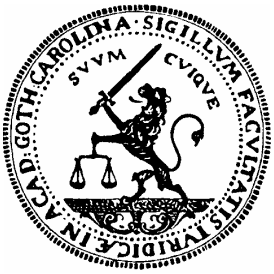

Faculty of Law

Lund University

Master of European Affairs Programme
Law

Master Thesis

By

Vera Treitschke

Decentralisation under Regulation 1: A “Fundamental Reform” for EC Competition Law Enforcement?

Katarina Olsson

Competition Law

Spring 2004

Contents

Abbreviations

Commission	European Commission
Colum. J. Eur. L	Columbia Journal of European Law
C.M.L.R.	Common Market Law Review
DG Competition	The Commission's Directorate General for Competition
EC	European Community
E.C.L.R.	European Competition Law Review
ECJ	European Court of Justice
ECN	European Competition Network
ECR	European Court Reports
ELJ	European Law Journal
E.L.Rev	European Law Review
EU	European Union
Fordham Int'l L.J	Fordham International Law Journal
MK	The German Monopolies Commission
OJ	Official Journal of the European Communities
PLI/Corp	Practising Law Institute Corporate Law and Practice Course Handbook Series

1. Introduction

On 16 December 2002 the European Commission ("Commission") adopted *Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*[1]. This Regulation recently entered into force on first of May 2004 and thus coincided with the accession to the European Union ("EU") of ten new Member States from central and eastern Europe. Whereas Regulation 1 does not alter the substance of EC competition rules laid down in Articles 81 and 82 EC[2], which prohibit restrictive practices and abuses of dominant positions if they restrict competition within the common market, it changes the way these rules are enforced. It thus replaces *Council Regulation No. 17, first regulation implementing Articles 85 and 86 of the Treaty*[3] which since 1962 laid down such enforcement rules. According to *Mario Monti*, Commissioner responsible for competition, first of May 2004 will be not only „Enlargement Day" but also „Competition Day" for it will see a revolution in the way competition rules are enforced in the EU.[4]

It has often been held that Regulation 1 constitutes a "fundamental reform" for the enforcement of EC competition law.[5] The declared purpose of Regulation 1 is to decentralise the enforcement of EC competition law. The Commission mainly argues that decentralisation will contribute to a more effective enforcement of EC competition rules in the interests of consumers and businesses.[6] The new regime shall allow the Commission to focus its resources on the most serious infringements such as foreclosure of the markets, international cartels and abuse of dominant positions.[7]

1.1 Background: Regulation 1 under debate

Regulation 1 is the result of a consultative process which started with the publication of the Commission's *White Paper on Modernisation of the*

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[1] *Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*, OJ L 1 4.1.2003 p. 1-25 (hereinafter: Regulation 1)

[2] The former Article 85 and 86 of the EC Treaty

[3] *Council Regulation No. 17, first regulation implementing Articles 85 and 86 of the Treaty* OJ 1962 13/204 (hereinafter: Regulation 17)

[4] Interview with Mario Monti, *The EU gets new competition powers for the 21st century*, http://www.europa.eu.int/comm/competition/publications/special/interview_monti.pdf

[5] Sven Norberg, *The European Commission and EC Competition rules or - a view from the Competition DG*, guest lecture held at Lund University on November 28, 2003

[6] Press Release IP/04/411, *Commission finalises modernisation of the EU antitrust enforcement rules* (March 30, 2004), p. 1
http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/04/411 0 RAPID&lg=EN&display=

[7] Sven Norberg, supra 5

Rules implementing Articles 85 and 86 of the EC Treaty[8] in 1999. Responses to the White Paper and to the thereof developed proposed *Council Regulation on the Implementation of the Rules on Competition laid down in Articles 81 and 82 of the Treaty*[9] were submitted to the Commission by individuals, companies, trade associations, Community and national institutions and by the Member States themselves.[10] The huge amount of submissions and additional literature shows how wide-ranged the reform already has been debated.[11] To a large extent the debate focused on Regulation 1's main purpose to decentralise the enforcement of EC competition law. Limits of space preclude a detailed analysis of these literatures. But to give a short outline of the debate it is suffice to say that *some observers*[12] were focusing on legal problems such as the lawfulness of the proposed reform while *others*[13] raised concerns about the operation of the enforcement regime of Regulation 1 in practice and its impact on companies, lawyers, the Commission, the national competition authorities and courts. *Other EC competition law experts*[14] in particular emphasised on expected practical difficulties for the new Member States from central and eastern Europe, whereas *some observers*[15] mainly questioned whether a further decentralisation will lead indeed to a more efficient enforcement of EC competition rules. *Few authors*[16] were using analytical tools offered by economic analysis to argue pro and against decentralisation.

1.2 Purpose

The purpose of this thesis is to contribute to the aforementioned debate by investigating if decentralisation under Regulation 1 constitutes a "fundamental reform" for EC competition law enforcement.

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[8] *White Paper on Modernisation of the Rules implementing Articles 85 and 86 of the EC Treaty*, Commission Programme No 99/027, (hereinafter: White Paper on Modernisation) http://europa.eu.int/comm/competition/antitrust/wp_modern_en.pdf

[9] *Council Regulation on the Implementation of the Rules on Competition laid down in Articles 81 and 82 of the Treaty* COM (00) 582 final (September 2000) (hereinafter: the Proposal)

[10] For an overview about Responses to the White Paper see Richard Wish, *Competition Law*, (2001), p. 251

[11] Paul Craig and Gráinne de Búrca, *EU Law*, (2003) p. 1063 (footnote: 5)

[12] Claus Dieter Ehlermann, *The Modernisation of EC Antitrust Policy: A Legal and Cultural Revolution*, C.M.L.R. 37 (2000), p. 537-590

[13] Frank L. Fine, *The Reform of EC Antitrust Enforcement: What will it mean for U.S.Practioners*, 1371 PLI/Corp 867; Vincent Power, *Representing Clients after the Modernisation of EC Competition Law*, International Company and Commercial Law Review 2003, p. 334

[14] Frank 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. 642

[15] Hans M. Gilliams, *Modernisation: From Policy to Practice*, E.L. Rev. 2003, 28 (4); p. 451-474

[16] Damien Geradin, *Competition between Rules and Rules of Competition: A legal and economic analysis of the proposed modernization of the enforcement of EC Competition Law*, 9 Colum. J. Eur. L. 1

During the debate very different and sometimes contrary views were expressed concerning the question if Regulation 1 introduces a decentralised or centralised EC competition law enforcement system. The thesis therefore attempts, in the first place, to give clarification in this respect and, second, to contribute new viewpoints to this discussion. For achieving this purpose the thesis deals with the following questions of importance:

1. How are the concepts of centralisation and decentralisation to be understood exactly?
2. How can the enforcement systems under Regulation 17 and Regulation 1 be classified by applying these concepts of centralisation and decentralisation? Do the enforcement systems differ?
3. If Regulation 1 introduces a decentralised enforcement system does this constitute a "fundamental reform" for public EC competition law enforcement? May it lead to an increased application of Articles 81 and 82 EC by national competition authorities?

1.3 Method and Materials

The methods used in order to achieve the purpose of the thesis are mainly *descriptive and analytical judicial methods*.
In general, the single discussions start with explaining the problems or questions and why it is of importance to solve or answer them. Some background information are given as this is necessary for the general understanding. Legal terms or legislative materials in question are described and interpreted by using the traditional legal method of interpretation, specifically the literal, contextual and teleological interpretation tools. Due to the fact that Regulation 1 just recently entered into force no judgements of Community courts relevant to the question of decentralisation under Regulation 1 exist at present. But nevertheless, litigated court cases dealing with the relationships between the Commission on the one hand and the national competition authorities and the Member States on the other for enforcing EC competition law under the previous system of Regulation 17 have been useful to assess some of the overall merits of these relationships.

The purpose of the thesis opens up for *assessing other fields of EC law* in particular its constitutional institutional law regarding the obligations of Member States within the EU legal system in general and for EC competition law enforcement in particular.

The *method of discourse analysis* has been overly used in order to compare and if necessary to distinguish from the way how the question of decentralisation under Regulation 1 has been already discussed in public by the Commission, EC competition law experts and national competition authorities.

For achieving the purpose of the thesis the primary source of *material* has been legislative materials, guidelines and notices of the EU and the

Commission as well as the Commission's Annual Reports of Competition Policy, speeches given by present and former members of the Community Institutions and the EU's Press Releases. As already mentioned above, some few judgements of the Community Courts could additionally be used. Dictionaries have been a necessary tool for assessing the exact meaning of the terms "centralisation", "decentralisation" and "fundamental reform". Finally, Articles written by well-known scholars, practitioners and former students have been a helpful support.

1.4 Delimitations

EC competition law can be enforced through public and through private enforcement actions. The latter way exists due to the fact that the doctrine of direct effect applies to Articles 81 and 82 EC.[17] Decentralisation under Regulation 1 may therefore constitute a "fundamental change" for both of them.

The Commission and the national competition authorities are both responsible for the public enforcement of EC competition law and thereby subject to the same procedural rules and aims laid down in Regulation 17 and now in Regulation 1. Decentralisation with regard to the public EC competition law enforcement deals mainly with the division of powers between the Commission and national competition authorities. In contrast, national courts are responsible for the private enforcement of EC competition law. They award compensation for losses caused by breaches of Articles 81 or 82 EC by exercising their power under national procedural law. In this respect decentralisation rather deals with the separation of powers between executive and judicial organs.
Under this background it appeared that during the search for a definition of centralisation and decentralisation these terms were in general only used for describing the division of powers between administrative authorities. Out of this reason, but also because EC competition law enforcement, at least at present, mainly takes place through public enforcement actions, it is appropriate to focus in the following only on the question *if decentralisation under Regulation 1 is a* "*fundamental reform*" *for the public enforcement of EC competition law by national competition authorities*. In this regard only the national competition authorities' general power to apply Articles 81 and 82 EC will be scrutinised since for achieving the purpose of this thesis an analysis of specific competencies under Regulation 1 is not necessary.

With respect to the question if decentralisation under Regulation 1 constitutes a "fundamental reform" several of its possible effects could be discussed such as the achievement of a more efficient enforcement. Since decentralisation of EC competition law enforcement is the declared purpose of Regulation 1 it is appropriate to focus in this respect on the question if through Regulation 1 indeed a better, means increased, decentralised

[17] Case 127/73 BRT v. Sabam 1974 ECR. 51, para. 16

application of EC competition law by national competition authorities will be achieved. However, it has to be stressed that the purpose of the thesis is not to provide a definite answer to this question, but rather to discuss elements of Regulation 1 which may or may not give incentives for national competition authorities to actually enforce Articles 81 and 82 EC. For being able to give a definite answer it would have been necessary to assess how the enforcement system under Regulation 1 works in practice. But due to the fact that Regulation 1 just recently entered into force such an assessment could not be made at present.

