hand, the ECJ has been reluctant to develop the aforementioned right further than conditioning it upon principles of equivalence and effectiveness.

It remains to be seen whether the ECJ will develop the doctrine of *Courage* in the same way as the doctrine of Member State liability arising from *Francovich*. Interestingly, both in *Francovich* and *Courage* the ECJ did not follow the paths suggested by the Advocate General. Only in *Case C-46&48/93 Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* did the ECJ agree with the opinion expressed by Advocate General Mischo in *Francovich* calling for application of the same conditions for Member State liability as are applied for the non-contractual liability of Community institutions under Article 288 of the Treaty.[148] Similarly, the ECJ in *Courage* disregarded the opinion of Advocate General van Gerven, who in *Banks* had called for uniformity of conditions. Obviously, the question is whether the ECJ will develop post-

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147 See *C-453/99 Courage*, paras. 28-29. See also the Judgment of 16 December 1976 in *Case 33/76 Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989, para. 5, where the ECJ announced that national courts were obliged to protect rights derived by citizens from directly effective Community law under Article 10 of the Treaty. Furthermore, the ECJ formulated the principle of equivalence via its statement that:

> '… it is for the domestic legal system of each Member State … to determine the procedural conditions governing actions at law intended to ensure the protection of rights which citizens have from the direct effect of Community law, it being understood *that such conditions cannot be less favourable than those relating to similar actions of a domestic nature.'* (emphasis added).

Moreover, the principle of effectiveness means that such national conditions are valid only as long as the protection of rights is not *de facto* impossible. The ECJ stated that in a negative way: 'The position would be different only if the conditions and time-limits made it impossible in practice to exercise the rights which the national courts are obliged to protect.' See also the Judgment of 19 December 1968 in *Case 13/68 SpA Salgoil v Italian Ministry of Foreign Trade* [1968] ECR 661, p. 462-463, about the relationship between rights granted by Community law and national law. Finally, see the Opinion of Advocate General van Gerven in *C-128/92 Banks*, paras. 47-48, where the Advocate General reiterates case-law of the ECJ concerning legal remedies obtainable for breaches of Community rights in national courts.

148 See the Judgment of 5 March 1996 in *Joined Cases C-46&48/93 Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1996] ECR I-1029, paras. 37-57, and compare it with the Opinion of Advocate General Mischo delivered on 28 May 1991 in *Joined Cases C-6&9/90 Andrea Francovich and others v Italian Republic* [1991] ECR I-5357, paras. 71-79.

Courage cases in a way similar to that of the post-*Francovich* case law or whether it will choose a less integrationist approach.

Specifically, the question is whether the ECJ will develop the principle of liability according to suggestions made by the Advocate General in *Banks*. The Advocate General submitted that the same conditions that govern non-contractual liability under Article 288 should be applicable to the right to damages for horizontal breaches of Article 81 between individuals. Pursuant to this proposal, disputes about damages for breaches of Article 81 would be subject to the same principles as developed by the ECJ in Article 288 cases, as well as in case law concerning Member State liabilty under *Francovich*.[149] To some extent that would also involve an assumption that private parties bring claims for damages only on a non-contractual basis.[150] In addition, the ECJ could scrutinize whether national laws governing the enforcement of the right to damages satisfy the principles of equivalence and effectiveness on a case-by-case basis. Thereby, the ECJ would be able to develop a right to damages for breaches of Article 81 similar to the development of Article 288 and the *Francovich* damages case law.[151] On those cases, the ECJ defined the constitutive substantive conditions as a matter of Community law and left the remaining substantive and procedural conditions to national law, on condition that they satisfy the principles of equivalence and effectiveness.[152] That would be a desirable path to choose from the viewpoint of the homogeneous development of Community law. Unfortunately, a reading of *Courage* suggests that the ECJ might take a less integrationist approach and leave very many of the constituent conditions to national law. The ECJ devoted more attention to defining conditions that could limit the right to damages rather than outlining constituent conditions for liability

149 See the Opinion of Advocate General van Gerven in *C-128/92 Banks*, paras. 46-54.

150 This clearly undermines the Commission's classification of the cases where the parties could use Article 81.

151 Sufficiently serious breach could be substituted by an evaluation of the undertakings' behaviour.

152 See *C-6&9/90 Francovich*, paras. 39-43 and *C-46&48/93 Brasserie*, paras. 37-57, 66-67. See also W. van Gerven, *Bridging the Gap Between Community and National Laws: Towards a Principle of Homogeneity in the Field of Legal Remedies?* 3 CMLR 1995, pp. 679-702, at pp. 692-695, suggesting that the distinction between substantive and procedural conditions may vary and that therefore, the ECJ should only distinguish between the rules depending on whether they are essential or non-essential/constitutive or non-constitutive. Consequently, Community law should define constitutive conditions irrespective of their substantive or procedural nature, whereas national law could govern non-constitutive conditions. Note, however, that in W. van Gerven, *Of Rights Remedies and Procedures*, 3 CMLR 2000, pp. 501-536, at pp. 522-524 and 526-527, Prof. van Gerven clarifies this distinction calling the substantive and procedural conditions as remedial rules and procedural rules *sensu stricto*. Since remedial rules correspond to Community rights, they should be uniform. In contrast, procedural rules *sensu stricto* must be left to national law.

for breach of Article 81 that give a right to damages.[153] Consequently, the present lack of incentives to resort to private litigation may remain unchanged for a long period.

One should hope that the ECJ decides to define Community conditions for the right to damages for breaches of Article 81. If the ECJ decides to follow the path outlined by Advocate General van Gerven, the right to damages would be governed by the following substantive conditions: 1) the existence of damage, 2) a causal link between the damage and the conduct, 3) the illegality of the conduct.[154] In this way, the ECJ would define the constitutive conditions for the right to damages or, in other words, remedial rules for to the right to damages. Further, in order to achieve efficient private enforcement, the ECJ should explain the minimum requirements that ought to be satisfied to prove the existence of damage and the causal link.[155] Such an explanation is essential in competition cases to allow individuals to be able to assess the feasibility of exercising their rights to damages in national courts as well as to assess the amount of resources needed to pursue such claims. With regard to illegality of the conduct, the rule should be that once either the court or the national competition authority establishes a breach of Article 81, illegality of the conduct is established.[156] Such explanations could partly solve the problems related to private enforcement. Nevertheless, the question remains whether the ECJ would be able to solve the problems relating to *locus standi* and the amount of damages.

If an issue of *locus standi* in an Article 81 case comes before the ECJ, the ECJ could rule that the need to ensure effective protection of the Community right to damages prohibits the Member State from rejecting class actions.[157] It is questionable whether the ECJ will be proactive enough to fit class actions within the general maxim that:

> 'While it is, in principle, *for national law to determine an individual's standing and legal interest in bringing proceedings*,[158] Community law nevertheless requires that the national legislation does not undermine the right to effective judicial protection […] and the application of national legislation cannot render virtually impossible the exercise of rights conferred by Community law.'[159]

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153 See *C-453/99 Courage*, paras. 28-33. Note that this has resulted in the CFI understanding the right to damages as a concept governed primarily by national law. See the Judgment of 28 February 2002 in *Case T-395/94 Atlantic Container Line AB and Others v Commission of the European Communities* [2002] ECR II-875, para. 414.

154 See the Opinion of Advocate General van Gerven in *C-128/92 Banks*, paras. 49-53.

155 With regard to the explanation of substantive conditions/remedial rules by the ECJ see W. van Gerven, *Remedies*, at pp. 526-527, suggesting that the ECJ does not sufficiently explain such conditions and leaves too much ambiguity in their scope.

156 See the Opinion of Advocate General van Gerven in *C-128/92 Banks*, para. 53.

157 See J. Lever, *Substantive Remedies*, p. 9.

158 Emphasis added.

159 See the Judgment of 11 July 1991 in *Case C-87-89/90 A. Verholen and others v Sociale Verzekeringsbank Amsterdam (Verholen)* [1991] ECR I-3757, para. 24. For an analysis of the issue of *locus standi* before national courts, see also T. Tridimas, *The General Principles of EC Law*, Oxford 1999, pp. 296-297. For a general overview of how the ECJ has used the principle of effectiveness when scrutinizing national rules see P. Craig

However, if the ECJ wants to supplement the reform proposed by the Commission and to fill the gap in procedural harmonization, *locus standi* should be broad and not narrow. That could change the inherent European preference to resort to public authorities instead of seeking a personal remedy. Before making investments in defence of one's rights, an individual should be sure that he gets an appropriate award for the resources invested in litigation.

Concerning the amount of damages, it appears that the maxim of *Brasserie* can serve as a guideline. There the ECJ stated that: 'Reparation for loss or damage caused to individuals as a result of breaches of Community law must be commensurate with the loss or damage sustained so as to ensure the effective protection of their rights.'[160] If the individual has attempted to mitigate the damages, neither loss of profit nor exemplary damages, if available under national law, can be excluded.[161] Consequently, the amount of compensation will depend very much on the provisions of national law and the practice of the national judiciary. The national courts may be reluctant, and in civil law jurisdictions even unable, to grant punitive damages that might serve as an incentive for litigants. It is more than doubtful that the ECJ would risk encroaching upon national laws and judiciaries and require them to grant exemplary damages with the aim of ensuring effective enforcement of Article 81.

Nevertheless, even without exemplary damage awards, the ECJ might slowly achieve increased resort to private enforcement if it gave clear guidelines for constitutive conditions and *locus standi*. If, however, the ECJ decides to resort only to principles of equivalence and effectiveness, we are unlikely to see any shift to private enforcement of Article 81 in national courts. Moreover, there is hardly a way in which either judicial activism by the ECJ or legislative action of the Council could solve the problem of overload of national courts and shorten the length of proceedings.[162] Thus, realistically, the only way in which private enforcement could occur is in arbitration proceedings where the ECJ would not even be able to oversee how the Community right to damages is enforced and developed. Unfortunately, the likelihood of increased private enforce-

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and G. de Burca, *EU Law: Texts, Cases and Materials*, 2nd ed., Oxford 1998, pp. 214-253. Note that at p. 235 the authors say that overall such usage shows that: 'the determination of the compatibility of the national procedural rule with Community law is dependent on the precise circumstances of the case.'

