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THE RELATIONSHIP BETWEEN EC
AND NATIONAL COMPETITION LAW

What is? What will be?

MASTER THESIS
20 POINTS

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CONTENTS

SUMMARY	1
ABBREVIATIONS	2
1 INTRODUCTION	3
1.1 Background and purpose	3
1.2 Question, disposition and delimitation	3
1.3 Prior research, method and material	4
2 THE CURRENT COMPETITION REGIME UNDER REGULATION 17	6
2.1 History	6
2.2 The scope of EC and national competition law	8
2.3 The relationship between EC and national competition law	11
2.4 The consequences of the procedural supremacy of EC competition law	14
3 THE PROCESS OF MODERNISATION	21
3.1 The need for modernisation	21
3.2 The 1999 White Paper	24
3.3 The Draft-Regulation on the modernisation of the competition regime	27
3.4 The German critique of Article 3 in the Draft-Regulation	30
3.5 Evaluating the German critique	33
4 COUNCIL REGULATION NO 1/2003 – THE NEW COMPETITION REGIME	36
4.1 The contents of Regulation 1/2003	36
4.2 The modified version of Article 3	37
4.3 Modernisation = Harmonisation?	43
4.4 The solution in the Merger Regulation	45
5 CONCLUSION	48

BIBLIOGRAPHY	51
TABLE OF CASES	55

Summary

The modernisation of the procedural framework behind Article 81 and 82 EC has been called the biggest thing in the field of competition since the signing of the Treaty of Rome. The relationship between EC and national competition law is one of the most revolutionary and debated subjects throughout the modernisation process. This thesis is meant to capture this debate and to analyse what the changes really means on a theoretical level as well as on a practical level.

The question dealt with is how this modernisation changes the relationship between EC and national competition law, both in theory and as a practical tool to solve the conflict of law? The chosen solution will also be evaluated.

ABBREVIATIONS

CFI	Court of First Instance of European Communities
CMLR	Common Market Law Reports
CMLRev	Common Market Law Review
DG IV	The Directorate responsible for enforcing the competition policy.
EC	The Treaty Establishing the European Community
ECJ	The Court of Justice of the European Communities
ECLR	European Competition Law Review
ECSC	European Coal and Steel Community
ELRev	European Law Review
ERT	Europarättslig tidskrift
EU	The European Union
MK	Monopolkommission
OJ	Official Journal
REG	Rättsfallssamling från Europeiska gemenskapernas domstol och Europeiska gemenskapernas förstainstansrätt
	SOU Statens offentliga utredningar

1 INTRODUCTION

1.1 Background and purpose

The modernisation of the procedural framework behind Article 81 and 82 EC has been called a legal and cultural revolution and it has been called the biggest thing in the field of competition since the signing of the Treaty of Rome.¹ We can rest assured that the modernisation of the procedural framework is a huge step forward in the development of the competition policy in Europe.

The relationship between EC and national competition law is one of the most revolutionary and debated subjects throughout the modernisation process. The purpose of this thesis is to capture this debate and to analyse what the changes really means on a theoretical level as well as on a practical level.

1.2 Question, disposition and delimitation

The focus in this thesis is put on this relationship between EC and national competition law. The question answered is how Regulation 1/2003² changes this relationship, both in theory and as a practical tool to solve the conflict of law? Furthermore the issue of whether the chosen solution is the appropriate one will be touched upon.

To do this a historical developmental perspective is used throughout the entire thesis, starting from the birth of the competition culture in Europe analysing how the relationship between EC and national competition law has changed. This perspective is crucial to understand the motives behind and problems underlying the enforcement of competition law in Europe.

¹ The treaty of Rome 25 of March 1957, [Hereinafter the EC treaty].

² Council Regulation No 1/2003 of December 2002 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty. [Hereinafter Regulation 1/2003]

The competition regime under Regulation 17³ serves as the base, which the new relationship established in Regulation 1/2003 can be judged against.

This thesis is divided into three chapters which describe the relationship between EC and national competition law today, the different proposals during the modernisation process and finally the new relationship established through Regulation 1/2003.

It is important to remember that it is not the reform itself that is the subject of this thesis. Therefore it is only touched upon briefly in away to clarify the spirit of the reform. A consequence of this is that a lot of other interesting questions relating to Regulation 1/2003 have been left outside this thesis, such as how to make the network of competition enforcers run smoothly? A further question is how we can avoid problems of forum shopping in a decentralised system? The role of the ECJ in the new system is also left aside. Another important limitation is that this thesis is mainly focused on the procedural side of competition law. A consequence of this is that the subjective side of the law has only been dealt with as far as it is needed for understanding the procedural framework.

1.3 Prior research, method and material

A lot has been written about the relationship between EC and national competition law up to the time of the passing Regulation 1/2003. Therefore finding material about the current system and accounts about its shortcomings was readily available. During the modernisation process the debate was strong and heated, resulting in a large quantity of articles in law journals the as well as opinions issued by European and Member States authorities. It is in the light of this put together with the text of Regulation 1/2003 itself that the new system is analysed.

The entire thesis is built on a critical analyse of the material available and effort has been put into showing how the different pieces fit together.

³ Council Regulation No 17/1962, [Hereinafter Regulation 17]

Therefore strictly descriptive texts are kept at a minimum. A special problem lay in separating the different commentators' de lege lata and de lege ferenda arguments. Since they often tend to be treated as one by the respective authors.

The material used is a mix of primary and secondary sources. Contemporary legal journals have proven an invaluable source of information and inspiration.

2 THE CURRENT COMPETITION REGIME UNDER REGULATION 17

2.1 History

The first time that the concept of competition law was introduced at a major scale in Europe was through the Treaty of Paris 1951⁴, establishing the Coal and Steel Community. Here the six contracting states⁵ placed an obligation on the Community to protect competition in the coal and steel markets.⁶

The tradition in Europe at the time was one putting emphasis on loyalty between customers and suppliers. Associations of dealers or manufacturers committed to deal with each other on a regular basis were considered the norm and such links were much more important than the protection of free competition. For instance, in the Netherlands cartels were seen as a necessary protection against foreign competition.⁷

What then was the reason for giving protection of competition such a big importance in the ECSC? There are two main reasons. Firstly, that the strictly regulated markets in Europe at the time demanded management at a completely centralised level and there was no political will at the time to create such a supranational controlling body. Secondly, Europe saw the example of the United States whose economy and industrial strength were at unequalled levels as a result of its reliance for decades on free competition.⁸

The next step towards establishing a competition regime in Europe was the EC treaty in 1957. The major invention was that the scope of the European competition regime was extended to the entire Common Market

⁴ The Treaty of Paris 18 April 1951, [Hereinafter the ECSC]

⁵ Belgium, Germany, France, Italy, Netherlands & Luxembourg.

⁶ Articles 4d, 5, 65 & 66 ECSC.

⁷ Temple Lang, p379.

⁸ Goyder, pp 18.

established between the Member States (the same as the ECSC), not only the Coal and Steel markets.⁹

An important difference between the ECSC and the EC treaty is that under the ECSC the High Authority had jurisdiction over all violations of competition inside the Coal and Steel markets, even if the infringement occurred in only one Member State. The EC treaty prescribed a shared jurisdiction between the Commission and the Member States. This since the daunting task to enforce the protection of competition in the entire Common Market would clearly have been too much for the Commission to handle.¹⁰

The Council was made responsible for determining the principles necessary to apply Article 81 and 82 EC through Directives and Regulations. One of the issues that needed to be decided upon was the relationship between national and EC competition law. Until such Directives or Regulations were adopted the responsibility to apply Article 81 and 82 EC was put on national competition authorities.¹¹

As a result, in 1962, Regulation 17 was enacted. Here the main responsibility for the enforcement of EC competition law was moved from the Member States to the Commission. There are two especially important inventions in Regulation 17. Firstly, the Commission was given a monopoly on granting exemptions according to Article 81(3) EC and secondly, a system of prior notification of agreements was established. The reasons for this centralisation of the competition sector were the lack of administrative structures in the Member States to allow for a more decentralised system combined with a general lack of competition culture in Europe.¹² It is noteworthy that the relationship between EC and national competition law remained unregulated.

⁹ Goyder, p 25.

¹⁰ Goyder, p 20, pp 30.

¹¹ Article 83 & 84 EC.

¹² Ehlerman, C.M.L.Rev, 2000, No 3 June, pp 539.

2.2 The scope of EC and national competition law

The scope of the EC competition law is laid down in Article 81(1) EC; one of the conditions here is that an agreement or a consorted practice¹³ must have an “affect on trade between Member States”. Consequently, if an agreement “affect trade between Member States” it falls within the European sphere where EC competition law can be applied. This condition delimits EC competition law from national competition law. This is expressed in the ECJ case Hugin:

“The interpretation and application of the condition relating to effects on trade between Member States contained in Articles 85 and 86 of the treaty must be based on the purpose of that condition which is to define, in the context of the law governing competition, the boundary between the areas respectively covered by Community law and the law of the Member States...”¹⁴

It is not obvious from just the text of the treaty how the term “affect on trade between Member States” shall be interpreted. In *Technique Miniere*¹⁵ the ECJ established that all influences on trade whether direct or indirect, actual or potential fall within the scope of Article 81 EC. Hence, it is enough to show that an “agreement potentially can “affect trade between Member States” for EC competition law to be applicable. Furthermore in the joint cases *Consten and Grundig*¹⁶ the ECJ established that all effects on trade can constitute a violation of Community law even if they increase the volume of trade.