2. Centralisation & Decentralisation

2.1 EC Competition Law Enforcement and the Question of Centralisation & Decentralisation

The concepts of centralisation and decentralisation are used in the field of public EC competition law enforcement mainly for describing the division of powers between on the one hand, the Commission, and on the other hand, the national competition authorities. A move from a, for instance, purely centralised towards a more decentralised enforcement regime will therefore effect mostly the allocation of powers between these authorities. On a first glance the usage and meaning of the concept decentralisation with regard to EC competition law enforcement seems to be clear. It shall imply a shift of enforcement responsibility from the Commission to several national competition authorities.

But for discussing decentralisation under Regulation 1 it is crucial to specify how these concepts are to be understood *exactly*. Only under this condition a clear and comprehensible scrutiny of the decentralisation situation prior and after the enforcement of Regulation 1 can be provided.

2.2 An uniform understanding of the Concepts of Centralisation & Decentralisation?

If a uniform and commonly used definition of centralisation and decentralisation with regard to EC competition law enforcement exists, this definition shall be used for the following assessment.

But, by analysing the voluminous debate about decentralisation of EC competition rules it appears that the concepts of centralisation and decentralisation were not defined. Reasons for this might be that the EC competition law experts[18] assume a common understanding in this respect. Instead, they directly started to discuss provisions of the former Regulation 17 and the new Regulation 1 which in their views give incentives for a more centralised or decentralised enforcement regime under the new Regulation 1. A common understanding of these concepts could as well not be discovered thereof. It seems that the understanding differs depending on the single observer's opinion about factors important for classifying a system as a centralised or a decentralised one. In particular for some observers the factors control and supervision were of importance while for other observers

[18] See, for example, Paul Craig and Gráinne de Búrca, supra 11, p. 1063; Damien Geradin, supra 16, p. 3

not. For underlying this divergence a short outline of the views expressed by two of the public enforcers of EC competition law, the Commission and the German Bundeskartellamt[19], shall be given.

According to the *Commission*, Regulation 1 is explicitly based on a more *decentralised* application of EC competition law.[20] However, the Institution itself or at least some of its members frequently raised concerns about the use of the term decentralisation in connection with EC competition law enforcement. According to *Hans M. Gilliams* the Commission is known for "not necessarily liking the term decentralisation" as this seems to suggest a shift in the preponderant responsibility for EC competition law policy from the Commission to national competition authorities.[21] This is confirmed by a view expressed by *Director Sven Norberg* of the Commission's Competition DG who has also held that he instead of using the term decentralisation prefers the term "delegation" for describing the division of power introduced by Regulation 1, as this better implies that the Commission will keep control over EC competition law.[22] It follows that within the Commission either different understandings of the term decentralisation exist or that the Commission is at least aware about its different understandings outside the Commission.

In contrast, Julia Toppel on behalf of the *Bundeskartellamt* expressed the view that rather *centralisation* than decentralisation of EC competition law enforcement will occur through Regulation 1.[23] Due to provisions of Regulation 1 which shall ensure a coherent application of EC competition law like in particular Article 11 (6) of Regulation 1, in its view overall control powers have been granted to the Commission. The coherence provisions of Regulation 1 will be in detail examined below. In essence, however, Article 11 (6) of Regulation 1 comprises the power of the Commission to withdraw a case from a national competition authority by opening a procedure with a view to adopting a decision. In the view of the Bundeskartellamt this will lead to a "hierarchic centralisation of decision-making competencies" with the Commission as supranational authority supervising national competition authorities.[24] It follows that the Bundeskartellamt seems to have used the factors control and supervision for classifying the system of enforcement powers under Regulation 1 rather as a centralised one.

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[19] German Federal Competition Authority

[20] This has been for the first time officially expressed in the Commission's *White Paper on Modernisation*, supra 8, para 42

[21] Hans J. Gilliams, supra 14, p. 452

[22] Sven Norberg, *Some practical aspects of the procedure before the European Commission in Art. 81-82 cases under Reg. 1/2003 in the light of its predecessor Reg. 17 from 1962*, guest lecture held at Lund's University on November 29, 2003

[23] Bundeskartellamt (Julia Topel), *Kohärenz der dezentralen Anwendung im System paralleler Kompetenzen*, Speech given at the "Conference of the Reform of European Competition law", 9.-10. November, 2000, p. 8
http://europa.eu.int/comm/competition/conferences/2000/freiburg/speeches/topel_de.pdf

[24] Bundeskartellamt (Julia Toppel), id., p. 8-9

2.3 Proposal for a Definition of the Concepts of Centralisation & Decentralisation

Since no uniform and commonly used definition appears to exist, an own proposal will be made regarding to how the concepts of centralisation and decentralisation will be understood in the following assessments.

But, providing such a proposal is not an easy task. In principle, it would be necessary to take various different aspects into consideration such as, for instance, the mere meaning of the words, historical and philosophical aspects and so forth. However, for achieving the purpose of the thesis it is sufficient to focus on how the concepts are to be understood from a *legal point of view* since in the following a legal analysis of the division of power under Regulation 17 and 1 shall be given. Special attention will be drawn to the factors control and supervision due to the fact that these factors have been for some authors decisive for categorising the systems as a centralised or a decentralised one.

The *Oxford English Dictionary* describes the meaning of the word "centralisation" especially as „the concentration of administrative power in the hands of a central authority, to which all inferior departments, local branches ect. are directly responsible."[25] Consequently the term "decentralisation" is paraphrased as "the action of decentralising which means to distribute administrative powers ect., which have been concentrated in a single head or centre", and, "especially in the field of Politics, the weakening of the central authority and distribution of its functions among the branches or local administrative bodies."[26] Accordingly, the understanding of the meaning decentralisation in general does not necessarily includes a loss of powers, but rather a redistribution of powers, whereas from the *political point of view* the *weakening* of the central authority will occur. From the political point of view the fact that an authority retains control and supervision over other authorities must lead to the conclusion that no weakening of the central authority occurs and therefore no decentralisation will take place. Consequently, from the political point of view the factors control and supervision are decisive for classifying an enforcement system as a centralist or a decentralised one.

But can this be held for the *legal point of view* as well? To rely on the general understanding of the terms cited above is not sufficient since some words have different meanings when being used in a legal context. According to *Creifeld Rechtwörterbuch* the terms centralisation and decentralisation are connected with the concentration of administrative authority ("Konzentration in der Verwaltung").[27] The latter term is

[25] The *Oxford English Dictionary*, Volume II B.B.C-Chalypsography (Second Edition 1989), p. 1035
[26] The *Oxford English Dictionary*, Volume IV Creel-Duzepere (Second Edition 1989), p. 327
[27] *Creifeld Rechtswörterbuch* (Ninth edition 1988) p. 661

described as the "concentration of powers in the hand of one central administrative authority". The shift of power to other authorities is called decentralisation regardless if these authorities are subordinated or separated ones. The subordinated as well as the separate authorities can be subject of different kinds of supervision and control. According to this understanding the retention of supervision and control does *not* preclude the classification of an enforcement system as a decentralised one.

It is, however, problematic to assume that in all remaining Member States of the EU the same legal understanding of centralisation and decentralisation is used. Meaning and functions of legal terms can differ in each country depending on its cultural and legal heritage.[28] Scrutinising all legal systems of the remaining Member States in this respect goes beyond the scope of this thesis and would be probably not be of much interest. Thus, the German legal understanding of the terms centralisation and decentralisation shall nevertheless form the basis (only) for the following legal assessment of the EC competition law enforcement systems under Regulation 17 and Regulation 1.

Hence, in principal the concentration of enforcement powers in the hand of one central administrative authority will be seen as centralisation. The shift in enforcement powers from one central authority to several others will be characterised as decentralisation *regardless* of the retention of control or supervision by the central authority.

[28] *West's Law & Commercial Dictionary in Five Languages*- English to German, Spanish, French, Italian - A-J, (1988), p. ix (preface) The term C*entralisation* means in German: Zentralisierung, Zentralisation, Spanish: centralización, French: centralisation, Italien: centralizzazione.

3. The Public Enforcement of EC Competition Law under Regulation 17 and Regulation 1

3.1 The Public EC Competition Law Enforcement Regime under Regulation 17

3.1.1 Background

Initially, until the entry into force of implementing legislation the authorities of the Member States were obliged to apply EC competition law according to Article 84 EC. With the creation and final adoption of Regulation 17 in 1962 such an implementing legislation existed being the framework for EC competition law enforcement for more than 40 years. Under Regulation 17 the Council tried to achieve two aims, first to foster economic efficiency by maximising economic welfare through the promotion of competition and second to promote market integration by preventing practices which have the effect of partitioning market along national lines.[29] At that time the integration of national markets was one of the Community's primary objectives and thus the promotion of this aim a special characteristic of the EC competition law enforcement regime.[30] Due to the fact that in the early years of the Community, competition policy was not widely known in many parts of the Community, Regulation 17 should help to establish a "culture of competition" in Europe.[31]

3.1.2 The Division of Power between the Commission and National Competition Authorities in theory: A centralist enforcement system?

3.1.2.1 Regulation 17

Article 9 of Regulation 17[32] was the main provision of Regulation 17 which dealt with EC competition law enforcement powers. For understanding its content the main features of the enforcement system established under Regulation 17 have to be clarified first.

