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# Reform of EC Antitrust Enforcement: Critics to the New System Are Highly Exaggerated

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## Introduction

One of the general tasks of the European Community is the establishment of the common market.<sup>1</sup> An important tool through which the Community acts in achieving this goal is development of competition policy that adheres to the principles of open market economy with free competition. The European Community Treaty recognises the creation of “a system ensuring that competition within internal market<sup>2</sup> is not distorted”, as a specific objective to be pursued within a framework of the general task.<sup>3</sup>

When undertakings engage in anti-competitive behaviour by cartels they might be considered to distort the competition, undermining the attainment of the Community objectives. The principal tool to control this behaviour in the Community is Art.81 of the Treaty implemented by Reg.17.<sup>4</sup> Article 81(1) provides that cartels, which subjectively intend (have as their object) or objectively cause (have as their effect) distortion of

competition in internal market, are prohibited, and therefore null and void under Art.81(2). However, such illegal cartels may be declared legal and enforceable under Art.81(3).

Regulation 17 provides, *inter alia*, the procedure for exempting cartels from the application of Art.81(2) of the Treaty. Accordingly, the undertakings may notify their restrictive practices to the Commission with the purpose of obtaining exemption under Art.81(3). The Commission then investigates notifications and makes decision to authorise the agreement under Art.81(3) or prohibit it under Art.81(1) and (2) of the Treaty, as the case may be.<sup>5</sup> If granted, authorisation renders agreements legally enforceable and provides them immunity from fines. Whereas the prohibition and nullity provisions of Art.81 are directly applicable and enforceable at Member State level, the power to apply exemption provision rests exclusively with the Commission.

These enforcement procedures have not significantly changed since 1962. Rules were well suited for the early Community with six Member States in which competition law was just developing. There was little competition culture and the Commission was able to concentrate on creating a new system in proactive way. Centralisation of prior authorisation was a useful way to enable the Commission to receive information on different markets and to develop competition policy accordingly. It was also useful for undertakings that needed a confirmation on the compatibility of their agreements with the Community competition rules.

The system, however, is no longer suitable. In the Community with 15 Member States, 11 official languages, 380 million people, and enlargement on the way, it is not possible to maintain centralised system of prior authorisation.<sup>6</sup> With regard to undertakings the notification procedure has become too timely and costly, imposing a lot of bureaucratic requirements. The administrative burden imposed on the Commission by notifications prevented it from concentrating on the most flagrant infringements of the competition rules, which are naturally never notified. Hence, many restrictive agreements or practices between undertakings went undetected and as such posed a threat to the free competition in the internal market. Therefore, the centralised system of prior notification and authorisation under Reg.17 no longer serves the purpose of effective supervision of competition, and it is often described as a poor tool in enforcement of antitrust law.

With a view to making Community competition rules

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1 See Art.2 of the Treaty Establishing the European Community (formerly the European Economic Community) 1957, as amended (hereinafter referred to as “the Treaty” or “EC Treaty”).

2 For definition of the internal market see Art.14(2) of the Treaty.

3 See Art.3(1)(g) of the Treaty.

4 Council Reg.17: First Regulation implementing Arts 85 and 86 [now 81 and 82] of the Treaty [1962] O.J. 13/204, as amended.

5 The decision focuses on weighing pro-competitive and anti-competitive sides of the agreements.

6 White Paper on Modernisation of the Rules Implementing Arts 81 and 82 of the EC Treaty [1999] O.J. C132/1.

more efficient the Commission has taken radical steps in suggesting amendments to the above described system. Proposed amendments were adopted by the European Council in Reg.1/2003<sup>7</sup> which will soon replace Reg.17.<sup>8</sup> The core objective of the new Regulation is to stop wasting the resources and make a better use of them, to create more efficient system capable of ensuring effective protection of the competition in internal market, and to be able to meet future challenges. The very idea of the reform is the switch from prior notification and authorisation system based on *ex ante* control to the directly applicable exemption system based on *ex post* control. The logical consequence of this is the abolishment of the Commission monopoly over the application of exemption provision and its decentralisation to the Member State level, namely to the national competition authorities and national courts, followed by deregulation. All enforcers of antitrust law will acquire new functions and obligations, which means redistribution and redefinition of their respective powers. Most importantly, however, the new system of *ex post* enforcement allows the Commission to refocus its resources and take a pro active stand in the modernisation and implementation of the Community antitrust rules, thus providing effective protection of the competition in the internal market.

Nevertheless, the new Regulation has been heavily criticised as of its early stages.<sup>9</sup> Prevailing among critics is the fear of inconsistent enforcement and a loss of legal certainty in the Community. In other words, decentralisation of the application of Art.81(3) to national level is feared to impede uniformity of interpretation and lead to divergent decision making, which would in turn threaten preservation of the unity and coherence of the system entailing a loss of legal certainty for undertakings. Interestingly, the European Parliament and the Economic and Social Committee that have been generally supportive of the Commission's initiative also expressed this concern.<sup>10</sup>

However, the present author believes that the regime under the new Regulation poses no serious reason for

such concerns. Whereas the application of the law in the proposed decentralised system might present a potential source of inconsistency, it is incapable of producing such magnitude to interfere with the effective functioning of the overall system.