160 See *C-46&48/93 Brasserie*, para. 82.

161 See *C-46&48/93 Brasserie*, paras. 84, 87, 89. With regard to national laws governing compensation see also the Judgment of 10 April 1984 in *Case 14/83 Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891, para. 23, where the ECJ stated that the compensation must be adequate to the damage sustained. See also the Opinion of Advocate General van Gerven delivered on 26 January 1993 in *Case C-271/91 Marshall II* [1993] ECR I-4367, para. 18, discussing the component of damage that the national court should assess when deciding upon the adequacy of damage: 'I am thinking in this connection of loss of physical assets …, loss of income …, moral damage … and damage on account of effluxion of time.' Then see the Judgment of 2 August 1993 in that same Case, in particular para. 31, where the ECJ ruled that compensation may include also interest payments.

162 See Opinion of the Economic and Social Committee on the White Paper, part 2.3.2.4.

ment is not the only issue where the Commission overestimates the possibilities of the undertakings. The same is true regarding the desirable amount of legal certainty.

IV. Legal Certainty and Legitimate Expectations

Generally, the principle of legal certainty provides: 'Those subject to the law must know what the law is so as to be able to plan their actions accordingly.'[163] The ECJ sometimes uses the principle of legal certainty interchangeably with the principle of legitimate expectations and stresses that 'by virtue of … [those principles] the effect of Community legislation must be clear and predictable for those who are subject to it.'[164] Bearing in mind the definition of the ECJ, one can see that the concept of legal certainty includes also the principle of coherent application of Community law. Undertakings would not be able to predict the effects of Community legislation if different authorities applied that law incoherently and inconsistently.

Within *ex ante* enforcement, either individual or block exemptions or comfort letters provided a degree of assurance and predictability to the undertakings. The situation will change when *ex post* enforcement takes place. On the one hand, the new system will release the undertakings from the burdensome obligation to notify. On the other hand, it is doubtful whether *ex post* enforcement of Article 81 can provide sufficient legal certainty.[165] What is more, the obligation to conduct self-assessment and bear the financial risk of breaching Article 81 may prove to be as burdensome and costly as an obligation to notify.

To sum up, Regulation 1/2003 reveals several problems concerning legal certainty. Firstly, Regulation 1/2003 deprives undertakings who have notified their agreements in accordance with Regulation 17 of their legitimate expectations. Secondly, Regulation 1/2003 changes the delimitation between national cartel prohibitions and Article 81. Thirdly, there might arise ambiguity about the shift to economic assessment proposed by the Commission. Finally, consistency in the application of Article 81 is placed in jeopardy.

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163 See T. Tridimas, *The General Principles of EC Law*, at p. 163.

164 See the Judgment of 12 November 1981 in *Joined Cases 212-217/80 Amministrazione delle finanze dello Stato v Srl Meridionale Industria Salumi and others Ditta Italo Orlandi & Figlio and Ditta Vincenzo Divella v Amministrazione delle finanze dello Stato* [1981] ECR 2735, para. 10.

165 However, see Commission Programme 99/027, para. 78, where the Commission argues that: '… undertaking's legal certainty will remain at globally satisfactory level, and in certain respects will even be strengthened.' Contrast it with the writings of M. Siragusa, *A Critical Review of the White Paper on the Reform of the EC Competition Law Enforcement Rules*, 23 Fordham Int'l L.J. 2000, pp. 1089-1113, at pp. 1093-1094; the evidence analyzed in *House of Lords Select Committee*, Reforming EC Competition Procedures, paras. 36-42; and also K. Holmes, *The EC White Paper on Modernization*, at pp. 59-61. Those sources are among the many showing convincingly that legal certainty will in effect decrease to the detriment of undertakings concerned.

A. Transitional Measures

The first issue concerning legal certainty and legitimate expectations is that the transitional measures of Regulation 1/2003 deprive undertakings that have notified their agreements of any more or less formal response. Regulation 1/2003 provides that notifications made pursuant to Regulation 17 shall lapse from the entry into force of Regulation 1/2003 – that is 1 May, 2004.[166] In contrast, the decisions that the Commission has adopted under Regulation 17 will remain in force until their expiration date.[167]

Consequently, the question is whether undertakings could claim that the transitional provisions of Regulation 1/2003 disregard their legitimate expectations. On the one hand, the ECJ allows Community institutions a margin of discretion towards implementation of Community policies.[168] On the other hand, there may be cases where persons derive their expectations from statements in legislation or actions of Community institutions. In the latter case, the ECJ may rule that there is a legitimate expectation that the situation will not change without suitable transitional arrangements.[169] The transitional measures of Regulation 1/2003 concerning pending notifications lie in the middle between those two extremes. From one point of view, Regulation 17 provided for a system of notifications meant to obtain exemptions and ensure immunity from fines. Thus, undertakings notifying their agreements knew that the Commission would refrain from fining them, and that it would scrutinize the agreements and respond either formally or informally. From another point of view, the undertakings had an opportunity to express their observations, but failed to request transitional measures ensuring that the Commission deals with pending notifications in the established way. Nevertheless, at the very minimum, the Commission and national competition authorities should grant those undertakings that had notified their agreements pursuant to Regulation 17 continued immunity from fines under Regulation 1/2003. Eventually, a general suggestion would be that the Commission takes into account the efforts of the economic operators to ensure compliance with the legislation instead of just attempting to reduce its workload as much as possible. One might justify the reform with a need to shift from quantitative to qualitative analysis of the most important agreements. Nevertheless, it remains hard to see why there should now be a new and complicated delimitation between Article 81 and national cartel prohibitions.

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166 See Article 34(1) of Regulation 1/2003.

167 See Article 43(1) of Regulation 1/2003.

168 See, e. g. the Judgment of 15 July 1982 in *Case 245/81 Edeka Zentrale AG v Federal Republic of Germany* [1982] ECR 2745, paras. 26-28, where the ECJ held that economic operators cannot rely on the principle of legitimate expectations that a situation will remain unaltered if the Community institutions have a margin of discretion to change that situation.

169 See e.g. the Judgment of 14 May 1975 in *Case 74/74 Comptoir National Technique Agricole (CNTA) SA v Commission of the European Communities* [1975] ECR 533, paras. 41-45, where the ECJ held that there was a disregard of legitimate expectations if the Commission, *without any transitional measures for the transactions definitely concluded*, abolished compensatory amounts provided for in licences properly granted to the economic operator.

B. Effect on Trade between Member States: National Laws and Article 81

Article 81(1) prohibits agreements that satisfy two cumulative criteria: 1) they may affect trade between Member States and 2) have as their object or effect the prevention, restriction or distortion of competition within the common market.[170] The requirement of the effect on trade between Member States merits special attention concerning the delineation of application of Article 81 and national laws. The condition that the agreement hinders competition shall be discussed with regard to an assessment under Article 81(1) and the possibility to qualify for the exception of Article 81(3).

Initially, the ECJ simply announced that the application of Article 81 or national laws depended upon the capability of the agreement to affect trade between Member States.[171] Afterwards, the ruling of the ECJ in *Walt Wilhelm* provided a formula for conflict resolution: '… conflicts between the rules of the Community and national rules in the matter of the law on cartels must be resolved by applying the principle that Community law takes precedence.'[172] The judgment of *Walt Wilhelm* made sufficiently clear that the prohibition under national law could apply concurrently with the Article 81(1) prohibition. Nevertheless, there remained scope for further debate about the application of national law and Article 81.

The question was whether stricter national law could apply to agreements exempted by Article 81(3) via individual or block exemption or dealt with by comfort letter. Arguably, the principle of supremacy of Community law means that national law cannot prohibit agreements exempted under Article 81(3) by either individual or block exemption.[173] However, note that the Article 81(3) exemption does not prevent the application of national law with a different objective, e.g. on unfair competition, if that law imposes different requirements from those evaluated when granting either an indivi-

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170 See Article 81(1) of Regulation 17. See also, *56/65 Société Technique Minière*, p. 249-250, where the ECJ gave guidelines about the interpretation of Article 81(1) and held, *inter alia*, that the requirements 'object or effect' are alternative.

171 See *Joined Cases 56&58/64 Consten and Grundig*, p. 341, and *22/78 Hugin*, para. 17.

172 See *Case 14/68 Walt Wilhelm*, para. 6.

173 See A. Jones and B. Suffrin, *EC Competition Law*, pp. 1008-1016, at p. 1013. For a more elaborated discussion of the issue, see C. S. Kerse, *E.C. Antitrust Procedure*, London 1994, pp. 380-388, at pp. 385-388, and D. G. Goyder, *EC Competition Law*, Oxford 1993, pp. 426-437, at pp.435-437. See also the Opinion of Advocate General Tesauro delivered on 8 June 1995 in *Case C-266/93 Bundeskartellamt v Volkswagen AG and VAG Leasing GmbH* [1995] ECR I-3477, paras. 44-60, about the relationship between block exemptions and national law. Note, however, that the ECJ did not address the issue in the judgment. Finally, see the Judgment of 11 December 1980 in *Case 31/80 NV L'Oréal and SA L'Oréal v PVBA "De Nieuwe AMCK" (Perfumes L'Oréal))* [1980] ECR 3775, paras. 22-23, where the ECJ held that the exemption decision gave rise to rights against third parties. There might be an argument that if the exemption decision protects the agreement from nullity claimed by third parties, it should also prevent national law from interfering with the agreement.

dual or a block exemption.[174] Similarly, the Article 81(3) exemption would not prevent invalidation of the agreement due to a breach of national contract law. The situation concerning comfort letters could be even worse, since such letters are non-binding and do not impose any obligation on national authorities even with regard to the application of Article 81. In practice, undertakings submit and ask national authorities to take into account comfort letters in national proceedings applying Article 81. Nevertheless, there is little theoretical ground to submit that comfort letters prevent national authorities from applying national law. One could only attempt to extend the notion of *Walt Wilhelm* and argue that the application of national law should not prejudice the application of Article 81 even if the Commission communicates such application by means of a comfort letter.[175] Like with comfort letters, the ECJ has only partly settled the issue whether national authorities can apply national law to agreements where Article 81(1) does not apply. On the one hand, the ECJ stated that:

> 'The fact that a practice has been held by the Commission not to fall within the ambit of the prohibition contained in Article 85 (1) and (2), the scope of which is limited to agreements capable of affecting trade between Member States, in no way prevents that practice from being considered by the national authorities from the point of view of the restrictive effects which it may produce nationally.'[176]

On the other hand, at least theoretically, there is a possibility that an agreement affects trade between Member States and *does not restrict competition* within the meaning of Article 81, but *does offend national laws*. There has been a suggestion that national authorities cannot apply stricter national law to agreements affecting trade between Member States but not restricting competition within the meaning of Article 81.[177] So far those issues lack clear answers because there have been few conflicts in practice.[178] Nevertheless, Regulation 1/2003 attempted to ensure a new delimitation of Article 81 and national laws.