For achieving the aforementioned aims the Council created a system which was, on the one hand, based on direct applicability of the prohibition rules

[29] Damien Geradin, supra 16, p. 8
[30] White Paper on Modernisation, supra 8, para 4
[31] ibid.
[32] Supplement A

laid down in Articles 81 (1) and 82 EC, means that the competent authority could directly prohibit behaviours which fall under these Articles.[33] On the other hand, it laid down special rules for the situation that an undertaking which concluded that its market behaviour will fall under the scope of Article 81 (1) EC wished to be exempted. Such an exemption was bound on prior notification of the restrictive practices to the Commission.[34]

Coupled with this parties' duty to notify the *Commission*, *Article 9 (1)* of Regulation 17 therefore provided that "the Commission shall have the *sole* power to declare Article 85 (1) inapplicable pursuant to Article 85 (3) of the Treaty." Applying the concepts of centralisation and decentralisation proposed above this enforcement power appears to be a pure centralist one by concentrating the power in the hand of one central authority, the Commission. In the view of the Commission this "centralist authorisation system" was necessary and the only appropriate enforcement system to achieve the aforementioned aims of EC competition law.[35]

With regard to the direct applicability of the prohibition rules laid down in Articles 81 and 82 EC the Council chose a different approach. *Article 9 (2)* of Regulation 17 provided that the Commission "shall have the power to apply Articles 85 (1) and Article 86 of the Treaty".[36] However, "as long as the Commission has not initiated any procedure under Articles 2, 3 and 6, *the authorities of the Member States shall remain competent* to apply Articles 85 (1) and 86 EC".[37] Applying the concepts of centralisation and decentralisation this approach contained decentralised elements by enabling several national competition authorities to directly apply Articles 81 (1) and 82 EC in their proceedings. But due Article 9 (3) of Regulation 17 the national competition authorities automatically lost their jurisdiction as soon as the Commission initiated proceedings. The Commission could by deciding to initiate such proceedings, as a consequence, "control" decentralisation.

It follows that the former EC competition law enforcement system under Regulation 17 constituted a system based on a mix between pure centralised and controlled decentralised elements.

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[33] Under the headline *Basic Provision* Article 1 of Regulation 17 provided that "(...) agreements, decisions and concerted practices of the kind described under Article 85 (1) of the Treaty and the abuse of the dominant position in the market, within the meaning of Article 86 of the Treaty, shall be prohibited, *no prior decision to that effect being required*." Special attention must be drawn to the fact that the exemption clause of Article 81 (3) EC does not fall under this Article.

[34] *Article 4 (1)* of Regulation 17 thus provided that for being exempted of Article 81 (1) EC the undertakings in question have to seek application by prior notification to the Commission, otherwise "no decision in application of Article 85 (3) may be taken".

[35] White Paper on Modernisation, supra 8, para 4

[36] Regulation 17, supra 3, Article 9 (2)

[37] Regulation 17, supra 3, Article 9 (3)

3.1.2.2 The 1997 Notice on Cooperation with National Competition Authorities

Although the general principles of the enforcement system were thus clearly laid down under Regulation 17's Article 9, the question remains when the national competition authorities and when the Commission should have applied and therewith enforce EC competition law.

Information thereof provide the *Notice on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Articles 85 or 86 of the EC Treaty*[38] which was published in 1997. This Notice gave guidelines for case allocation and practical cooperation between the Commission and national competition authorities concerning EC competition law enforcement. It is important to stress that this Notice did not affect the division of power laid down in Regulation 17.[39]

Regarding the *general case allocation* the Notice on cooperation with national competition authorities promoted decentralised application of Article 81 EC by national competition authorities under certain conditions. Thus the restrictive practices must have had mainly national effects, must not have displayed a particular Community interest such as the appearance of new points of law and must have been unlikely to qualify under Article 81 (3) EC.[40] For the application of Article 82 EC only an analysis of the first two conditions must have been made due the non-existence of an exemption clause similar to Article 81 (3) EC under Article 82 EC.[41]

The Notice on cooperation with national competition authorities furthermore gave detailed guidelines for cooperation between the Commission and national competition authorities in cases which were either dealt with by the Commission or by a national competition authority first. *Cases dealt with by the Commission first* could have three possible origins: own-initiative proceedings, notifications and complaints.[42] Own-initiative proceedings, means centralised enforcement, would be started by the Commission if the aforementioned conditions for decentralised application by national competition authorities would not be met. Due the applicants' duty to notify exclusively the Commission for seeking exception under Article 81 (3) EC such a notification could clearly not be handled by a national competition authority. Proceedings on the Commission's own initiative and notifications could therefore not lead to a decentralised processing by national competition authorities, but were in their very nature

[38] *Notice on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Articles 85 or 86 of the EC Treaty* of 15 October 1997, 1997 O.J. (C 313) 3 (hereinafter: Notice on cooperation with national competition authorities)
[39] Notice on cooperation with national competition authorities, id., para 9
[40] Notice on cooperation with national competition authorities, supra 38, paras 33-36
[41] Notice on cooperation with national competition authorities, supra 38, para 32
[42] Notice on cooperation with national competition authorities, supra 38, para 37

purely centralised. The situation however differed when it came to the question of initiating a proceeding because of a complaint made by a third party to the Commission. The Commission could after a careful examination of the complaint reject a complaint if it did not show sufficient Community interest.[43] If the competition authority of the Member State mostly affected by the contested agreement or practice would have had on a prior request by the Commission agreed to investigate and to decide on the complaint, it would have been referred to this competition authority either automatically or at the complaint's request.[44] In this special case and conditions decentralisation of EC competition law enforcement could have occurred in cases dealt with by the Commission first. *Cases which national competition authorities dealt with first* should have been basically those fulfilling the three (or two for applying Article 82 EC) conditions for decentralised application of EC competition law mentioned above. However, if a notification of a restrictive practice which was undergoing an investigation by a national authority was made to Commission the latter was obliged to make a decision on the substance of this request.[45] This would by virtue of Article 9 (3) of Regulation 17 remove from this national authority the power to apply Article 81 (1) EC even if such a notification was just made by the applicants in order to achieve exactly this result. The Commission being aware of this problem provided therefore that it could in the case of such a *dilatory notification*[46] decide to not examining such notifications as a matter of priority.[47]

In line with its aim to enhance decentralised application of EC competition law the Commission finally committed that it would in principle not *itself* initiate proceedings in the same case until the proceedings pending before the national authority had been completed due the effect of Article 9 (3) of Regulation 17.[48] Exemptions were however possible under *quite exceptional circumstances*, for instance in a situation where the national proceedings are unduly long drawn-out.[49]

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[43] Case T-24/90 Automec v. Commission [1992] ECR II-2223, para 79, Notice on cooperation with national authorities, supra 38, paras 41-47

[44] Notice on cooperation with national competition authorities, supra 38, para 46,

[45] Notice on cooperation with national competition authorities, supra 38, para 38 According to the case-law of the Court of first Instance, the exclusive powers of the Commission for granting an exemption under Article 81 (3) EC confer on the applicant the right to obtain from the Commission a decision on the substance of his request for exemption. See, for instance, Case T-24/90 Automec v. Commission [1992], supra 43, para 75

[46] Notice on cooperation with national authorities, supra 38, paras 55-56: A *dilatory notification* is one where a firm, threatened with a decision banning restrictive practice which a national authority is poised to take following an investigation under Article 81 (1) EC or under national law, notifies the disputed agreement to the Commission and asks for it to be exempted under Article 81 (3) EC. A *similar situation* arises where an agreement is notified to the Commission with a view to preventing the imminent initiation of national proceedings which might result in the prohibition of that agreement.

[47] Notice on cooperation with national authorities, supra 38, para 57

[48] Notice on cooperation with national authorities, supra 38, para 62

[49] Notice on cooperation with national authorities, supra 38, paras 62-63

3.1.3Public Enforcement of EC Competition Law under Regulation 17 in Practice

But how did the public enforcement system of EC competition law under Regulation 17 work *in practice*? Could decentralised application of EC competition law enforcement indeed be achieved through the Notice on cooperation with national competition authorities?

Some information thereof provides the Commission's annual *Reports on Competition Policy*[50]. The first two annual Reports on Competition Policy after the adoption of the Notice on cooperation with national authorities in 1997 contained detailed figures about this cooperation, hence about possibly achieved increased decentralised EC competition law enforcement. According to the *1998 Report on Competition Policy* the Commission rejected fifteen complaints for lack of Community interest, these cases were then handled by the authority of the Member State most affected by the practice complaint and furthermore encountered three cases of dilatory notification.[51] In the view of the Commission these figures showed an increased implementation of EC competition law on a decentralised basis (even though a more intensive use could be made).[52] The *1999 Report on Competition Policy* mentioned thirteen complaints rejected or suspended by the Commission in 1998 on the ground that a national authority was handling them, four discomfort letters, indicating that Article 81 (3) EC will not be applied, which were sent to the national authority most affected and hence gave it a free hand to apply Article 81 (1) EC if it wished to do so.[53] Furthermore two dilatory notifications were detected.[54] Compared to the previous year a more intensive use of decentralised public EC competition law enforcement could clearly not be recognised. In the following years the Reports on Competition Policy did not contained such detailed figures about the cooperation with national competition authorities.[55]

But already the aforementioned detailed figures from the years 1998 and 1999 lead to the assumption that the promoted decentralised public EC competition law enforcement did not work as well as expected. In its White Paper on Modernisation published in 1999 the Commission itself explicitly admitted that "the mechanisms for cooperation with national authorities have not to date encountered the success expected".[56] This is additionally supported by annual figures given by the Commission about the "Application of the community competition rules by national authorities"

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[50] All issues are available at http://www.europa.eu.int/comm/competition/annual_reports/
[51] The *XXVIIITH Report on Competition Policy 1998*, (European Commission 1999) p. 28
[52] id.
[53] The *XXIXTH Report on Competition Policy 1999* (European Commission 2000), p. 30
[54] id.
[55] In contrast, the 1993 Notice on cooperation with national courts is mentioned in each volume of the annual competition reports in an own chapter since its adoption in 1993, reporting the impact and use of this Notice by national courts.
[56] The White Paper on Modernisation, supra 8, para 39

which are also included in the Commission's annual *Reports on Competition Policy*.

Despite the adoption of the Notice on cooperation with national competition authorities the national competition authorities in their national proceedings barely applied Articles 81 (1) and 82 EC in any way. Thus, according to the latest annual Report on Competition Policy 2002 the Member States reported an average application of Articles 81 (1) and 82 EC by their national competition authorities of two or three times during the period of review (2002).[57] These numbers are in line with figures of the previous years. Taking Germany as an example, its Bundeskartellamt applied Articles 81 and 82 EC in 1997 three times[58], in 1998 four times[59], in 1999 five times[60], in 2000 one time[61] and finally in 2001 and 2002 three times[62]. In contrast, the Commission has opened steadily a number of new antitrust cases during the last couple of years.[63] For instance, in 2002 the Commission opened 321 new cases.[64]

No single case is known in which the Commission initiated *itself* proceedings in the same case already pending before a national competition authority due exceptional circumstances such as unduly long drawn-out mentioned above.[65]

Consequently, even though the Commission intended to decentralise the public enforcement of Articles 81 (1) and 82 EC under Regulation 17 by its Notice on cooperation with national competition authorities such a decentralisation did almost not take place in practice. In fact, the enforcement of EC competition law remained nearly completely in the hand of one central authority, the Commission.