This article provides three arguments to support this view. The first two arguments show that level of consistency needed for the effective functioning of the new system can be ensured through the existing and envisaged mechanisms, taking into consideration, in particular, highly centralised regulatory and law making powers. The third argument demonstrates that even far higher level of inconsistency in the United States anti-trust enforcement is incapable of disintegrating otherwise well co-ordinated system.

## Centralisation of law and policy-making powers in the Commission: a strong mechanism for consistency

In the context of this and the following section, a valid argument would have to contain a justification of the high degree of centralisation, before moving on to the discussion on how this mechanism contributes towards uniformity.

### Justification

Regardless of the high degree of centralisation, the Commission in fact remains just one of the enforcers of the Community competition rules. However, unlike all other enforcers it retains a special responsibility for the successful functioning of the entire system. In order to be able to carry out its tasks of an institution entrusted with defining and implementing Community competition policy, it is necessary to allow the Commission a sufficiently wide discretion and high powers, as confirmed in the recent Court's case law in *Masterfoods*.<sup>11</sup>

Furthermore, logic dictates that if decentralisation of application is a problem for consistency then centralisation of control is a solution. Having considered this as a necessary response to the reinforcement of the system of parallel competencies, and in order to preserve consistency of interpretation and application, the Commission has strengthened its central role under the new

7 Council Reg.1/2003 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty [2003] O.J. L1/1.

8 On May 1, 2004. Until then Reg.17 stays in force.

9 See, e.g. Summary of Observations on White Paper on Reform of Reg.17, February 29, 2000. Available at [www.europa.eu.int/comm/competition/antitrust/others](http://www.europa.eu.int/comm/competition/antitrust/others)

10 See European Parliament Report on the Commission White Paper for Modernisation of the Rules Implementing Arts 81 and 82 of the EC Treaty (COM(1999) 101-C5-0105/1999/2108 (COS). Final A5-0069/1999 of November 30, 1999, and Opinion of Economic and Social Committee on the Commission Proposal for a Council Regulation on the Implementation of the Rules on Competition Laid Down in Arts 81 and 82 of the Treaty [2000] O.J. C365; [2001] O.J. C155/14.

11 Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] E.C.R. I-11369.

Regulation.<sup>12</sup> The establishment of such hierarchy of regulatory powers between enforcers is desirable in decentralised system because it presents a structural pro for coherent application.

The next consideration concerns the degree of centralisation: how much power should be entrusted to the central body? The appropriate answer to this question must make a reference to the Treaty objectives and principles of subsidiarity and proportionality outlined under Art.5.

Article 3(1)(g) provides that the Treaty objectives include a creation of internal market with a system of undistorted competition. From the statistical evidence and reference to inefficiencies of the present system, it is obvious that these objectives were not well served. Hence, the very purpose of the new Regulation is to facilitate the achievement of these objectives through the mechanisms enhancing the efficiency in protection of free competition in internal market.<sup>13</sup>

One of the indispensable mechanisms includes the increase in central powers. As far as this author is aware, compatibility of the new Regulation with the principle of proportionality has not been contested. In addition, I argue that the Commission powers indeed increase in absolute terms but not from the point of view of relative values. Namely, along with an increase in the Commission's powers, the standard of judicial control over the actions of the Commission is expected to correspondingly increase from self-imposed limited jurisdiction to normal standard judicial review.<sup>14</sup> This implies that at the Community's institutional level the Commission acquires even greater level of responsibility in the exercise of its powers than it has had under the system of Reg.17.

The new Regulation, furthermore, serves the principle of subsidiarity better than the system under Reg.17 because it ensures that the action takes place at the most efficient level, with the Commission acting only in cases involving Community interest<sup>15</sup> or having effect on intra-Community trade.<sup>16</sup>

It follows from the above that as long as the Community action efficiently serves the Treaty objectives at the

same time paying due regard to the principles of proportionality and subsidiarity, any degree of centralisation is appropriate, justified and legal. The high degree of centralisation in the Commission under the new Regulation corresponds to this formula, because it is meant to ensure, in a legal way, the level of consistency necessary to provide for the effective attainment of Treaty objectives.

### *Sole law and policy maker*

... the Commission, entrusted by Art.85(1) of the EC Treaty with the task of ensuring the application of the principles laid down in Arts 81 and 82 of the Treaty, is responsible for defining and implementing Community competition policy.<sup>17</sup>

In the new directly applicable exception system, national courts and authorities are required to interpret and apply the Community competition law in accordance with the existing legislation, the Court's case law and administrative decisions by the Commission. They are also required to take into consideration Commission notices and guidelines. The new Regulation intends to keep the sole power to develop the competition policy through legislative proposals and block exemption regulations, as well as through soft law instruments and decisions, centralised in the Commission. As one commentator noted, "ensuring consistency is much easier with the same system of law".<sup>18</sup> Therefore, although applied by means of parallel competencies, the law and policies will be directed from the centre, which will help maintain consistency in the system.