Even a purely national cartel with effects only within the territory of one Member State can be said to have “affect on trade between Member States”. This is the case, when an agreement is extending over the entire

¹³ [Hereinafter agreements and consorted practices will be referred to as only agreements]

¹⁴ Case C-22/78, *Hugin Kassaregister AB v. Commission*

¹⁵ Case C-56/65 *La Technique Miniere v. Maschinenbau*.

territory of the Member State and is by its nature designed to protect domestic production and thereby reinforcing the division of markets.¹⁷ Hence, even a national agreement with no objective effects outside the Member State and no subjective intentions to have effects outside of that very same Member State can be deemed to “affect trade between Member States” if it reinforces the division of markets.

As the extensive scope of the EC competition law proved too big a burden for the Commission, the ECJ took measures. It stated that agreements that have an “affect trade between Member States” fall outside the scope of Article 81(1) EC, if this effect is insignificant with regard to the weak position on the market of the persons concerned.¹⁸ This opened the way for the Commission to issue the “de minimis notice” defining which cases were of too little importance to merit a Commission decision.¹⁹

Even with the “de minimis” doctrine the potential scope of the EC competition law is vast. In fact it is possible to apply it to most agreements with any commercial significance.²⁰ Thus, unless national competition laws contain a territorial limitation of jurisdiction in most situations we have to deal with a potential concurrent application of EC and national competition law.

But even if national competition law contains a territorial limitation the risk of concurrent jurisdiction is not always totally eliminated. Two examples illustrate this. First, we will look at the solution in the Competition Act of the United Kingdom from 1998²¹. The scope of the Act is limited to agreements that may affect trade within the UK and it is also a prerequisite that the agreement is intended to be implemented in the UK.²² Here we have a clear territorial limitation of the jurisdiction both on the

¹⁶ Case C-56 & 58/64 *Itabissements Consten S.A R.L. & Grundig-Verkaufs-GmbH v. The Commission*

¹⁷ Case C-8/72 *Vereeniging van Cementhandelaren v Commission* & Case T-29/92 *Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid v. The Commission*.

¹⁸ Case C-5/69 *Franz Völk v. Etablissements J. Vervaecke*

¹⁹ Commission Notice of 27 May 1970, (De Minimis Notice).

²⁰ Wesseling, ECLR, 1999, Issue 8, p426.

²¹ The UK Competition Act 1998, [Hereinafter the Act].

²² Section 2(1) & 2(3) the Act.

objective side, that the agreement needs to affect trade within the UK and on the subjective side, that the agreement must be intended to be implemented in the UK.

Why is this form of strict territorial limitation of the jurisdiction of the Competition Act not enough to avoid concurrent jurisdiction with EC competition law? The scope of the EC competition law is vast. An agreement does not need to have objective effects on trade and subjective intentions to have these effects. It is enough with actual or potential, direct or indirect effects for EC competition law to be applicable. Consequently, a strictly national cartel in the UK can fall under EC jurisdiction.

A second example provides the situation in Italy. Here the limitation of the scope of national competition law takes another form. The Italian Competition Act is limited to issues that do not fall within the scope of EC competition law.²³ This approach is based on an exclusive EC jurisdiction and therefore there is no room for concurrent application of Italian and EC competition law.²⁴ This approach seems to be the only way to totally avoid concurrent jurisdiction with the long arm of EC competition law.

This said, not all Member States have territorial limitations in their national competition laws, for instance France.²⁵ The Swedish competition law²⁶ does not contain any territorial restrictions inside the Law, but it is generally held in the preparatory works²⁷ that an agreement must have effects inside Sweden for the Law to be applicable.²⁸

²³ Article 1.1, Law No. 287/1990, Provisions for the protection of competition and the market.

²⁴ Siragusa & Scassellati-Sforzolini, CMLRev, 1992, Issue 1, pp 99.

²⁵ See Salord, ECLR, 2000, Issue 2, pp 131.

²⁶ 6§, Swedish Competition Law No (1993:20)

²⁷ A very important source of interpretation of Swedish law.

²⁸ SOU 2000:4, pp 104.

2.3 The relationship between EC and national competition law

The situation under Regulation 17 of the enforcement of competition law in Europe (as we have seen above) is one of concurrent application, where national and EC competition law applies simultaneously. The next step was to determine the hierarchy between EC and national competition law. This issue is unregulated, no guidance could be taken from the wording of Article 81 EC and Regulation 17 was silent on this point. Consequently, the responsibility to determine the relationship between national and EC competition law falls on the ECJ.

The paramount case is *Walt Wilhelm*²⁹ from 1968. The situation was the following: the Commission had begun proceedings against a group of companies from all over Europe over alleged price fixing. At the same time the German competition authorities had begun their own investigation against German companies concerning their part of the same allegations. *Walt Wilhelm* one of the directors of the German companies claimed that the German competition authorities should desist from carrying out their own investigations while the Commission investigated the same matters. The *Kammergericht* in Berlin referred the case to the ECJ for a preliminary ruling according to Article 234 EC.

In this Case the ECJ stated that national and EC competition laws consider cartels from different perspectives. “On one hand Article 81 EC sees competition law in the light of obstacles that might affect trade between Member States and on the other hand the national competition laws consider cartels from their own point of view peculiar to them.” In principle the same cartel can be object to proceedings under both set of rules. This would have been an acceptance of the double-barrier theory supported by the national competition authorities at the time, but the ECJ continued to add:

“However, if the ultimate goal of the Treaty is to be respected, this parallel application of the national system can only be allowed in far

²⁹ Case C-14/68 *Walt Wilhelm v. Bundeskartellamt* [Hereinafter *Walt Wilhelm*].

as it does not prejudice the uniform application throughout the Common Market of the Community rules on cartels and of the full effect of the measures adopted in implementation of those rules”

This is the core of the Walt Wilhelm decision, the so-called mitigated double-barrier-theory.³⁰ Thus, even if national competition laws in principle may be applied simultaneously with EC competition law, this can only be done as long as **it does not prejudice the uniform application throughout the Common Market of the Community rules.**

Here the court clarified the conflicts of law and it also reaffirmed the coexistence of EC and national competition law. The solution offered is in accordance with the general EC law principle of supremacy. It is important to remember that the general rule is, that in order for an agreement to be lawful it must meet the requirements of both sets of rules and it is only under the circumstances mentioned above that the supremacy of EC law comes into force.³¹

A consequence of concurrent application and parallel proceedings is the risk of concurrent sanctions. This situation, however, is not unacceptable according to the ECJ, because it follows from a general requirement of natural justice that any previous punitive decision must be taken into account when determining a sanction that is to be imposed.³² Hence, if one authority has imposed a sanction on an agreement, a second authority that wishes to impose sanctions on the same matter must take the previous sanction into account. This principle is also expressed in Article 90 of ECSC.³³

The Walt Wilhelm version of supremacy can only be found in the sphere of competition law. One of the reasons for this special treatment maybe that it is only in this field that a Community authority issues decisions directed directly towards the citizens.

³⁰ Wesseling, ELRev, 1997, Feb, p 40.

³¹ Markert, CMLRev, 1974, p98.

³² Walt Wilhelm

³³ See also the CFIs judgements: T-141/89 Trefileurope v. The Commission & T-148/89 Trefilunion v. Commission.

This has also been termed procedural supremacy³⁴ as a distinction to normative supremacy that is a general rule in EC law.³⁵ The court's approach is procedural because Article 81 EC does not render national competition law inapplicable as a general rule. It just states that in the individual case the safeguards of the uniform application of EC law may result in that the national competition law is unenforceable in that case. Hence, the supremacy of EC competition law over national competition law is judged on a case by case basis.

It is also worth mentioning that the procedural supremacy in *Walt Wilhelm* is limited to final formal decisions. The impact of this is that for instance comfort letters do not take supremacy over national law.

In *Walt Wilhelm* the ECJ also gave the Commission the power to “*carry out certain positive, though indirect, action with a view to promoting a harmonious development of economic activities within the whole Community, in accordance with Article 2 of the treaty.*” This means from the perspective of the Member States that they cannot apply national law in a way that it renders Community decisions representing such “positive actions” obsolete.³⁶

Deriving from this the answer to Mr Wilhelms objection is that the fact that the Commission has initiated proceedings does not mean that the national authorities automatically have to suspend their own proceedings.

³⁴ Walz, *ELRev*, 1996, Dec, pp 451.

³⁵ Bernitz & Kjellgren, pp79.

³⁶ Walz, *ELRev*, 1996, Dec, p 452.

2.4 The consequences of the procedural supremacy of EC competition law

The procedural supremacy set out in *Walt Wilhelm* does in no way eliminate all conflicts between the concurrently applicable legal orders. Now its time to look at the consequences in practice: in which situations does EC competition law prevail over national competition law etc.

The first situation is when an agreement is forbidden under EC competition law. Can a more lenient national competition law repair that through an exemption? This is the most clear cut situation where the procedural supremacy comes into effect and prevents the application of national competition law. Thus, the answer is that the stricter EC competition law prevails, and the agreement is null and void under Article 81(2) EC, unless it has been exempted under Article 81(3) EC.³⁷

The second situation is when EC competition law does not prohibit an agreement. Under what circumstances can a stricter national competition law be applied? Here we must differentiate between two cases. Firstly, when the Commission has granted an agreement a negative clearance because a requisite in Article 81(1) EC is not fulfilled, and secondly, when an agreement falls under Article 81(1) EC but is benefiting from an exemption under Article 81(3) EC.