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[57] The *XXXIInd Report on Competition Policy 2002*, (European Commission 2003) p. 319-326

[58] The *XXVIITH Report on Competition Policy 1997*, (European Commission 1998), p. 334

[59] The *XXVIIITH Report on Competition Policy 1998*, (European Commission 1999), p. 34

[60] The *XXIXTH Report on Competition Policy 1999*, (European Commission 2000) p. 33

[61] The *XXXTH Report on Competition Policy 2000*, (European Commission 2001) p. 322

[62] The *XXXIst Report on Competition Policy 2001*, (European Commission 2002) p. 354-355, The *XXXIInd Report on Competition Policy 2002*, (European Commission 2003) p. 328

[63] The Commission's annual Report on Competition Policy only gives an overview about its application of antitrust rules in a whole, which means Article 81, 82 and 86 EC.

[64] The *XXXIInd Report on Competition Policy 2002*, (European Commission 2003)

[65] Alan Riley, *EC Antitrust Modernisation: The Commission does very nicely - Thank you! Part I*: *Regulation 1 and the notification burden*, European, E.C.L.R. 2003, 24 (11), p. 612

3.2 The EC Competition Law Enforcement under Regulation 1

3.2.1Background

As already noted above, due to the fact that in the early years of the Community competition policy was not widely known in many parts of the Community, the aforementioned EC competition law enforcement system of Regulation 17 was deemed to be necessary to establish a "culture of competition" in Europe.[66] But because of the creation of the Economic and Monetary Union and clarifications of EC competition law and policies over the past forty years, the Commission promoted a modernisation of these EC competition law enforcement rules already since the middle of the 90ies.[67] Such a modernisation was declared as being possible and necessary to warrant a systematic, efficient and legitimate application of competition rules in an enlarged Union.[68] The main aspects of the modernisation reform were related to decentralisation of EC competition law enforcement. Due to experience gained so far by businesses as well as by national competition authorities and courts the Commission drew the conclusion that such as decentralisation was not only desirable, but also feasible.[69] The Commission thereby wishes to be able to concentrate on detecting and stopping the most serious infringements of EC competition law.[70]
Under this background the Commission adopted the Proposal[71] which was transformed by the Council into Regulation 1.

3.2.2The Division of Power between the Commission and National Competition Authorities in theory: A move towards more decentralisation?

3.2.2.1 Regulation 1

In contrast to Regulation 17, Regulation 1 has not just one core provision, but several important provisions dealing with division of enforcement powers between the Commission and national competition authorities with respect to Articles 81 and 82 EC. Some of these provisions are laid down in Chapter II of Regulation 1.
According to *Article 4* of Regulation 1 the Commission "shall have the powers provided for by this Regulation" for enforcing Articles 81 and 82

[66] See 3.1.1 Background (p. 11 of the Thesis)
[67] White Paper on Modernisation, supra 8, paras 6-8
[68] European Union Competition Policy, *XXXIInd Report on Competition Policy 2002*, European Commission DG for Competition, (Foreword by Mario Monti), p. 3
[69] id.
[70] European Union Competition Policy, *XXXIInd Report on Competition Policy 2002*, supra 68, p. 4
[71] Proposal, supra 9

EC[72], while under *Article 5*[73] of Regulation 1 the competition authorities of the Member States "shall have the power to apply Articles 81 and 82 of the Treaty in individual cases." Accordingly, the national competition authorities have under the new Regulation 1 the power to apply in their national proceeding the *entire* Article 81 EC, which means not only Articles 81(1) and 82 EC, but also *Article 81 (3) EC*. The national competition authorities are therewith empowered to exempt restrictive practices which fall under Article 81 (1) EC. The way how such an exemption may be granted has been changed under Regulation 1. Unlike to its predecessor, the granting of an exemption is not bound anymore on prior notification of restrictive practices to the competent authority. This follows from Article 1 (2) of Regulation 1 which provides that "agreements (...) caught by Article 81 (1) of the Treaty which satisfy the conditions of Article 81 (3) EC shall not be prohibited, *no prior decision to that effect being required*".[74] No application for seeking an exemption and no formal decision on this matter is thus required anymore. It follows that, like under the former enforcement system with regard to Articles 81(1) and 82 EC, Article 81 (3) EC is now directly applicable by both the Commission and the national competition authorities. As a natural consequence, Article 81 (3) EC will only be applied in the course of other, for instance, infringement proceedings. This constitutes a replacement of a former system of administrative exemption by a system of legal exemption.[75] However, the block exemption system established under Regulation 17 is retained.[76] According to *Article 29 (2)* of Regulation 1 not only the Commission but also the competition authority of Member States may withdraw the benefit of a block exemption from an individual undertaking or agreement under certain conditions, but only in respect of its own territory.[77] For the adoption of block exemptions the Commission will remain to be solely competent.[78]

Applying the concept of centralisation and decentralisation it appears that by giving away the Commission's *sole* power for granting exemptions under Article 9 (1) of Regulation 17 to several other national authorities, clearly, a shift of powers, means decentralisation, occurred.

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[72] Regulation 1, supra 1, Article 4

[73] Supplement B

[74] Regulation 1, supra 1, Article 1 (2)

[75] Prof. Dr. Wernhard Möschel, *Effizienter Wettbewerbsschutz in einer erweiterten Gemeinschaft durch Einbeziehung der nationalen Wettbewerbsbehörden und nationalen Gerichte*, (para 4) speech given at the Conference on "The Reform of European Competition Law", Freiburg 9 and 10 November 2000, published under http://europa.eu.int/comm/competition/conferences/2000/freiburg/speeches/moeschl_de.pdf . Möschel is criticising the change for being highly risky for the competition policy.

[76] According to *Alan Riley* the retention of the system of block is at first sight conceptually odd when the individual exemption system is abolished. Sound practical reasons (esp. the providence of legal security to the industry) justify this approach. Alan Riley, supra 65, p. 604

[77] Regulation 1, supra 1, Article 29

[78] This follows from Article 5 of Regulation 1 which only grants the national competition authorities enforcement powers concerning *individual* cases.

However, as already noted above, not only the national competition authorities, but also the Commission remains competent to enforce Articles 81 and 82 EC according to Article 4 of Regulation 1. Thus, Regulation 1 creates a system of parallel competences like under the former Regulation 17 with regard to Articles 81 (1) and 82 EC. By means of Article 9 (3) of Regulation 17 this former system of decentralised enforcement contained a centralised element. I have therefore characterised the decentralisation under Regulation 17 as "controlled decentralisation".[79]

Regulation 1 maintains this centralised element under its *Article 11 (6)*. This Article provides that "(...) the initiation by the Commission of proceeding (...) *shall relieve the competition authorities of the Member States of their competence* to apply Articles 81 and 82 of the Treaty."[80] Already in its White Paper on Modernisation the Commission had expressed its view that in a system of concurrent jurisdiction the maintenance of such a measure is necessary or even essential for ensuring coherent application of EC competition law.[81] Irrespective of its underlying aim, this provision has nevertheless the aforementioned effect that national competition authorities are automatically relieved of their competence if the Commission initiate its own proceedings. Like under Regulation 17, this has an impact on the division of power between the Commission and the national competition authorities and therewith on the decentralisation issue.

Regulation 1 contains other measures which also have the aim to ensure a coherent application of EC competition rules, in particular *Article 16 (2)* of Regulation 1[82] which lays down principle rules for the "uniform application of Community competition law" and *Article 11 (5*) of Regulation 1 which provides that "national competition authorities may consult the Commission on any case involving the application of Community law".[83] However, even though the Commission thereby obtains control and supervisory powers this has no influence on the decentralisation issue itself since by the use of these measures the division of power will be not directly affected.[84]

Consequently, despite the abolishment of the centralised authorisation system and thus of the main centralist feature of the former Regulation 17, the EC competition law enforcement system under Regulation 1 cannot be characterised as pure decentralised, but rather as "*controlled* decentralised".

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[79] See 3.1.2.1 Regulation 17 (p. 12 of this Thesis)
[80] Regulation 1, supra 1, Article 11 (6)
[81] White Paper on Modernisation, supra 8, para 15
[82] Regulation 1, supra 1, Article 16 (2) provides: When competition authorities of the Member States rule on agreements (...) under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, the cannot take decisions which would run counter to the decision adopted by the Commission.
[83] Regulation 1, supra 1, Article 11 (5)
[84] This follows from the Proposal of the Concepts of Centralisation and Decentralisation, p. 12-14. A different view is, however, expressed by for instance the Bundeskartellamt (Julia Topel), supra 23 , p. 8

But nevertheless, Regulation 1 provides a move towards more decentralisation.

3.2.2.2 The Commission Notice on cooperation within the Network of Competition Authorities

Like under Regulation 17, the general principles of the enforcement system are thus clearly laid down under Regulation 1's provisions. Still, within this legal framework the question remains when the national competition authorities and when the Commission shall apply and therewith enforce EC competition law.

Information thereof provide the *Commission Notice on Cooperation within the Network of Competition Authorities*[85] which replaces the 1997 Commission Notice on cooperation with national competition authorities, and which contains guidelines for the division of work and for the practical cooperation between the Commission and national competition authorities. In this regard a new feature of the cooperation system under Regulation 1 must be emphasised, the creation of the "*European Competition Network*" ("ECN"). This network shall ensure that the Community competition rules are applied in "close cooperation"[86] between the Commission and national competition authorities by providing a forum for discussion and cooperation.[87] The ECN thus shall be "the basis for the maintenance of a common competition culture in Europe".[88] Moreover, compared to former Notice on cooperation with national competition authorities the structure of the Notice on cooperation within the ECN changed due to the fact that the system of prior notification has been abolished and therewith the problems notifications (could) have created for the allocation of powers.

