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Summary

From the first of May this year the notification system is to be abandoned to the benefit of a directly applicable system in which the undertakings themselves will be forced to assess the EC competition rules. A major decentralisation is also to take place, allowing both the national competition authorities and the national courts to apply the EC competition rules in their entirety. Even though the reform is believed to have a lot of positive effects, especially concerning administrative efficiency, there are quite a few worries linked to the new system. Most of these are connected to legal certainty aspects and the risk of losing coherency and consistency in the application of the EC competition law. For instance critics have expressed their concerns as to the possibility for national judges to deal with the complex economic considerations that have to be taken into account when applying Article 81(3). Moreover the risk of having divergent judgements/decisions is believed to increase as the national competition authorities and the national courts are given the right to apply Articles 81 and 82 in their entirety. Closely connected to this issue lies the problem of different procedural rules in different Member States, something which both increases the risk of forum shopping and divergent decisions. The above stated assumes however that the amount of cases in national courts and national competition authorities will increase as a result of the abolition of the notification system. This is probable, but not at all a guarantee.

In order to solve these problems, the Commission has presented a will to increase the co-operation between the players on the EC competition field. This is done through an increased information exchange, especially between the Commission and the national competition authorities. The latter co-operates further with the Commission through a so called European Competition Network. This network seems to solve most of the predicted problems in this part of the decentralisation. The situation is however somewhat different when it comes to the national courts. In order to decrease the risk of divergent decisions, the Commission has been given the possibility to intervene as *Amicus Curiae*. The national courts are also obliged to send every judgement based on the application of Articles 81 and 82 to the Commission. Furthermore they cannot rule against Decisions taken by the Commission. It is also notable that the Commission have a special funding system which encourages national judges to have seminars and create networks together with judges in other Member States.

The question is whether these measures are sufficient. As have been shown in the essay, there are quite a few situations which leave a lot to ask for in terms of co-operation. This is especially true for the interaction between the national courts and the Commission.

It is desirable that these predicted problems will be solved in a close future, but both political considerations and technical/administrative aspects might postpone this development. It is however likely that there will be a second modernisation package in the future, regulating among other things the procedure in national courts. This is likely to take place after the Commission has evaluated the effects of the reform.

One must however bare in mind, that the European Court of Justice or the Court of First Instance always can decide upon the behaviour of the national courts provided that it lies within their jurisdiction (which of course is the case with EC competition law).

Preface

The presented text have been written both when the notification system was still applicable and after the reform took place. This has lead to a situation in which the terminology at one point became inaccurate. Instead of presenting the notification system as “the old” system, I have called it the current system etc.. I have chosen this approach because the major part of the essay was written before the first of May this year. I apologise for possible inconveniences for the reader.

As will be discussed more further down, the essay mainly focuses on the future to come. Obviously there are a great deal of insecurity to be found when working with predictions. I would therefore already here make a mental reservation as to the conclusions in the analysis. While writing I often found myself in situations where I doubted whether or not I had any substantial grounds for the presented theories. I was however somewhat relieved after attending a seminar in Stockholm. Several well informed academics and practitioners were also present. As the confusion was quite palpable even amongst these people, my worries became a bit abated.

I would like to express my gratitude to the people who has helped me with the essay. First I must mention Anna-Lena Järvstrand, judge at Stockholm city court. Her devotion to competition law was very inspiring and she provided me with, among other things, a lot of valuable information concerning Swedish competition policy. I would also like to thank Christer Fallenius, president of the Swedish market court, who, for instance, made me reflect over whether or not the factual consequences of the reform would be so significant. Furthermore I would like to express my gratitude to Anne Vadasz-Nilsson at the Swedish competition authorities and my supervising teacher Henrik Norinder.

Abbreviations

CFI	Court of First Instance
EC	European Community
ECJ	European Court of Justice
ECN	European Competition Network
NCA	national competition authority

1 Introduction

This essay is written in a very special time. The European Union is welcoming 10 new Member States at the same time as it introduces a completely new EC competition policy. It is impossible to miss the connection between the two events. The Commission have, as we will see further down, been aware of the problems of the notification system for quite some time. The administrative burden of the current policy is already significant and through the expansion of the Community the situation would have turned precarious.

When I started writing the essay, I was aware of the fact that the notification system was to be abandoned to the benefit of a directly applicable system in which the undertakings themselves would be forced to assess the EC competition rules. I also knew that a major decentralisation was to take place, allowing both the national competition authorities and the national courts to apply the EC competition rules in their entirety. What I could not grasp at that point was the complexity of the situation. Involving more “players” on the competition field meant introducing a variety of possible problematic situations.

While searching for information about the reform I bumped into an article¹ written by Sarunas Keserauskas², a lecturer in competition law at Riga Graduate School of Law. In the introduction of the article the writer made quite a memorable political remark about the changes introduced by the Commission. He stated that:

*“ what may appear as a surprise in terms of classical Marxist theory, the revolutionary changes were carried out by the very institution that was leading the overthrown authoritarian regime ”*³

Maybe the word “overthrown” is a bit exaggerated – the Commission will continue to have the leading role of the EC competition policy development but, according to me, the comment still illuminates the Commissions’ will to share the power earlier possessed (almost) exclusively by the Competition Director General of the Commission.

¹ See Sarunas Keserauskas, “Practical implications of the EC antitrust enforcement revolution”, p.1, <http://www.lpvplp.lt/en/docs/download/341.php>, 2004.05.16, 12:30 am.

² Sarunas Keserauskas, graduate of Vilnius University, is an associated lawyer at the Law Firm Lideika, Petrauskas, Valiūnas ir Partneriai.

Mr Keserauskas is a lecturer in EC Competition Law at Riga Graduate School of Law, Riga, Latvia, a lecturer in Family Law at Vilnius University, Lithuania. Mr Keserauskas is a member of the working group for drafting a commentary to the Civil Code of the Republic of Lithuania.

³ See *supra* note 1 p.1.

This essay will however not focus on the political reasons for the change even though I will shortly present the political objectives of the reform. Instead I will try to predict the outcome of the reform. Which procedural problems are connected to the new directly applicable system and how can these be solved? In order to find answers to these questions it is also important to grasp the mechanisms of the new policy. I have therefore chosen to present two notices describing the interaction between the operators on the field. Furthermore there will be a brief presentation of the current notification system in order to provide the reader with valuable background information as well as an understanding of the need for the reform.

1.1 Method

Since the introduction of the so called “Modernisation Package”, which includes the Notices and Regulations concerning the reform, is a very “fresh” event, there are little to be found in books about the reform. I was obliged to resort to documents issued by the Commission and articles written by experts on the area. This has lead to an essay in which the set of problems brought forward is based on the predictions and opinions of others. This is inevitable since the future always consists of predictions and not states of facts. It is however important to keep in mind that it is only in the analysis that I state my point of view; the described problems in the rest of the essay are worries etc. expressed by others.

I have also found inspiration to the analytic part through interviews with two judges who are regularly working with competition law issues. Furthermore I attended a seminar held in Stockholm which was partly focused on the questions brought forward in this essay. As many of the participants where highly initiated in both the Swedish competition law and corresponding EC rules, the opinions presented by them provided me with a lot of valuable information.

In other words, my method has not been to clearly state facts – obviously the chapters describing the current system are exceptions from this. Instead I have investigated possible situations which can occur in the new directly applicable system. I found this method to be both difficult and interesting. Studying the opinion of both positive and negative “Nostradamuses” made it possible for me to at least be able to *guess* how the reality will look like in a couple of years.

1.2 Delimitations

As for delimitations, I chose to leave out almost all of the material part of the EC competition rules. It would have been interesting to study Article 81(3) more thoroughly – especially in the light of the new Notice describing the Article – but doing that would have meant moving away from the main aim of the essay, which is to present possible *procedural* problems related to the reform. I have also focused on the consequences for the public authorities and not so much on how the reform will affect private undertakings and their legal advisers. Their situation will obviously also change as the new system enters the competition field. The reason for this delimitation is to be found in the difficulties in finding material concerning the impact on private parties. The authorities have their guidelines and public information something which facilitates the analysis of their behaviour etc.. The same is not true for companies and legal advisers.

2 The current system

2.1 Centralisation

The traditional way of dealing with competition issues at Community level is symbolised by a centralised approach. The notification system (see below in 2.2) constitutes the core of the system and the centralised power of the Commission is further underlined by its monopoly over the possibility to grant exceptions under Article 81(3).

It is not however the competition Articles in the Treaty that give the Commission the monopoly of Article 81(3). Instead Article 9(1) in Regulation 17/62⁴ establishes the current policy. The provision states that “...the Commission shall have the sole power to declare Article 81(1) inapplicable pursuant to Article 81(3).” No similar rule exists concerning the application of Article 81(1) or Article 82.