### *Different forms of law and policy-making under the new Regulation*

#### *(a) Block exemption regulations*

Under the new Regulation policy and law making powers take different forms. One of them is the adoption of block exemption regulations applicable to all types of agreements. Due to such general applicability the Commission sees them as a "main tool to ensure the consistent application of the law throughout the single market and legal certainty for undertakings".<sup>19</sup> The application of Arts 81 and 82 of the Treaty will be

12 This is the right derived from the Treaty Art.83(2)(d), as well as the duty of the Commission in its role of a guardian of the Treaty. This Article confers the power on the Community legislator to define the respective functions of the Commission in applying the provisions of the article.

13 See Explanatory Memorandum to Commission Proposal for Reform [2000] O.J. C365/12.

14 See para.33 of the new Regulation.

15 For clarification of the concept see Case T-24/90 *Automec Srl v Commission* [1992] E.C.R. II-2223.

16 Explanatory Memorandum, p.11.

17 Case C-344/98 *Masterfoods*, para.[46].

18 See speech by Giuliano Marengo, on Joint Conference of the European Commission and the European Parliament, "The Reform of the European Competition Law" Freiburg, November 9 and 10, 2000. Available at:

19 Explanatory Memorandum, p.15.

subject to these block exemption regulations, creating safe harbours for categories of agreements.

The Commission however may withdraw the benefit of a block exemption regulation where the conditions cease to be compatible with its requirements.<sup>20</sup> This power also ensures transparency in the enforcement of competition policy. The undertakings will know exactly what kinds of practices are exempted by virtue of block exemption regulation as well as what practices make them no longer compatible with it, so the question of whether or not to benefit from block exemption will be entirely a matter of their decision.

National enforcers are not empowered to modify the effect of the block exemption regulations so to confer a benefit on the agreements that otherwise do not qualify for it. They may, however, withdraw the benefit of block exemption in respect of their Member State territory.<sup>21</sup> Mechanisms designed to ensure legal certainty in the exercise of this power will be discussed later in the second part of this article.

#### *(b) Commission decisions in individual cases*

Policy will be dictated also through the Commission decisions in individual cases.<sup>22</sup> Decisions finding inapplicability of Art.81,<sup>23</sup> which must be distinguished from former individual exemption decisions because of their declaratory nature, will be taken only in exceptional cases to clarify the policy where the Community public interest so requires and only on Commission's own initiative. The concept of public interest involves the cases raising new, previously undecided points of law, which therefore need to be clarified.<sup>24</sup> This will enable the Commission to give a direction to the implementation of the law, and provide for transparency of the rules. Within the network of competition authorities, and with a view to preserve consistency, the Commission has sole power as to adoption of such non-infringement individual decisions.

Infringement decisions in individual cases<sup>25</sup> will be a major operative part in the system of *ex post* enforcement and their main function will be to protect the competition. They will also play an important role in establishing precedents, and due to the Commission's refocused resources, they number is expected to grow.<sup>26</sup> Infringement Commission decisions clarify policy and

position on certain issues, and as such, they will certainly contribute towards increase in legal certainty.

All of the Commission decisions have the effect of Community acts within the meaning of Treaty's Art.249, and bind in their entirety those to whom they are addressed. They do not bind the national courts and authorities the way judgments of Community Courts do, but at best provide substantial guidance in reaching a decision. Critics argue that this will create inconsistency and decrease legal certainty in decentralised system, given that national enforcers are allowed to adopt contrary decisions to those of Commission. The present author, however, argues that, whereas Commission decisions indeed lack the binding effect *de jure*, they will have such effect *de facto*.

*De facto* binding effect will be entailed, *inter alia*, by one main consideration. Article 16 of the new Regulation imposes a duty on national courts and authorities to avoid contradicting Commission decisions and decisions contemplated by the Commission. While it was still in form of proposal, this duty, under the draft Art.16, resulted from the principles of loyalty under Art.10 of the Treaty and the principle of uniform application. The very idea of being under the duty to avoid the conflicting decision, interpreted as meaning that Commission decisions do not in fact bind the national enforcers, is intellectually unsatisfactory, especially because it was deemed to result from the binding provision of Art.10 of the Treaty.<sup>27</sup> If the Commission indeed intended to leave any space for discretion and make its decisions non-binding, it would have chosen another wording, for example, "national enforcers are under the duty to take into consideration Commission decisions". The title of Art.16 "Uniform application of Community competition law" further supports this author's argument, as it reflects the endeavour of the Commission to preserve the uniformity by means of a duty imposed therein. Provision of the Art.16, therefore, *de facto* imposes an equivalent of a duty not to adopt conflicting decisions on the Member States courts and authorities.

In addition, "the Commission is entitled to adopt at any time individual decisions under Art.81 of the Treaty, even where an agreement or practice has already been the subject of a decision by a national court and the decision contemplated by the Commission conflicts with that national court's decision".<sup>28</sup>

20 See Art.29(1) of the new Regulation.

21 See Art.29(2) of the new Regulation.

22 See Arts 7–10 of the new Regulation for different types of decisions that can be taken by Commission.

23 See Art.10 of the new Regulation.

24 See para.14 of the new Regulation.

25 Art.7 of the new Regulation.

26 White Paper, p.31.

27 The fact that the duty was deemed to result from the principles of loyalty under Art.10 of the Treaty and the principle of uniform application is a good indicator of the intention of Commission, which shouldn't be ignored and forgotten just because it no longer forms a part of the Art.16.