In the first case of negative clearance, the Commission has made a final formal decision that an agreement falls outside of the prohibition of Article 81(1) EC either because there is no restriction of competition or no “affect on trade between Member States”. When an agreement falls outside Article 81(1) EC all together is treated by the ECJ in the case *Guerlain*.³⁸ Referring to the *Walt Wilhelm* decision the ECJ went on to say that the fact that an agreement is found by the Commission not to violate EC competition law in no way prevents the Member States from applying national competition law on the same matter.

³⁷ Wesseling, ECLR, 1999, Issue 8, pp 426.

³⁸ Cases C-253/78, 39 & 99/79, *Procureur de la Republique v. Giry & Guerlain*

Still it is important to remember that in this case the agreement did not have any “affect on trade between Member States”. Are there any reasons to believe that the result would be different if the agreement fell within the scope of Article 81(1) EC but the Commission decided that there was no distortion of competition?

General Advocate Tesouro has argued that if Member States are allowed to apply stricter national competition law to this kind of agreements it would lead to divergent market conditions within the Community, which would go against the goals of the EC Treaty. Therefore it could be worth considering extending the procedural supremacy to include this situation as well. The ECJ never got the opportunity to give its opinion on the question because they found in the specific case that competition was distorted in the sense of Article 81(1) EC.³⁹

In the absence of other court decisions regulating this question we must remember that the ECJ in *Walt Wilhelm* stated that national and EC competition laws consider cartels from different perspectives. This idea of dual control and concurrent application is the cornerstone on which the procedural supremacy in *Walt Wilhelm* is built on. To allow this kind of decisions to have supremacy over national competition law would create a large sphere of exclusive jurisdiction for the Commission. This would be against the spirit of the mitigated double-barrier-theory. Therefore it is generally considered that a stricter national competition law may be applied on an agreement that does not restrict competition in the sense of EC competition law.⁴⁰

When the Commission has issued an informal decision that it is going to close the file, a so-called comfort letter, the procedural supremacy can never come into question because it is limited to formal final decisions.⁴¹ This form of informal decisions does not even protect an undertaking from future Commission actions.⁴²

³⁹ Case C-266/93, *Bundeskartellamt v. Volkswagen AG & VAG Leasing GMBH*

⁴⁰ Wesseling, *ECLR*, 1999, Issue 8, pp 427.

⁴¹ Cases C-253/78, 39 & 99/79, *Procureur de la Republique v. Giry & Guerlain*

⁴² Walz, *ELRev*, 1996, Dec, p 453 & 456.

Thus, no matter if an agreement falls outside the scope of art 81(1) EC because there is no restriction of competition or because there is no “affect on trade between Member States”, a stricter national law may be applied.

Now, let us turn the attention to the second situation when an agreement violates competition in the sense of Article 81(1) EC but is benefiting from an exemption under Article 81(3) EC. Can stricter national laws be applied on such agreements?

The starting point is yet again *Walt Wilhelm*. There the Commission was given the right to carry out certain positive, though indirect, actions with a view to promoting a harmonious development of economic activities within the whole Community, in accordance with Article 2 of the EC Treaty.

It is not referring to exemptions under Article 81(3) EC in this passage in the judgement but there is little doubt that positive though indirect measures refer to Article 81(3) EC, if only because there is no other reasonable alternative.⁴³ Do all exemptions however represent such positive though indirect measures?

Here two different forms of exemptions exist, the individual exemption and the group exemption. In the case of the former we deal with an individual formal decision. Stating that an agreement although it violates competition in the sense of Article 81(1) EC is exempted under Article 81(3) EC, this because of the overall positive effects on the Common Market. This is definitely an example of such positive though indirect measure referred to in the *Walt Wilhelm* decision. Consequently, the procedural supremacy rule extends to the situation when the Commission issues an individual exemption under Article 81(3) EC. A stricter national competition law can therefore not be applied on agreements that benefits from an individual exemption.

Is there any reason to treat group exemptions in a different way? Even though group exemptions are ill fitted for the procedural supremacy rule because there are no individual formal decision in every case, most

⁴³ Wesseling, ECLR, 1999, Issue 8, p428.

commentators give them precedence over stricter national law. This because they derive from the criterion in Article 81(3) EC that guarantee that a positive policy at Community level is being pursued within the spirit of Articles 2 and 3(g) EC.⁴⁴

Another reason for extending supremacy to these cases is that when group exemptions are given the form of a Regulation the Member States influences the legislative process. According to Article 10(3) of Regulation 17 the Advisory Committee on restrictive practices and monopolies was created. In this committee the Member States can express their opinions on procedure. The committee also gets involved in the legislative process where it is influential but not decisive. The Commission however prefers to get the blessing of the majority of the Advisory Committee on proposed decisions. A consequence of this influence on the legislative process is that individual Member States should not be able to diverge from the solution that the majority prefers for their on individual purposes.⁴⁵ An exception to this rule is when the group exemption itself provides for the possibility for Member States to apply stricter national law.⁴⁶

Hence, both formal individual and group exemptions under Article 81(3) EC take precedence over stricter national law. This leads to the conclusion that the deciding question to discover the reach of the procedural supremacy is weather an agreement is exempted under Article 81(3) EC or if it is deemed to fall outside Article 81(1) EC altogether. Consequently Member States are allowed to apply national competition law when the Commission has taken no action at all or when the Commission has issued a negative clearance or a comfort letter.

Does this conclusion change if the Member States themselves have taken actions to avoid concurrent jurisdiction through limiting their own jurisdiction?⁴⁷

⁴⁴ Walz, ELRev, 1996, Dec, p 456.

⁴⁵ Goyder, p 428 & 435.

⁴⁶ See: Commission Regulations: 1983/84, Recital 19, 4087/88, Recital 13, 125/85, Recital 25. Goyder p 436.

⁴⁷ See Chapter 2.2.

The solution chosen in the UK is not changing the result above too much. The procedural supremacy gives the same result in UK as if there had been no territorial restrictions. This because even though the territorial scope of the Act is limited it is still built on the same principles as a national law without territorial restrictions. The only difference is that an extra prerequisite is added, namely that an agreement must affect trade in the UK and be meant to be implemented in the UK. This extra condition does not change the theoretical basis of concurrent jurisdiction it merely serves to reduce the number of cases of dual application in practice.

In the case of Italy the result becomes somewhat different, this because the Italian competition Act rejects the mitigated double-barrier-theory. This approach is built on an exclusive EC jurisdiction and can be characterised as a modified single-barrier-theory.⁴⁸ What makes it different from a pure single-barrier-theory is that there is an Italian competition Act that can be applied when there is no Community dimension and not only one set of rules.

The result of the exclusive EC jurisdiction is that it is enough that an agreement falls within the scope of Article 81(1) EC for EC competition law to take precedence. A consequence of this is that it is impossible to apply Italian competition law on agreements where the Commission has issued a decision, whether formal or informal that it does not distort competition on EC level. Under the procedural supremacy theory it would have been possible to apply national competition law in such cases. Thus, Italy has really limited its jurisdiction on a theoretical level and has not just taken measures to avoid the number of cases of dual application in practice.⁴⁹

The questions concerning how the procedural supremacy of *Walt Wilhelm* works with national competition law with and without jurisdictional limitation have been dealt with. There is one more question though that must be answered to paint the entire picture of the reach of the procedural supremacy of EC competition law, namely how to distinguish a

⁴⁸ Siragusa & Scassellati-Sforzolini, *CMLRev*, 1992, No 1, p100.

⁴⁹ Siragusa & Scassellati-Sforzolini, *CMLRev*, 1992, No 1, pp 106.

national competition rule from other national law? The so-called diagonal conflicts.

The question is necessitated by the fact that the EU has attributed powers. This means that the Community organs as well as the Community itself has to act within the framework of the powers conferred to them. It is the Member States that remains the “masters of the treaties” and the Community cannot take new competence by itself; it has to be given to it.⁵⁰ From this follows that the Member States must have transferred their power in order for a matter to fall within the European sphere.

The ECJ has accepted that an agreement that benefit from an exemption under Article 81(3) EC can be prohibited or rather unenforceable under national contract law. This since the private law sector falls within the national legislative sphere where the EU has not been attributed any powers. This means that the fact that an agreement is befitting from an exemption under Article 81(3) EC in no way means that its enforceability against third parties is guaranteed.⁵¹

What approach has the ECJ then taken towards defining what is a national competition law? On the one hand a national rule that is part of a national competition Act does not per definition mean that it is a competition rule.⁵² On the other hand EC competition law can in certain cases take supremacy over national rules contained outside the national competition act. For instance the licensing of intellectual property in certain situations.⁵³ In the reasoning of the ECJ we can see that the function of the rule has been put in the centre. The important factor is not how the Member States have chosen to arrange their national legal system but rather what functions the individual rules serve.

⁵⁰ Article 5 & 7 EC & Brunner v. The European Union treaty [1994] 1 CMLR 57 (From the German Federal constitutional court, Bundesverfassungsgericht).

⁵¹ Wesseling, ECLR, 1999, Issue 8, p429, Case C-41/96 VAG-Handlerbeirat eV v SYD-Consult & Case C-376/92 Metro & Co. v Cartier SA.

⁵² Case C-41/96 VAG-Handlerbeirat eV v SYD-Consult & Case C-376/92 Metro & Co. v Cartier SA.

⁵³ Arnall, Dashwood, Ross & Wyatt, Wyatt & Dashwood's European Union law, p735ff., C-56 & 58 Itablisements Consten SARL & Grundig-Verkaufs GmhbH v. The Commission.