As implied above Articles 81(1) and 82 already have direct effect⁵. In other words the current system, however centralised, have some decentralised aspects. The national courts can consequently decide if an agreement, a decision or concerted practice is restrictive to competition but they cannot rule upon the existence of an exemption

In 1993 the “Notice on co-operation with the national courts”⁶, was issued. The Notice focuses mainly on the possibility for the national court to turn to the Commission in case of need for information and guidance when applying Articles 81(1) and 82.⁷

The current role of the national competition authorities (NCAs) is limited. They have to be authorised to apply European competition rules. Presently only eight of the Member States have empowered their NCAs to apply Articles 81(1) and 82.⁸

In 1997 a “Notice on co-operation between the Commission and national competition authorities”⁹ was published. Its purpose was to reduce the number of complaints addressed to the Commission. The Notice sets out guidelines for the allocation of cases between the national authorities and the Commission and invites undertakings to make greater use of the national competition authorities.¹⁰

⁴ O.J. 1962 13/204.

⁵ Case 127/73 *BRT 1* [1974] ECR 51., Case C-234/89 *Stergios Delimitis v Henninger Bräu AG* [1991] ECR I-935.

⁶ O.J. C 39, 13.2.1993, “Notice on co-operation between the Commission and national courts in applying Articles 85 and 86 of the EEC Treaty”, p.6.

⁷ O.J. 1999, C132/1, “White Paper on Modernisation” p.16f.

⁸ See Claus Dieter Ehlermann, “The modernisation of EC antitrust policy: a legal and cultural revolution”, (2000) *Common Market Law Review* 37, p.581.

⁹ O.J. C 313, “Notice on Co-operation between the national competition authorities and the Commission in handling cases falling within the scope of Articles 85 or 86 of the EC Treaty”.

¹⁰ See *supra* note 7 p. 17.

2.2 The notification system

Regulation 17/62 from 1962 deals with the implementation of Articles 81(1) and 82. According to this Regulation, there are three ways for the Commission to find out about an infringement of the competition rules. Articles 11-14 in Regulation No 17 provide the Commission with the possibility to *investigate* an undertaking in search for possible restriction of competition. A second way of finding out if an infringement is committed is through a *complaint*. Thirdly, the Commission can be made aware of a restriction through a *notification*.¹¹

Agreements which can restrict competition have to be notified to the Commission¹². Such a policy is called an *ex ante* system. Decisions following the notification can be made in two ways. The Commission can either give a formal Decision which is binding upon both parties and the national courts or it can give an informal settlement, saying that it will close the file on the matter. These informal settlements are called *comfort letters*. The constantly increasing pile of notifications forced the Commission to introduce this technique in the early 70s in order to speed up the processing of applications for authorisation. The system has been accepted even though the Decisions are non-binding. The letters are almost never published in the official journal, something which hinders interested parties from giving comments according to Article 19(3) of Regulation 17.¹³

The formal way of deciding upon a case is by granting a negative clearance.¹⁴ This is to be done if there are no grounds for believing that the agreement/practice falls under Articles 81(1).

The possibility to grant individual as well as block exemption is reserved to the Commission (see above).¹⁵ In order to maximise the possibility to receive some kind of authorisation from the Commission, most of the companies let their notification include both a request for negative clearance and a *comfort letter*.¹⁶

¹¹ P.Craig, G. de Burca, EU Law, third edition, New York 2003, p 1062ff.

¹² Article 4 of Regulation 17/62.

¹³ See *supra* note 7, p.15.

¹⁴ Article 2 of Regulation 17/62.

¹⁵ Article 9(1) of Regulation 17/62.

¹⁶ Lectures in EC competition law with Henrik Norinder at the University of Lund, autumn 2003.

3 Reasons for reforming the competition policy

3.1 The Objective(s) of the reform

As early as 1961, the Economic and Social Committee pointed out the risks of a notification system in an opinion. They claimed that such a system “*risked diverting the Commission from its true mission by overloading it with administrative work that would prevent it from carrying out a serious in-depth examination of agreements between undertakings and their real effects*”.¹⁷

The Committee was unfortunately right in its prediction. The administrative burden led to the issuing of the White Paper on Modernisation on the 28th of April 1999. This Commission program suggested a reform which was both welcomed and criticised by the operators of the EC competition field.

As it appears, the White Paper on modernisation sees both the Commissions’ need to refocus on the more harsh infringements and the decentralisation as its main objectives¹⁸. This opinion follows the one held by former Director General Alexander Schaub, who believes that one of the objectives of the reform is to “*establish a system of decentralised enforcement, bringing the application of Community competition rules closer to citizens and undertakings*”.

According to Claus Dieter Ehlermann²⁰, another former Director General, the reform has only one main goal which is to give the Commission the possibility to refocus on the infringements of Articles 81(1) and 82. Contrary to the view of Schaub, he believes that the decentralisation is not an objective but a tool to help fulfil that objective.²¹

To understand the need for a reform, it can be of interest to mention the scope of EC Competition law. The so-called territorial criteria includes the criterion of effect on trade between Member States. As the European Community is a large integrated market even restrictive practices between undertakings established in one and the same Member State may have an influence on Community trade and is therefore to be included in the work of the Commission. With the current system of notification the amount of

¹⁷ Opinion of 28 March 1961 on the first regulation implementing Articles 85 and 86.

¹⁸ See *supra* note 7, p.19f.

¹⁹ See Dr Alexander Schaub, “Developments of European Competition Law”, paper presented at the Hellnic Competition Commission Conference on “developements of competition law and policy – European and National perspective,” 19 April 2002, http://Europa.eu.int/comm/competition/index_en.html, 2004.05.16, 13:00 am.

²⁰ European University Institute, Italy. Member of the Appellate Body of the WTO. Member of the Advisory board of Common Market Law Review. Former Director General of Competition at the European Commission.

²¹ See *supra* note 8, p.560.

administrative work on behalf of the Commission is too heavy of a burden, especially as the Community grows larger. Procedural rules that were designed for a Community of six Member States are still being applied, without any significant changes.²² In other words, the scope of competition law is large and so is the pile of notifications waiting to be decided upon. It is notable that during the last 5 years, the Commission has made in average 5 formal exemption Decisions a year. Notwithstanding a reduction of the notification pile in the 90s the more difficult cases are still waiting to be decided upon.²³

3.2 The Objective(s) for having a notification system

According to Ehlermann, one of the reasons for the introduction of the notification system in 1962 was the Commission's need for information about the different markets in the Community. He means however that after 40 years of this system this need has been fulfilled. The notification system is no longer necessary as a source of market information.²⁴

There are several opponents who do not agree with this reasoning. In the Summary of Opinions, issued after the presentation of the White Paper on Modernisation, two Member States claimed that the notification system still provides the authority with valuable information about the different markets. Information that is of essence in the fight against hardcore cartels. The two Member States also underline the preventive effect of the previous authorisation system as well as the Commission's possibility to "adjust" agreements before they are being put in action by the parties.²⁵

This standpoint is also supported by Wernhard Möschel²⁶ who puts the emphasis on the Commission's possibility to work together with the companies before an agreement takes effect in order to get the best conformity with competition policy. Furthermore, he means that the notification system hinders the undertakings from "going beyond" the permitted agreement since the Commission "knows".²⁷

According to Möschel the alleged inefficiencies attached to the notification system are exaggerated. He argues that every year the Commission has settled as many cases as incoming notifications. This means that the backlog at the moment only consists of about 1200 cases. According to Möschel, one single effort is enough to deal with these. Furthermore, he claims that

²² See *supra* note 7 p.11.

²³ See *supra* note 8, p.541.

²⁴ See *ibid* p.562.

²⁵ "White paper on reform of Regulation 17 - Summary of the observations" Competition DG Document - 29.02.2000, p. 7.

²⁶ Professor at the Law faculty of Tübingen. Chairman of the German Monopolies Commission.

²⁷ Wernhard Möschel, Guest Editorial: "Change of Policy in European competition law? ", (2000) Common Market Law Review 37: p.497.

the new Vertical Regulation²⁸ will lead to a decrease in the amount of incoming notifications.²⁹

Another frequently used argument claimed by the proponents of the notification system is the legal certainty aspect. This issue will be discussed more thoroughly further down.

²⁸ O. J. L 336, 29.12.1999, “Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices”.

²⁹ See *supra* note 27, p.495.

4 Interaction in the new directly applicable system

The “White Paper on modernisation” became Regulation 1/2003³⁰ (from this point “the Regulation”) which, seen separately, leaves a lot of questions unanswered. What becomes clear is however the fact that after the first of May 2004, the notification system will be history. The 40 year old competition policy is replaced by a new directly applicable exemption system also called an ex post system. Article 1(2) of the new Regulation establishes that agreements falling under Article 81(1) but which satisfy the conditions of Article 81(3) are valid “*no prior Decision to that effect being required*”. National courts will start applying Article 81 in its entirety as Article 81(3) becomes directly effective. Companies will be forced to assess the competition rules by themselves when the possibility to receive a negative clearance, an individual exemption or a comfort letter disappears.