28 Case C-344/98 *Masterfoods*, para.[48].

### *(c) Notices and guidelines, legislative proposals*

Besides development of the policy through decisions in individual cases, the right to propose legislative texts also rests solely with the Commission. Notices and guidelines will serve the purpose of explaining policies (especially those of economic nature) and providing guidance as to the application of the Community competition rules.<sup>29</sup> Although these soft-law instruments do not formally bind national authorities<sup>30</sup> they are expected to make a valuable contribution to the consistent application of the law, as the Commission would confirm the approach set under those instruments when adopting individual decisions. If the Court upheld such individual decisions, relevant rules in soft law instruments would become binding on the national authorities. Soft law instruments are also meant to improve the transparency of the competition policy and provide guidance to both, national enforcers and private parties.<sup>31</sup> The exclusive Commission powers to propose legislative texts will also dictate the way in which a new competition culture will develop, through shaping the binding rules and clarifying the specific ideas behind the new Regulation.

### *Mechanism of Article 3*

Furthermore, Art.3 of the new Regulation makes sure that in the proceedings before national courts or competition authorities where trade between Member States is affected Community law applies alongside the national laws. Given the supremacy of Community over national laws this Article also implies the exclusion of national provisions contradicting those of the EC in competition cases. National enforcers will be required to apply Community law in cases where application of national laws could lead to inconsistency with Community rules. This eliminates legal uncertainty coming out of concurrent application of national and Community law and directly contradicts fears of renationalisation. At the same time primacy of Community rules effectively ensures that the very legislation and policies Commission adopts become applicable and, when needed, corrective instruments to cases affecting interstate trade. Article 3, hence, renders the Commission's central role in policy making meaningful. In the line

with the rest of the reform, the aim of this Article is to ensure the necessary degree of efficiency and coherence in the internal market. Together with centralised policy-making, the adoption of this provision can be expected to contribute towards consistency to a marked degree, and given the framework of the new Regulation, in the long run produce a high level of convergence between national laws of the Member States.

### *Conclusion*

There can be no watertight distinction between the first and the second part of the argument in this article. The evidence of high centralisation of powers is not confined to policy-making but it extends throughout the system in other means of vertical control, for example, in strengthening the Commission's regulatory powers. The following paragraphs will discuss the different instruments of information and cooperation envisaged under new Regulation. Besides the fact that they serve the function of co-ordination in the network of enforcers and give the Commission wide regulatory discretion, they are also designed to preserve consistency and transparency of enforcement.

### **Old and new mechanisms as guarantors for uniform and transparent application**

#### *Means of vertical control and co-operation in the network of administrative enforcers*

The Commission places a great confidence in co-operation through building a network with national competition authorities and believes that this is what will ultimately strengthen the coherence of enforcement. The adoption of decentralised application, however, requires stronger co-operative mechanisms and stronger control in the network. With the aim of preserving consistency in the network, information and discussion are the main means of co-operation envisaged. They will contribute towards understanding of the rules with the long-term effect of creating high level of consistency and the *ad hoc* effect of allowing the Commission to correct possible inconsistencies in enforcement of Community competition rules.

#### *(a) Information*

With a view to preventing conflicting decisions, the new Regulation retains the provision imposing on the administrative enforcers a duty of close co-operation.<sup>32</sup>

29 White Paper, p.31.

30 It is further argued in this article that they have an indirectly binding effect under the new system regardless of subsequent adoption of the Commission decisions.

31 On October 10, 2003 the Commission has published the so called "Modernisation Package" [2003] O.J. C243/3, which includes a number of notices and guidelines clarifying the rules under new Regulation.

32 See Art.11(1) of the new Regulation.

Accordingly, on matters which require scrutiny from the centre (that is have effect on intra-Community trade) and in order to ensure consistency, national competition authorities are to inform Commission of any initiation of proceedings in cases in which they act under the Treaty Arts 81 and 82.<sup>33</sup> They are also to inform the Commission of any intention to withdraw the benefit of a block exemption, accept commitments or take infringement decisions.<sup>34</sup> This double information requirement will enable the Commission to have an overview of all the cases affecting intra-Community trade dealt with by any member of the network.

In the White Paper the Commission expressed a view that provision of this kind of information will help maintain the consistency of competition policy enforcement.<sup>35</sup> The confidence to maintain the consistency through information mechanisms was interpreted by some authors as implying that the Commission envisages telling the national authorities its view on the matter and expecting them to comply.<sup>36</sup> In the case of non-compliance the Commission will deal with the case itself using the corrective instrument of Art.11(6) to withdraw the case from the jurisdiction of national authorities, the same way it does under Art.9(3) of Reg.17 at the present.<sup>37</sup> This power of Commission is presumed to pressure the national authorities to comply with its view in the first place.<sup>38</sup> Although this possibility existed before, the Commission did not use it, as there has not been much conflict in the past. Based on this fact it is possible to assume that conflicts will not occur in the future either, especially because national competition authorities will become a part of the more integrated network pursuing common goals under the guidance of the Commission.