This approach goes in line with the method of comparative law. The basic methodological principle here is that of functionality. In order to make an accurate comparison between legal systems a comparatist must go through the different systems in its entirety looking for rules that fills the same objectives. He/she should never be confined in the search to the places where a rule would have been placed according to his/her own national experience.⁵⁴

The conclusions we can draw from this is that national competition rules can be found in different parts of the national legal system and the fact that a norm is enshrined in a competition act does not mean that it really is a competition rule. Since the procedural supremacy is limited to the field of competition law we must add a final prerequisite for EC competition law to take precedence, namely that the national rule it collides with really is a competition rule.

⁵⁴ Zweigert & Kötz, pp34.

3 THE PROCESS OF MODERNISATION

3.1 The need for modernisation

The competition regime in the EU under Regulation 17 is based on concurrent application of EC and national law with only a procedural supremacy of EC law.

After 40 years of application the conditions in the competition sector have changed. The competition regime established through Regulation 17 in 1962 has remained virtually unchanged until now. This although it was designed for an EU with only six Member States compared to today's fifteen.⁵⁵ During this period the Commission's resources remained the same. Put together with the fact that the procedure to take formal decisions under Regulation 17 is very cumbersome and that the Commission has a monopoly on granting exemptions under Article 81(3) EC⁵⁶ a serious backlog of cases at the Commission has been created.

The Commission has adopted a lot of different measures to deal with this backlog, for instance group exemptions and the de minimis doctrine. The most effective measure was taken into use in the 1970s when the Commission started using comfort letters. As we have seen above the comfort letters are not covered by the procedural supremacy rule since they are not formal decisions.⁵⁷ This creates a huge problem in practice since about 90% of all notifications today are closed informally by either a comfort letter or simply just filed without further action.⁵⁸ The conclusion of this is that in practice the area where national competition law can be applied is actually much larger than it seems, since comfort letters does not preclude the application of a stricter national law.

⁵⁵ White paper on modernisation of the rules implementing Articles 85 and 86 of the EC treaty, Commission programme No 99/027, 24 & 25. [Hereinafter the White Paper].

⁵⁶ Regulation 17, Article 9(1).

⁵⁷ Ehlermann, CMLRev, 2000, No 5, p 541.

⁵⁸ White paper, 34.

This situation also has built in discriminatory effects between undertakings since some receive formal decisions, which protect them from stricter national competition law while some get an informal decision which does not offer such protection. In this situation however we have to remember that undertakings when notifying an agreement have the choice whether to be satisfied with a comfort letter or not. How free this choice really is remains doubtful for two reasons. Firstly because of the lack of information on the effects of accepting a comfort letter. Secondly because of the slim possibilities to obtain a formal decision within reasonable time.⁵⁹ A consequence of this is that only undertakings rich enough to wait for a formal decision really have the opportunity to obtain such a decision.

The extensive usage of comfort letters serves to undermine the procedural supremacy of EC competition law. The competition regime in the EU is much more of a double-barrier theory in practice than the *Walt Wilhelm* decision lets on. This leads to the second problem with the current system.

The whole concept of a double-barrier theory is costly for undertakings. Let us illustrate this with an example: If an undertaking is to introduce a distribution system that covers the whole of Europe it will have to take into consideration not only EC competition law but also as many national competition laws as there are Member States. Thus, if a formal decision is not issued an undertaking must make sure the agreement conforms with 15 different sets of national competition laws to achieve legal certainty for a Europe wide agreement. Even though almost all national competition laws (all except Germany's)⁶⁰ are more or less modelled after EC competition law this is still a costly solution both in terms of money and time. The mitigated double-barrier theory is therefore hardly a cost-effective system.⁶¹

There is a more theoretical argument for a modernisation of the procedural supremacy. In *Walt Wilhelm* the ECJ stated that national and EC

⁵⁹ Wóds, ECLR, 2000, Issue 3, p159.

⁶⁰ Zinsmeister, Rijkers & Jones, ECLR, 1999, Issue 5, p279

⁶¹ Walz, ELRev, 1996, Dec, pp 449, 457 & 463.

competition law consider cartels from different points of view. Article 81 EC sees competition law in the light of obstacles that might “affect trade between Member States”, and national competition laws considers cartels from their own point of view peculiar to them.

Commentators argued⁶² at the time that this statement was no longer valid after the EU Treaty⁶³ and the completion of the Single Market. This because the objective of EC competition law through this had changed from establishing the Single Market to regulating the functioning of this market. If this was the case the fundamental justification for the double-barrier theory was no longer applicable and consequently that would mean an imminent need to reform the relationship between EC and national competition law.

This trend was not confirmed by the case law from the ECJ since it continued to refer to the *Walt Wilhelm* decision after the EU treaty.⁶⁴ But in some more recent cases a change can be noticed in the application of EC competition law. Here the ECJ and the Commission renounced jurisdiction over purely national agreements in favour of national competition laws.⁶⁵ There is little doubt that according to past case law of the ECJ that Community jurisdiction could have been asserted.⁶⁶ The motivation for EC jurisdiction over purely national agreements in the past has been that such agreements lead to the balkanisation of the Common Market. That the ECJ did not assert jurisdiction over a case like this could be evidence of a change of the objective of EC competition law inline with what was argued.

Hence, the competition regime under Regulation 17 can be criticised for its enforcement deficit, which leads to heavy reliance on informal decisions. A consequence of this is a lack of legal certainty to undertakings. This legal uncertainty increases the already high costs for undertakings associated with the mitigated double-barrier theory. Finally, a doubt could

⁶² Wesseling, *ELRev*, 1997, pp 43.

⁶³ The treaty of Maastricht, signed 7 February 1992.

⁶⁴ Case C-67/91 *Direccison General de Defensa de la Competencia v. Asociacion Espanola de Banca* (Spanish Banks), Judgement July 1992.

⁶⁵ Case C-251/96 *Carlo Bagnasco v BNP*, L 271/28 Dutch Banks.

⁶⁶ *Whish*, p 111.

be expressed if the fundamental reason in favour of the mitigated double-barrier theory in Walt Wilhelm was still valid, namely that the EC and national competition laws pursue different objectives.

The lack of competition culture in Europe at the time necessitated and justified the mitigated double-barrier theory. Today we have a competition culture in Europe which makes this argument not applicable anymore.⁶⁷ From this follows that Walt Wilhelm only seems acceptable seen in its historical context. Therefore it is safe to say that there are a lot of genuine reasons in favour of a modernisation of the relationship between EC and national competition law, this since the procedural supremacy in Walt Wilhelm in a lot of regards is clearly inadequate.

3.2 The 1999 White Paper

The need for modernisation of the rules implementing Article 81 and 82 EC with the target to replace Regulation 17 became evident in the 1990's when a lot of papers were given on the subject, criticising the current regime and demanding reform.⁶⁸

In April 1999 the Commission took its first step towards modernisation when it issued a White Paper.⁶⁹ The proposals put forward were more far reaching than anyone could have predicted. The core of the current regime established under Regulation 17 were to be replaced. Both the prior notification of agreements and the Commission's monopoly on exempting agreements under Article 81(3) EC were to be abandoned. The reasons for these proposals were first and foremost reducing the Commission's workload. As we have seen, the problems under Regulation 17 was that too much work landed on the Commission's table causing problems such as backlog of cases. A consequence of this is that the Commission is confined to a strictly responding role. There was simply no resources left to investigate cartels on the Commission's own initiative.

⁶⁷ Walz, ELRev, 1996, Dec, p 462.

⁶⁸ Whish, pp 246.

During the period 1988 to 1998 the Commission itself initiated only 13% of all cases initiated at the Commission.⁷⁰ The future enlargement of the EU will only worsen this situation, this because the accession of new Member States will increase the geographical scope of EC competition law. The prospect of an even heavier workload in the near future is one of the reasons for the Commission's timing of the White Paper.

The target of the reform is to free up the Commission to focus on the most serious cross border cartels and through that strengthening the protection of competition in the EU. The proposals in the White Paper are meant to achieve this through a decentralisation of the application of EC competition law. The decentralisation of the competition policy in Europe as a tool to reduce the workload of the Commission was first presented in the CFI decision *Automec II*.⁷¹

It is a fact that Article 81(1) EC is already directly applicable in national courts under the current regime.⁷² The Member States though have been reluctant to make use of this power. If they do use it, they do so in parallel with equivalent provisions under national competition law.⁷³ One reason for this is the effect of the Commission's exemption monopoly in combination with Article 9(3) in Regulation 17. Here undertakings could stall proceedings in national courts through notifying an agreement to the Commission. This because the Member States are only allowed to apply Article 81(1) EC when the Commission has not initiated proceedings. Hence, the effect of an undertaking notifying an agreement after national authorities initiated proceedings is that the national proceedings have to be made pending the outcome of the notification. From this we see that having the Member States taking part in the enforcement of EC competition law was thwarted from the start. The proposals in the White paper are meant to

⁶⁹ White paper , See note 55.

⁷⁰ White Paper ,44.

⁷¹ T-24/90, *Automec II v. Commission*. For a full account of limits to decentralisation of the application of EC competition law see: Wahl p 526 - 531.

⁷² Case C-127/73, *BRT v. SABAM*

⁷³ *Zinsmeister, Rijkers and Jones*, ECLR, 1999, Issue 5,p 277.

encourage Member States to apply EC competition law instead of national competition law.