Since Regulation 1 is based on the system of parallel competences it follows that all cases can be dealt with in principle by a single national competition authority or by several national competition authorities in parallel or by the Commission.[89] The aim is that cases are dealt with by the most appropriate authorities within the ECN, the objective being that each case should be handled by a single authority.[90] A *single national competition authority* will be regarded as being well placed to deal with a case if there is a material link between the infringement and the territory of its Member State which will be usually the case if the agreement or practice in question substantially affects competition mainly within its territory.[91] Furthermore a single action

[85] *Commission Notice on Cooperation within the Network of Competition Authorities*, OJ C 101 2004/C 101-0081 (27.04.2004) (hereinafter: The Notice on cooperation within the ECN)
[86] Regulation 1, supra 1, Article 11 (1)
[87] Notice on cooperation within the Network of Competition Authorities, supra 85, para 1
[88] id.
[89] Commission Notice on cooperation within the Network of Competition Authorities, supra 85, para 5
[90] Regulation 1, supra 1, Recital (18)
[91] Commission Notice on cooperation within the Network of Competition Authorities, supra 85, paras 8-11

of a national competition authority is appropriate if this action is sufficient to bring the entire infringement to an end, whereas *parallel action by two or three national competition authorities* are appropriate if such a single action would be not sufficient and where the agreement or practice has substantially affect on competition mainly in their territories.[92] The *Commission* is particularly well placed if an agreement or practice has effect on cross-border markets covering more than three Member States or several national markets.[93] Moreover, out of Community interest the Commission is considered to be competent if it requires the adoption of a Community decision, first, to develop Community competition policy or, second, to ensure effective enforcement or, third, if a case is closely linked to other Community provisions which are more efficiently applied by the Commission or for which the Commission has exclusive competence.[94] No further guidance for the interpretation of these conditions is given.

The Notice on cooperation within the network of ECN gives furthermore detailed guidelines for the mechanism of cooperation within the ECN for the purpose of case allocation.[95] Among others reallocation after the initiation of a case by one or several national competition authorities is both possible and sometimes necessary for an effective protection of competition.[96] Reallocation issues should be solved swiftly, normally within a period of two months.[97]

But when will the Commission initiate proceedings under Article 11 (6) of Regulation 1? In this regard the Notice on cooperation within the ECN, like its predecessor, distinguishes basically between two situations.
First, where the Commission is the authority to initiate proceedings first national competition authorities may no longer deal with a case and they can no longer start their own proceedings with applying EC competition law due to the effect of Article 11 (6) of Regulation 1.[98] Second, where one or more national competition authorities initiate proceedings[99] first (about which they have informed the ECN) the Commission can initiate proceeding

[92] Commission Notice on cooperation within the Network of Competition Authorities, supra 85, paras 11-12
[93] Commission Notice on cooperation within the Network of Competition Authorities, supra 85, para 14
[94] Commission Notice on cooperation within the Network of Competition Authorities, supra 85, para 15
[95] Commission Notice on cooperation within the Network of Competition Authorities, supra 85, paras 16-30
[96] Commission Notice on cooperation within the Network of Competition Authorities, supra 85 para 7. Accordingly, it will be endeavour to reallocate cases to a single well placed competition authority as often as possible.
[97] Commission Notice on cooperation within the Network of Competition Authorities, supra 85, para 18 The period starts from the date of the first information sent to the network pursuant to Article 11 (2) and (3) of Regulation 1.
[98] Commission Notice on cooperation within the Network of Competition Authorities, supra 85, para 53
[99] According to Article 11 (3) of Regulation 1 this means first formal investigative measures.

during the aforementioned initial allocation period of two months.[100] Besides the requirement of having consulted the authorities concerned before, no further conditions for the initiation of proceeding are imposed on the Commission. *After* this allocating phase the Commission will "in principle only apply Article 11 (6) of Regulation 1" if the conditions of one of explicitly listed situations and further requirements such as the providence of written reasons for the initiation are or have been fulfilled.[101] One of these situations, for instance, describes the need to adopt a Commission decision to develop Community competition policy in particular when a similar competition issue arises in several Member States or to ensure effective enforcement.[102] No further guidance for the interpretation of these conditions is given.

3.2.3 Public Enforcement of EC Competition Law under Regulation 1 in practice

Due to the fact that Regulation 1 just recently entered into force on the first of May 2004 no actual figures about the application of EC competition rules in cases initiated by national competition authorities can be given at present. An assessment similar to that which made beforehand with regard to the practical situation under Regulation 17 can therefore not be provided.

3.3 Decentralisation under Regulation 17 and Regulation 1: A comparison

By applying the concepts of centralisation and decentralisation provided in the second chapter, the assessment of EC competition law enforcement under, first, Regulation 17 and, second, Regulation 1 has shown that already under Regulation 17 a controlled decentralised enforcement of EC competition law had been envisaged and promoted by the Commission's Notice on cooperation with national competition authorities. For the enforcement of Article 81 (3) EC, however a pure centralist enforcement regime coupled with the need of prior notification was chosen by concentrating the power of enforcement in the hand of one central authority, the Commission. Under Regulation 1 these two latter features are abolished, hence granting national competition authorities the power to apply not only Article 82 EC, but also Article 81 EC directly in its entity. According to Regulation 1 and the Commission's Notice on cooperation within the ECN the principle objective is that a single national authority shall handle a case. However, Regulation 1 maintains the Commission's power to withdraw a case form a national competition authority and thus the other centralised

[100] Commission Notice on cooperation within the Network of Competition Authorities, supra 85, para 54

[101] Commission Notice on cooperation within the Network of Competition Authorities, supra 85, paras 54 (a)-(e) - 56

[102] Commission Notice on cooperation within the Network of Competition Authorities, supra 85, para 54 (d)

feature of the former enforcement system under Regulation 17. The enforcement system under Regulation 1 must therefore also be described as a (just) controlled decentralised one.

If follows that the abolition of the Commission's exclusive power for granting exemptions according to Article 81 (3) EC is the main change made under Regulation 1 with regard to decentralised EC competition law enforcement.

4. The Outcome: A "Fundamental Reform" for the Enforcement of EC Competition Law by Public Authorities?

4.1 Background - A "fundamental reform"

As already noted above, Regulation 1 has often been held for constituting a "fundamental reform" for the enforcement of EC competition law.[103] But what *is* actually a "fundamental reform"? According to the *Oxford English Dictionary* a "reform" is in general, a change or amendment made to something to make it better.[104] The adjective "fundamental" indicates that something is going to the root of the matter.[105]

Since decentralisation of the EC competition law enforcement is the declared purpose of Regulation 1 the question arises if, in the first place, by means of Regulation 1 a fundamental change with regard to decentralised application of Articles 81 and 82 EC by national competition authorities has taken place. If this should be the case, it is secondly to ask if this change leads to "something better". Under the term "something better" various possibly effects of Regulation 1 can in principle be discussed, for instance the lead to a more efficient enforcement of EC competition law.[106] However, with regard to the purpose of Regulation 1 the principle question in this regard must be, if the changes of Regulation 1 will lead in fact to a better, means increased, decentralised application of EC competition law by national competition authorities.

4.2 From Regulation 17 to Regulation 1: A fundamental change for decentralised application of EC competition law?

The comparison of EC competition law enforcement under Regulation 17 and Regulation 1 has shown that the abolition of the Commission's exclusive power for granting exemptions according to Article 81 (3) EC is the main change made under Regulation 1 with regard to decentralised EC

[103] Sven Norberg, supra 5
[104] The *Oxford English Dictionary*, Volume XIII, p. 479-480
[105] The *Oxford English Dictionary*, Volume VI, p. 266
[106] As did many commentators, for example Hans M. Gilliams, supra 15, and Damien Geradin, supra 16

competition law enforcement. But does this change constitute a "fundamental" change?

According to *Claus Dieter Ehlermann*, a former Director General of Competition at the Commission, the reorganisation of responsibilities between the Commission and national competition authorities is not only a fundamental change but a "legal and cultural revolution" by breaking with the traditional belief that the exclusive responsibility of the Commission for granting exemptions is a sort of "natural" Commission monopoly.[107] For forty years the Commission and its DG competition took the view that only a central EC authority can determine whether the conditions for an exemption are fulfilled due an often highly complex assessment and weighting of different facts, elements and interests in this regard.[108] In the view of the Commission and the vast majority of EC competition experts only the *Commission* was qualified to proceed with this task.[109]

Convincingly, the Commission's monopoly to apply Article 81 (3) EC *was* one of the main if not the core feature of EC competition law enforcement for the last four decades. With the abolition of this monopoly and the introduction of a system in which any national competition authority can apply Article 81 (3) EC a fundamental change has occurred.

4.3 Can an Increase of decentralised EC competition law enforcement by national competition authorities be expected?

But will this fundamental change lead in fact to an increased decentralised EC competition law enforcement by national competition authorities and consequently to a "fundamental reform" in this respect?

As already noted, due to the fact that Regulation 1 just recently entered into force no actual figures about the application of EC competition law by national competition authorities can be given. No definite answer can therefore be given to this question at present. But nevertheless, in the following some elements of the enforcement system under Regulation 1 will be discussed which may or may not stimulate national competition authorities to increasingly enforce Article 81 and 82 EC.

4.3.1Article 5 of Regulation 1: An incentive for the application of EC Competition Law?

Under Regulation 17 no duty to act was imposed on national competition authorities. This followed from the wording of Article 9 (3) of Regulation

[107] Claus Dieter Ehlermann, supra 12, p. 537-538
[108] id., p. 537
[109] Claus Dieter Ehlermann, supra 12, p. 538

17 which provided that "the authorities of the Member States *shall remain competent* to apply Articles 81 (1) and 82 EC". It has, however, been additionally discussed if by means of the general principle of cooperation laid down in Article 10 EC a concrete obligation to enforce EC competition law could be imposed on national competition authorities.[110] But neither statements by the Commission nor decisions made by the European Court of Justice (ECJ) supported such a viewpoint.[111]
In its decisions the latter rather stressed that under Article 10 EC national competition authorities are (merely) obliged to cooperate with the Commission in the implementation of EC competition law.[112] Moreover, since national competition authorities are responsible for ensuring that Article 81 EC is observed, they have a duty to declare a national measure which is contrary to the combined provisions of Articles 10 and 81 EC inapplicable.[113]
The Commission never said that national competition authorities have a duty to apply EC competition law, but rather provided in its Notice on cooperation with national competition authorities that "it is *desirable* that national authorities should apply Articles 85 or 86 of the Treaty".[114] As a possibly result of this non-obligation some Member States not even enabled their national competition authorities to apply EC competition law. In 2002, for instance, still only twelve of at that time fifteen Member States had conferred such powers on their national competition authorities.[115]

In contrast, under *Article 5* of Regulation 1 the national competition authorities are now explicitly obliged to apply Articles 81 and 82 EC by providing that they "(...) *shall have the power* to apply Articles 81 and 82 of the Treaty (...)".[116] Under *Article 35* of Regulation 1 the Council therefore imposed on the Member States the obligation to designate and empower authorities to apply EC competition law as public enforcers before 1 May 2004.[117] Consequently, in all Member States of the EU[118] the competition authorities nowadays not only have the possibility, but the obligation to apply Articles 81 and 82 EC. It follows that if a national competition