To some extent Article 3 of Regulation 1/2003 does clarify the relationship between Article 81 and national laws. Firstly, Article 3(2) contains an explicit statement that national laws cannot prohibit an agreement affecting trade between Member States but not restricting competition within the meaning of Article 81. That should end any doubts on the issue. Secondly, Article 3(3) does not preclude the application of national

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174 See the Judgment of 5 June 1997 in *Case C-41/96 VAG-Händlerbeirat eV v SYD-Consult*, [1997] ECR I-3123, paras. 12-19.

175 However, see the Judgment of 10 July 1980 in *Joined Cases 253/78&1-3/79 Procureur de la République and others v Bruno Giry and Guerlain SA and others (Perfumes Guerlain)* [1980] ECR 2327, para. 19, where the ECJ held that even a decision of the Commission to close the file on the case cannot prevent a national authority from applying national law. See also *31/80 Perfumes L'Oréal*, para. 12.

176 See *Case 253/78&1-3/79 Perfumes Guerlain*, para. 18.

177 See A. Jones and B. Suffrin, *EC Competition Law*, at p. 1015. However, see R. Wesseling, *The Commission White Paper on Modernization of EC Antitrust Law*, at pp. 427, arguing the contrary.

178 See C. S. Kerse, *E.C. Antitrust Procedure*, at p. 388 and L. O. Blanco, *European Community Competition Procedure*, Oxford 1996, pp. 27-34, at p. 29.

laws that pursue a different objective from Article 81. Thereby, Regulation 1/2003 incorporates the case law of the ECJ.

However, there remains a question about the definition of provisions of national law that: '… predominantly pursue an objective different from that pursued by Article 81…' For the sake of coherence and legal certainty, a suggestion would be to develop a set of factors to be taken into account when determining the objectives of national law. Unclear delimitation between laws having the same objective as Article 81 would contradict the principle of supremacy of Community law. Nevertheless, it is more likely that instead of giving clear conditions, the ECJ will scrutinize national laws in procedures under Article 234. Finally, either non-binding or limited harmonization in the area of private law could resolve the differences in treatment of Article 81(3) exceptions in different Member States.[179] While judicial guidelines could clarify the definition of laws with a different objective, there is a *de novo* problem of concurrent application of national law and Article 81(3).

Article 3 of Regulation 1/2003 does not explicitly introduce mutually exclusive application of Article 81 and national competition laws. Instead of mere encouragement, Regulation 1/2003 imposes an obligation to apply Article 81 in conjunction with national competition law whenever the agreement may affect trade between Member States. This is particularly interesting for the Member States that have modelled their cartel prohibitions on Article 81.[180] The issue becomes even more problematic if those Member States decide to retain their exemption systems. Undertakings would notify their agreements under national law to obtain national exemptions. When deciding on the notification, national competition authorities would have to look whether the agreement is prohibited under Article 81(1) and whether an Article 81(3) exception applies. At the end of the procedure, however, the formal result would be an exemption under national law and issued by the national authority. This gives rise to a situation where some undertakings would be able to obtain a sort of 'back door' exemption under national law that would indirectly also certify that the agreement in question qualifies for an Article 81(3) exception. Additionally, in the Member States where undertakings notify agreements, national competition authorities would be in a more advantageous situation regarding information about the markets. Furthermore, there is a question about the usage of information obtained through notification. According to the judgment in *Spanish Banks*, national authorities could use the information obtained from the Commis-

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179 On the issue of possible codification of European private law, see W. van Gerven, *Codifying European Private Law? Yes, If*, 2 ELRev 2002, pp. 156-176, at pp. 162-166. Note that while Prof. van Gerven does not reject the idea of substantive and more serious harmonization, the article voices concerns about the possible legal basis for such harmonization.

180 See U. Zinsmeister, E. Rikkers and T. Jones, *The Application of Articles 85 and 86 of the EC Treaty by National Competition Authorities*, 5 ECLR 1999, pp. 275-280, at p. 280, comparing national cartel prohibitions of the Member States and concluding that only Germany does not have its law modelled on Article 81. Note also that only six national competition authorities apply Article 81 in practice.

sion as circumstantial evidence to initiate proceedings.[181] Similarly, national authorities are likely to use information obtained via notifications under national law to initiate proceedings under Article 81. Thus, Regulation 1/2003, when looked at in conjunction with national competition laws, indirectly creates different levels of legal certainty. Alternatively, if there is no notification system, the obligation to apply Article 81 whenever the national competition authority applies national law may lead to the disappearance of national competition laws. Mutually exclusive application of Article 81 and national cartel prohibitions would have led to better results than the differences in the level of legal certainty now to be expected.

C. Shift to Economic Assessment Under Article 81

If the agreement affects trade between Member States and exceeds the *de minimis* threshold, the respective authority will assess its impact upon competition.[182] Firstly, the authority will consider the objects of the agreement. Secondly, if the objects of the agreement do not include restrictions of competition, the authority will deal with the overall effects of the agreements. Note that this linear analysis does not require assessment of the effects of certain types of vertical and horizontal agreements, e.g. those dividing markets and fixing prices.[183] In this way, the ECJ and the Commission have

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181 See *C-67/91 Spanish Banks*, para. 39, where the ECJ held: 'The Member States are not required to ignore the information disclosed to them and thereby undergo – to echo the expression used by the Commission and the national court – "acute amnesia." That information provides circumstantial evidence which may, if necessary, be taken into account to justify initiation of a national procedure.' See also the Judgment of 17 October 1989 in *Case 85/87 Dow Benelux NV v Commission of the European Communities* [1989] ECR 3137, where the ECJ rejected the applicant's argument that the Commission could not open an investigation on the basis of information obtained in previous investigation and indicating infringement of competition rules.

182 See Commission Notice on Agreements of Minor Importance which Do Not Appreciably Restrict Competition Under Article 81(1) of the Treaty Establishing the European Community (de minimis), OJ 2001 C 368/13, paras. 7, 8, 9. For purposes of comparison, see also the 'old' Commission Notice on Agreements of Minor Importance which Do Not Fall Within the Meaning of Article 85 (1) of the Treaty Establishing the European Community, OJ 1997 C 372/13, paras. 9, 10.

183 The ECJ applied formal and rigid requirements in its Judgment of 13 July 1966 in *Joined Cases 56&58/64 Consten and Grundig*, p. 342, where the ECJ rejected the submission that the Commission had to base its reasoning on an analysis of economic effects and stated that the Commission did not have to analyze the effects of the agreement once the object of the agreement appeared to restrict competition. The agreement in question conferred absolute territorial protection. Logically, bearing in mind the objective of market integration, the ECJ could not allow such partitioning of the markets. For a ruling that price fixing in vertical distribution is *per se* prohibited, see the Judgment of 3 July 1985 in *Case 243/83 SA Binon & Cie v SA Agence et Messageries de la Prese (Binon)* [1985] ECR 2015, para. 44. Further, with regard to horizontal agreements see the Judgment of 15 September 1998 in *Joined Cases T-374, 375, 384&388/94 European Night Services Ltd, Eurostar (UK) Ltd, Formerly European*

sent out a clear and unambiguous message about certain agreements that are contrary to Article 81. Consequently, no undertaking can claim today that it did not understand the message about agreements that have restriction of competition as their object. Questions of legal certainty are more likely to arise, however, when undertakings have to assess the effects of agreements on competition.

Concerning the assessment of potentially anti-competitive effects of agreements, the approach envisaged by the Commission initially differed from the line of reasoning of the ECJ. That made self-assessment of an agreement's compliance with Article 81 inherently difficult.[184] The Commission tended to adopt a hard-line approach securing the common market against division. By contrast, the ECJ and CFI left more space for economic analysis under Article 81, in order to assess the overall effects of both vertical and horizontal agreements upon competition.[185]

Eventually, the Commission surrendered to the request for economic analysis under Article 81(1).[186] Firstly, the Commission initiated a reform concerning vertical restraints and announced that it would conduct an economic analysis under Article 81(1).[187] Consequently, a new policy of economic assessment of vertical restraints materialized in the form of a broad block exemption regulation supplemented by guidelines of the Commission.[188] However, Regulation 2790/1999 does not apply to licensing and

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Passenger Services Ltd, Union Internationale des Chemins de Fer, NV Nederlandse Spoorwegen and Société Nationale des Chemins de fer Français (SNCF) (European Night Services) v Commission of the European Communities, [1998] ECR II-3141, para. 136, where the CFI explicitly announced that Article 81 prohibits '… obvious restrictions of competition such as price-fixing, market-sharing or the control of outlets.'

184 See V. Korah, *An Introductory Guide to EC Competition Law and Practice*, 7th ed., Oxford 2000, pp. 347-357, at p. 348, discussing the paucity of economic analysis and, *inter alia*, announcing that 'It is frequently not possible to advise businessmen what the attitude of the Courts or Commission to their agreement is likely to be.'