The other part of the proposal to abandon the notification system put demands on undertakings to be more self-reliant in their assessment of the consequences of Article 81 EC. This brings EC competition law closer to the US where undertakings already have to rely on their own assessments.⁷⁴ The consequence of this part of the proposal is a change in the focus of the enforcement of competition in EU. The current regime with its prior notification is mostly concerned with future behaviour while the suggested reform primarily targets past conduct.⁷⁵

The relationship between EC and national competition law was not touched upon in the Commission's White Paper. There was little doubt though that such far reaching changes in the architecture of the enforcement system of competition law in Europe would have a major impact on this relationship.⁷⁶

The Commission presented a summary of the different opinions expressed on the White Paper the 29 of February 2000. In general the reaction to the White Paper was supportive of the intentions behind the proposal. Many commentators though decided to wait with their final judgement of the reform until a more detailed proposal was put forward.⁷⁷ The European Parliament stressed that the primacy of EC competition law should not be called into question. The ECOSOC went even further in their comments saying that it must be stated expressly in the new Regulation that national competition law may not be applied when EC competition law applies. Hence, one of the questions that definitely needed an answer was what impact the proposed reform would have on the relationship between EC and national competition laws. The White Paper was the first step towards modernising the procedural framework behind Article 81 and 82 EC. Here the Commission showed a genuine desire to change the system, giving up the foundation of the system established under Regulation 17.

⁷⁴ Whish, p 253.

⁷⁵ Gerber, ECLR, 2001, Issue 4, p 123.

⁷⁶ Wesseling, Elrev, 2001, Aug, p 360.

3.3 The Draft-Regulation on the modernisation of the competition regime

The next step in the modernisation process was taken in September 2000 when the Commission issued its Draft-Regulation⁷⁸ on the implementation of the rules on competition laid down in Articles 81 and 82 EC. Here the Commission gave the proposals made in the White Paper a more concrete form.

The time had now come to “regulate” the relationship between EC and national competition law. This was done in Article 3 of the Draft-Regulation and what a bomb it turned out to be.

“Where an agreement, a decision by an association of undertakings or a concerted practice within the meaning of Article 81 of the Treaty or the abuse of a dominant position within the meaning of Article 82 may affect trade between Member States, **Community competition law shall apply to the exclusion of national competition laws.**”⁷⁹

Here the Commission simply proposed an exclusive EC jurisdiction over all cases that “affect trade between Member States”. Their reason for this was that the procedural supremacy of *Walt Wilhelm* did not deal with the inconsistencies and differences in treatment of undertakings between the Member States in a satisfactory way. For undertakings to be able to take full advantage of the Single Market it is important to establish a level playing field throughout the EU. The Commission also highlighted that the proposal removed the high cost associated with the concurrent application of EC and national competition law both for undertakings and competition authorities.

⁷⁷ Wesseling, *Elrev*, 2001, Aug, p 358.

⁷⁸ Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87, [Hereinafter the Draft-Regulation].

⁷⁹ The Draft-Regulation Article 3.

In general the competition regime in Europe would be made more efficient.⁸⁰

The major attraction of the proposal is that there would no longer be any need to determine the relationship between of EC and national competition law. This would avoid the potential dual application of up to 16 different sets of competition laws and since there would only be one legal order the consistent enforcement of competition in the EU would be enhanced.⁸¹ The high costs associated with parallel proceedings will also be lowered.

The proposal would mean a change of the theoretical base of the enforcement of competition law in the EU from a system of overlapping concurrently applied legal orders to one of an exclusive EC jurisdiction. This is a normative supremacy rule as a contrast to the procedural supremacy prescribed in *Walt Wilhelm*. It is normative because it sets an objective criterion “affect on trade between Member States” whose fulfilment makes national competition inapplicable.⁸² A consequence of this is that there would no longer be any need to determine the reach of EC competition law on a case by case basis. Hence, Article 3 would mean the end of the procedural supremacy rule in *Walt Wilhelm*.

The exclusive jurisdiction is extended to all cases where “trade between Member States is affected”. In the system under Regulation 17 EC competition law could only trump national competition laws when an agreement is both “affecting trade between Member States” and restricts competition in the sense of Article 81(1) EC. It follows from this that the Commission through Article 3 is proposing an extension of the scope of EC competition law to include agreements when there is an “affect on trade between Member States” but competition is not restricted. Thus, another consequence of Article 3 is an extension of the supremacy of EC

⁸⁰ The Draft-Regulation Article 3.

⁸¹ Whish,, p 254.

⁸² Walz, *ELRev*, 1996, Dec, p 456.

competition law to all agreements that potentially could be covered by Article 81 EC.⁸³

The extension of the scope of EC competition law is a way to ensure that the result of the reform really becomes a decentralisation of the application of EC competition law and not a re-nationalisation of the competition policy in the EU. It serves as a way of balancing the Commission's lost influence through the abolishment of the exemption monopoly.

The solution chosen in the Draft-Regulation brings about a problem though, namely that it does not deal with the jurisdictional scope of Article 81 EC. As we have seen above, the criterion "affect on trade between Member States" has been given a very broad interpretation in the case law of the ECJ, covering almost all agreements of any commercial significant. To use this as a tool to limit of the scope of an exclusive jurisdiction of EC competition law will render national competition law virtually obsolete.

Here we must take into consideration a recent case⁸⁴, which may be a signal of a change in ECJ case law. In this case strictly national cartels have been deemed not to have "affect on trade between Member States". This would leave room for a national competition law dealing with strictly national cartels without any affects outside the very same Member State. It is still too early to draw conclusions, this since it is only one case has been decided. We do not know to what extent this decision is going to be mirrored in future decisions and furthermore we do not know which old decisions will be rendered obsolete by this new decision. As long as this remains unclear the present scope of EC competition law remains unclear.⁸⁵ Hence, in order for the system proposed in Article 3 to work satisfactorily the "affect on trade between Member States" criterion must be clarified. This can be done either in the Regulation itself or by the ECJ.

Thus, Article 3 represents an ambitious attempt to reform the relationship between the EC and national competition law. Abandoning the

⁸³ Mavroidis, Neven, *Legal Issues of economic integration* 2001.

⁸⁴ Case C-251/96 *Carlo Bagnasco v BNP*

⁸⁵ Wesseling, *Elrev*, 2001, Aug, p 364-367.

procedural supremacy rule in *Walt Wilhelm* and replacing it by a system based on a normative supremacy rule.

3.4 The German critique of Article 3 in the Draft-Regulation

An interesting thing is that the summary of opinions on the White Paper presented by the Commission meant the end of the public debate on the modernisation process. There is a rumour that after February 2000 strictly confidential discussions took place between the Commission and delegates of the Member States.⁸⁶ One institution that issued a critique on the Draft-Regulation was the German Monopolkommission.⁸⁷

To better understand the German critique of Article 3 of the Draft-Regulation it is important to see it in the context of the unique position that Germany holds in the European competition regime. The system of prior notification is a German brainchild incorporated into EC competition law through Regulation 17, ending a debate with France that wanted a system focussing on past conduct of the undertakings.⁸⁸ In its opinion on the White Paper the Bundeskartellamt still emphasised the value of prior notification as a means to obtain information and of the preventive effects that the institute has on undertakings. It was acknowledged though that the Commission and other Member States did not share this view.

Fourteen of the fifteen Member States and all the candidate countries have more or less modelled their national competition legislation on Article 81 and 82 EC. The odd one out is Germany with the only national competition law not modelled on EC competition law. A further difference between Germany and the rest of the Community is that in Germany national authorities make use of their power to apply Article 81(1) EC independently from national rules under Regulation 17. It may be that this is limited to the energy sector but it is still a fact that no other national

⁸⁶ Wesseling, *Elrev*, 2001, Aug, p 358.

⁸⁷ The German Monopoly Commission [Hereinafter MK]

⁸⁸ Goyder, p 35.

authority applies Article 81(1) EC even though most are empowered to do it.⁸⁹

This paints the picture of the German position in the EU competition regime both in respect of which conducts we should focus on (past or future) and what legal solutions to choose to incorporate it. A consequence of this unique position is that Article 3 and the devaluation of national competition laws that comes with it will undoubtedly mean the biggest change in Germany.

With this in mind it is easier to understand why the MK in Germany published a special report, “*Problems Consequent upon the Reform of the European Cartel Procedures*”⁹⁰. In this report the MK criticises the Draft-Regulation from a functional perspective and puts question marks around its legality.

On a functional level the MK is questioning the Commission’s arguments that Article 3 will make the protection of competition more effective and that the abolishment of parallel application will mean less costs for undertakings.

The MK argues that the protection of competition will be less effective in a system based on exclusive competence of EC competition law. This because national competition laws have been developed and adjusted to the conditions on the national markets for decades. The principals of application have been shaped as well through a long period of practical usage. The high level of legal certainty that this process has generated would not be maintained under the legal order proposed in Article 3. Another fear expressed by the MK is the danger that the exclusion of national competition law from agreements that “affect trade between Member States” could lead to gaps in the protection of competition. Hence,

⁸⁹ Zinsmeister, Rijkers and Jones, ECLR, 1999, Issue 5, pp 278.

⁹⁰ Available in English on www.monopolkommission.de. The following pages are based on page 9 – 20 of the MKs special report, “*Problems Consequent upon the Reform of the European Cartel Procedures*”. Date 2003 03 20.

the MK does not share the Commission's view that the protection of competition would be made more efficient through Article 3.