As earlier stated the Regulation leaves a lot to ask for in terms of practical implementation of the new rules. However, seen in the light of the Notices on co-operation, the Regulation becomes more clear. These have the purpose of facilitating practical implementation of the new competition policy. The question of whether or not they suffice is for the future to decide. The reform will demand a lot of effort in terms of co-operation. This part of the paper describes the anticipated interaction between the operators of the new decentralised competition system

4.1 Co-operation between the national competition authorities and the Commission.

Article 5 of the Regulation provides the national competition authorities with their powers. Contrary to the old system, all NCAs shall have the power to apply Article 81 and 82. They can take Decisions, acting on their own initiative or on a complaint, requiring that an infringement is brought to an end, ordering interim measures, accepting commitments and imposing fines. Obviously, they may also decide that there are no grounds for action on their part.

The co-operation between NCAs and the Commission is dealt with in the “Draft Commission Notice on co-operation within the Network of Competition Authorities”³¹. The Notice further explains Articles 11-14 of the Regulation. It also provides for the creation of a network of competition authorities called the European Competition Network. The purpose of the

³⁰ O.J. 2003 L1/1, “Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty”.

³¹ O.J. C 101, 27.04.2004, “Draft Commission Notice on co-operation within the Network of Competition authorities”.

network is to produce an efficient division of work and to make sure that the application of the EC-competition law remains consistent within the network.³²

It is of importance to first point out that the NCAs can and will look different depending on the Member States³³. In some countries they even consist of a court. The Member States are however under an obligation to present a competition authority that provides effective, proportionate and dissuasive sanctions for infringement of EC-law³⁴.

Article 11 of the Regulation provides the framework on how the co-operation in question will be formed. It points out the general rule in the first paragraph by stating that “*The Commission and the competition authorities of the Member states shall apply the Commission competition rules in close co-operation*”. The Article further obliges the Commission to provide the NCAs with copies of the most important documents received in connection to investigations. Other, not so important, documentation is to be provided after a request from the NCA³⁵. Furthermore the NCAs are under an obligation to inform the Commission before or without delay after they start an investigations under Article 81 or 82 of the Treaty. The same has to be done 30 days before the adoption of a Decision.

Article 11(6) refer to the Commissions’ right of evocation. Moreover Article 11 provides the competition authorities with the possibility to ask the Commission for advice. Most of this co-operative procedures is to take place within the European Competition Network (See chapter 6.2)

Article 11(3) is of great importance when it comes to case allocation. As above stated, the Article obliges the NCA to inform the Commission before or without delay after commencing the first formal investigative measure. This allows the entire “net” to find out about an ongoing investigation. In that way, possible questions of case allocation can more easily be resolved since the members of the ECN will be aware of the actions of each other.

In most of the cases, the authority that receives the complaint or starts an investigation ex-officio will be in charge of the proceedings. But sometimes a re-allocation is necessary. It is of great importance that these are quick and efficient so as not to hold up an ongoing investigation. A case re-allocation is, according to the Notice, normally to be solved within a period of two months.³⁶

Every member of the ECN has a discretion in whether or not to investigate a case. Article 13 gives the other NCAs the possibility to suspend proceedings or reject a complaint if another authority is dealing with or has already dealt with the case. However, the NCAs are under no obligation to do this.

³² See *ibid* p.1.

³³ Article 35 of Regulation 1/2003.

³⁴ C-68/88 Commission v Greece [1989] ECR 2965, 23 to 25.

³⁵ Article 11(2) of Regulation 1/2003.

³⁶ See *supra* note 31, 2ff.

When an authority wants to take care of a case, there are three cumulative conditions that have to be met:

- the agreement/practice has to have substantial direct, actual or foreseeable effects on competition within its territory, is implemented within or originates from its territory;
- the NCA has to be able to effectively terminate the infringement/the effects of the infringement and to sanction where it is necessary;
- the NCA has to have possibilities to gather information.³⁷

According to the Notice, there are three ways to deal with a case:

- one NCA handles the case.
- several NCAs deal with the case in parallel.
- the Commission handles the case.

The most efficient way of dealing with a case is when only one country handles it. Parallel action should be used only when it is not sufficient with only one NCA.³⁸

The Commission will be in charge of cases where more than three Member States are involved. They also should take over cases which can develop competition policy/ensure effective policy or cases which are closely linked to other Community Decisions.³⁹

4.1.1 The Advisory Committee

The Advisory Committee is dealt with in Article 14 of Regulation 1/2003. The Article provides that the Committee is to be consulted before the Commission takes a Decision. The Committee shall compose of representatives of the competition authorities of the Member States. The opinion of the Committee can both be written and oral, and the Commission “shall take the utmost account of the opinion delivered by the advisory Committee”. The above stated shows the willingness of the Commission to involve the Advisory Committee and thereby the national competition authorities, in the co-ordination and policy development of EC competition law. The Committee can not however give binding opinions, which mean that its influence depends on the will of the Commission. Katherine Holmes⁴⁰ claims in her article about the modernisation package, that even if that influence proves to be marginal, the Committee will function as a forum for discussion where the representatives from the different countries can exchange experiences and improve co-operation in order to achieve a more consistent application of EC competition law.⁴¹

³⁷ See *ibid*, p.2.

³⁸ See *ibid*, p.3.

³⁹ See *ibid*, p.3f.

⁴⁰ Partner in the EC group at the law firm Richards Butler, based in London.

⁴¹ Katherine Holmes, “The EC White Paper on Modernisation”, this article originally formed part of a presentation at the IBC Advanced Competition Law Conference in London, May 2000. Now it is found in *World Competition* 23(4) 2000, Kluwer Law international, p 73.

4.2 The power of the national courts and their co-operation with the Commission.

The power of the national courts is established in Article 6 of the Regulation which states that “*National courts shall have the power to apply Articles 81 and 82 of the Treaty*”.

When it comes to the co-operation between the Commission and the national courts, the “Draft Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82”⁴² becomes of great importance. The Notice is an explanation on how to assess the Articles in Regulation 1/2003 that deal with the co-operation between national courts and the Commission.

The first problem handled by the Notice is that of parallel application of national competition law and EC competition law in the national court. Regulation 1/2003 deal with this issue in Article 3. If the conditions in Article 81 or 82 are fulfilled, EC competition law has to be applied. In other words it is not enough with national law. In this case it is not necessary to use national competition law. If this is done anyway, it is important that the national court knows that it cannot prohibit agreements, Decisions or concerted practices (from this point only “agreements”) that do not infringe Article 81(1) or fulfil the conditions in Article 81(3)⁴³. The national court has also stated that agreements that violate 81(1) and do not fulfil 81(3) cannot be allowed under national law. The concept of supremacy hinders the national courts from judging in any other direction.⁴⁴

The national courts are also competent to apply other Community acts which have direct effect such as Community Decisions and Regulations. It is essential to point out that the national courts always must follow the case law of Community Courts⁴⁵. Other documentation issued by the Commission, such as Notices, are to function as guidelines for the national court and are of relevance as long as the ECJ (CFI) does not say otherwise.⁴⁶

Article 11(6) seen in the light of Article 35 (3 to 4) prevents parallel investigation of the same case by the national court and the Commission only if the national court is seen as a NCA. On the other hand Article 16 states that the national courts have to be in line with the Commission Decisions when they judge upon the same case in parallel or after a Commission Decision is taken. In a parallel situation where the national

⁴² OJ C 101, 27.04.2004, “Draft Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC”.

⁴³ Article 3(2) of Regulation 1/2003.

⁴⁴ See *supra* note 42, p. 3.

⁴⁵ Case 63/75 Fonderies Roubaix [1976] ECR 111, 9 to 11 and C-234/89 Delimitis [1991] ECR I-935,46.

⁴⁶ See *supra* note 42, p.4.

court has a case pending before it, it must avoid adopting a Decision that would conflict with a Decision contemplated by the Commission⁴⁷. The national court can ask the Commission whether it has started proceedings concerning the agreement and on the likelihood of a Decision in the specific case. The court can, in case of a positive answer, decide to stay proceedings and wait for the Commission Decision. They can however decide not to do this if the contemplated Decision leaves no reasonable doubt or if the Commission has already decided on a similar case.⁴⁸ If the Commission has already made a Decision in the same case, the national court must follow it as long as the ECJ has not ruled contrary to the Decision in question⁴⁹. If the court doubts the legality of the Decision it can refer the matter for preliminary ruling to the ECJ⁵⁰. If there is a question of validity of the Decision following Article 230 of the Treaty, the national court must stay proceedings until the matter is settled⁵¹. The national court can, if necessary order interim measures when staying proceedings.

When it comes to procedural rules, the general rule is that national procedural rules are to be applied. They must not however be contrary to the general principles of EC Law. Once again, the supremacy concept leads the national courts. The case law of the ECJ states that:

1. where there is an infringement of Community law, national law must provide for sanctions which are effective, proportionate and dissuasive⁵².
2. where the infringement of community law causes harm to an individual, the latter should be able to ask the national courts for damages⁵³.
3. the rules on procedures and sanctions which national courts apply to enforce Community law:
 - must not make such enforcement excessively difficult or practically impossible (the principle of effectiveness)⁵⁴ and they
 - must not be less favourable than the rules applicable to the enforcement of equivalent national law (the principle of equivalence)⁵⁵.