185 See e.g. the Judgments in *Case 56/65 Société Technique Minière*, p. 249 and *Joined Cases T-374&375&384&388/94 European Night Services*, paras. 136-137, the Judgment of 12 December 1967 in *Case 23/67 SA Brasserie de Haecht v Consorts Wilkin-Janssen* [1967] ECR 525, p. 415, and the Judgment of 28 January 1986 in *Case 161/84 Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis* [1986] ECR 353, paras. 14, 27. For a summary of comments on this assessment see I. Forrester and C. Norall, *The Laicization of Community Law: Self-help and the Rule of Reason: How Competition Law Is and Could Be Applied*, 1 CMLR 1984, pp. 11-51, at pp. 11-18. See also R. Wesseling, *The Commission White Paper on Modernization of EC Antitrust Law: Unspoken Consequences and Incomplete Treatment of Alternative Options*, 8 ECLR 1999, pp. 420-433, at pp. 421-424, where the author elaborates upon the economic assessment under Article 81(1) and calls it 'economic rule of reason.'

186 See e.g. Commission Decision 1999/474, OJ 1999 L 186/28, paras. 89-133 conducting an assessment of the infringement of Article 81(1) in the light of guidelines from the case law of the ECJ and CFI.

187 See Communication From the Commission On the Application of the Community Competition Rules to Vertical Restraints, section I, part 2.

188 See Commission Regulation 2790/1999. Note that Article 12 of Regulation 2790/1999 in effect repealed exemptions under Commission Regulation 1983/83, OJ 1983 L 173/1 (exclusive distribution), Commission Regulation 1984/83, OJ 1983 L 173/5 (exclusive

agreements assigning intellectual property rights. In addition, it is doubtful whether undertakings satisfying the requirements of Regulation 2790/1999 while also exceeding the thirty-percent threshold set thereby will be able to find all answers in the guidelines.[189] Furthermore, the whole idea of reference to market shares as criteria for the application of block exemptions may be problematic because they do not necessarily reflect the real market power.[190] Secondly, the Commission acknowledged that there was also an increased need for an economic assessment of horizontal agreements. Therefore, the Commission adopted new block exemption regulations relating to specialization and research and development agreements as well as guidelines relating to the application of Article 81 to horizontal agreements.[191] It appears that the result is that undertakings face not only reform of the implementation of Article 81 but also changes in the substantive application of Article 81.

A full evaluation of the success of the Commission concerning substantive reforms of enforcement is beyond the scope of this paper. Nevertheless, it is doubtful that the framework for application and explanation of Article 81 and the economic assessment will be sufficient for undertakings to be able to enjoy legal certainty similar or greater than the previous level. That is mainly because the *ex ante* enforcement regime of Article 81 simply provided more safeguards for legal certainty.

Firstly, despite the fact that notification under the *ex ante* enforcement regime rarely resulted in negative clearances or exemptions, the undertakings could obtain comfort letters that analysed the applicability of Article 81 to the agreement in question.[192] In essence, such a letter expressed how the Commission saw the particular agreement in light of the information available to it. Furthermore, similar to cases of revocation of individual exemptions, the Commission would initiate infringement proceedings after issuing a comfort letter only if there were material changes, e.g. existence of undisclosed barriers for access to the market, or changes of law or fact affecting the assess-

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purchasing), and Commission Regulation 4087/88, OJ 1988 L 359/46 (franchising agreements) starting from 31 May 2000. See also Commission Notice – Guidelines on Vertical Restraints, OJ 2000 C 291/1. Finally, note that by virtue of Article 2(5) of Regulation 2790/1999, Regulation 2790/1999 does not apply to vertical agreements in the motor vehicle sector, covered by Commission Regulation 1400/2002, OJ 2002 L 203/30, and technology transfer agreements, covered by Commission Regulation 240/96, OJ 1996 L 31/2.

189 For comments on the drawbacks of Regulation 2790/1999 see R. Subiotto and F. Amato, *Preliminary Analysis of the Commission's Reform Concerning Vertical Restraints*, at pp. 24-25.

190 V. Korah, *EC Competition Law*, p. 360.

191 See Commission Notice – Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Co-operation Agreements, OJ 2001 C 3/2, paras. 6-7. See also Commission Regulation 2658/2000, OJ 2000 L 304/3 (specialization agreements), and Commission Regulation 2659/2000, OJ 2000 L 304/7 (research and development agreements).

192 See M. Paulweber, *The End of a Success Story?* at pp. 13-14, suggesting that the undertakings support and value the benefits resulting from comfort letters despite the fact that they lack legal force.

ment.[193] Thus, the comfort letters gave reasonable levels of certainty in *each individual case*.

Secondly, *ex ante* enforcement of Article 81 provided formal decisions clarifying the substantive application of Article 81(3) in a positive way. In short, the undertakings could receive guidance from 1) infringement decisions of the Commission about agreements that *did not* satisfy the criteria of Article 81(3); 2) exemption decisions of the Commission about agreements that *did* satisfy the requirements of Article 81(3); 3) decisions of the CFI and ECJ in Article 230 and 234 proceedings. Thus, *ex ante* enforcement was meant to serve and to some extent did indeed serve the interests of undertakings in providing them with a balance between positive and negative application of Article 81(3). Thereby the undertakings knew to what kind of agreements Article 81(3) would apply and what kind of agreements could not benefit from the exemption. In contrast, an *ex post* enforcement system would deprive the undertakings from formal decisions explaining what kind of agreements can benefit from Article 81(3).

Ex post enforcement of Article 81 would be 'a *de facto* principle of abuse control.'[194] The undertakings would obtain information from: 1) formal infringement decisions of the Commission and national competition authorities; 2) non-applicability decisions of the Commission; 3) judgments of national courts in appeals against decisions of national authorities – which will be hard to find for undertakings in other Member States, as well as judgments of the CFI in Article 230 and 234 proceedings. Consequently, the undertakings will have to rely on the Commission's guidelines instead of analysis of decisions to assess whether their agreements comply with Article 81(3). Note also that judgments responding to Article 234 references are inherently limited to answer questions about interpretation of the law and not to apply the law to factual situation.[195] Ironically, that places large-scale agreements in a position inferior to those benefiting from block exemptions since guidelines in contrast to block exemptions are not among the forms of secondary law that create direct rights for individuals.[196] Thus, instead of either notifying or conducting self-assessment with a view to the decisions, case law and block exemptions, the undertakings would have to assess their agreements in the light of guidelines and a few non-infringement decisions. Finally, the Commis-

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193 See the Judgment of 8 June 1995 in *Case T-9/93 Schöller Lebensmittel GmbH & Co. KG v Commission of the European Communities* [1995] ECR II-1611, paras. 105-109, for submissions of the Commission concerning the opening of proceedings in cases where a comfort letter has previously been issued and paras. 110-115 for the assessment of the CFI. Note that in para. 114 the CFI expressly states that the entrance of new competitors and the revelation of additional entrance barriers could justify a reassessment of the agreements as a material change in circumstances.

194 See *German Monopolies Commission*, Special Report, para. 6. See also T. Wibmann, *Decentralized Enforcement of EC Competition Law and the New Policy on Cartels: The Commission White Paper of 28th of April 1999*, 23 World Competition 2000, pp. 123-154, at p. 140.

195 See C. D. Ehlermann, *The Modernization of EC Antitrust Law*, at p. 76-77, reminding that the responses to preliminary rulings leave application of the law to the facts to the national court and submitting that preliminary rulings could be extended to factual assessment.

196 See Article 249 of the Treaty.

sion contradicts itself concerning the prospects of self-assessment. On the one hand, it announces that undertakings should be able to find guidance from the existing body of decisions and case law to assess their conduct. On the other hand, the Commission now places a larger emphasis on economic assessment under Article 81(1) and replaces almost all block exemption regulations, severely limiting the usefulness of older decisions and judgments. To sum up, the formal decision-making framework for the application of Article 81 does not seem sufficient for undertakings to obtain as much or more legal certainty as under *ex ante* enforcement of Article 81. A general suggestion would be that all undertakings concerned with compliance with Article 81 develop their own compliance programmes.[197] In addition, the undertakings should not try to substitute logics and common sense in Article 81 analysis with purely economic models incomprehensible even to lawyers trained in the subject.[198] Finally, the overall confusion about how Article 81 will now be applied in general is exacerbated by the question how it will be applied in different Member States.

D. Concern About Diverging Application of Article 81

Although Regulation 1/2003 contains some safeguards to ensure that national authorities apply Article 81 consistently, there is scope for diverging application. Firstly, even if national competition authorities apply Article 81 more or less consistently, there is a question about the differences in fining policies applicable to similar infringements in different Member States. Secondly, there remain the overarching questions whether national competition authorities and national courts can apply Article 81(3) in a more formal and rigid way without resorting to policy decisions and margins of appreciation. Finally, these concerns prepare the ground for another problem, namely forum shopping.

1. Fining Policy for Breaches of Article 81

Regulation 1/2003 does nothing to approximate the amount of fines that national competition authorities can impose when they adopt infringement decisions. So far, the Commission has adopted only a notice encouraging the undertakings to reveal their hard-core agreements and promising either immunity from or a reduction of fines.[199]

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197 On preparation for self-assessment of compliance see, e.g. P. M. Taylor, *EC and UK Competition Law and Compliance: A Practical Guide*, London 1999, pp. 284-305, at p. 288-305, reproducing also the questionnaire for compliance.

198 D. Hildebrand, *The European School in EC Competition Law*, 25 World Competition 2002, at p. 5, expresses a rather reasonable view that '[...] the focus of economic insights should not be confused with the application of complex, mathematical formulas and/or econometrical calculation models [...].'

199 See Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, OJ 2002 C 45/03. Note that in para. 29 the Commission recognizes that the undertakings may derive legitimate expectations about the imposition of fines in accordance with the notice.