The MK also rejects the Commission's second claim that the proposed reform will lead to lower costs for undertakings. The reason for this is based on the facts that the national courts and competition authorities will still apply national procedural rules and that the interpretation of the competition policy is different in different Member States. These differences in national procedural laws mean different rules on damages, different deadlines for application, etc. Put together with the fact that after the abandonment of the notification system, undertakings must make their own assessments if an agreement conforms to EC competition law high transaction costs for undertakings will be created. This since the undertakings will be asked to predict what consequences the differences in procedure and interpretation will have in a concrete case. Hence the MK rejects the thought that as long as the procedural rules and interpretations are different, the application of the same legal order by itself will create a level playing field for undertakings.

Another functional dimension of Article 3 that the MK points to is that the development of EC competition law might be hampered. This since the possibility of dialogue and comparison between different legal orders is lost. The Commission will no longer be able to learn from different competition laws.

When it comes to the legality of Article 3 the MK questions this from several perspectives. Firstly, it asks if the exclusion of national competition law from the European sphere is compatible with the doctrine of attributed power. This since the legal base of Article 3 is Article 83(e) EC, which gives the Council the right to establish the relationship between EC and national competition law. The MK expresses doubts if the power to exclude national competition law is included in the right to establish the relationship between EC and national competition law.

Secondly, the MK argues that the proposed solution is violating the principles of Subsidiarity and Proportionality. The purpose with the exclusive jurisdiction of EC competition law is to oblige national

competition authorities to apply EC competition law. This to avoid a re-nationalisation of the competition law following the abolishment of the Commission's monopoly on granting exemptions under Article 81(3) EC. The MK argues that the creation of an exclusive EC jurisdiction is a more severe measure than necessary. The objective pursued by the Commission could be fulfilled with an obligation to apply EC competition law that saying that national authorities may not limit themselves to apply only their national competition laws. The MK's suggestion would mean that national competition law remains applicable as long as it does not conflict with EC competition law. This rule would also ease the danger of gaps in the protection of competition.

Jeremy Lever QC has expressed the functional critique of the MK in a precise and inspired way in his account of the MK's criticism:

“Essentially, it is wasteful and hazardous to jettison national rules, decisional practices and case law that have been accumulated, in the light of experience, over the years at the national level and replace it with a general clause open to wide scope of interpretation by undertakings, competition authorities and courts.”⁹¹

3.5 Evaluating the German critique

When it comes to the first point of criticism, namely that the competition policy will be less effective because of the increasing legal uncertainty offered to undertakings, it must be seen as a reflection of the German position in competition. The MK defines this high level of legal security as undertakings being able to ask the authority they appeal to for a statement of the consequences of an agreement with regard to the competition policy. This is one of the consequences of the whole reform to abolish the prior notification that undertakings will have to be self-reliant in their assessment of the competition law. This critique is therefore to be seen as a reflection of the German conception of the value for legal certainty of

prior notification. A consequence of the reform proposal is that only the possibility of a potential Community action under Article 3 will protect an undertaking from stricter national competition law. A result of this, one might argue, is that the legal security offered to undertakings actually would improve compared to the current system under Regulation 17.⁹²

The second point of criticism is the potential danger of gaps in the protection of competition. Here the MK brings out a lot of examples of German laws that would become inapplicable through an unconditional normative supremacy rule. This does not mean though that this problem is limited to Germany. For instance, the UK Fair Trading Act of 1973 contains provisions of investigations of complex monopolies.⁹³

Here it seems as if the MK hit on a point of more general concern, namely that some Member States have more comprehensive and detailed legislation than the EC competition law. Deriving from this there is a danger that the level of protection of competition could become lower in certain Member States through the enactment of Article 3. This said it is not necessarily the strictest legislation that provides for the best functioning of the market. It may also be argued that the danger of a re-nationalisation of the competition policy is a greater. The application under the current regime under Regulation 17 has shown that given a choice between applying national and EC competition law the national authorities chose the former.⁹⁴

The second part of the MKs critique rejects the Commission's claim that the costs for undertakings will be lower under the proposed reform. This since the interpretation of the competition policy and the national procedural rules are different throughout EU.

When it comes to interpretations of the competition policy there are at least five different interpretations of what it means to protect competition inside the EU. The first conception of competition sees it as a means to achieve an optimum allocation of resources. Economic efficiency is at heart at this theory of law and economics. Then we have the understanding of

⁹¹ Lever QC, ECLR, 2002, Issue 7, page 322.

⁹² Se above Chapter 3.1.

⁹³ Whish, p 254.

competition with economic freedom in the centre; meaning to what extent competition should restrict the decision-making ability of the economic actors. This conception comes from classical liberalism. The third view is coming from German neo-liberalism, seeing competition from a perspective of economic power. The target here is to prevent undertakings from using their economic power to undermine the competitive structures of the market. Competition is also seen as a mean to destroy and weaken obstacles to economic change. The fifth conception is the one promoted by the Commission and ECJ in the construction of the Single Market. Here competition law is seen as a mean to achieve the integration of the national markets of the Member States.⁹⁵ These different understandings of what competition law is are not centred around certain countries preferring one or the other understanding. They are all expressed to a different degree in all the Member States, sometimes indirectly sometimes directly.

The differences in procedure law are obvious since this field has not been harmonised by Community law⁹⁶ and the Commission does not deem this to be necessary either.⁹⁷

Consequently, a problem with the decentralisation of the application of the EC competition policy is that it could lead to a non-uniform application of EC competition law. This because of different understandings what competition really means and differences in procedure. These differences exist in the current regime under Regulation 17 and are part of the concurrent application of different legal order. To oblige national authorities to apply EC competition law is a step towards a more uniform solution. In this light it can be said that Article 3 is the first step towards avoiding redundant costs for undertakings. The higher the level of uniformity that the Commission and the ECJ manages to achieve the lower the transaction costs for undertakings.

⁹⁴ Zinsmeister, Rijkers and Jones, ECLR, 1999, Issue 5, p 277.

⁹⁵ Gerber, ELCR, 2001, Issue 4, p 124.

⁹⁶ For a look at the differences see: Jones, ECLR, 2001, Issue 10, p 405-415.

⁹⁷ Draft-Regulation

4 COUNCIL REGULATION No 1/2003 – THE NEW COMPETITION REGIME

4.1 The contents of Regulation 1/2003

The new European competition regime was founded on the 16 December 2002, when the Council adopted Regulation 1/2003 replacing Regulation 17.⁹⁸ The new system is meant to apply from 1 May 2004.⁹⁹

The general content of the reform is the same as envisioned in the Draft-Regulation and the White Paper. The Commission is giving up its monopoly to grant exemptions pursuant to Article 81(3) EC, thereby achieving a decentralisation of the enforcement system of EC competition law. Furthermore the notification system is abolished changing the focus from future agreements to past conducts. The objective behind the reform is to simplify the administrative procedure in order to free up the Commission's resources so it can focus on pursuing hardcore cross-border cartels.

As a consequence of the abolishment of the notification system the Commission's powers of investigation is strengthened. This to make up for the loss of the information that the prior notification provides.¹⁰⁰

To guarantee the uniform application of EC competition law when the enforcement is entrusted to the national authorities as well as the Commission, a net-work is created to facilitate co-operation between the different enforcers. This co-operation consists of the mutual duty to inform the other authorities when proceedings are initiated. Copies of decisions taken by Member States' authorities should also be sent to the Commission. The fact that a competition authority in another state is dealing with a case is seen as a sufficient ground for a competition authority to suspend its own proceedings. Furthermore to safeguard a uniform application of EC

⁹⁸ With exception of Article 8(3) Regulation 17, Regulation 1/2003, Article 43.

⁹⁹ Regulation 1/2003, Article 45.

¹⁰⁰ Regulation 1/2003, Chapter V, Articles 17-21.

competition law the duty is placed on the national authorities not to issue decisions that contradict Commission decisions. They must also refrain from taking decisions that contradict decisions that the Commission is contemplating.¹⁰¹

This was a short rendition of the features of Regulation 1/2003. The differences with the Draft-Regulation are only minor, but by no means insignificant. The determination of the relationship between EC and national competition law was one of the things that were altered compared to the Draft-Regulation.

4.2 The modified version of Article 3

Article 3 of the Draft-Regulation was one of the Articles that had to be amended to achieve a political consensus. Instead the new version of Article 3 says:

1. Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81(1) of the Treaty which may affect trade between Member States within the meaning of that provision, they shall **also apply Article 81 of the Treaty to such agreements**, decisions or concerted practices...
2. The application of national competition law may **not lead to the prohibition of agreements**, decisions by associations of undertakings or concerted practices which may affect trade between Member States but **which do not restrict competition within the meaning of Article 81(1) of the Treaty**, or which **fulfil the conditions of Article 81(3)** of the Treaty or which are covered by a Regulation for the application of Article 81(3) of the Treaty...

An exclusive jurisdiction for EC competition law is no longer created. National competition laws remain applicable in combination with EC

¹⁰¹ Regulation 1/2003, Chapter III, Articles 11-16.

competition law on agreements that have “an affect on trade between Member States”. This application however cannot result in a prohibition of any agreement that is conforming to Article 81 EC.

The difference in practice between this rule and an exclusive jurisdiction is not big. The supremacy of EC law results in that national competition law can never exempt what EC competition law prohibits and Article 3 says that a stricter national law cannot prohibit agreements that does not restrict competition according to EC competition law.