When it comes to the co-operation between the Commission and the national court, Article 10 of the Treaty is of essence. It is stated in two important Community Court cases that this Article implies the obligation for

⁴⁷ Article 16(1) of Regulation 1/2003.

⁴⁸ See *supra* note 42, p.6f.

⁴⁹ Case 314/85 Foto –Frost [1987] ECR 4199, 12 to 20.

⁵⁰ Article 234 of the EC Treaty.

⁵¹ Article 16(1) of Regulation 1/2003 and C-344/98 Masterfoods [ECR I-11369, 52 and 57.

⁵² Case 68/88 Commission v Greece [1989] ECR 2965, 23 to 25.

⁵³ C-453/99 Corage and Crehan [2001] 6297, 26 and 27, C-9/90 Francovich [1991] ECR I-5357, 33 to 36.

⁵⁴ See e.g case 33/76 Rewe [1976] ECR 1989, 5.

⁵⁵ See e.g. case 199/82 San Giorgio [1983] ECR3595, 12.

the Commission and the national court to support each other when applying EC-law^{56, 57}.

The Commission will function as *Amicus Curiae*, which means friend of the court. In this role, the Commission will provide the national court with transmission of information, Commissions' opinions and submissions of observation. This role of the Commission cannot be limited by the Member States which must introduce procedural rules that allow this co-operation. There must not however remain any doubt as to the independence of the court.⁵⁸

The *transmission of information* is very important when it comes to knowing whether or not a case is already in some way dealt with by the Commission or is in progress to be dealt with. The information can also be of procedural nature. According to the Notice, the Commission will answer the request for transmission of documentation within one month.

The national court can also ask for an opinion from the Commission. The court must first try and seek guidance in Regulations, Decisions, Notices, guidelines, and case law and if that turns out to be insufficient, an opinion from the Commission might clear out the situation. The opinion can be about economic, factual or legal matters but it is not binding for the national court. It is stated that the opinions should be given at least within a four month period after the request.⁵⁹

A third way of helping national courts with European competition law is to provide the court with a submission of observations. This observation can also be given by the NCAs. The submissions of observation can be both oral and written. The oral submissions must however be permitted by the national court in question. There are no such limits for the written observations.⁶⁰

In order to help the Commission to submit useful information, they are entitled to get a copy from the national court of all necessary documentation in the specific case.⁶¹

The co-operation between the Commission and the national courts also obligates the latter to be of assistance for the Commission. Apart from the transmission of documentation in case of submission of observation (see above), the national courts have to transmit all judgements that have been reached when applying EC competition rules. This will enable the Commission to submit observation if one of the parties choose to appeal the judgement. Furthermore the national court plays an important role in the context of Commission inspections. If the inspection is to take place in a business premises, a national enforcement authority might be necessary to carry through the inspection. The national court has to allow such co-

⁵⁶ C-2/88 IMM zwartweld [1990] ECR I-3365, 16 to 22 and C-234/89 Delimitis [1991] I-935, 53.

⁵⁷ See *supra* note 42, p. 5f.

⁵⁸ See *supra* note 42, p. 8ff.

⁵⁹ See *ibid.*

⁶⁰ See *ibid.*

⁶¹.See *ibid*

operation. When the inspection is to take place in non business premises, the Commission has to have an authorisation from the national court. In both circumstances, the national court is entitled to ask for detailed information about the inspection in order to know that it is authentic and not excessive or arbitrary.⁶²

⁶² See *supra* note 57.

5 Problems connected to the directly applicable system

When choosing to abandon the notification system, the Commission found themselves opting for a system which deprived them from the absolute power that they earlier possessed. By banishing the notification system and declaring Article 81(3) directly applicable, the Commission took a daring path towards something that may turn into a more insecure development of EC competition policy. A lot of experts have expressed their concern as to the practical solution of the reform, but the majority is positive to the concept presented in the “White Paper”. Most of them agree on the fact that it requires a great deal of co-operation to accomplish an efficiency increase at the same time as keeping legal certainty and consistency in the application of the competition rules. This chapter will deal with the problems connected to the reform.

5.1 Legal Certainty

5.1.1 Legal certainty in the current notification system

Ehlermann argues that the new system will provide the undertakings with more legal certainty than the current system. Today national courts can use 81(2) to declare an agreement void even if it could have been lawful according to Article 81(3).⁶³ This is done if the parties have not notified the agreement to the Commission. In other words, an agreement that might be valid is declared void in the absence of a notification.⁶⁴ The companies that do notify an agreement run the risk of waiting in vain for a formal Decision which most of the time becomes a comfort letter. These informal letters do not fully protect the companies. As they are non-binding, situations can occur where one of the parties or a third party challenge the agreement in a national court.⁶⁵

The notification system can also be used as a tool to block proceedings in national courts. The national court can decide to stop proceedings when a request for an individual exemption Decision is sent to the Commission. This is often done since a positive answer on such request can make an otherwise void agreement lawful⁶⁶. This is both a cost and time consuming way of dealing with an agreement.⁶⁷

⁶³ See *supra* note 8, p.563ff.

⁶⁴ See *supra* note 25, p.7ff.

⁶⁵ See *supra* note 8, p.563.

⁶⁶ See *supra* note 25, p.7ff.

⁶⁷ See *supra* note 1, p.4.

A lot of critics to the reform talk about the heavy burden of assessing Article 81(3) (see below) and call this a threat to legal certainty. The heavy burden of assessing Article 81 and 82 is however already present in the procedure connected to the notification system.⁶⁸

5.1.2 Legal certainty problems: The lack of official review

As already stated, the abolition of the notification system can lead to a loss of legal certainty for the undertakings. They will no longer receive a prior formal or informal Decision concerning the status of their agreement. Such positive Decision will only be possible in narrowly defined situations under Article 10 of the new Regulation. The whole burden of applying competition law will end up in the hands of the parties something that strikingly increase their responsibility. According to Mario Monti⁶⁹, this is exactly what the Commission is trying to achieve. He says that the reform will “bring about a change of culture for companies and their lawyers” as the companies will “no longer be able to systematically ask competition authorities to assess ex ante the legality of their transactions.”

The major practical change of the above stated is that the parties to an agreement will have to form their own view, probably with the help of their legal advisers, as to the status of their deal. Such views should however be reviewed from time to time in order to be in line with the market changes.⁷⁰

Möschel means that when it comes to legal certainty the new directly applicable system cannot provide the same security as the old one. He claims that “*a statement from a competent authority, even if only an informal one, is for undertakings quite different from the legal opinion of a practising lawyer.*” This will be especially true for the new Member States.

5.1.2.1 Is the legal certainty of individual undertakings a legitimate concern?

Competition law is rather unique in a Community context. The competition sector is the only one in which the Commission is dealing with the application of Community rules. This centralisation can only be explained in the light of the history of the Community in which such a centralised approach was natural. The 1962 Regulation corresponded to the concepts and perspectives of the early years of the EC.⁷¹ Since then the Commission has developed a detailed competition policy including principles and case law.⁷²

⁶⁸ See *supra* note 25 p.7ff.

⁶⁹ Mario Monti, “European competition Policy: Quo Vadis”, paper presented at the international forum of European Competition Policy, Brussels 10 April 2003, http://Europa.eu.int/comm/competition/index_en.html, 2004.05.16, 13:00 am.

⁷⁰ See *supra* note 41, p 60.

⁷¹ See *supra* note 8, p.540.

⁷² See *ibid*, p.544f.

European competition authorities has traditionally taken a very dominant role compared to for example the same authorities in the US. The former also has a more developed co-operation with undertakings. Ehlermann believes that this traditional approach might present an explanation why the opponents of the White Paper fear the abolition of the notification system on legal certainty grounds. He agrees that it can be in the public interest to assure companies that their agreements are in line with competition policy, but at the same time, he notes that “*it can be argued that the task of competition authorities is to ensure the respect of competition law, not to assure individual undertakings that they comply with these rules*”.⁷³

5.1.3 Legal certainty problems; lack of recognition of Decisions/judgements in other Member States.

The judgement taken by the court in an EC competition case is recognised in another member state according to Article 33 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters. This is however only true for a Decision on the same subject-matter and between the same parties⁷⁴. If the parties or the subject-matter is different, the judgement will not function as a source of law.

The above stated could lead to situations where an undertaking faces legal action concerning one single agreement in several countries by different claimants. If we have a situation where an agreement is found to be in breach of Article 81 in a national court, this judgement is only valid *inter partes*. Other affected parties in other countries, where the agreement form part of the relevant market, will have to sue in their respective countries in order to have their rights protected. This situation is both costly and insecure for the undertakings concerned and presents a serious legal certainty issue.

One of the solutions to the problem of double legal action is the Commissions role as *Amicus Curiae*. By intervening, the Commission can see to that cases concerning the same agreement are coherently solved. It does not however hinder the additional costs that double action give to the involved undertakings. Another possible solution would have been to obligate the courts to have due regard to cases involving the same defendant, subject matter and market which have been decided in other courts. The duty could include an obligation to consider the Decisions of the NCAs of other Member States as well⁷⁵.