Thereby, the Commission gives undertakings legitimate expectations about the fining policy. In contrast, there are no Community guidelines about how the national competition authorities should impose the fines. Regulation 1/2003 explicitly provides that national competition authorities can impose fines provided in their national laws when applying Article 81.[200] No doubt, the national competition authorities should respect the principle of *Walt Wilhelm* stating that in procedures conducted separately: '…any previous punitive decision should be taken into account in determining the sanction which is to be imposed.'[201] However, this restriction would be useful only if two national authorities attempted to adopt infringement decisions regarding the same conduct.

The question remains about cases where one national competition authority adopts an infringement decision under Article 81 *and* national competition law. There would not be a 'previous decision' in the proper sense of the term for other competition authorities in other Member States. The same authority would have to decide what deterrent measures to apply for breaches of two similar types of provisions differing only in the trade affected – purely domestic or between Member States. No doubt, national competition authorities could attempt to follow the path suggested by the Commission and fine the undertakings only for the more serious infringement.[202] Moreover, national competition authorities could try to fix fines taking into consideration the gravity and the duration of the infringement, as the Commission has to.[203] In addition, national competition authorities could treat the principles for determining the level of fines as established in decisions and case law applying Regulation 17 as guidelines for the application of their national laws.[204] Nevertheless, since Regulation 1/2003 leaves legislation on fines to national law, the Commission could not reproach a national competition authority for fixing fines of insufficient amount. What is more important, the undertakings of different Member States could be subject to different punishment for similar breaches of Article 81. The discretion enjoyed by national competition authorities in the application of national laws accompanied by the present differences in the legislation of the Member States are even likely to create differences in the pu-

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200 See Article 5 of Regulation 1/2003.

201 See *14/68 Walt Wilhelm*, para. 11.

202 See Commission Decision 89/93 of 7 December 1988, OJ 1989 L 33/44 (*Flat Glass*), para. 84, where the Commission stated:

> '…the simultaneous infringement of two provisions of the Treaty by the same conduct raises the problem of how fines should be imposed in such a case… the Commission considers that the principle that fines should not be applied cumulatively in respect of the same set of facts should apply and that therefore only the fines for the more serious infringement should be imposed on the undertakings.'

203 See Article 23(3) of Regulation 1/2003.

204 For the factors that the Commission and the ECJ takes into account when setting fines see the summary in *C. Kerse*, EC Antitrust Procedure, at pp. 258-278.

nishment.[205] Such differences in fining would jeopardize the consistent application and observation of Article 81. Moreover, in conjunction with different skills in application of Article 81 they might give rise to forum shopping. Since there is a strong argument that turning to the least severe authority cannot and should not be remedied by repeated prosecution by another authority, such forum shopping could only be avoided by harmonization of the rules on fining.[206]

Finally, it is hard to conceive how the Commission intends to fulfil its task of defining competition policy if it does not have the power to influence the fining practices of national competition authorities. There is no doubt that the Commission has created legitimate expectations concerning immunity from fines in exchange for co-operation. This has been a policy pursued by the Commission to foster the revelation of hard-core hidden cartels. Similarly, the strict stance and high fines in the absence of co-operation has been part of the policy to focus on cartels harming consumers.[207] At the end, instead of one clearly defined policy of implementation of Article 81, the undertakings may receive diverging amounts of legal certainty and different fines depending on the Member State in which they operate – or where they get caught. Here, one should not forget the possibility of criminalization, which would most probably lead to undertakings trying to escape criminal prosecution first. Although Regulation 1/2003 is not meant to apply to national laws imposing criminal sanctions, it may exceptionally apply '[...] to the extent that such sanctions are the means whereby competition rules applying to undertakings are enforced.'[208] While there might be a good argument that the present sanctioning policy also imposes charges of criminal nature,[209] there is little doubt that the success of leniency policies will depend on whether there exists a threat of criminal sanctions in the form of imprisonment. In addition to pursuing a sensible fining policy the result of the reform will depend also on the ability and willingness of national competition authorities to conduct a proper application of Article 81(3) that promotes the consistency of application of Article 81.

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205 See T. Jones, *Regulation 17: The Impact of the Current Application of Articles 81 and 82 by National Competition Authorities on the European Commission's Proposals for Reform*, 10 ECLR 2001, pp. 405-415, at pp. 406-413, arguing that only the Commission should impose fines for breaches of Article 81 and comparatively outlining the differences in the legislation of different Member States.

206 See W. P. J. Wils, *The Principle of Ne Bis in Idem in EC Antitrust Enforcement: A Legal and Economic Analysis*, 26 World Competition 2003, pp. 131-148, at pp. 143-148 arguing that the Commission should not, and by virtue of the principle of *Ne Bis in Idem*, even could not initiate another prosecution against undertakings who have been subject to inadequately stringent sanctions on Member State level.

207 See XXXIst Report on Competition Policy – 2001, SEC (2001) 462, paras. 30-32, calling year 2001 'a record year of cartel decisions' and recognizing that Community competition policy will place a special emphasis on detection and punishment of secret cartels also after the enforcement reform of Article 81.

208 See the last sentence of para. 8 of the Preamble of Regulation 1/2003.

209 See, e. g. G. J. M. Corstens, *Criminal Law in the First Pillar*, 11 European Journal of Crime, Criminal Law and Criminal Justice, 2003, pp. 131-144, at p. 133, W.P.J. Wils, *The Principle of Ne Bis in Idem*, at pp.133-136.

2. Policy Implications and Economic Assessment Under Article 81(3)

The abolition of the Commission's monopoly to grant Article 81(3) exemptions has raised concerns about the suitability of national competition authorities and national courts as *fora* for the application of Article 81(3). The main question relates to the margin of discretion in the application of Article 81(3). While the Commission does not seem to envisage a problem with discretionary choices of different national authorities after the enforcement reform, there is no doubt that the Commission itself used to make policy decisions and that the ECJ and CFI did not prevent it from doing so.[210] Firstly, there have been situations where the Commission has not hesitated to exercise its discretionary powers to take into consideration, e.g. the social situation, the situation in the industry and energy efficiency.[211] Secondly, the ECJ and the CFI have approved the discretion of the Commission by exercising a restrictive review in cases where the Commission has granted Article 81(3) exemptions.[212] *Remia* and *Europay* show that the ECJ and CFI would not interfere with the economic assessment as long as the Commission did not conduct an *erreur manisfeste*. 'In other words, agreements which restrict com-

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210 See Commission Programme 99/027, para. 57, where the Commission states that the purpose of Article 81(3) '… is to provide a legal framework for the economic assessment of restrictive practices and not to allow application of the competition rules to be set aside because of political considerations.'

211 See e.g. Commission Decision 84/380 of 4 July 1984, OJ 1984 L 207/17(*Synthetic Fibres*), paras. 37, where the Commission stated that: 'The co-ordination of plant closures will also make it easier to cushion the social effects of the restructuring…' For decisions of the Commission involving industrial policy considerations see Commission Decision 87/3 of 4 December 1986, OJ 1987 L 5/13 (*ENI/Montedison*), paras. 27-29, Commission Decision 84/387 of 19 July 1984, OJ 1984 L 212/1 (*BPCL/ICI*), para. 34. Finally, see Commission Decision 2000/475 of 24 January 1999 (*CECED*), OJ 2000 L 187/47, paras. 47-49, discussing energy efficiency and reduction of pollution from energy as reasons to grant an Article 81(3) exemption.

212 See the Judgment of 11 July 1985 in *Case 42/84 Remia BV and others v Commission of the European Communities* (*Remia*) [1985] ECR 2545, para. 34, where the ECJ stated:

> '…the Commission has to appraise complex economic matters. The Court must therefore limit its review of such an appraisal to verifying whether the relevant procedural rules have been complied with, whether the statement of the reasons for the decision is adequate, whether the facts have been accurately stated and whether there has been any manifest error of appraisal of a misuse of powers.'

See also the Judgment of 23 February 1994 in *Case T-39&40/92 Groupement des Cartes Bancaires "CB" and Europay International SA v Commission of the European Communities* (*Europay*) [1994] ECR II-49, para. 109, where the CFI states that review '…of the complex economic appraisals made by the Commission when it makes use of the discretion conferred on it by Article 85(3) of the Treaty, with regard to each of the four conditions laid down in that provision, is necessarily limited…'

petition may benefit from an exemption if the Commission considers that the overall effects of the agreement on the Community's policies are positive.'[213]

Consequently, there exists a problem now that this margin of discretion is being transferred to no less than twenty-five different national competition authorities. The issue of discretion is even more problematic with regard to national courts, let alone the arbitration tribunals, their primary task being application of the law instead of making of policy decisions. Critical voices about the economic assessment and policy decisions under Article 81(3) accompanied Regulation 1/2003 through all legislative stages. No doubt, different levels of discretion accompanied by varying judicial assessments under Article 81(3) will reduce consistency of application. Consequently, undertakings will lose some measure of legal certainty. Some operators might benefit from this, for example if they are good at lobbying.[214]

There is nowadays an inclination towards including policy considerations in the assessment of the four criteria of Article 81(3).[215] This is even more likely since the Commission has eventually recognized that an economic assessment must be conducted under Article 81(3) to determine whether an agreement is overall harmful or beneficial for competition. Under the system of legal exception, the application of policy choices would be even easier than under the exemption system. National competition authorities could refrain from starting formal proceedings in cases which involve balancing of different interests.[216] As a consequence, the initiation of Article 81 proceedings would depend on different powers of the national competition authorities to accept or reject complaints and initiate proceedings *ex officio*.[217]

Bearing in mind the risks of subjectiveness of national authorities, solutions are necessary to ensure an unbiased and unprejudiced application of Article 81(3). There was an argument that divergence in policy choices and the willingness to initiate proceedings could be avoided via the imposition of institutional constraints upon the Member States.[218] No doubt, it would be hard to find a proper legal basis for institutional harmonization of generally independent Member State institutions. Also, that would amount to explicit encroachment upon the cultural and legal backgrounds of each Member

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213 See R. Wesseling, *The Draft-Regulation Modernizing the Competition Rules*, at p. 367.

214 See H. Ullrich, *Harmonization Within the European Union*, at p. 183, warning about current levels of political lobbying and antitrust enforcement.