Furthermore, in practice, information forwarded to the Commission will be made available also to all other members of the network, which will prove especially useful in the context of the new Art.13. This Article creates a mechanism regulating allocation of cases in the network of competition authorities meant to avoid parallel proceedings and enhancing a one-stop shop principle. As cases may be brought simultaneously or successively before more than one authority, it provides

a legal basis for all public enforcers to suspend the proceedings if the case is, or has been previously dealt with by another authority in the network. The Commission will handle cases involving sufficient Community interest, whereas other cases will be allocated inside the network of national authorities to the best placed authority based on criteria of effects within the territory.

The provision of Art.13 has non-compulsory character and it may happen that national authorities disagree as to which one is the best placed to deal with a case. In accordance with the principle of close co-operation they should try to settle the disagreement by discussion, and in accordance with the principle of legal certainty this discussion should be a subject to transparent time-limit, some have suggested a period of three months, for ultimate allocation. If the discussion however does not produce a workable solution within the prescribed time-period, the Commission will have to interfere in order to preserve efficiency in dealing with cases. It will have at least three available options: allocate the case to the authority where it considers best placed; decide to conduct parallel proceedings on the basis that both jurisdictions have sufficient connecting factors and that it is the most effective way of solving the competition problem; or withdraw a case from the jurisdiction of national authorities by means of Art.11(6) and deal with it itself. The last option will probably apply where there are more than two authorities involved in the dispute so the parallel proceedings would be inefficient, and allocation to a single authority would be an ineffective way to deal with the case.

#### *(b) Discussion*

Discussion in the network will also be of great importance for consistency. In the Explanatory Memorandum the Commission recognises that development and application of Community competition law is a matter that concerns all authorities and states that “policy issues will be the subject of discussion within the network”.<sup>39</sup> The new Regulation therefore strengthens the role of the Advisory Committee on Restrictive Practices and Dominant Positions, a consultative body to be composed of members of competition authorities of the Member States. Hence, in adopting block exemption Regulations the Commission is required to consult the Advisory Committee twice in the process. A consultation meeting with the Committee presided over by the Commission member will take place before adoption of all decisions by the Commission (save the interim measures) and the opinion it produces will be appended to the draft

33 See Art.11(3) of the new Regulation.

34 See Art.11(4) of the new Regulation. Note that national authorities are not empowered to take positive decisions that further reduce the risk of divergent decisions.

35 See para.105.

36 See Alison Jones and Brenda Sufirin, *EC Competition Law: Text, Cases, and Materials* (Oxford UP, New York, 2001), p.1027.

37 By initiating own proceedings the Commission withdraws the jurisdiction from national authorities. This is also in line with the European Court of Justice case law.

38 See Jones and Sufirin, p.1027.

39 See Explanatory Memorandum, p.12.

decision and published on the request of the Committee. If the Commission so decides, or if the Member State so requests, a case dealt with by national authority may be put on agenda too. Outside the forum, the national authorities may consult the Commission and ask for its assistance in all cases involving application of Community law. Discussion of this kind should greatly contribute towards understanding of, and willing compliance with, the centrally adopted legislation and central guidance in general which is a type of co-operation the Commission hopes for with a view to strengthening uniform enforcement.

### *Co-operation with national courts*

Moreover, the new Art.6 specifically confers a power to apply Art.81(3) of the Treaty onto the national courts. Most critics, however, considered national courts an unsuitable forum for application of the complex economic assessments that this Treaty provision requires. In this respect some commentators noted that the role of the national courts would not be substantially different as they have already been applying Arts 81(1) and 82.<sup>40</sup> The judgment of the Court in *Delimitis* illustrates that the role of national courts will, indeed, not significantly change under the proposed system. In that case the Court emphasised that where an agreement before the national courts clearly infringes Art.81(1) of the Treaty and will, in their opinion, not benefit the Commission exemption under Art.81(3), national courts are free to rule on incompatibility of an agreement.<sup>41</sup> It means that even in the present system of enforcement courts are required to make assessments under Art.81(3) of the Treaty, regardless of the lack of power to apply its provisions. Furthermore, it has been argued that the application of Art.82 of the Treaty, in respect of which national courts have full jurisdiction, is at least as difficult as the application of Art.81 is to exemption provisions.<sup>42</sup> United States judges have been applying full economic assessments of competition cases for the last 100 years, and there is no reason to believe that they are more capable of performing this task than their

European counterparts.<sup>43</sup> In the words of the President of the Brussels Commercial Court, Belgian courts are “very well placed to make use of the possibility to apply directly Art.81(3) of the Treaty”.<sup>44</sup>

In the course of judicial proceedings in which Community competition law is applied, the Commission may request national courts to transmit to them all documents that are necessary.<sup>45</sup> It will use such information to intervene in national judicial proceedings in the role of *amicus curiae* and submit its observations where it considers guidance of that kind will help maintain the consistency of enforcement. In any case, national courts are to forward to the Commission a copy of all judgments made under Arts 81 and 82<sup>46</sup> in order to enable its possible intervention on appeal to the higher national court.<sup>47</sup> Similarly to the argument made above concerning the provision of Art.16, although labelled not binding, it can be expected that the Commission submissions to the national courts will have a quasi-binding effect in practice.