The problem is however less grave in situations of *lis pendens*. Article 27 and 28 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and

⁷³ See *ibid*, p.565f.

⁷⁴ See *supra* note 41, p.61.

⁷⁵ See *ibid* p.62f.

commercial matters, are regulating this situation. Article 27 concerns situations where the same action between the same parties are brought in the courts of different member States. Other courts than the court first seised, *must* then stop proceedings until the jurisdiction of the first court is established. When this is done, the other court shall decline jurisdiction. Article 28 deals with the situation where *related* actions are dealt with at the same time in different courts. The second seised court *may* in those cases choose to decline jurisdiction if the first seised court has jurisdiction over the actions in question and its law permits consolidation thereof. Article 28(3) states that “*for the purpose of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together in order to avoid the risk of irreconcilable judgements resulting from the separate proceedings*”. Article 28 can consequently hinder situations of double legal action and thereby save time and effort for the parties and the national courts.

A Decision taken by a NCA is only valid in the territory of the Member State. According to Ehlermann the Decision will probably have “*wider ranging psychological consequences and lead to the withdrawal of the restrictive agreement throughout the EU*”.⁷⁶ The ECN (see more below), with its complex web of communication and information exchange will probably bring about this psychological validity of the NCA Decisions. As to these Decisions, the problem of double legal action could be avoided since Article 13 allows the NCAs to stop proceedings if another national competition authority deals with the case.⁷⁷

5.1.4 Legal certainty problem; precedent and policy development

The implementation of the system can lead to an increase in cases in national courts concerning both Article 81(1) and, of course, Article 81(3). A question most probable to arouse is whether or not the existing case law and other information available is sufficient for judges to come to a fair decision. Not forgetting the possibility for the advisers to predict outcomes of cases with a sufficient degree of certainty. As already mentioned, most of the former Decisions taken by the Commission is in the form of comfort letters. The majority of them were not published and will not provide the guidelines needed in a system of direct applicability. It may therefore be difficult to clarify the boundaries of above all Article 81(3).⁷⁸

Möschel agrees with the above stated and adds that the private parties will be the “*masters of the proceedings*” why the national court cannot clarify the facts *ex officio*. He fears chaos or inactivity as a consequence of the lack of clarification.⁷⁹

⁷⁶ See *supra* note 8 p.572.

⁷⁷ See *supra* note 74.

⁷⁸ See *supra* note 41, p.63.

⁷⁹ See *supra* note 27 p.497.

Measures to solve the expected problem have been taken. Apart from the guidelines on the application of Article 81(3), once again the Amicus Curiae role given to the Commission provides a way of improving the possibility for the national court to reach a fair and reasonable decision. As mentioned above, the court is not however bound by the opinion of the Commission in case of intervention. Another solution is to attend to Article 234 and seek preliminary rulings. This can however be a time consuming action.

5.1.5 Legal certainty problems; the judges

Closely related to the above mentioned problem is the concern about the judge's "incompetence" when judging in cases concerning EC competition law. The question is whether ordinary judges are sufficiently equipped to find the right answers to the complex questions of fact and law which an economic and legal appreciation under Article 81(3) requires.⁸⁰

In order to increase the knowledge of the members of the national courts, several suggestions such as specialised courts, training for judges and a contact net between the judges in different member states (see below) are discussed amongst the involved. Once again the role of the Commission as Amicus Curiae can be of help when fostering a "common competition culture" among the judges dealing with EC competition law.⁸¹

In Sweden, competition issues can be raised in two circumstances. When the national competition authority is one of the parties in a case, the hearing is due to a special chamber in Stockholm city court.⁸² The judges ruling on these cases are normally used to dealing with complex competition law problems. Questions concerning competition law can however also be raised in a private litigation, for instance in a dispute on the validity on an agreement. These cases are handled in normal district courts where the judges lack special knowledge of competition law. The need for training etc. is obviously more necessary in the later situation.

Ehlermann believes that problems with lack of knowledge in the national courts can occur during a transitional period. Again partly because of the scarcity of formal Commission Decisions. He adds however that the application of Article 82 is also complex, but is and has been applied by national judges for quite some time.⁸³ He also disagrees with the argument that national judges cannot understand complex economic considerations. He means that judges are handling a lot of difficult and complex cases on a daily basis.⁸⁴

In the summary of opinions issued in connection to the White Paper some critics claim that the difficulties in the application of the provision demands

⁸⁰ See *supra* note 8, p.585.

⁸¹ See *supra* note 41, p.67.

⁸² Information received through an interview with Anna-Lena Järvstrand, judge at the Stockholm city court.

⁸³ See *supra* note 8, p 584.

⁸⁴ See *ibid*, p.585.

that only specialised courts and not normal courts should be able to apply EC competition law.⁸⁵

Ehlermann holds that specialised judges would be impractical since Article 81 issues can include a large variety of cases.⁸⁶ Some of which does not have the possible competition restrictive behaviour as the only material ground. Consequently it would be quite impractical to direct all of these cases to specialised courts.⁸⁷

5.2 Coherent and consistent application of EC competition law

The fear of losing the coherent and consistent application of EC competition law is, together with the legal security problem, the greatest concern with the coming reform. As already mentioned, the new system can and probably will lead to an increase in the amount of private litigation before national courts, something that will increase the risk of variations in the application of Articles 81 and 82. The different interpretation of EC competition law causes uncertainty for business. As lack of consistency also presents a legal certainty issue - the problems are closely interrelated - some of the opinions presented in chapter 5.1 will be repeated in the following part.⁸⁸

5.2.1 National courts

According to the Summary of Opinions, the main concern when it comes to decentralisation is the ability of the national courts to apply art 81(3) in a coherent and consistent manner. This is of particular fear for undertakings that operate EU wide with distribution systems since “*inconsistencies could threaten the integrity of the network*”⁸⁹.

Some experts are however less concerned about the consistency problem. Ehlermann points out that national courts and authorities are presently applying different EC rules, something that always constitute a risk for coherence and consistency. According to Ehlermann, the EC Treaty accepts this risk. The only way of ensuring uniform application of EC law is through the Court of Justice. But not even the ECJ and the CFI can guarantee absolute coherence.

It is clear, seen in the light of other EC-law, that competition law has had a special position in the work of the Community. Contrary to almost all other EC law, Regulation 17/62 states that EC competition law is to be applied by the Commission. The Commission will continue to apply competition law directly to undertakings even after the reform. “Its central role in determining EC competition policy will not be touched”.⁹⁰

⁸⁵ See *supra* note 25, p.14

⁸⁶ See *supra* note 8, p.585.

⁸⁷ Comment from the author.

⁸⁸ See *supra* note 41, p.70.

⁸⁹ See *supra* note 85.

⁹⁰ See *supra* note 8, p.576.

The question remains why partly loosing this special treatment would lead to a catastrophe in the coherence and consistency of EC competition law, when this is not the case in other areas. Ehlermann finds the concern in this area almost excessive and points out that the reform is not revolutionary but a step towards normality. Moreover even though the risk of divergent Decisions increases through the abolition of the monopoly, this can be solved through an enlarged co-operation between the players. The large difficulties in interpreting Article 81(3), will be less difficult since the abolition of the monopoly and the decentralisation will lead to more formal Decisions and hopefully better legal certainty.⁹¹ Moreover, as mentioned above, the possibility to ask the ECJ (CFI) for a preliminary ruling still remains, something that probably will increase their workload, but more importantly supply the national court with guidance in difficult cases. This necessary guidance is furthermore developed in the Amicus Curiae role of the Commission. It can however be noted that some countries' traditions hinder the judges from seeking such advice. The independence of the court can also be questioned as the parties will feel that the Commissions' involvement has substantially changed the outcome of the case. One fear is also that one administrative burden (the notification system) is replaced by another. This is partly solved by sharing the right to interfere with the national competition authorities.⁹²

5.2.2 National competition authorities

The fear of loosing consistency in the application of EC competition law is not as great when it comes to the NCAs as when dealing with national courts. Because of the already effective European Competition Network, the reform is believed to pass smoothly. Even Möschel believes that this part of the decentralisation does not present a serious problem.⁹³

The practical aspects of this network will be discussed in the following chapter.

It is clear that the Commission must exercise some form of control over the NCAs. Article 11 of Regulation 1/2003 provides a clear example of the thought hierarchy with the Commission "on top". Contrary to the relation between the national courts and the Commission, no sovereignty issue is raised in this constellation. The control of the Commission is however preventative not corrective. As stated above in chapter 4.1.1, the Commission is to be informed both before an investigation starts and one month before a formal Decision is taken. Possible inconsistencies can then be resolved before a Decision is taken instead of afterwards. This allows the undertakings to have faith in the Decisions taken by their NCAs.⁹⁴

⁹¹ See *ibid* p.577.

⁹² See *supra* note 41, p.70f.

⁹³ See *supra* note 27, p.497.

⁹⁴ See *supra* note 41, p.71f.