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[110] Marloes Janssen, Relationship between the Commission and the National Competition Authorities and its developments, Lund University 2003 (unpublished) p. 4-5
[111] Id.
[112] Suzanne Kingston, *A "new division of responsibilities" in the proposed regulation to modernise the rules implementing Articles 81 and 82 E.C.? A warning call*, E.C.L.R. 2001, p. 341
[113] Case C-198/01 *Congorzio Industrie Frammiferi (CFI) v. Autorità Garanta della Concorrenza e del Mercato* 9.9.2003 para 58
[114] Notice on cooperation with national competition authorities, supra 38, para 15
[115] The *XXXIInd Report on Competition Policy 2002*, supra 55, p. 337: However, in 1997 only seven Member States did confer such power on their national competition authorities (p. 334). The number of those thus steadily increased.
[116] Regulation 1, supra 1, Article 5 (1)
[117] Regulation 1, supra 1, Article 35 (1)
[118] Since the ten new Member States did not ask for any transitional period with regard to the application of Article 81 and 82 EC the national authorities of these Member States have to apply EC competition law from he first day of their membership onwards (Frank Emmert, supra 14, p. 652)

authorities of a Member States fails to fulfil this obligation, the Member State is in breach of its obligation under the Treaty and may become subject to proceedings under Article 226 EC and to claims for state liability according to the doctrine established by the ECJ in the Cases C-6&9/90 *Francovich and Bonifaci v. Italy*.[119]

All this can possibly lead to an increased application of EC competition law by national competition authorities, hence to an increase of decentralised enforcement.

4.3.2Article 3 of Regulation 1: An incentive for the application of EC Competition Law?

4.3.2.1 Background: The Impact of National Competition Law Legislation on Decentralisation of EC Competition Law

Article 3 of Regulation 1 provides *rules about the relationship between Articles 81 and 82 EC and national competition laws*. Even though this Article does, on the first glance, not deal with the division of enforcement responsibilities between the Commission and national competition authorities it is, nevertheless, of particular importance for the new enforcement system that national competition authorities not just apply their national competition laws, but Articles 81 and 82 EC to all agreements and practices which may affect trade between Member States. Commission policy is to increase decentralisation of *EC* competition law enforcement.[120] Consequently, in the view of the Commission and many EC competition law experts an increased reliance on national competition laws represents a move in the opposite direction[121] (even though national competition law regimes are nowadays modelled on EC competition rules) [122].

The Commission originally suggested in its *Proposal* to Regulation 1 that *only* EC competition law should be applicable to agreements or practices capable of affecting trade between Member States.[123] At that time the same agreement or conduct could be subject of EC competition law and several national competition laws. This concept of parallel application of Community and national competition law was developed by the ECJ in its Case 14/68 *Walt Wilhelm v. Bundeskartellamt* which furthermore, in accordance with the principle of primacy of Community law, established that national law can applied only in so far as it does not prejudice the

[119] Cases C-6&9/90 *Francovich and Bonifaci v. Italy* 1991 ECR I-5357

[120] Claus Dieter Ehlermann, *Reform of European Competition Law - Coherent application of EC Competition Law in a System of Parallel Competencies*, Speech given at the "Conference of the Reform of European Competition law", 9.-10. November 2000, p. 1 http://europa.eu.int/comm/competition/conferences/2000/freiburg/speeches/ehlermann.pdf

[121] David J. Gerber, *Law and Competition in Twentieth Century Europe - Protecting Prometheus*, p. 400

[122] For an overview about the various national competition law systems see Richard Wish, supra 10, p. 50-53

[123] Proposal, supra 9, Article 3, p. 15

uniform application of the EC competition rules throughout the common market.[124] Even though in this judgement the ECJ left open whether national competition laws can be stricter than EC competition law, in the following years the rule was established that agreements and practices within the meaning of Article 81 (3) EC can be prohibited under stricter national law as long as this does not impair the effective and uniform application of EC competition law.

In the view of the Commission and of other EC competition law experts the fact that agreements and practices of undertakings can be subject to different and even stricter national standards is contrary to the notion of a single market.[125] They argue that competition is thereby distorted since each time companies engage in inter Community trade they must examine the position not only under EC competition law but also under each of the laws of the Member States affected by the agreement.[126] Companies thus will have to comply with the strictest national law, even though this can reduce the benefits created by the agreement in other Member States.[127] Consequently, in the Proposal the application of a single set of rules was deemed to be necessary.[128]

However, Article 3 of the Proposal was heavily criticised by various (large) Member States for excessively enlarging the scope of application of Community law.[129] Thus, the German Monopolies Commission ("MK") questioned in its report the compatibility of Article 3 of the Proposal with the principles of proportionality and subsidiarity due to the fact that it would lead to the complete displacement of national competition law since many agreements fulfil the requirement of being capable of affecting cross-border trade.[130]

Ultimately a compromise version was adopted by Regulation 1. *Article 3* of Regulation 1 thus provides first, that national competition authorities shall *also* apply Articles 81 and 82 EC where they apply national competition law to agreements and practices which may affect trade between Member States.[131] Second, under Article 3 (2) of Regulation 1 is introduced that national competition law may not prohibit agreements and practices within the meaning of Article 81 (1) EC which are permitted under EC competition law. This prohibition does not extend to national competition laws which

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[124] Case 14/68 *Walt Wilhelm v. Bundeskartellamt* 1969 ECR 1 paras 3-4
[125] Id.
[126] Andreas Schraub, *Reform of European competition law*, Speech given at the „Conference of the Reform of European Competition law", November 9.-10., 2000, p. 4-5 http://europa.eu.int/comm/competition/speeches/text/sp2000_026_en.pdf
[127] Id.
[128] Proposal, supra 9, Article 3, p. 15-16 According to Claus Dieter Ehlermann, supra 120, p. 1 Article 3 of the Proposal is „fully justified".
[129] Frank L. Fine, supra 13, p. 887
[130] Jeremy Lever, *The German Monopolies Commission's Report on Problems consequent upon the Reform of the European Cartel Procedure*, E.C.L.R. (2002), p. 322
[131] Regulation 1, supra 1, Article 3 (1)

impose stricter rules (than Article 82 EC) on unilateral conducts.[132] Third, Article 3 (3) EC does not preclude Member States from implementing on their territory national legislation, which protects predominantly other legitimate interests.[133] Consequently, this compromise version remains the aforementioned concept of parallel application of EC and national competition law, but introduces the prohibition of stricter national laws with regard to Article 81 EC.

4.3.2.2 Article 3 of Regulation 1: A definite Incentive?

But does Article 3 of Regulation 1 possibly lead to an increased application of EC competition law?

In some Member States, like Germany, national competition authorities have effectively enforced their national competition law for decades and thus have built up a legal tradition and culture in this regard. Not only these authorities but also the Member States themselves seem to have therefore a natural reluctance to switch to EC competition law.[134] Thus, in its aforementioned report the MK raised its critics concerning the originally suggested Article 3 of the Proposal "particularly because of the richness of German national law in this area competition law ".[135] Furthermore it has to be kept in mind that even though the national competition authorities already under Regulation 17 could *also* apply EC competition law, in practice such application nearly did not take place at all. Of course, reasons for this reluctance might have been the Commission's exclusive competence to grant exemptions under Article 81 (3) EC and the fact that in some Member States their national competition authorities did not have the power to apply EC competition law. But nevertheless, those which had been granted the power to apply Articles 81 (1) and 82 EC could have at least fully applied Article 82 EC -- but they did not do so. The same must be held for the application of Article 81 (1) EC with regard to hard-core cartels where the undertakings in question could by no means invoke an exemption under Article 81 (3) EC.

It can certainly be argued that due to their new obligation to apply EC competition law the national competition authorities will start to actually apply Articles 81 and 82 EC. Due the aforementioned natural reluctance it is however still crucial to provide clarifications and guidance to the question when EC competition law applies so that the national competition authorities know when they have to apply these rules in addition to their national laws. The inter-Member State trade clause is of central importance

[132] Regulation 1, supra 1, Article 3 (2) s. 2
[133] Regulation 1, supra 1, Recital (9)
[134] Mario Todino, *Modernisation from the Perspective of National Competition Authorities: Impact of the Reform on Decentralised Application of EC Competition Law*, E.C.L.R. 2000, p. 352
[135] Jeremy Lever, supra 130, p. 322

in this respect as it "defines the boundary between the areas respectively covered by Community law and the law of the Member States"[136].

The Commission recently adopted a Notice on *Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty*[137] in order to provide guidance to enforcers and businesses. It sets out principles developed by the Community Courts in relation to the interpretation of this concept.[138] Both the Commission and the Community Courts have initially adopted a broad interpretation of the inter-state trade concept, thereby enlarging the scope of EC competition law.[139] Over the last years, however, a more narrow interpretation could be recognised, which, for instance, the judgement of the ECJ in the Case Carlo Bagnasco v. BPN[140] and the decision of the Commission in Dutch Banks[141] reflect. Thus, since the Guidelines on the effect of trade concept are not intended (and cannot) to change the scope of the inter-state trade concept its narrow interpretation may lead to more extensive application of national competition law to the detriment of EC competition law.

Naturally, this problem might have arisen as well under Article 3 of the Proposal. But due to the overlapping scope of EC competition law and national competition laws under Article 3 (1) of Regulation 1 an additional problem may occur - the *risk of spill-over effects* of national competition laws which are similar to EC competition laws but which are interpreted differently by the national competition authorities.[142] This may have an impact on the coherent application of EC competition law.[143]

Moreover, *Article 3 (3)* of Regulation 1 opens up the possibility for applying solely national law which pursues predominantly an interest different from that pursues by Articles 81 and 82 EC which is the protection of competition on the market.[144] Some authors assume that national competition authorities will use this Article as an "escape mechanism" from the application of EC competition law.[145] Even if this scenario will not take

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[136] Case 22/78 *Hugin Kassaregister AB v Commission* 1979 ECR II-1869, para 17

[137] Commission Notice - *Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty*, OJ 101 2004/C 101-0043 (27.04.2004) (hereinafter: Guidelines on the effect of trade concept)

[138] Id., para. 3

[139] Richard Wish, supra 10, p. 111

[140] Case 215/96 and C-216/96 *Bagnasco e altri v Banca Popalare di Novara e Cassa di Genova e Imperial* 1999 ECR I-135, paras 48-51

[141] Commission's Decision *Nederlandse Vereiniging van Banken* OJ 1999 L 271/28 para 57

[142] Claus Dieter Ehlermann, supra 120, p. 3

[143] However, the *Bundeskartellamt* for instance, does not necessarily see incoherent application of EC competition law as a disadvantage, but as rather necessary for the further development of EC law (Bundeskartellamt/Julia Topel, supra 23, p. 9)

[144] Regulation 1, supra 1, Recital (9)

[145] Alan Riley, *EC Antitrust Modernisation: The Commission does very nicely - Thank you! Part 2: Between the idea and the reality: Decentralisation under Regulation 1*, E.C.L.R. 2003, 24 (12) at footnote 67

place it is however questionable if Article 3 (3) of Regulation 1 will provide clear guidance about the relationship of EC competition law and national law. Most laws pursue more than one interest, consequently disputes may arise about which is their predominantly aim. In the end, this will be a matter of the Community judiciary.