215 See W. P. J. Wils, *The Modernization of the Enforcement of Articles 81 and 82 EC*, at p. 1685 discussing possibilities for 'national bias.'

216 On possible 'non-action' of national competition authorities see J. H. J. Bourgeois, *Decentralized Enforcement of EC Competition Rules*, at pp. 6-7, suggesting that as far as complaints are concerned, the Commission should take the initiative if national competition authority fails to consider a *prima facie* infringement.

217 L. Idot, *A Necessary Step Towards Common Procedural Standards*, p. 6, saying that in some Member States complaints may be rejected through informal procedure.

218 See P. C. Mavroidis and D. J. Neven, *The White Paper: A Whiter Shade of Pale of Interests and Interests*, at http://www.iue.it/RSCAS/Research/Competition/2000/Mavroidis%2BNeven_1.pdf, at pp. 9-10, arguing that application of competition law generally involves an exercise of discretion that may lead to decisions influenced by perceptions of civil servants and the amount of lobbying that undertakings exert upon national competition authorities.

State.[219] Nevertheless, the mere fact that the Member States are under an obligation to designate a competition authority responsible for *effective compliance* with Regulation 1/2003 may be sufficient for some scrutiny of the institutional structures of national competition authorities.[220] Thus, there might be cases where the Commission would resort to Article 226 procedures. The Commission could claim that Member States whose competition authorities repeatedly fail to observe consistent enforcement of Article 81 have breached Article 35 of Regulation 1/2003 in conjunction with Article 10 of the Treaty. Finally, the Commission could always fight against biased application of Article 81(3) via either taking over the investigation or asking the competition authority of another Member State to conduct the investigation. Nevertheless, Article 35 of Regulation 1/2003 states: 'The authorities designated may include courts.' Thus, at least theoretically there would be a mismatch between judicial independence and the supervision of the Commission. Furthermore, the option of Article 81(3) being applied by the courts in infringement proceedings or private enforcement also raises the problem of the ability of judges to conduct an Article 81(3) assessment.

While the judiciary would be less inclined towards biased decisions influenced by political considerations, there have been concerns about the ability of the judges to conduct complicated economic assessment.[221] No doubt, the pre-Nice discussions about the ability of the ECJ to respond to preliminary rulings in competition cases may have added some momentum to the overall question of the courts applying Article 81(3).[222] Nevertheless, 'Tribunals with different attitudes and different economic philosophies are inevitably going to come to different decisions.'[223] No doubt, arbitrators deciding upon agreements infringing Article 81(1) would also evaluate, without any direct supervision of the Commission, whether the agreement satisfies the Article 81(3) criteria.[224] Consequently, undertakings are likely to experience the application of Article 81(3) by judges from different backgrounds, pursuing different objectives and having undergone different training. Bearing in mind the cultural and legal differences of the Member States, such discrepancies might be inevitable. Nevertheless, undertakings should not

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219 See L. Idot, *A Necessary Step Towards Common Procedural Standards*, p. 4.

220 See Article 35 of Regulation 1/2003.

221 See R. Whish, *The Enforcement of the EC Competition Law in the Domestic Courts of Member States*, in L. Gormley (ed), *Current and Future Perspectives on EC Competition Law*, London 1997, pp. 73-88, at p. 86, suggesting that as far as Article 81 was concerned, the UK courts regarded the issues in a rather technical way and sometimes had high expectations about the burden of proof.

222 See e. g. V. Korah, *EC Competition Law*, p. 191, asserting that preliminary rulings in competition cases should come from the CFI that has more expertise.

223 See *House of Lords Select Committee*, Reforming EC Competition Procedures, para. 132.

224 See C. Baudenbacher and I. Higgins, *Decentralization of EC Competition Law Enforcement and Arbitration*, 8.1 Columbia Journal of European Law 2002, pp. 1-18, at p. 3, expressing concern that arbitrators are placed in a disadvantaged situation because they cannot get assistance from the Commission if they wish. However, see also A. Komninos, *Assistance to Arbitral Tribunals in the Application of EC Competition Law*, http://www.iue.it/RSCAS/Research/Competition/2001/Kominos.pdf, at pp. 19-23, arguing that the Commission should assist arbitrators upon their application.

receive a different assessment of their agreements under Article 81(3) depending on whether, e.g. an Italian or an English judge conducts the analysis. Solving the problem might require the creation of specialized competition courts and harmonized training programs for the judges in all Member States. However, the present institutional structure of the Member States for the application of national and EC cartel prohibitions does not show a tendency in this direction.

If there remains a niche for policy considerations and differences in economic assessment under Article 81(3), both complainants to national competition authorities and litigants in Member State courts may resort to forum shopping. No doubt, it would be logical for the complainant to turn to the national authority of the Member State where he has his residence or establishment. However, if the national competition authority of that Member State rejects his complaint because of a biased policy consideration under Article 81, the complainant may turn to the Commission or the national competition authority of another Member State. Similar issues will arise if Member State courts conduct the Article 81(3) assessment differently.

Given the hardships of litigation under Article 81, potential litigants would no doubt attempt to make every use of provisions allowing them to sue in the most favourable *fora*. While potential litigants are likely to have determined the applicable law and court to entertain jurisdiction in their contracts, they would nevertheless have a choice of *fora* for litigation in tort claims, e.g. damage claims involving a foreign element. By virtue of Articles 5(3) of the Brussels Convention and Regulation 44/2001, the plaintiff may bring a claim in tort in the place where the harmful event occurred.[225] When interpreting the Brussels Convention, the ECJ stated that the place where the harmful event occurred covers both the place where the event creating the damage occurred as well as the place where the damage itself occurred.[226] No doubt, the ECJ wanted to help the plaintiff having to establish the case. Moreover, the ECJ has attempted to keep the plaintiff's choice of *fora* within reasonable limits.[227] Nevertheless, if Member State courts have different attitudes towards the application of Article 81(3), there will be attempts to bring claims for damages in the courts treating conditions of Article 81(1) formalistically. This gives rise to a further debate about the rules of *lis pendens* under the Brussels Convention and Regulation 44/2001.

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225 See Article 5(3) of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (consolidated version) (Brussels Convention), OJ 1998 C 27/1. See also Article 5(3) of Council Regulation 44/2001, OJ L 12/1. Finally, see Article 68 of Regulation 44/2001 stating that Regulation 44/2001 supersedes the Brussels Convention. See also the Judgment of 27 September 1988 in *Case 189/87 Athanasios Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co. and others* [1988] ECR 5565, para. 17, where the ECJ stated that tort '…covers all actions which seek to establish the liability of a defendant and which are not related to a "contract" within the meaning of Article 5 (1).'

226 See the Judgment of 30 November 1976 in *Case 21/76 Handelskwekerij G. J. Bier BV v Mines de Potasse d'Alsace SA* [1976] ECR 1735, paras. 16-19.

227 For a nutshell discussion of how the ECJ has interpreted Article 5(3) of the Brussels Convention see P. North and J. J. Fawcett, *Private International Law*, London 1999, pp. 183-273, at pp. 211-219.

According to the Brussels Convention and Regulation 44/2001, a court of one Member State is under an express obligation to stay proceedings *only if* a court of another Member States has simultaneously seized the same case (a case involving the same parties and cause of action).[228] Note that in cases where some but not all the parties are the same, the second court seized is under an obligation to decline jurisdiction only concerning the parties litigating in both states and may continue proceedings concerning other parties.[229] Furthermore, the stay of proceedings in related actions is non-mandatory and at the discretion of the court.[230] Thus, there might be situations where the courts arrive at different decisions involving actions for damages and the application of Article 81. No doubt, by doing so they would disregard their obligation under Article 10 of the Treaty. Again, the ECJ may have to warn the courts of Member States through Article 234 judgments about the obligation to avoid irreconcilable judgments and to have due regard to judgments applying Article 81 of different Member State courts. Unfortunately, the Commission avoided incorporation of such a warning in Article 16 of Regulation 1/2003.[231] The undertakings could rely upon such a provision in conjunction with Article 10 of the Treaty. Thereby they would remind the Member State courts of their obligation to interpret Article 81(3) in a uniform manner and bear in mind the overall aims of Article 81. No doubt, the existing fear about the application of Article 81(3) is even more exacerbated in relation to the States acceding to the EU on 1 May 2004.

V. Accession of the CEECs: Another Red Alert?

After the Countries of Central and Eastern Europe[232] (CEECs) applied for membership in the European Union, the Commission did not hesitate to send them a clear message that the introduction of competition policy was of particular importance. Firstly, the Europe Agreements with the CEECs provided that provisions resembling Article 81 must be applied to trade between the Community and the respective country after the Association Council adopts rules for implementation.[233] Secondly, the CEECs had to

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228 See Article 21 of the Brussels Convention and Article 27 of Regulation 44/2001. Note also that Article 30 of Regulation 44/2001 explains which is the court first seized.

229 See the Judgment of 6 December 1994 in *Case C-406/92 The owners of the cargo lately laden on board the ship "Tatry" v the owners of the ship "Maciej Rataj"* (*Tatry*) [1994] ECR I-5439, para. 35.

230 See *C-406/92 Tatry*, para. 52, where the ECJ stated that the term 'related actions' was broad and covered 'all cases where there is a risk of conflicting decisions, even if the judgments can be separately enforced and their legal consequences are not mutually exclusive.'

231 See K. Holmes, *The EC White Paper on Modernization*, at p. 63.

232 The Republic of Hungary, the Republic of Poland, Romania, the Republic of Bulgaria, the Slovak Republic, the Czech Republic, the Republic of Latvia, the Republic of Lithuania, the Republic of Estonia, the Republic of Slovenia.