5.3 Forum shopping

The problem of forum shopping is closely related to both legal certainty and consistency in the application of EC competition law. The core of the problem lies in the procedural variations in both national courts and national competition authorities. Differences occur for example in variations of powers available to the NCAs; difference relating to the collection of evidence and the rights of defence, fining policies; nature of sanctions etc; whether NCA Decisions should be binding on their national courts etc.⁹⁵ The undertakings affected by an agreement will obviously choose the authority that best protects their interest when filing a complaint or starting a private litigation. Two aspects of this problem will be discussed. The first brings forward the different possibilities for the undertakings to choose where to file a complaint or attend to private litigation. Secondly the discussion will focus on the possibility to harmonise the procedural rules in order to make the different authorities as similar as possible and thereby reducing the concern of forum shopping.

5.3.1 Choosing authority

It can, and probably will, be quite difficult for the undertakings etc. to decide which authority to turn to when filing a complaint. First they must decide if they want to go to court or send a complaint to a public enforcer. Moreover they must know which court to turn to. The same goes for the NCAs and the Commission.

5.3.1.1 Public enforcement or private litigation

All of the enforcers – national courts, NCAs and the Commission will be able to apply Article 81 in its entirety and concerned undertakings will have a wide choice when deciding where to send their complaints.

This might lead to situations where it can be difficult to choose. When deciding where to file a complaint, the undertakings must consider which authority that best protects their interests. When choosing to file a complaint with a NCA the undertaking must bear in mind that the Decision is only valid in the territory in question⁹⁶ (see above Ehlermann on psychological effects).

The most notable difference between a national court and a public enforcer is that the former safeguards the rights of the individuals created by the direct effect of Articles 81(1) and 82. The national court is bound to rule on a case before it. Only they can decide upon nullity/validity of contracts and grant damages for individuals. The public enforcers do not have the same purpose with their proceedings. The national competition authorities and the Commission have the possibility to choose which cases to proceed with and which to leave behind.⁹⁷

⁹⁵ See *supra* note 41 p.67.

⁹⁶ See *supra* note 1, p. 7.

⁹⁷ See *supra* note 42, p.2ff.

5.3.1.2 Jurisdiction of the national court

As already mentioned, the jurisdiction of the courts is regulated through Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters⁹⁸. The general provision in the Regulation is Article 2, which states that persons shall be sued in the Member States in which they are domiciled. Article 5 to Article 22 however present exemptions to that general rule, something that increases the possibilities for the claimant to sue in the court of his choice. For instance, Article 5 states that in matters relating to a contract, the defendant can be sued in the courts of the place of performance of the obligation in question.

5.3.1.3 Jurisdiction of the public enforcers

The jurisdiction of the public enforcers is dealt with in the “Notice on co-operation within the network of Competition authorities”. As already mentioned above in chapter 4.1, there are three cumulative conditions that have to be met if an authority is to be considered “well placed” to deal with a case. The agreement/practice has to have substantial direct, actual or foreseeable effects on competition within its territory, is implemented within or originates from its territory. The authority must also be able to effectively bring to an end the entire infringement and sanction it properly. Finally the authority must be able to gather the evidence that is necessary to prove the infringement.⁹⁹ These cumulative criteria can obviously be fulfilled in several countries, which can lead to situations where a complainant can forum shop for the best alternative.

5.3.2 Harmonisation of procedural rules

The White Paper on Modernisation does not bring forward any suggestions about harmonisation of the procedures of the NCAs when dealing with a complaint.

As mentioned above in chapter 4.1, the national courts have to follow some basic procedural rules when applying EC law. Where there is an infringement of Community law, national law must provide for sanctions which are effective, proportionate and dissuasive¹⁰⁰. Furthermore, where the infringement of community law causes harm to an individual, the latter should be able to ask the national courts for damages¹⁰¹. Finally, the rules on procedures and sanctions which national courts apply to enforce Community law

Must not make such enforcement excessively difficult or practically impossible (the principle of effectiveness)¹⁰² and they

⁹⁸ OJ 2001 L12/1.

⁹⁹ See *ibid*, p.2.

¹⁰⁰ Case 68/88 Commission v Greece [1989] ECR 2965, 23 to 25.

¹⁰¹ C-453/99 Corage and Crehan [2001] 6297, 26 and 27, C-9/90 Francovich [1991] ECR I-5357, 33 to 36.

¹⁰² See e.g case 33/76 Rewe [1976] ECR 1989, 5.

Must not be less favourable than the rules applicable to the enforcement of equivalent national law (the principle of equivalence)¹⁰³.

Apart from these principles, national courts do not have any harmonised procedural rules to follow. The coming situation can lead to forum shopping and inconsistency – both when it comes to court proceedings and complaints addressed to national competition authorities.

The question of harmonisation is rather controversial. Ehlermann claims that harmonisation of procedural rules is contrary to the principle of subsidiarity. He further holds that problems of disparities and deficiencies of NCAs and national courts can be solved later on when more practical experience have been achieved.¹⁰⁴

Katherine Holmes believes that a certain harmonisation developments will occur, but in a natural way without any legislation being necessary.¹⁰⁵

¹⁰³ See e.g. case 199/82 San Giorgio [1983] ECR3595, 12.

¹⁰⁴ See *supra* note 8.

¹⁰⁵ See *supra* note 41, p.76.

6 The practical solution of the co-operation

As seen in the former chapter, the problems connected to the reform can be quite serious. In order to protect legal certainty and consistent application of EC competition law, the operators in the field must co-operate. But how will this co-operation work in practice? This chapter will discuss more thoroughly the co-operative measures taken by both individuals and the Commission. As the Commission sees the co-operation as the key element for the functioning of the reform, the practical solution on co-operative measures might turn out to be the “road to success”. The chapter is divided in two since the national competition authorities and the national courts are different in this aspect.

6.1 National courts

The national courts are at the moment in quite a delicate situation. They are currently scarcely applying EC competition law which obviously make them fragile when risking to face a situation of increasing cases in this area. As to co-operation between them and other operators, they constantly have to bear in mind that they have to be independent and impartial when dealing with arising questions.

6.1.1 Training of national judges in EC competition law and judicial co-operation between national judges

It lies in the Commission’s interest that the national judges both have a functioning co-operation with judges in other Member States and possesses sufficient knowledge of the EC competition rules. For that purpose, it is possible to get funding for education, seminars, creation of networks etc.. The Commission believes that assistance should be provided to judges both in the current Member States of the European Union and in the accession countries.

The projects financed under the 2004 budget must relate to the training of national judges or to judicial co-operation in EC competition law. The projects may comprise activities intended for national judges from several countries.

The activities provided for may take the form of:

- the organisation of conferences seminars, symposia or meetings on EC competition law for national judges;
- short or long-term training in EC competition law as part of study programs for national judges;
- the distribution of documentation and information on EC competition law specifically tailored to the needs of national judges;

co-operation, including the setting-up of networks, between judicial authorities or other public or private bodies responsible for encouraging or monitoring the proper application of EC competition law by national judges.

The proposed budget for all projects in 2004 is EURO 800 000. There are some special rules on how much funding one project can have. For instance one event can only receive a maximum of 75% of its funding from the Commission.¹⁰⁶

Swedish judges will hopefully, together with judges from Finland, Denmark and the Baltic countries, have a seminar in EC competition law sponsored by the Commission in December this year.¹⁰⁷

6.1.2 The Association of European competition law judges

Another event sponsored by the Commission in 2003 was a seminar with the purpose of setting up a network of judicial co-operation between national judges in the field of European competition law. The organisation, the Association of European Competition Law Judges (the AECLJ), is lead by sir Christopher Bellamy, a former judge of the Court of First Instance.

The Association of European Competition Law Judges was created in Luxembourg in September 2002 by a founding group of judges representing each of the fifteen Member States of the European Union, with the participation of judges from the European Court of Justice, the Court of First Instance, and from the EFTA Court.

The purpose of the Association is to provide a forum for the exchange of knowledge and experience in the field of competition law among the judges across the European Union. The organisation hopes that the exchange will help protecting coherency and consistency of approach, especially seen in the light of the introduction of the modernisation package.

So far the Association has received two initial grants of funds from the Commission of the European Communities.

The main focus of the Association is the holding of conferences and training seminars, addressing issues which are of concern to judges and creating opportunities to share experiences and to discuss concerns.¹⁰⁸

¹⁰⁶ Training of national judges in EC competition law and judicial co-operation between national judges,
http://europa.eu.int/comm/dgs/competition/proposals2/20040316_call/call_en.pdf,
2004.06.08,22:26.

¹⁰⁷ See *supra* note 82.

¹⁰⁸ See *ibid*.