It has to be pointed out that when national authorities apply Community law, they have to do so in accordance with the practices and position of Commission. In a way they would have to submit to the Commission’s view if it was to disagree.<sup>48</sup>

If this statement is true in the case of national authorities, it must of necessity be true in the case of national courts as well. The same requirement to apply the rules in accordance with the practice and position of the Commission is imposed on the courts. The submission of observations in the role of *amicus curiae* certainly does constitute such position of the Commission, notwithstanding the principle of judicial autonomy. Where the national court however, intends to adopt a decision contrary to the position of the Commission in the role of *amicus curiae*, it is very likely that it will first refer a case to the Court under the preliminary rulings procedure.<sup>49</sup>

All competition decisions by national authorities and all pending proceedings before national courts in the Community may potentially lead to the use of this

40 See, e.g. Alban O. Salord, “Concurrent Application, the April 1999 White Paper and the Future of National Laws” [2000] 2 E.C.L.R. 136.

41 See the judgment in Case C-234/89 *Delimitis v Henninger Bräu* [1991] E.C.R. I-935; [1992] 5 C.M.L.R. 210, paras [43]-[55].

42 See Claus-Dieter Ehlermann, “The Modernisation of Antitrust Policy: A Legal and Cultural Revolution” 37 C.M.L.Rev. 585.

43 Speech of Mario Monti, the Commissioner in charge for Competition Policy, “Towards the application of Art.81(3) by National Courts” Conference at the Europäische Rechtakademie, Trier, November 27, 2000.

44 See speech by Anne Spiritus-Dassesse, Freiburg, 2000.

45 Art.15(3) of the new Regulation. The courts are obliged to respond to such request.

46 Art.15(2) of the new Regulation.

47 Also, the copy of judgments will enable Commission to receive useful information on national markets of the Member States.

48 See Salord, [2000] 2 E.C.L.R. 134.

49 This procedure is outlined in Art.234 of the Treaty.



procedure. Depending on the remedies sought, complainants have a choice of bringing their case before national authorities or national courts, or, where the case involves sufficient Community interest, before the Commission. A party dissatisfied with a decision of a national competition authority may complain to the national courts responsible for judicial review of such administrative decisions. Any court within the meaning of Art.234 of the Treaty may make use of preliminary rulings,<sup>50</sup> whereas courts against whose decisions there is no judicial remedy (courts of last instance) are required to make a reference to the Court.<sup>51</sup> Although not the most efficient way of deciding a case, this procedure will successfully serve the purpose of ensuring uniformity.<sup>52</sup> Together with the envisaged intervention in judicial proceedings it should eliminate all serious concerns about inconsistency resulting from the divergent application of Community law by national courts.

The Commission nevertheless has provided for training for national judges in order to prepare them for upcoming tasks.<sup>53</sup> Such special training should further reduce the possibility of divergent decisions and should raise awareness of the role of the courts in the new system. Moreover, under the new Art.15(1), where the judge dealing with the competition issue under Community law finds it difficult to make necessary assessments it may request assistance from the Commission. Where the problem concerns interpretation of the law it may refer the question to the Court. It will be hard in practice to bypass these mechanisms and create a possibility of inconsistency, in particular given the role of the Commission in the new system.

### *Instruments compensating absence of harmonised procedural rules*

Unlike the case of substantive law, the Commission has not envisaged either co-operation with regard to consistent application of procedural rules or harmonisation

50 See Case 166/73 *Rheinmühlen* [1974] E.C.R. 33, where the Court held that “national courts have the widest discretion in referring matters to the Court of Justice if they consider that a case pending before them raises questions involving interpretation[ . . . ]necessitating a decision on their part.”

51 Art.234 of the Treaty. This provision is subject to *acte clair* theory developed by the Court in Case 283/81 *Cilfit* [1982] E.C.R. 3415, according to which last resort courts do not have to make reference under Art.234 where the correct application is so obvious as to leave no space for any reasonable doubt. A special procedure exists for contesting the final and formal decisions of the Commission directly before the Court. See the procedure of action for annulment under Art.230 of the Treaty.

52 Concerns that related to the lack of common appeal authority have failed to take account of this procedure.

53 More on training available at: [www.eubusiness.com/funding/competition/comp01\\_en.htm](http://www.eubusiness.com/funding/competition/comp01_en.htm)

of procedural rules. Article 5 of the new Regulation specifically provides that national authorities are to apply the sanctions available under national laws when effecting decisions for infringement of Arts 81 and 82 of the Treaty. This provision applies to the courts as well. Some critics went so (irrationally) far as to claim that “differences between national rules on procedure may obstruct the target of a coherent application of Art.81 even more than differences in substantive rules”.<sup>54</sup> Others expressed the view that differences in procedural rules give incentive to the complainants to “shop” for the court or authority where procedures are quicker and remedies more attractive, and lead to renationalisation of Community competition law. The following paragraphs will respond to these critics.

#### *(a) Regarding forum shopping*

Article 3(1)(h) of the Treaty provides that the approximation of national laws shall go only so far as required for the effective functioning of the common market. This Article prohibits the Community legislator to impose a level of harmonisation that is higher than necessary for the achievement of common market objectives for, as such, it would conflict with the principle of proportionality. The present author shares the view of the Commission that procedural harmonisation is not necessary for the uniform application of the law.