Consequently, compared to the originally suggested Article 3 of the Proposal, Article 3 of Regulation 1 enhances national competition authorities' possibility to circumvent or at least reduce the application of EC competition law. Despite their obligation to apply EC competition law under Article 5 of Regulation 1, increased decentralised enforcement of EC competition law by national competition authorities will thus probably depend to great extent on the *willingness* of national competition authorities to actually apply EC competition law.

At present, Article 3 of Regulation 1 does not seem to be a provision which will lead to an increased application of *EC* competition law.

4.3.3Article 11 (6) of Regulation 1 and other supervisory powers of the Commission: Incentives for the application of EC Competition Law?

As already noted before, under the enforcement system of Regulation 1 the Commission obtains some supervisory powers laid down especially in Article 11 of Regulation 1. This Article does contain a consultation mechanism and, more crucially, maintains the power of the Commission to withdraw a case from a national competition authority by opening a procedure with the view to adopting a decision.[146] This maintenance of the Commission's power under the former Article 9 (3) of the Regulation 17 was heavily criticised by national competition authorities and some EC law experts for keeping, for instance, a "hierarchical institutional architecture"[147]. In line with this criticism it has been stated that this power was a reason why national competition authorities were naturally reluctant to apply EC competition law under the former enforcement system of Regulation 17.[148]

Even though no single case is known in which the Commission in fact made use of this power[149] there are some signs that this reluctance against the Commission's withdrawal powers is retained with regard to Article 11 (6) of Regulation 1.
The Bundeskartellamt, for instance, stated that it is aware of the fact that the Commission may withdraw cases from it at any time, means even nearly at

[146] Regulation 1, supra 1, Article 11 (6)
[147] Suzanne Kingston, supra 112, p. 344
[148] Id., p. 344
[149] This might be due to the fact that only in few cases national competition authorities applied EC competition law. See 3.1.3. Public Enforcement of EC Competition Law under Regulation 17 in Practice (p. 15 of this Thesis)

the ending of its inquiries. As a consequence it prefers not to initiate proceedings in which intensive inquiries have to be made, but rather will refer complainers directly to the Commission.[150] If more national competition authorities share this view, Regulation 1 will certainly not lead to an increased application of EC competition law enforcement. It must however be stressed that this statement was made in 2000, hence before the Commission has declared that the objective of Regulation 1 in respect to case allocation is that each case should be preferable handled by a single national authority.[151]

Furthermore, with the adoption of the Notice on cooperation within the ECN the Commission gave guidelines on how the operation of Article 11 (6) of Regulation 1 will work in practice. Compared to the explanations made within its predecessor this Notice contains more detailed guidelines in this regard. But still some broad terms are used for defining situations when the Commission may initiate proceedings like, for instance, to "ensure effective enforcement".[152] Such broad terms might be, on the one hand, necessary to ensure a flexible control system by leaving some discretion to the Commission for deciding when it seems necessary to withdraw a case from a national competition authority. But on the other hand, this might be an incentive for national competition authorities for keeping their reluctance against the Commission's withdrawal power, in particular, and the application of EC competition rules in general.

After all, the Commission's supervisory and control powers laid down in Regulation 1 are certainly no incentives, but rather deterrence for the national competition authorities to enforce Articles 81 and 82 EC.

[150] Bundeskartellamt (Julia Topel), supra 23, p. 8
[151] Regulation 1, supra 1, Recital (18)
[152] The Notice on cooperation within the Network of Competition Authorities, supra 85, para 54 (d)

5. Summarising Remarks

By defining the concepts of centralisation and decentralisation, in the first place, a comprehensible assessment of the EC competition law enforcement systems under Regulation 17 and Regulation 1 and their auxiliary Notices could be made in the following. It was found out that despite the maintenance of the Commission's power to withdraw cases from a national competition authority with a view to adopting a decision by Article 11 (6) of Regulation 1 the abolition of its monopoly for granting exemptions under Regulation 17 constitutes a shift to further decentralisation of EC competition law enforcement. However, due to the maintenance of this withdrawal power the decentralisation under Regulation 1 can still only be characterised as a, by the Commission, controlled decentralisation.

In a second step the question was raised if the (further) decentralisation under Regulation 1 constitutes indeed a "fundamental reform" for decentralised EC competition law enforcement by national competition authorities. While it could be held that at least through the abolition of the Commission's monopoly to apply Article 81 (3) EC a fundamental change has been made in this respect, the question if this will in fact lead to an increased decentralised EC competition law enforcement and hence to a "fundamental reform" could be not answered in affirmative at present. A look in the future would be necessary for being able to provide a definitive answer to this question. But nevertheless some elements of the new Regulation 1 were described which may or may not give incentives for national competition authorities to actually enforce Articles 81 and 82 EC. Thus, the fact that the national competition authorities will be now obliged to apply these provisions according to Article 5 of Regulation 1 can lead to increased decentralised EC competition law enforcement. However, the effect of this obligation might be reduced due to the fact that Article 3 of Regulation 1 opens up possibilities for national competition authorities to circumvent the application of EC competition law. Furthermore due to the maintenance of the aforementioned withdrawal power laid down under Article 11 (6) of Regulation 1 and the insertion of other supervisory powers the national competition authorities may keep their natural reluctance to actually enforce EC competition law. After all, in particular the latter powers may hinder an increased decentralised EC competition law enforcement by national competition authorities and, as a consequence, may lead to a negation of a "fundamental reform" by Regulation 1 in this respect.

6. Conclusion

Decentralisation under Regulation 1 appears to depend to a crucial extent on the *willingness of national competition authorities* to actually apply Articles 81 and 82 EC. Regulation 1 may otherwise lead to an increase of decentralisation in a form which is not intended by the Commission's competition policy - the sole use of *national* competition laws. As noted above, in the view of the Commission and most EC competition law experts this represents a move in the opposite direction. Consequently, for the success of the announced "fundamental reform" in the future it will be of overall importance that the Commission can diminish the national competition authorities' natural reluctance to enforce *EC* competition law and to use the current EC competition law enforcement system introduced by Regulation 1.

But how can this task be achieved? Basically, two plausible approaches can be discussed in this respect.

First, the Commission could in principle just rely on the national competition authorities' obligation to apply Articles 81 and 82 EC under Article 5 of Regulation 1 in cases where EC competition law is applicable (according to Article 3 of Regulation 1). It follows thereof that if a national competition authority of a Member State fails to fulfil its obligation to do so, the Commission can initiate a proceeding under Article 226 EC against this Member State. However, this seems to be a rather dangerous and not even effective approach since, in the first place, such proceedings are very slow and may until the complete clearance of the scope of Articles 81 and 82 EC, in particular its inter-Member State trade clause, not even always be successful. Moreover, the enforcement system under Regulation 1 is built on the concept of "close cooperation". Possibly this approach will lead rather to the opposite.

Consequently, the second approach which relies on the "sincere cooperation principle" laid down under Article 10 EC appears to be much more effective for encouraging national competition authorities to enforce EC competition law. The cooperation mechanism laid down in the Commission's Notice on cooperation within the ECN goes already in this direction by setting up the ECN which can be used, for instance, as a forum for an exchange of information and thus for enhancing a better understanding between the authorities. However, as noted before, some EC competition law experts and national competition authorities are doubting the will of the Commission to build up an EC competition law enforcement system based on true „mutual trust" due to Article 11 (6) of Regulation 1. Since the complete abolition of this Article is not under discussion, it will also not be debated here.
But, for improving the willingness of the national authorities to enforce Articles 81 and 82 EC it is, first of all, necessary that the Commission gives (further) guidance when it will make use of its power to withdrawal.

Obviously, according to the Notice on cooperation within the ECN the Commission does not plan to use this power in an extensive way, but rather only in exceptional circumstances. More detailed guidance for the interpretation of the broad terms used in this regard will nevertheless provide more certainty for the national competition authorities and will thereby help to increase the acceptance of the Commission's withdrawal power. Possibly, the publication of informal recommendations or opinions would be already sufficient to achieve such an effect. Moreover, the Commission already improved the transparency of the decision-making process under Article 11 (6) of Regulation 1. But still, besides the right to be consulted and under certain conditions to question and express (dissenting) opinions within a network meeting, the national competition authorities have no actual possibility to hinder the enforcement of an, in their view, unlawful withdrawal. The insertion of a kind of "control system" in which for instance 2/3 of the member states authorities could block such a withdrawal decision would certainly lead to a reduction of the national competition authorities' natural reluctance against the Commission's withdrawal power. However, by building up such a control system it must be ensured that the enforcement system under Regulation 1 remains able to work (which might be a difficult if not even an impossible task).

A more simple solution in this respect may be to limit the period in which the Commission can apply Article 11 (6) of Regulation 1. Currently, the Commission can withdraw a case at any time. As noted above, it has been criticised that this can lead to the situation that a national competition authority can be deprived from a case after having made already very intense inquiries. Since the national competition authorities are obliged to inform the Commission after having commenced first formal investigative measures according to Article 11 (3) of Regulation 1, the Commission is in principally already at that time enabled to examine if the conditions for a withdrawal are definitely or at least probably fulfilled. Actually, the Commission already distinguishes between two different periods for the application of Article 11 (6) of Regulation 1 and its conditions, the period during and after the allocation phase within the ECN. A limitation to the application of Article 11 (6) of Regulation 1 only to the former period would be therefore simple to accomplish and would certainly satisfy national competition authorities as they would not be deprived from cases anymore after having made intense inquiries. Of course, conditions may change, in particular in complex proceedings, so that under very exceptional and clear defined circumstances the application of Article 11 (6) of Regulation 1 must still remain possible at a later time. But in principle, by limiting the Commission's power of withdrawal to this initial period, this would enhance the national competition authorities' belief in a system of close and sincere cooperation.