The EC supremacy rule chosen in Article 3 Regulation 1/2003 cannot be characterised as a normative supremacy rule. This since it sets a criterion “affect on trade between Member States” that sets EC competition law as the standard level of protection of competition. What distinguishes this supremacy rule from the normative supremacy rule found in the Draft-Regulation is that here national competition law remains applicable. The rules have all the characteristics of a normative rule: it refers to an objective criterion, it does not focus on decisions and in what form these decisions are taken.¹⁰² If there is an “affect on trade between Member States” Article 3 comes into affect and national competition law cannot lead to any different solution than the application of EC competition law. Therefore there is no longer any need to test the reach of EC competition law on a case by case basis. This form of regulating the relationship between EC and national competition law can be characterised as a normative “de facto supremacy” rule. This since it is a normative rule and it has the practical effects of a supremacy rule even though in theory national competition law remains applicable.

The consequence of this approach is the abandonment of the procedural supremacy rules in *Walt Wilhelm*. A lot of the practical problems connected to this procedural approach are also eased with the new Regulation. The emphasis is no longer placed on decisions therefore the problems with the extensive use of comfort letters disappears. This since undertakings does not need a Commission decision to be protected from

¹⁰² Walz, *ElRev*, Dec pp458.

stricter national competition laws under the new regime. This serves to increase the legal security offered to undertakings.

Regulation 1/2003 explicitly states that a stricter national law may not be applied when an agreement is pursuant to EC competition law. This means that the scope of EC competition law has been extended in comparison with the *Walt Wilhelm* doctrine. There the important question was if an agreement fell under Article 81(1) EC but was exempted under Article 81(3) EC or if an agreement was deemed to fall outside Article 81(1) EC altogether. The former protected an undertaking from stricter national competition laws but the latter not.¹⁰³

Hence, the normative “de facto supremacy” rule in Regulation 1/2003 in practice strengthens the supremacy of EC competition law. It also simplifies the relationship between EC and national competition laws compared to the procedural rule in *Walt Wilhelm*. But the abandonment of the notification system might have called for an even more perspicuous solution. In this light the normative supremacy in Article 3 of the Draft-Regulation might be preferable for its clearness. The clearer and more easily a system can be interpreted, the lower the transaction costs of the self-assessment of the competition consequences of agreements will be for undertakings.

With a genuine normative supremacy rule like the one in Article 3 of the Draft-Regulation there was no longer any need to establish the relationship between EC and national competition law.¹⁰⁴ This is not necessary to do under Regulation 1/2003 either, but an extra complication is added. Under the normative “de facto supremacy” rule one must make sure that the combination of the application of national and EC competition law does not lead to a different result than the application of EC competition law only. Since it is explicitly stated in Regulation 1/2003¹⁰⁵ that the result of this must be the same, then it is hard to understand why national competition law should be applied in the European sphere at all.

¹⁰³ Wesseling . ECLR, 1999, Issue 8, p 429.

¹⁰⁴ See Chapter 3.3.

¹⁰⁵ Regulation 1/2003, Article 3(2).

The objective of the reform is to simplify administration and to create an effective supervision of competition. One of the reasons given to explain the inadequacy of the system under Regulation 17 was the high costs for undertakings created by the parallel application. The modification of Article 3 seems to go against the spirit of the reform, making it more complicated and less cost effective than it could have been.¹⁰⁶

A possible reason could be concerns over the proportionality of Article 3 the Draft-Regulation. The MK voiced concerns about this in its critique of the Draft-Regulation, suggesting the normative “de facto supremacy” rule as a more balanced solution.¹⁰⁷ This makes sense if seen in combination with the recent case law of the ECJ.¹⁰⁸ Here we can see increasing concern about the competencies of the Member States. Protecting their legal sphere from excessive Community intervention. Case C-376/98 annulled the tobacco advertising directive because it only referred to an accepted but vague objective as a legislative base. This is not enough and the Community legislatures must instead make sure that the proposed solution is an appropriate tool to achieve the intended aim. This applies to every single provision not only to the legislative Act as a whole.¹⁰⁹

In the preamble of Regulation 1/2003 it is merely stated that the proposed measures do not go beyond what are necessary and they are in accordance with the principles of subsidiarity and proportionality.¹¹⁰ The Commission said the same about the Draft-Regulation with out further qualifications.¹¹¹ Since both versions are considered to be in line with the principles of proportionality and subsidiarity without any further motivation the answer whether these concerns for proportionality was the reason prompting the change of Article 3 remains unknown.

A further related reason could be that the Council did not feel it had the attributed powers necessary to create an exclusive EC jurisdiction in

¹⁰⁶ Regulation 1/2003, Preamble (2) & (3).

¹⁰⁷ See Chapter 3.4.

¹⁰⁸ Case C-376/98 Germany v. Parliament and Council. (Judgement October 2000).

¹⁰⁹ Editorial comment, CMLRev, 2000, No 6 Dec, p 1301.

¹¹⁰ Regulation 1/2003, Preamble (34).

¹¹¹ Draft-Regulation p 11.

Article 83(e). The MK was arguing this point, saying that it would take a redraft of the EC treaty to allow this. Here it is important to remember the doctrine of implied powers embodied in Article 308 EC. With the Merger Regulation¹¹² in mind where an exclusive EC jurisdiction with these Articles as a legal base, this seems like a hard line to pursue.

Another possible solution is that there are political reasons for the changes. That certain alterations of Draft-Regulation were deemed necessary for it to be enacted by the Member States in the Council. The national competition authorities preference for applying EC competition law together with national competition law if they ever applied EC competition law under Regulation 17, could be a reason for this.¹¹³ Also the fact that the MK suggest the same solution as the final version of Article 3 in its critique of the Draft-Regulation could point to that the changes were politically motivated.

The reason that some commentators put in favour of the parallel application of national competition law, as Regulation 1/2003 prescribes, is that the national authorities will have difficulties applying the “affect on trade between Member States” criterion in a correct way.¹¹⁴ A consequence of this difficulty is that an uncertainty is created for undertakings, which would lead to higher costs.

Here the safeguards built in to the EC treaty must be remembered though. First and foremost, there is the possibility to receive a preliminary ruling from the ECJ but also the possibility of infringement actions against Member States.¹¹⁵ Assuming that the ECJ will be handed adequate resources to deal with this in a good way this will be a big help on the national level to apply the “affect on trade between Member States” criterion correctly. It has also been said that it will be a strength for the national competition authorities to apply the same rules, since it will make

¹¹² Council Regulation No 4064/89, [Hereinafter Merger Regulation].

¹¹³ Zinsmeister, Rijkers and Jones, ECLR, 1999, Issue 5, p 277.

¹¹⁴ See for instance Wahl, ERT, 2001, No. 2, p 232.

¹¹⁵ Articles 226 & 234 EC.

co-operation easier.¹¹⁶ The reason for the preferred solution could be one of the above mentioned or yet again something else.

A consequence of the reform is that the Member States will have to make sure that the application of national competition laws within the European sphere does not lead to any different result than EC competition law. How they choose to do that is for now up to each Member State. Whatever solution the Member States choose, some kind of re-alignment of national competition law will be necessary. For instance, in Sweden a special investigator will look at these and present his result on 31 July 2003.¹¹⁷ A lot of questions need to be answered, for instance, what happens with the notification systems on a national level? The Commission will come out with guidelines on the application of Regulation 1/2003 during the autumn of 2003.

Some Member States chose to limit their jurisdiction under Regulation 17 in order to avoid concurrent application.¹¹⁸ Does this have any impact on the result of the current reform? When it comes to the UK in theory the same problems arise with the limitation of jurisdiction to agreements that only have effects and are meant to be implemented in the UK. In practice however the number of cases that the UK competition Act can be applied on in the European sphere will be substantially limited. Especially taking into consideration the latest case law from the ECJ.¹¹⁹ When it comes to Italy Regulation 1/2003 does not mean any changes. This since the Italian competition Act rejects the procedural supremacy in *Walt Wilhelm* and instead prescribes an exclusive EC jurisdiction in line with Article 3 in the Draft-Regulation. The consequence of this is that the Italian competition

¹¹⁶ Norberg, Reform for effektivare konkurrens politik, *Konkurrens nytt*, 2003, No 4, p6.

¹¹⁷ Dir. 2003:2,

[http://www.kilpailuvirasto.fi/cgi-bin/svenska.cgi?luku=nyheter&sivu=nyh/nyh-2002-10-15](http://rixlex.riksdagen.se/htbin/thw?%24%7BHTML%7D=DIR_LST&%24%7BOOHTML%7D=DIR_DOK&%24%7BHTML%7D=DIR_ERR&%24%7BMAXPAGE%7D=26&%24%7BTRIPSHOW%7D=format%3DTHW&%24%7BBASE%7D=DIR&%24%7BFREETEXT%7D=&RUB=&BET=2003%3A2&ORG=&UDAT= Date 030628. See also Finland <a href=) Date 030628.

¹¹⁸ See chapters 2.2 & 2.4.

¹¹⁹ See chapter 3.2.

Act does not apply in the European sphere, therefore no problems with re-alignment will arise.

Regulation 1/2003 does not contain any definition on what is competition law therefore the ECJ doctrine on diagonal conflicts remain the same. Hence an additional prerequisite continues to apply in order for EC competition law to take precedence, namely that the national rule it collides with really is a competition rule.¹²⁰

4.3 Modernisation = Harmonisation?

It has been argued that the modernisation of competition law can be characterised as a “de facto” harmonisation of the competition laws in Europe, that the enlarged sphere of EC competition law will render national competition laws virtually obsolete. This fear was especially expressed in connection with the stronger formulation of Article 3 in the Draft-Regulation. The solution argued in favour of instead was the one chosen in the final version of the Article 3 where the room allowed to national competition law on a first glance seems bigger than in the Draft-Regulation. But since the result of the parallel application of EC and national competition law cannot change the outcome from the one prescribed by EC competition law the same fears could still be voiced.