The general principle in the Community requires national remedies to be so deterrent to provide for the full effectiveness of the Community rules.<sup>55</sup> In addition, the administrative principle of proportionality provides that sanctions imposed should not be excessive in relation to the breach. These two principles set the lower and the upper limits to the level of national sanctions. Although not strictly defined, the limits do ensure that the range of fines cannot substantially differ between jurisdictions so to encourage forum shopping.

Should this prove not enough, co-operation in the network requires the cases to be allocated to the best placed authority according to the criteria of effects within the territory. The information circulating within the network will make sure that cases reach the most appropriate forum. When supported with envisaged “one-stop shop” control this will make it impossible for the complainants to select what is in their opinion the most lenient authority. Instead, the system will take care

54 Basedow, Jurgen, “Who Will Protect the Competition in Europe? From Central Enforcement to Authority Networks and Private Litigation,” [2001] 2 *European Business Organisation Law Review*, pp.443–468.

55 See Case 14/83 *Von Colson and Kauman* [1984] E.C.R. 1891.

to allocate the complaints and choose the proper forum for them.

The concerns about forum shopping are probably much more related to private than to public enforcement as no mechanisms for allocation of cases exists with regard to private litigation. However, logic leads to the assumption that due to lack of culture as to private litigation, there will be very few cases brought before the national courts in the initial period. In the meanwhile, until such culture develops, it can be expected that this specific concern will be subject to clarification and regulation through subsequent measures.<sup>56</sup>

Finally, the only consideration that might promote forum shopping in general is that of inconsistency in the application of Community law. As this paper demonstrated, a high level of centralisation and instruments of vertical regulation and co-operation in the system are capable of preventing or correcting all possible inconsistencies. Therefore, the application of different national procedures will not, as such, prevent the consistent application of Community substantive rules,<sup>57</sup> directly providing a disincentive as regards forum shopping.

#### *(b) Regarding renationalisation*

The decentralisation lacking harmonised procedural rules was deemed, *inter alia*, as a danger leading to renationalisation. In the light of arguments made above concerning consistency of application, procedural rules are in themselves incapable of constituting a danger of renationalisation.

The Commission's role of guidance in the network is expected to have a great influence on the enforcement of Community law by national authorities. Not only will the co-operation enhance the consistency of application: national authorities will become a part of the same system together with the Commission in pursuance of common goals related to accomplishment of the internal market. As recognised, "when the authorities apply the same rules within the framework of a network they will individually be less vulnerable to political pressures, leading to a better protection of competition".<sup>58</sup>

It has also been argued that the aim of the reform is not to establish a system in which national authorities

are turned into national extensions of Commission.<sup>59</sup> The present authors believe that whereas it may not be the aim, it certainly is the effect of the reform. Decentralisation under the new Regulation is intended to increase the application of EC law and not of national antitrust rules.<sup>60</sup> As a result of close co-operation envisaged under Art.11, supported by the provision of Art.3, national laws will eventually converge and will be substituted with Community laws in the long run.<sup>61</sup> This will render the national authorities mere branches of the Commission helping the enforcement of Community competition law.

#### *Transparency under the new Regulation*

Among submissions of other observations, industry was in particular concerned that the discontinuation of prior notification and authorisation procedure as well as lack of detailed rules under the new Regulation would result in a loss of transparency.<sup>62</sup> This fear is unfounded because, under the system of Reg.17, legal uncertainty already exists hence the present author believes that the new Regulation will in fact advance the transparency of the rules to a high degree.

#### *(a) Discontinuation of ex ante control*

Due to its non-binding character, the Reg.17 practice of informal settlements by comfort letter, which accounts for more than 80 per cent of total decisions, does not provide legal certainty to undertakings. The Commission may at any time withdraw the benefit of a comfort letter,<sup>63</sup> and they also do not provide any protection to the undertakings before the courts.<sup>64</sup> Moreover, in this system companies must examine their position not only under Community law, but under each of the laws of the Member States affected by the agreement. They might be a subject of parallel proceedings on national and Community level and a subject of concurrent application of the national and Community law. Proceedings before national authorities can be blocked the moment the undertaking under investigation notifies the restrictive agreement to the Commission, which decreases transparency for complainants.

<sup>59</sup> *ibid.*

<sup>60</sup> See speech by Claus-Dieter Ehlermann, Freiburg, 2000.

<sup>61</sup> That the substitution will happen was also argued by Salord [2000] 2 E.C.L.R. 141.

<sup>62</sup> See Summary of Observations, p.14.

<sup>63</sup> See Cases T 7 & 9/93 *Langnese-Iglo & Schöller Lebensmittel v Commission* [1995] E.C.R. II-1533, and Case C-279/95P *Langnese-Iglo v Commission* [1998] E.C.R. I-5609.

<sup>64</sup> In Case C-234/89 *Delimits v Henninger Bräu*, [1991] E.C.R. I-00935, the Court held that the national courts may not rely on a Commission comfort letter stating its view that the agreement

<sup>56</sup> In fact, the Commission has included a draft Notice on Complaints in its "Modernisation Package." See n.31.