After all, Regulation 1 constitutes a fundamental change for decentralised public enforcement of EC competition law. But only time will show if it will in fact lead to a better, means increased, application of Articles 81 and

82 EC by national competition authorities. Just in this case Regulation 1 will indeed be a “fundamental reform” for public EC competition law enforcement.

Supplement A

Regulation 17

Article 9 Powers

1. Subject to review of its decision by the Court of Justice, the commission shall have sole power to declare Article 85 (1) inapplicable pursuant to Article 85 (3) of the Treaty.
2. The Commission shall have power to apply Article 85 (1) and Article 86 of the Treaty; this power may be exercised notwithstanding that the limits specified in Article 5 (1) and in Article 7 (2) relating to notification have not expired.
3. As long as the Commission has not initiated any procedure under Articles 2,3 or 6, the authorities of the Member States shall remain competent in this respect notwithstanding that the time limits specified in Article 5 (1) and in Article 7 (2) relating to notification have not expired.

Supplement B

Regulation 1

Article 5 Powers of the competition authorities of the Member States

The competition authorities of the Member States shall have the power to apply Article 81 and 82 of the Treaty in individual cases. For this purpose, action on their own initiative or on a complaint, they may take the following decisions:

requiring that an infringement be brought to an end,
ordering interim measures
accepting commitments
imposing fines, periodic penalty payments or any other penalty provided for in their national law.

Where on the basis of the information in their possession the conditions for prohibition are not met they may likewise decide that there are no grounds for action on their part.

Bibliography

Literature and Periodicals

Paul Craig and Gráinne de Búrca, *EU Law* (Text, Cases, and Materials), Third Edition 2003, Oxford University Press Inc., New York,
ISBN 0 19 924943 1

Claus Dieter Ehlermann, *The Modernisation of EC Antitrust Policy: A Legal and Cultural Revolution*, C.M.L.R. 37: 537-590, 2000

Frank 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. 642-678 (2004)

Frank L. Fine, *The Reform of EC Antitrust Enforcement: What will it mean for U.S.Practioners*, 1371 PLI/Corp 867-899 (2003)

Damien Geradin, *Competition between Rules and Rules of Competition: A legal and economic analysis of the proposed modernization of the enforcement of EC Competition Law*, 9 Colum. J. Eur. L. 1-28 (Fall 2002)

David J. Gerber, *Law and Competition in Twentieth Century Europe - Protecting Prometheus*, Clarendon Press Oxford 1998
ISBN 0 19 826285 X

Hans M. Gilliams, *Modernisation: From Policy to Practice*, E.L. Rev. 2003, 28 (4) p. 451-474

Marloes Janssen, *Relationship between the Commission and the National Competition Authorities and its developments*, Lund University 2003, p. 1-18 (unpublished)

Suzanne Kingston, *A "new division of responsibilities" in the proposed regulation to modernise the rules implementing Articles 81 and 82 E.C.? A warning call*, E.C.L.R. 2001, p. 340-350

Jeremy Lever, *The German Monopolies Commission's Report on Problems consequent upon the Reform of the European Cartel Procedure*, E.C.L.R. p. 321-325 (2002)

Vincent Power, *Representing Clients after the Modernisation of EC Competition Law*, International Company and Commercial Law Review 2003, p. 334-343

Alan Riley, *EC Antitrust Modernisation: The Commission does very nicely - Thank you! Part I*: *Regulation 1 and the notification burden*, E.C.L.R. 2003, 24 (11), 604-615

Alan Riley, *EC Antitrust Modernisation: The Commission does very nicely - Thank you! Part 2: Between the idea and the reality: Decentralisation under Regulation 1*, E.C.L.R. 2003, 24 (12) p. 657-672

Mario Todino, *Modernisation from the Perspective of National Competition Authorities: Impact of the Reform on Decentralised Application of EC Competition Law*, E.C.L.R. 2000, p. 348-352

Richard Wish, *Competition Law*, Fourth Edition 2001, Butterworths, ISBN 0 406 002665

Speeches and Press

Bundeskartellamt (Julia Toppel), *Kohärenz der dezentralen Anwendung im System paralleler Kompetenzen*, speech given at the Conference of „The Reform of EC competition law“, 9.-10. November 2000, http://europa.eu.int/comm/competition/conferences/2000/freiburg/speeches/topel_de.pdf

Claus Dieter Ehlermann, *Reform of European Competition Law - Coherent application of EC Competition Law in a System of Parallel Competencies*, Speech given at the „Conference of the Reform of European Competition law“, Freiburg 9.-10. November 2000, http://europa.eu.int/comm/competition/conferences/2000/freiburg/speeches/ehlermann.pdf

Prof. Dr. Wernhard Möschel, *Effizienter Wettbewerbsschutz in einer erweiterten Gemeinschaft durch Einbeziehung der nationalen Wettbewerbsbehörden und nationalen Gerichte*, speech given at the Conference on „The Reform of European Competition Law“, Freiburg 9.-10 November 2000, http://europa.eu.int/comm/competition/conferences/2000/freiburg/speeches/moeschl_de.pdf.

Interview with Mario Monti, *The EU gets new competition powers for the 21st century*, http://www.europa.eu.int/comm/competition/publications/special/interview_monti.pdf

Sven Norberg, *The European Commission and EC Competition rules or - a view from the Competition DG*, guest lecture at Lund University 28 November 2003 (unpublished)

Sven Norberg, *Some practical aspects of the procedure before the European Commission in Art. 81-82 cases under Reg. 1/2003 in the light of its predecessor Reg. 17 from 1962*, guest lecture at Lund University, 29 November 2003 (unpublished)

Press Release IP/04/411, *Commission finalises modernisation of the EU antitrust enforcement rules* (March 30, 2004) http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/04/411 0 RAPID&lg=EN&display=

Andreas Schraub, *Reform of European competition law*, Speech given at the „Conference of the Reform of European Competition law“, Freiburg 9.-10. November 2000, http://europa.eu.int/comm/competition/speeches/text/sp2000_026_en.pdf

Dictionaries

Creifelds Rechtswörterbuch, Ninth Edition, Edited by Dr. Carl Creifelds & Dr. Lutz Meyer-Gossner, CH. Beck Muenchen 1988, ISBN 3 406 328628

The *Oxford English Dictionary*, Volume II, B.B.C-Chalypsography, Second Edition, Prepared by J. A. Simpson and E. S. C. Weiner, Oxford University Press 1989, ISBN 0 19 861214 1

The *Oxford English Dictionary*, Volume IV, Creel-Duzepere, Second Edition, Prepared by J. A. Simpson and E. S. C. Weiner, Oxford University Press 1989, ISBN 0 19 861216 8

The *Oxford English Dictionary*, Volume VI, Follow-Haswed, Second Edition, Prepared by J. A. Simpson and E. S. C. Weiner, Oxford University Press 1989, ISBN 0 19 861218 4

The *Oxford English Dictionary*, Volume XIII, Quemadero-Roaver, Second Edition, Prepared by J. A. Simpson and E. S. C. Weiner, Oxford University Press 1989, ISBN 0 19 8612225 7

West's Law & Commercial Dictionary in Five Languages- English to German, Spanish, French, Italian - A-J, West Publishing Company St. Paul Minnesota 1988, ISBN 0 314 80502 8

Legislative Material, Guidelines and Notices

Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty OJ L 1 4.1.2003, p. 1-25

Council Regulation No. 17, first regulation implementing Articles 85 and 86 of the Treaty, OJ 1962 13/204, p. ???

Council Regulation on the Implementation of the Rules on Competition laid down in Articles 81 and 82 of the Treaty, COM (00) 582 final, September 2000

White Paper on Modernisation of the Rules implementing Articles 85 and 86 of the EC Treaty, Commission Programme No 99/027, http://europa.eu.int/comm/competition/antitrust/wp_modern_en.pdf

Commission Notice on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Articles 85 or 86 of the EC Treaty of 15 October 1997, 1997 OJ (C 313) 3

Commission Notice on Cooperation within the Network of Competition Authorities, OJ C 101 2004/C 101-0081 (27.04.2004)

Commission Notice - *Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty*, OJ 101 2004/C 101-0043 (27.04.2004)

Reports

European Union Competition Policy, *XXXIInd Report on Competition Policy 2002*, European Commission DG for Competition, Luxembourg: Office for Official Publications of the European Communities 2003, ISBN 92 894 4505 X

The *XXVIITH Report on Competition Policy 1997*, (European Commission 1998) Luxembourg: Office for Official Publications of the European Communities 1998, ISBN 92 828 4057 3

The *XXVIIITH Report on Competition Policy 1998* (European Commission 1999), Luxembourg: Office for Official Publications of the European Communities, 1999, ISBN 92-828-7198-3

The *XXIXTH Report on Competition Policy 1999* (European Commission 2000), Luxembourg: Office for Official Publications of the European Communities, 2000, ISBN 92 828 9984 5

The *XXXTH Report on Competition Policy 2000*, (European Commission 2001), Luxembourg: Office for Official Publications of the European Communities, 2001, ISBN 92 894 0844 8

The *XXXIst Report on Competition Policy 2001*, (European Commission 2002), Luxembourg: Office for Official Publications of the European Communities, 2002, ISBN 92 894 3547 X

The *XXXIInd Report on Competition Policy 2002* (European Commission 2003), Luxembourg: Office for Official Publications of the European Communities, 2003, ISBN 92 894 6028 8

Table of Cases

Case 127/73	BRT v. Sabam 1974 ECR I-51
Case T-24/90	Automec v. Commission [1992] ECR II-2223
Cases C-6&9/90	Francovich and Bonifaci v. Italy 1991 ECR I-5357
Case 14/68	Walt Wilhelm v. Bundeskartellamt 1969 ECR 1
Case 22/78	Hugin Kassaregister AB v Commission 1979 ECR II-1869
Case C-215 and C-216/96	Bagnasco e altri v Banca Popalare di Novara e Cassa di Genova e Imperial 1999 ECR I-135
Case C-198/01	Congorzio Industrie Frammiferi (CFI) v. Autorità Garanta della Concorrenza e del Mercato 9.9.2003
Commission's Decision	Nederlandse Vereiniging van Banken OJ 1999 L 271/28