233 See Article 62 of the Europe Agreement Establishing an Association Between the European Communities and Their Member States, of the one part, and the Republic of Hungary, of the other part, OJ 1993 L 347/2; Article 63 of the Europe Agreement with the Republic of Poland, OJ 1993 L 348/2; Article 64 of the Europe Agreement with

take over the principles of Community competition policy and received invitations to adapt their competition laws to those of the Community.[234] All of them indeed adopted laws on competition incorporating the principles of EC competition law. However, the Commission seems to have forgotten that the CEECs also received a promise that after their accession, the Commission would take over the responsibility of ensuring that undertakings cannot distort competition within the internal market. In contrast to current Member States of the EC, CEECs are experiencing neither the democratic deficit of the EC, nor the need to conduct decision making closer to the citizen.[235] However cynical or ironical that may be, CEECs are too immature to take over the responsibility to ensure undistorted competition from the Commission. The Commission is clearly overestimating the ability of CEECs acceding on 1 May 2004 to participate in the decentralized application of Article 81.

Apparently, the willingness of the Commission to dispose itself of the burden of notifications was strong enough to blur its judgment about the CEECs. No doubt, the CEECs have transposed and implemented their cartel prohibitions in line with the *acquis communautaire*. Furthermore, the CEECs joining in 2004 do not have problems in fulfilling the requirement of Article 35 of Regulation 1/2003 about the establishment of a national competition authority.[236] However, the issues become more problematic when one looks further than the adoption of laws and the establishment of administrative structures. A comparative analysis of the CEECs' preparedness to apply Article 81 in an unbiased manner reveals a number of problem areas that the Commission has been unwilling to think about.[237]

While it would not be possible to find a common denominator for shortcomings of the competition enforcement regimes of CEECs, there nevertheless appears a set of

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Romania, OJ 1994 L 357/2; Article 64 of the Europe Agreement with the Republic of Bulgaria, OJ 1994 L 358/3; Article 64 of the Europe Agreement with the Slovak Republic, OJ 1994 L 359/2; Article 64 of the Europe Agreement with the Czech Republic, OJ 1994 L 360/2; Article 64 of the Europe Agreement with the Republic of Latvia, OJ 1998 L 26/3; Article 64 of the Europe Agreement with the Republic of Lithuania, OJ 1998 L 51/3; Article 63 of the Europe Agreement with the Republic of Estonia, OJ 1998 L 68/3; Article 65 of the Europe Agreement with the Republic of Slovenia, OJ 1999 L 51/3.

234 See Commission White Paper – Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union, COM (1995) 163, part 4, para. 22.

235 For example, many civil servants in the Republic of Latvia are generally ready to accept all the policy innovations coming from the EC and EU without even questioning how Latvia could defend its interests after accession.

236 See Appendix, criteria II.

237 See Appendix. See also F. Emmert, *Introducing EU Competition Law and Policy in Central and Eastern Europe: Requirements in Theory and Problems in Practice*, 27 Fordham Int'l L.J. 2004, pp. 642-678; Andre Fiebig, *The Introduction of European Union Competition Law and Policy in the New Member States*, 1 Loyola Chicago Int'l Law Rev. 2003/04, pp. 61-69; and D. Vaigauskaite, *Implementation of the EC Competition Law in Lithuania: Is the State Able to Apply the Acquis Effectively?*, unpublished thesis, submitted on 19 March 2002 at Concordia International University Estonia (on file with the author).

recurring deficiencies. Firstly, some of the national competition authorities of the CEECs lack resources, human capacity and expertise. Secondly, as in today's Member States, in almost all the CEECs the judiciaries need more training in competition matters.[238] The inadequacy of training accompanied by a shortage of resources may very well disrupt the efficiency of enforcement and lead to inconsistent application of Article 81.[239] Moreover, it may create an unwillingness to conduct investigations *ex officio* and a preference to wait for notifications under national law and complaints.[240] Furthermore, the perceived levels of corruption are still rather high in almost all CEECs. This leaves scope for an expansion of policy decisions under Article 81(3) in national competition authorities and 'stretching' of the assessment under Article 81(3) in national courts. No doubt, Euro-optimists would object that preliminary rulings and interventions from the Commission would end such practices of civil servants and members of the judiciary. However, the feasibility of preliminary rulings depends not only upon Article 234 of the Treaty but also upon the willingness of the national judiciary to let the 'Trojan horse' of preliminary references into the national judicial systems.[241] Furthermore, there is an underlying question as to whether the ECJ will be willing and able to educate the judges of the CEECs in the same way as it slowly taught the judges of the initial Member States how to make preliminary references and what to do with the answers. The ECJ may consider that there is a sufficient body of case law and guidelines revealing the art of Article 234 reference phrasing.[242] The judiciary of the CEECs may very well receive little more than scoff about their ill preparedness to apply EC law. Similarly, regular and useful interventions by the Commission will depend on its capacity to scan the proceedings before national competition authorities and courts. Furthermore, even if a fear of sanctions by the Commission may deter national authorities in CEECs from adopting straightforward biased decisions, they might still mitigate the impact of Article 81 on their national undertakings by imposing either no or only small fines that would have little or no deterrent effect. The Commission has already announced that all of the

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238 See A. Riley, *EC Antitrust Modernization: Part Two*, at pp. 660-661.

239 The levels of training and expertise should have been increased by pre-accession projects, such as Twinning Light and TAIEX seminars. However, the progress made with the help of these projects has been generally slow and the necessary assistance from the Commission and the old Member States is already phased out because of accession, which coincides with decentralization.

240 See I. Alehno, *Arî Eiropâ konkurences politika turpina attîstîties* (Continued Development of European Competition Policy – title translated by the author), 7 Latvijas Vçstnesis 2003, part Eiropas Vçstis, where Mr Alehno clearly indicates that the Latvian Competition Council would not start investigation *ex officio*.

241 The author of this paper entertains serious doubts whether the statement in the Judgment of 5 February 1963 in *Case* 26/62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration (van Gend&Loos) [1963] ECR 1, part B (para. 11) that '…the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields (emphasis added)' will have much appeal to the judiciary of the CEECs and encourage them to submit questions for interpretation of EC law.

242 See P. Craig, *The Jurisdiction of Community Courts Reconsidered*, at pp. 563-564.

CEECs are in need of stricter fining policies. Consequently, Regulation 1/2003 may contribute to a lack of deterrence in the enforcement of Article 81 since it leaves the fining policy to national law. Lastly, only one CEEC has followed the Commission and introduced a clear leniency policy designed to support discovery of secret cartels. This serves as a proof that the Commission may have trouble in setting a common competition policy in the EC if Regulation 1/2003 leaves important issues to national law.

Again this short analysis of the CEECs' non-readiness for decentralization and the entry into force of Regulation 1/2003 was not to say that decentralization should not take place. This part contained a warning call that the Commission and the CEECs themselves should take the implications flowing from Regulation 1/2003 seriously. No doubt, as in current Member States, the CEECs' successful application and enforcement will depend upon the goodwill of civil servants and members of the judiciary to understand the need for mutual loyalty under Article 10 of the Treaty. Education and training in Article 81 enforcement is the only way to create such loyalty to the competition policy of the EC and the aims of Article 81 as fostering the overall well-being. Therefore, long-term education programmes should complement short-term seminars, twinning projects and workshops. Staff and researchers of national authorities should be given opportunities for education and internships with the ECJ, CFI and the Commission in return for legally binding commitments to work in the public sector. Furthermore, the CEECs should rethink the issues of financing and remuneration of the judiciary and civil servants that might attract professionals who have obtained expertise in the field. Another option would be the appointment of consultants from old Member States at least as far as national competition authorities of the CEECs are concerned. No doubt, textbooks on EC law in national languages of the CEECs, horizontal contacts between the national authorities, as well as codification of national competition laws of the CEECs also have to be improved and expanded.[243] Finally, institutional guidelines and handbooks may prove useful in learning the path of Article 81 analysis. However, one should bear in mind that the options proposed here are of a long-term nature and would not produce immediate results. Last but not least, the new Member States are going to experience a huge brain-drain, as their most qualified civil servants are applying for much better paying positions in the institutions in Brussels. Thus, the integration of the undertakings of the CEECs into the single market via Article 81 may remain in jeopardy. There is room for improvement both concerning the application of Regulation 1/2003 in existing Member States as well as in CEECs.

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243 See F. Emmert, *Introducing EU Competition Law and Policy in Central and Eastern Europe: Requirements in Theory and Problems in Practice*, 27 Fordham Int'l L.J. 2004, pp. 642-678, at pp. 675-678.

VI. Summary of the Necessary Improvements and Developments

Generally, Regulation 1/2003 will not be workable unless the Commission, national authorities of the Member States, and the undertakings and complainants understand that there must be a balance between co-operation and supremacy of EC law.

Concerning co-operation, the Commission must first provide more explanation as to how the new system will work. All parties interested in a proper application of Article 81 should know when cases are likely to be of 'sufficient Community interest' and when national authorities of the Member States may get involved. Indeed, an analysis of cases dealt with by formal decisions could very well reveal what the Commission itself considers worthy of investigating. Then, the Commission should also clarify under what conditions it will adopt non-infringement decisions. Furthermore, the Commission should understand that it will not be able to monitor the decision making in all Member States. Thus, instead of monitoring proceedings in national authorities, it should focus on drafting clear and careful decisions in the infringement proceedings it pursues. Such decisions should integrate the guidelines on horizontal and vertical restraints and explain their meaning via application to particular cases. Such a policy *par excellence* should also solve the abovementioned problems with the simultaneous shift towards economic assessment under Article 81.

In the meantime, the ECJ may have to remind the Member States about their limited sovereignty and obligation to take every effort to ensure the effective enforcement of Article 81. The ECJ may have to assist the Commission in its efforts at decentralization with a series of clear and sometimes unfriendly judgments. In particular, the ECJ could help in adopting a strict line in Article 234 and 226 proceedings and sending a clear message to the Member States that the obligation under Article 10 of the Treaty applies to Regulation 1/2003. As noted, the statements of the ECJ in the *CIF* case seem to indicate that the ECJ is indeed willing to remind national competition authorities and courts about their duties of cooperation in ensuring that Article 81 is observed. Furthermore, the ECJ may have to relax its filter of Article 234 references and the questions contained therein if the acceding CEECs turn out to be willing but unable to apply Article 81 properly. In addition, the ECJ would have to continue building upon the criteria for the right to damages under Article 81. No doubt, the right to damages for breaches of the provisions of the Treaty should find its place in the system of legal remedies of the EC. Then, in the absence of procedural harmonization, the ECJ may have to scrutinize whether national laws provide sufficient damages as well as deterrent fines for breaches of Article 81 of the Treaty. Also, there is a need for a judicial definition of laws pursuing objectives different from Article 81. Finally, if the Commission itself fails to define the scope of Article 81, the ECJ and CFI may have to take the initiative and give guidelines for the decentralized application of Article 81.