6.2 National competition authorities

From the first of May 2004 the Commission and other NCAs will co-operate in a network called the European Competition Network, ECN. The network is made up of all competition authorities in charge of the application of Articles 81 and 82. It will be the framework for the intense co-operation required to ensure a correct case allocation and a consistent application of the rules. The authorities have the power to exchange confidential information and to use such information as evidence in their respective proceedings. The ECN is a flexible and informal network; it does not take Decisions and cannot compel its members to act in a certain way. It is expected that the constructive character of the discussions will help solving most of the issues which may arise. Should a deadlock occur, the Commission retains the power to relieve national competition authorities of their competence by opening proceedings. Since its creation, the ECN has concentrated mainly on the setting-up of the new system by discussing the modalities of the future co-operation, the content of the various implementing measures and transitional issues.¹⁰⁹

Practically this will mean that information etc. will be exchanged through an intranet called CIRCA where the Commission and the NCAs inform each other of which cases they deal with etc.. The language used in this network is English. The national authorities also co-operate in teams specialised in certain areas. They meet regularly in something called ECN Plenary meetings. These meetings are not connected to the intranet – the members meet in “real life”. It is however common that they contact each other through the telephone or, if the information exchange is sensitive, through emails written in code. The ECN plenary meetings function as a forum in which the members can exchange ideas on the practical functioning of the network etc.. So far the meetings have mostly dealt with the understanding of the texts provided for in the modernisation package. It is important to point out that the conclusions reached in these meetings are non-binding.¹¹⁰

¹⁰⁹Competition Policy Newsletter, p2, special edition, http://www.europa.eu.int/comm/competition/publications/cpn/special_edition.pdf, 2004.05.15 14:55.

¹¹⁰Information from email correspondence with Anna Vadez-Nilsson, a specialist in competition law at the Swedish competition authority.

7 Analysis

7.1 Decentralisation?

It may be argued whether or not decentralisation was one of the objectives of the reform but it is undoubtedly a positive consequence. Bringing the decision making closer to the people can be risky but is definitely a politically correct decision. The question is whether or not the reform really will have the wanted decentralised effect. While studying both the new Regulation and the Notices on co-operation I got the feeling that the power of the Commission is still very significant. They are in total control of the Decisions of the national competition authorities, and even though the national courts of course keep their independence, it seems as though the Commission, through the Amicus Curiae role and the information obligations, will have a leading position in the national courts as well. I however believe that this role will change as the knowledge about the EC competition law in the national courts increases. It is far more difficult to control a court that possesses self-confidence on behalf of the application of EC competition rules than a less informed court. In other words I think that “true” decentralisation will develop together with the knowledge of the national courts.

7.2 Efficiency gains

The reform was necessary most of all because of the administrative situation. The Commissions’ main work should be to hunt down cartels not to handle incoming notifications from undertakings. This is especially important as the Community grows larger and the market becomes more integrated. In other words, as to the goals of the reform, I see no reasons for questioning the objectives of the Commission. The current system is a too resource demanding way of dealing with European competition law.

I can however agree with Möschel when he argues that the notification system is an important source of information concerning the market situation. There are however more “less partial” means of receiving that knowledge. Furthermore I ask myself what use this information have when there are not enough resources to follow up the notified agreements and the knowledge received by them. I strongly believe that the new system will provide the Commission with a sufficient amount of information to attend to its true mission – to hunt down cartels and other competition law offenders.

Several critics have expressed their concern as to the “new” administrative burden given to the Commission. Will the Amicus Curiae role replace the notification system in this aspect? I believe not. First of all the Commission have a “helper” – the national competition authority – that will function as Amicus Curiae when there is a need for this. Moreover it is not likely that the new system will lead to a “boom” in European competition law cases

pending in national courts. The application of Article 81 and 82 in national courts will probably increase (see chapter 7.3.1), but I do not believe that it will raise from almost zero to a hundred over night. Moreover this extra work for the Commission will probably occur during a transitional period. As soon as the national courts becomes more accustomed with applying EC competition law, the need for assistance will decrease.

Sweden will also abolish the national notification system why the Swedish competition authorities may face a situation in which they will have more time to initiate investigations and hunt down cartels. This might in the long run lead to more proceedings in the district court of Stockholm and the Swedish market court concerning Swedish competition law.¹¹¹ As the abolition of the Swedish notification system came as a response to the Commissions' reform, it is easy to argue that the modernisation package is "to blame" in case of such development.

7.3 Legal certainty and coherent and consistent application of EC competition law

7.3.1 Legal certainty

The legal certainty issue has been wildly debated since the introduction of the White Paper. The question whether or not it will be a big practical issue is for the future to decide. So far the Swedish courts have scarcely applied EC competition law even though Article 81 and 82 have been directly applicable (for us) since we entered the Community¹¹². The abolition of the notification system *might* lead to more private litigation and incoming complaints to both the Commission and the NCAs concerning EC competition law but, as earlier stated, it is very difficult to predict the amount of incoming cases. However the introduction of the Euro has lead to a more integrated market. This may cause more and more situations in which agreements, Decisions or concerted practices are subject to EC competition law.¹¹³ This mean that the national courts must come to terms with the fact that EC competition law is here to stay. The application of the EC rules, whether they are applied in parallel with national law or not will be more common in the future and it is important that the judges are sufficiently equipped for that job. I also truly believe that our national competition authorities will come in touch with EC competition law on a more regular basis.

When it comes to the anticipated "incompetence" of the national judges, I believe that the greatest concern lies in the new Member States which are

¹¹¹ Information received through an interview with the chairman of the Swedish market court, Christer Fallenius.

¹¹² See *supra* note 82.

¹¹³ Article 81(1) of the EC Treaty.

not used to apply EC law. The “old” Member States are well aware of the EC competition law as the national provisions very much resembles the Community rules. Still I believe it to be of great importance to educate the national judges and develop the communication system between judges in different countries. The EC competition law is complex, difficult and demands far reaching economic analysis. This is mostly true for the “newcomer” for the national courts – Article 81(3). But to say that this analysis is too difficult for the judges to handle, is really to underestimate the competence of national judges. Further training is however necessary in order to avoid complete dominance by the lawyers in the court rooms across the Union. I am sure that the Commission does not want to see a scenario in which the private parties and their legal advisers becomes the new developers of EC competition law. In order to avoid this, education and network activities for judges are utterly important (see more further down).

Another legal certainty issue brought forward by Möschel is whether or not the national court *ex officio* can apply the EC competition law. In other words, if neither of the parties refer to Articles 81 or 82 in the Treaty during proceedings, can the judges still apply the rules? This question is especially important in optional cases since, contrary to compulsory/non-optional proceedings, the national courts are not obliged to consider not adduced circumstances. Möschel claims that the national courts cannot consider EC competition rules *ex officio*, and some participants on the seminar in Stockholm agreed with this opinion. They argued that it is too difficult for the national judges, who are not as fully aware of the market situation, to be able to know if the agreement have an effect on trade between the Member States or if it is restrictive to competition. The latter is of course easier to determine when dealing with hardcore restrictions such as cartels and price determination, but in a situation where this is not so clear it is questionable if the court can be obliged to *ex officio* deal with the question.

But, as was pointed out on the seminar, according to the ECJ the national courts do have this obligation. The European Court of Justice decided in the ECO Swiss case¹¹⁴ that the national courts are obliged to apply Article 81(2). Whether this is true also for Article 81(3) is not clear.

According to me, the national courts must apply the Treaty Articles if circumstances that indicate that these rules are applicable are brought forward in the proceedings. If this is not the case, it should not lie in the hands of the national court to on their own initiative look for evidence and declare Articles 81 and 82 applicable.

7.3.2 Coherent and consistent application of EC competition law

As have been noted in the presented text, the Commission do believe that co-operation between the operators will lead to a functioning decentralised system. The difficult part is however still to come. When it comes to the

¹¹⁴C-126/97 Eco Swiss china ltd. V Benetton International NV [1999] ECR I-3055.

national courts, the co-operation has to start from scratch. Even though there is a Notice on co-operation with national courts, this is almost never used. In Sweden there is presently no co-operation whatsoever between the Commission and the national courts concerning competition law.¹¹⁵ Obviously this will change as the Amicus Curiae role of the Commission develops, but it is of importance to point out that there are no co-operative ground to stand on when entering the new system. It seems to me that the above mentioned Notice from 1993 did not at all affect the courts and the Commission towards a closer relationship. Of course the special position of the national courts presented, and still presents, some difficulties in consideration of co-operation (see more below), but as far as I see it, the Commission could at least have functioned as information provider without questions of sovereignty or independence were being raised.

The Amicus Curiae role of the Commission is and has been under debate. It sounds obviously against the sovereignty principle that the Commission can interfere in the proceedings in national courts and “tell the judges how to solve the case”. It is however important to bare in mind that either the submission of observation or the opinion are binding. The national court can rule against the will of the Commission. Personally I do not think this will occur on a regular bases - the Commission is the “guru” in this area and possesses the knowledge and the experience that the national courts still do not have.

Another aspect is the opinion of the parties. They will probably feel that the Commissions’ interference settles the case – no other argumentation on their behalf being necessary.