These arguments are built on the vast interpretation of scope of EC competition law, the classical market building understanding of the “affect on trade” criterion. This would mean that there would be no room left for the application of national competition law on agreements of any commercial significance.¹²¹

The idea of one EC competition law applicable to the entire European legal sphere and abolish national competition law has been called simple but naive. This since the current state of European integration would not facilitate such a radical change. The Member States at the time being just do

¹²⁰ See Chapter 2.4.

¹²¹ See Chapters 2.2 & 3.3.

not have the political ambition to do this.¹²² Most commentators agree that this development is not desirable.¹²³

The situation in the US has been put forward in favour of this position. There “every citizen owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either, [even for] the same act.”¹²⁴ Since federal and state competition law overlap in jurisdiction even a dual application in the spirit of Walt Wilhelm seems possible.¹²⁵ Furthermore the federal competition law does not prohibit a parallel application of state competition law.¹²⁶ Hence, even inside the US different competition laws are allowed to coexist.

Consequently it is not desirable to abolish national competition law altogether. But is the result of Article 3 really going to be a “de facto” abolishment of national law? Here we must remember the debate about the change of the objective of the EC competition law¹²⁷ and the recent changes in the case law of the ECJ deeming strictly national agreements to fall outside the scope of Article 81 EC.¹²⁸

Regulation 1/2003 confirms that the objective of EC competition law has changed from market building to regulating the functions of the Single market. Further more it is stated that the Member States are not precluded from adopting stricter national competition laws on their own territory.¹²⁹ This is a confirmation of the fact that the scope of EC competition law is changing and that the “affect on trade between Member States” criterion is to be interpreted in a more restrictive way. Where national competition law has been given the room to apply on agreements limited in its effects to only one Member State. The details of the extent of this change in scope will not be known until the ECJ can revise its case law. Then we will know which old decisions will be rendered obsolete and which will still apply.

¹²² Power, Editorial, ECLR, 1995, Issue 2, p75.

¹²³ For Instance: Carlsson, Konkurensnytt No 10, 2000; Kingston, ECLR, 2001, Issue 8, 349f; Wahl, ERT No 2, 2001, p 230-233.

¹²⁴ Moore v. Illinois, 55 US 13, 20 (1852).

¹²⁵ Salord, ECLR, 2000, Issue 2, p 130.

¹²⁶ California v ARC America Corp, 490 US 93, 101, 109, (1989).

¹²⁷ See chapter 3.1.

¹²⁸ See chapter 3.3.

The change of the scope of EC competition law to allow for a sphere for national competition law can be categorised as a silent reform of the substantive law. This silent reform has taken place in parallel with the modernisation of the procedural law. The consequence of this is that even the wording of Article 3 in the Draft-Regulation will leave room for national competition law.

Deriving from this it is quite clear that Regulation 1/2003 does not have and is not intended to have the effect of a “de facto” harmonisation of competition laws in Europe.

4.4 The solution in the Merger Regulation

It is stated in Article 3(3) of Regulation 1/2003 that when national authorities apply national merger laws Article 3(1) and (2) does not apply. This comes from the fact that Regulation 1/2003 does not replace the Merger Regulation from 1989.¹³⁰ This Regulation contains its own rules concerning the relationship between EC and national merger laws.

The Merger Regulation is based on the “one stop shop” principle. The system is built on mutual exclusive EC and national jurisdiction. A criterion based on turnover is used to separate the European and national legal spheres. When the criterion is fulfilled the merger has a “Community interest” and falls under EC jurisdiction. It is a violation of the Merger Regulation for a national authority to apply national merger law on a merger that has a “Community interest”. The Merger Regulation goes further than Article 3 in the Draft-Regulation and the Italian competition Act. This since an equally exclusive national jurisdiction is created.

A practical application of the turnover criterion gives that commerce must be appreciably affected in at least two Member States.¹³¹ Regulation 1/2003 does not explicitly contain any criterion of delimitation towards national competition law. But as we have seen in the preamble it has been

¹²⁹ Regulation 1/2003 Preamble (8).

¹³⁰ Regulation 1/2003 Articles 36-43 econtrario.

accompanied by a silent reform of substantive law limiting it down to approximately the same scope as the “Community interest” theory.

This shows that the European competition regime is no strangers to exclusive jurisdictional clauses. But here the unique function of Article 81 and 82 EC plays in. The function of these Articles is to safeguard the Single Market against private actors undoing the harmonisation achieved by the Member States. To make sure that the actions of undertakings do not leads to the balkanisation of the national markets. A consequence of this is that a solution with numerically defined thresholds like the Merger Regulation is unsuitable to determine the scope of Article 81 and 82 EC. The special function and nature of these Articles require a more flexible alternative.¹³² This because these Articles are designed to prevent private parties from undoing the harmonisation achieved at governmental level. The solution in Regulation 1/2003 is then more suitable to safeguard the special nature of Article 81 and 82 EC. This since this system creates a European legal sphere where national competition law cannot be applied to a different result than EC competition law. But it does not create a national sphere that is protected in the Regulation 1/2003. It is the change of interpretation of the “affect on trade between Member States” criterion made by the ECJ that creates a sphere for national competition law. The benefit of this solution is that in most cases there will be room for national competition laws to be applied on the domestic markets. But still it is possible for the ECJ to take jurisdiction over purely domestic cartels if concerns about the realisation of the goals of the EC treaty demand it. Since this change is made in ECJ case law it can be altered by the ECJ if the purpose of the EC treaty demands it.

Thus, a protected European legal sphere is in line with the safe guards needed for Article 81 and 82 EC but an equally protected national sphere does not contain the flexibility needed. Therefore an exclusive EC jurisdiction in the lines of the Draft-Regulation might be beneficial for the sake of simplifying the self-assessment by undertakings but not an exclusive national jurisdiction in the lines of the Merger Regulation.

¹³¹ Wesseling, *ELRev*, 2001, Aug, p 365.

¹³² Wahl, p 324.

5 Conclusion

The question this thesis is meant to answer is how Regulation 1/2003 changes the relationship between EC and national competition law both in theory and as a practical tool to solve the conflict of law?

On a theoretical level the enactment of Regulation 1/2003 brings about the abandonment of the procedural supremacy in *Walt Wilhelm*. Instead a normative “de facto” supremacy rule is created. The consequence of this is that the supremacy of EC competition law over national competition law is strengthened. It is no longer necessary to establish the primacy of EC competition law on a case by case basis. Hence, the reform changes the theoretical basis for the relationship between EC and national competition law. It puts it more in line with the general form of supremacy found in Community law. This also serves to end the long debate among commentators of exactly how far the reach of the procedural supremacy rule really is. The question was not how to solve the conflict of law in a certain situation but rather if there was any conflict of law at all. A consequence of this is a simplification in determining the reach of EC competition law.

This strengthening and simplification shines through on a practical level as well. Regulation 1/2003 means that an objective criterion is set to determine the reach of the EC “de facto” supremacy. If there is an “affect on trade between Member States” the application of a national competition law cannot lead to any other result than the EC competition law would have led to. The consequence of this is that the reach of EC competition law is extended. Under the procedural supremacy rule EC competition law only prevented the application over national competition law on agreements that fell under Article 81(1) EC but were exempted under Article 81(3) EC. If an agreement fell outside Article 81(1) EC either because there was no “affect on trade between Member States” or because competition was not restricted national competition law could be applied freely. After the reform the “de facto” supremacy extends to the situation where there is an “affect on trade between Member States” but no restriction of competition.

Another important change is that the “de facto” supremacy is not limited to formal decisions. This solves the problem with the comfort letters that was not covered by the procedural supremacy rule and served to undermine the entire system. This guarantees that the system has the reach that the legislator intended.

Thus, Regulation 1/2003 creates a simpler system with a stronger primacy of EC competition law. Is the solution chosen the most appropriate one?

Here one of the big innovations through Regulation 1/2003 must be remembered. The abandonment of the notification system has the consequence that undertakings must be more self-reliant in their assessments of the competition consequences of agreements. One of the reasons for the reform is to diminish the costs for undertakings. The clearer the relationship is between EC and national competition law, the easier it will be for undertakings to predict the outcome, meaning lower costs.

Therefore it could be argued that the version of Article 3 in the Draft-Regulation with its clear-cut exclusive EC jurisdictional clause is a more appropriate solution. This especially seen together with the silent reform of the scope of EC competition law confirmed through Regulation 1/2003. This way there will still be room for national competition laws even with an exclusive EC jurisdiction.

To imitate the solution in the Merger Regulation instead of the Draft-Regulation would go too far. This since the creation of a national exclusive sphere will not facilitate the flexibility needs of the nature of Article 81 and 82 EC.

To go even further than the Draft-Regulation and really abolish national competition law has not been treated in this thesis because it is unforeseeable at the current level of European integration. A solution like that would also mean a big compromise of the principle of subsidiarity, even though it would be even simpler for undertakings.

In general it can be said that both the solution in Article 3 in Regulation 1/2003 and the Draft-Regulation is an adequate mean to come to terms with the problems created by the procedural supremacy. The focus of

the debate will move from the reach of the primacy of EC competition law to how to achieve consistence between the different enforcers of EC competition law. The solution in the Draft-Regulation might be preferable for its simplicity but still it must be remembered that the result of Regulation 1/2003 in practice is not too different. The Commission has throughout the modernisation process showed a desire to really change the system and to correct its flaws of the procedural supremacy. This to handle the challenges of the future, with the biggest enlargement of the EU around the corner.

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