Nevertheless, much will depend upon the national authorities themselves. Efficient enforcement will depend upon their levels of training, expertise and resources. Both efficiency and legal certainty will be directly contingent upon each Member State's authorities' openness towards decisions and judgments of the national authorities of other Member States. The CEECs should devote particular attention to these issues. The existing Member States, the Commission and the CFI and ECJ should continue to

assist them with staff training, internships and preparation of handbooks and institutional guidelines.

These measures should help in overcoming the problem as submitted earlier, namely that Regulation 1/2003 will lead to less efficient enforcement without actually alleviating administrative burdens. Still, the only way in which the majority of undertakings will now obtain sufficient legal certainty under *ex post* enforcement of Article 81, will be even more reliance on their legal counsels and self-assessment. This conclusion emanates from the recognition that *ex post* enforcement of Article 81 does very little to diminish the inherent tradeoffs between effective enforcement and legal certainty.

VII. Conclusion

This paper demonstrated that Regulation 1/2003 alone will not deliver efficient enforcement of Article 81 with less administrative burdens. Similarly, it will not secure legal certainty, in particular in light of EU enlargement. Nevertheless, in due course, and with a variety of flanking measures, it should be possible to reduce and eventually avoid the simultaneous decrease of overall efficiency, legal certainty and uneven enforcement of Article 81 in old and new Member States.

If, however, the institutions and authorities involved fail to take into account the suggestions in this paper, the market integration objectives of Article 81 may truly be in jeopardy. Thus, the future of European integration is not only dependent on the finding of common values for constitution building. While the Treaty Establishing a Constitution for Europe could, perhaps, consolidate some discrepancies on the political level, 'the constant improvements of the living and working conditions of their peoples'[244] can only be achieved and promoted via consistent and workable measures in economic law. Thus, successful *ex ante* enforcement of Article 81 is necessary not only for the Commission to maintain its institutional appeal. For the old Member States, such success is needed to retain the momentum of integration, and for the citizens of the new Member States, it should show that they have not cast their referenda votes in vain.

[244] See the Preamble of the European (Economic) Community Treaty, as amended.

Appendix: Comparison of the Competition Laws of CEECs Joining the EU on 1 May 2004

I. Hungary

1) National Competition Law	Competition Act, contains the main principles of EC anti-trust rules.
2) National Competition Authority	Office for Economic Competition and Competition Council
3) Judiciary	Remuneration of judges has in effect decreased. First instance proceedings – 1 year. Training of judiciary in competition matters necessary. Inadequate technical facilities and budgetary resources.
4) Corruption	Remains a general problem.
5) Enforcement Record	2001: 120 anti-trust decisions, two prohibitions with fines, 10 decisions on restrictive agreements. Reasonably good enforcement.
6) Severity of Sanctions	More deterrent sanctions should be imposed.
7) Leniency Program	None
8) Public Awareness	Increased awareness of competition rules needed within the business community.
9) Source	Commission's 2002 Regular Report on Hungary's Progress Towards Accession, COM (2002) 700, http://www.europa.eu.int/comm/enlargement/report2002/hu_en.pdf

II. Poland

1) National Competition Law	Competition Act, contains the main principles of EC anti-trust rules.
2) National Competition Authority	Office for Competition and Consumer Protection
3) Judiciary	Duration of proceedings – depends on the court, average - 1-6 months, may take up to 40 months. EC law training provided, though generally difficult to ensure uniform quality and content.
4) Corruption	A problem within the judiciary, generally a source of serious concern.
5) Enforcement Record	2001: 654 decisions, 20 decisions concerning restrictive agreements. General shift to cartel investigations.
6) Severity of Sanctions	Policy of more deterrent sanctions needed.
7) Leniency Program	None
8) Public Awareness	Not mentioned
9) Source	Commission's 2002 Regular Report on Poland's Progress Towards Accession, COM (2002) 700, http://www.europa.eu.int/comm/enlargement/report2002/pl_en.pdf

III. Slovak Republic

1) National Competition Law	Act on the Protection of Competition, contains the main principles of EC anti-trust rules.
2) National Competition Authority	Anti-Monopoly Office. Functions well, good track record, high level of staff training.
3) Judiciary	Concerns about impartiality, political neutrality. Modernization of equipment necessary. Duration of proceedings – 14 months. Need for comprehensive EC law training of judges – also in competition matters.
4) Corruption	Perception about corrupt judiciary. Generally a cause for serious concern.
5) Enforcement Record	2001: 167 decisions, 24 on restrictive agreements – 9 prohibitory, 2 with fines.
6) Severity of Sanctions	More severe sanctions needed.
7) Leniency Program	None
8) Public Awareness	Increased awareness of competition rules needed within the business community.
9) Source	Commission's 2002 Regular Report on Slovakia's Progress Towards Accession, COM (2002) 700, http://www.europa.eu.int/comm/enlargement/report2002/sk_en.pdf

IV. Czech Republic

1) National Competition Law	Legislation compatible with acquis
2) National Competition Authority	Office for the Protection of Competition – 129 officials. Sufficient resources and expertise.
3) Judiciary	Duration of court proceedings – 10 – 27 months depending on the level of the court. Lack of administrative and sometimes financial support. Ongoing judicial training, judicial academy set up.
4) Corruption	A serious cause of concern
5) Enforcement Record	2001: 132 anti-trust decisions (22 on restrictive agreements), 12 prohibitions, 4 with fines. 3 court appeals rejected.
6) Severity of Sanctions	More deterrent sanctions needed
7) Leniency Program	Revised along the lines of the Commission's own program.
8) Public Awareness	Intensified program to increase public awareness – press conferences, information bulletin, publicly accessible list of restrictive agreements which are exempted.
9) Source	Commission's 2002 Regular Report on Czech Republic's Progress Towards Accession, COM (2002) 700, http://www.europa.eu.int/comm/enlargement/report2002/cz_en.pdf

V. Latvia

1) National Competition Law	Competition Law in line with acquis. Implementing legislation necessary for block exemptions.
2) National Competition Authority	Competition Council and investigative Competition Bureau. Overall staff – around 40 with a high turnover rate. The amount of financial resources must be increased. Staff training necessary.
3) Judiciary	Concerns about independence and efficiency of the judicial system. Comparatively low remuneration. The training of judges needs to be intensified and more financial resources devoted to it. Training in competition matters is necessary. Upgrading of infrastructure must be continued.
4) Corruption	Perceived as a problem among the judiciary. Generally a source of concern.
5) Enforcement Record	2001: 30 decisions, 6 prohibitions, 1 with fines. 11 decisions concerning restrictive agreements.
6) Severity of Sanctions	More deterrent sanctions needed
7) Leniency Program	None
8) Public Awareness	Increased awareness of competition rules needed within the business community.
9) Source	Commission's 2002 Regular Report on Latvia's Progress Towards Accession, COM (2002) 700, http://www.europa.eu.int/comm/enlargement/report2002/lv_en.pdf

VI. Lithuania

1) National Competition Law	Competition Law in line with acquis
2) National Competition Authority	Competition Council. Staff – 55 civil servants.
3) Judiciary	Ongoing judicial training should be continued and professional capacity of the judges increased. Training in competition matters is necessary. There has been progress in reduction of the backlog of the cases.
4) Corruption	Concern in specific sectors, but overall a considerable progress in the fight against it.
5) Enforcement Record	2001: 73 anti-trust decisions, 2 prohibitions with fines.
6) Severity of Sanctions	Attempts to increase the level of fines. Improvement needed in rules governing the imposition of fines.
7) Leniency Program	None
8) Public Awareness	Increased awareness of competition rules needed within the business community.
9) Source	Commission's 2002 Regular Report on Lithuania's Progress Towards Accession, COM (2002) 700, http://www.europa.eu.int/comm/enlargement/report2002/lt_en.pdf

VII. Estonia

1) National Competition Law	Legislation in line with acquis
2) National Competition Authority	Competition Office. Financial and human resources, training needed.
3) Judiciary	Duration of proceedings 4-5 months. Sufficient infrastructure, IT. Training of judiciary in competition matters needed.
4) Corruption	A rather limited problem.
5) Enforcement Record	2001: 33 decisions, 4 prohibitions, 1 with fine, 8 concerning restrictive agreements.
6) Severity of Sanctions	More severe fining policy needed.
7) Leniency Program	None
8) Public Awareness	Increased awareness of competition rules needed within the business community.
9) Source	Commission's 2002 Regular Report on Estonia's Progress Towards Accession, COM (2002) 700, http://www.europa.eu.int/comm/enlargement/report2002/ee_en.pdf

VIII. Slovenia

1) National Competition Law	Competition Law, contains the main principles of EC anti-trust rules.
2) National Competition Authority	Competition Protection Office. More resources and staff at smaller turnover rate needed.
3) Judiciary	Concerns about involvement of the executive. Backlog of cases. Decrease in funding for judicial training. Training of judiciary in competition matters necessary.
4) Corruption	A rather limited problem
5) Enforcement Record	2001: 49 decisions, 4 conditional approvals and prohibitions, 6 decisions concerning restrictive agreements.
6) Severity of Sanctions	More severe fining policy needed
7) Leniency Program	None
8) Public Awareness	Not mentioned
9) Source	Commission's 2002 Regular Report on Slovenia's Progress Towards Accession, COM (2002) 700, http://www.europa.eu.int/comm/enlargement/report2002/si_en.pdf