When studying the different provisions of the new Regulation, I find some of them a bit hard to understand - even seen in the light of the Notices. One example is Article 16. The purpose of this Article is to provide for a uniform application of Community competition law, but according to me the present non existing co-operation between national courts and the Commission hinders the Article from having the wanted effect. The provision obliges the national courts not to rule contrary to Decisions taken by or *contemplated to be taken by* the Commission. The Article presupposes that the national court is made aware of the Commissions’ activities, something that is not at all obvious. The national courts are furthermore not obliged to tell the Commission about a pending case until after the judgement has been taken why the Commission will be made aware of a possible contradicting judgement “too late”. In Sweden the national competition authorities will function as an intermediary; the national court will send the judgement to the NCA which will pass on the judgement to the Commission.¹¹⁶ In other words, there will be no direct contact between the national courts and the Commission in this aspect. This might be understandable seen in an efficiency perspective, but when it comes to

¹¹⁵ See *supra* note 82 and Förordning (2004:226) om underrättelse till konkurrensverket om dom eller slutligt beslut som gäller tillämpningen av artikel 81 eller 82 i fördraget.

¹¹⁶ See *supra* note 82.

increasing co-operation between the Commission and the national courts in order to keep consistency, this Swedish measure does not present the ultimate solution.

As far as I have understood, the only way for the national court to find out about the activities of the Commission is by asking either the Commission directly or the NCA which will pass on the question. This is according to me not an efficient method of dealing with the situation. I believe that a network, similar to that between the public enforcers but adapted to the special circumstances in which the national courts operate, must be developed also between the Commission and the national courts. An alternative is to have a rule in which the national courts inform the Commission about the case, not after the judgement, but as soon as it is clear that EC competition rules are involved. As it is difficult to estimate how often the Commission and the national courts will work with the same case in parallel, the need for such measures can be questionable, but it is important to point out that lack of co-operation can also increase the risks of inconsistent judgements in different national courts. (see further down).

The circumstances are somewhat different when we have a situation of double legal actions between the same parties on the same issue in different national courts. The judges will then probably be made aware of the situation through the defendant who wants to avoid a situation in which he faces legal action in two courts. As mentioned above in chapter 5.1.3, the courts must then stop proceedings and reject the case if the first seised court has jurisdiction over the case.

The above stated presents situations in which there is a risk of losing the coherency and consistency in the application of the EC competition rules. Ehlermann maintains that it is impossible to guarantee absolute coherence, but I mean that one must try. In order to avoid divergent Decisions which causes uncertainty on the market, the coherency problem must be solved. As almost every expert on the field, I do not see this problem when it comes to the situation between the NCAs and the Commission. The ECN and its obvious hierarchy with the Commission "on top", seems to develop into a functioning system of information exchange. There is however a certain risk of inconsistency when looking upon the relationship between the national courts and the different national competition authorities. It is clear that the national courts are bound by the Decisions of the Commission, but what about the Decisions of the national competition authorities? This is a question that has not yet been regulated, why one can only speculate about the answer. The close co-operation between the Commission and the NCAs – the latter must inform the Commission of the case before a Decision is taken – suggests that the NCA Decision is just as binding as the Commission Decision. I however find this a bit difficult to accept, since the national courts partly function as a forum in which Decisions from national competition authorities can be "tested". It would also be rather spectacular to bind the national courts by Decisions taken by the NCAs of other Member States since the Decisions in question only are binding in the territory of the Member State.

As the question of co-operation is far more delicate in situations concerning national courts it will not be possible to take the entire concept of the ECN and use it in a similar project between national courts. It lies in the concept of sovereignty that the national courts remain independent and make their own decisions. Katherine Holmes suggested in the earlier mentioned Article that a solution to the coherency problems could be to force the national court to take other similar judgements in other courts and NCA Decisions *into account* when judging in an EC competition law case. This would mean giving the judgements some kind of precedent effect. I believe that this is, at least at the moment, a too far reaching suggestion. A safer way to go is to develop some kind of “case bank” where judges *can study* – not involving any obligations - prior judgements in order to avoid divergent judgements. Such a bank would also facilitate for the Commission as it could lessen the burden of the Amicus Curiae role. I think that such a bank will be developed – the new Regulation demands that the national courts send their judgements concerning Article 81 and 82 to the Commission – but it will take some time since there are not enough judgements yet to fill out such a bank.

There are however more ways to develop co-operation network between judges. Even though they cannot ask straight out how to judge in this or that situation, the judges in different countries may always discuss possible situations and exchange experience and ideas with each other. It is important to have such “informal” networks both within one country and with judges in other countries. The Commissions’ funding can be of great help when building such associations since the national courts can have problems collecting the money to support this activity. The Association of European competition law judges is an excellent example of this co-operation.

I do not know how difficult it is to get funding from the Commission, but as it lies in the Commissions’ interest that a close relation between the national judges is developed, one can hope that they are generous when deciding upon the applications. Maybe the “funding” way of sponsoring networks and information seminars etc. is a better way for the Commission to support co-operation than being in charge of this activity themselves. However, if this way proves to be insufficient, the Commission must more actively try to educate and bring together the national judges.

Another question, raised in the competition seminar in Stockholm, is whether absolute coherency is necessary or not. This aspect is mainly of importance when discussing different kinds of cases. For example if we have a situation where a civil law proceedings lead to a judgement in which an agreement with competition related clauses is seen as valid, a inconsistent Decision by the Commission obliging one of the parties to pay penalty for breaking EC competition law, would not necessary cause a huge harm in legal certainty aspects. It can however be difficult to draw the lines, and I believe that even though absolute coherence can never be practically be achieved in the current situation, it is important that the operators on the competition market strive to attain consistency.

7.4 Harmonisation of procedural rules

We are presently facing a situation in which we do not have enough firm procedural rules for the national courts to follow when applying EC competition rules. Obviously such legal act would hinder both forum shopping in national courts and provide for consistency. However, seen in the light of both technical and political aspects it might be difficult to find support for such rules in the Member States. The procedural rules in the different Member States provide a wide range of variety which most of the time find their source in old traditions and general principles. It would demand a great deal of diplomacy and persuasion to create a generally accepted Regulation. I also suspect that we must have a situation of “coherency chaos” to even start discussing the possibility of having a Regulation on procedure. I strongly believe that the Commission will have the national courts “under surveillance” in order to estimate the need for harmonisation. The modernisation package might just turn out to be the start of something new that will turn into the issuing of more binding or “guiding” documents on the area.

One must however always bare in mind, that the European Court of Justice or the Court of First Instance always can decide upon the behaviour of the national courts provided that it lies within their jurisdiction (which of course is the case with EC competition law). The question is however how much time and effort they are willing to give the harmonisation of procedural rules in national courts. Probably we will see one or two guiding cases concerning this, but lack of resources hinder them from creating a complete system of harmonised rules.

Moreover Katherine Holmes might be right when predicting that there will be a natural harmonisation of such rules in the future. The question is also whether the present difference is so essential that the undertakings actually spends time and money to seek the best court or NCA. Furthermore, even though the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters leaves the claimant with a few options, he is not totally free in choosing court. The same goes with the jurisdiction of the NCAs.

8 Summary

From the first of May this year the notification system is to be abandoned to the benefit of a directly applicable system in which the undertakings themselves will be forced to assess the EC competition rules. A major decentralisation is also to take place, allowing both the national competition authorities and the national courts to apply the EC competition rules in their entirety. Even though the reform is believed to lead to a lot of positive effects, especially concerning administrative efficiency, there are quite a few worries linked to the new system. Most of these are connected to legal certainty aspects and risks of losing coherency and consistency in the application of the EC competition law. For instance, critics have expressed their concerns as to the possibility for national judges to deal with the complex economic considerations that have to be taken into account when applying Article 81(3). Moreover the risk of having divergent judgements/Decisions is believed to increase since we will have more players on the EC competition field. Closely connected to this issue lies the problem of different procedural rules in different Member States, something which both increases the risk of forum shopping and divergent Decisions. The above stated assumes however that the amount of cases in national courts and national competition authorities will increase as a result of the abolition of the notification system. This is probable, but not at all a guarantee.

In order to solve these problems, the Commission has presented a will to increase the co-operation between the players on the EC competition field. This is done through an increased information exchange, especially between the Commission and the National competition authorities. The latter co-operates further with the Commission through a so called European Competition Network which seems to solve most of the predicted problems in this part of the decentralisation. The situation is however somewhat different when it comes to national courts. In order to decrease the risk of divergent Decisions, the Commission have been given the possibility to intervene as *Amicus Curiae*. The national courts are also obliged to send every judgement based on the application of Articles 81 and 82 to the Commission. Furthermore they cannot rule against Decisions taken by the Commission. It is also notable that the Commission have a special funding which encourages national judges to have seminars and create networks together with judges in other Member States.

The question is whether these measures are sufficient. As have been shown in the essay, there are quite a few situations which leave a lot to ask for in terms of co-operation. This is especially true for the interaction between the national courts and the Commission.

It is desirable that these predicted problems will be solved in a close future, but both political considerations and technical/administrative aspects might postpone this development. It is however likely that there will be a second modernisation package in the future, regulating among other things the procedural in national courts. This is likely to take place after the Commission has evaluated the effects of the reform.

One must however bare in mind, that the European Court of Justice or the Court of First Instance always can decide upon the behaviour of the national courts provided that it lies within their jurisdiction (which of course is the case with EC competition law).

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