<sup>57</sup> Also argued by Mario Todino, "Modernisation from the Perspective of National Competition Authorities: Impact of the Reform on Decentralised Application of EC Competition Law" [2000] 8 E.C.L.R. 349.

<sup>58</sup> See speech by Alexander Schaub, Freiburg, 2000. Available at: [www.europa.eu.int/comm/competition/conferences/2000/freiburg](http://www.europa.eu.int/comm/competition/conferences/2000/freiburg)

Furthermore, when filling in the A/B Form for prior notification of the restrictive practices in the present system, companies first assess the likelihood of exemption before deciding whether or not to notify an agreement. Undertakings will always make a decision not to notify when they consider that an agreement cannot be exempted.<sup>65</sup> Besides the fact that such agreements restrict free competition, this is also proof that companies know exactly how to make an assessment of compatibility under Community competition rules. The concerns of industry are therefore unfounded.

The new Regulation will in fact strengthen legal certainty and increase transparency in many respects. Companies will be required to observe the rules by making their own assessment of compatibility and as pointed out “there is no reason why competition law should be any different from other legal areas where companies have to make sure that they are acting in compliance with the law”.<sup>66</sup> Where the law, however, appears unclear or where the undertakings engage in transactions raising new points of law, the Commission will issue a reasoned opinion stating its view on the matter. The reasoned opinions envisaged under the new Regulation will have strong influence on the judges and courts, even greater than comfort letters do under the present system.<sup>67</sup> National courts and authorities are under a duty to apply the law in accordance with the practice and position of the Commission, and reasoned opinions, in law and in fact, do amount to such practice and position.

Moreover, the possibility of parallel proceedings has been decreased by the new Art.13 that gives national authorities and the Commission the right to suspend proceedings or reject a complaint if the same case is, or has been dealt with, by another competition authority. The decentralisation of application of Art.81(3) of the Treaty and the abolishment of the notification system, no longer makes it possible for undertakings to use dilatory notifications and block the national proceedings. The new Art.3 eliminates the possibility of application of inconsistent national rules to cases affecting intra-Community trade. Therefore, the system envisaged under the new regime will in fact lead to an increase in transparency and not the other way around.

### *(b) Lack of detailed rules under the new Regulation*

While the new Regulation was still at the level of proposal some of the criticisms related to insufficient and imprecise rules. The envisaged adoption of subsequent legislation, of which the Commission has already made use, provides an answer to such critics. It would have been premature and politically unwise on the part of the Commission to have created very detailed rules at that point.<sup>68</sup> The proposal needed to receive an approval in the Council and many detailed rules would have just increased the subjects for debate. It would have been equally unwise from the legal point of view. Critics have ignored the fact that the imperfections of the new system cannot and should not be solved in advance through theoretical assessment of impacts of the new Regulation. Instead, it is much wiser to wait for the practical experience gained after entry into force of the new Regulation to show practical problems,<sup>69</sup> which can be dealt with through the issue of subsequent legislation. The rules are therefore carefully designed to provide a sufficiently precise framework and clear ideas to allow space for clarification based on the practical needs. As already indicated, the inconsistencies that may appear will be of transitory nature, and in that initial period the Commission will have to make a full use of its regulatory powers.

### *Conclusion*

The mechanisms outlined above will enhance a “level playing field” throughout the Community and provide undertakings with a greater level of legal certainty. They will also insure a level of consistency needed for effective functioning of the proposed directly applicable exception system. In this respect, “instruments of consistency must be seen as aiming not at a deadly uniformity but at ensuring that the system remains viable for undertakings and that sound competition policy is applied at the end of the day”.<sup>70</sup> This is the acknowledgement of a fact of life rather than intelligent anticipation: there are no deadly uniformities in this world and a certain level of inconsistency will have to remain in spite of the establishment of well designed mechanisms.

The following argument relates to the inconsistency and legal uncertainty surrounding enforcement of anti-trust law in the US system. It is meant to illustrate that the remaining possibility of inconsistent enforcement in

65 This claim can be based on the statistical fact that in 40 years of enforcement the Commission took only 9 negative decisions.

66 See speech by Charlotte Cederschiöld, Freiburg, 2000.

67 See Ehlermann, 37 C.M.L.Rev. 574.

68 This was also recognised by Claus D. Ehlermann, Freiburg, 2000.

69 See Claus D. Ehlermann, 37 C.M.L.Rev. 582.

70 See speech by Guiliano Marengo, Freiburg, 2000.

period of post-modernisation in the Community is incapable of constituting a threat to the effective functioning of the proposed system.

## Inconsistencies and legal uncertainties in US system of antitrust enforcement

### General

The US antitrust system has been in existence since the adoption of the Sherman Act in 1890<sup>71</sup> and has been the first jurisdiction in the world to adopt a modern system of competition law. It is therefore often taken as an authoritative example by the nations developing or instituting new competition regimes. In this respect the Community is no different. European competition law has been compared to the US model ever since its creation. The fact that the new Regulation adopts fundamental changes that resemble certain features inherent in the US system has given an additional reason for such comparison. Many commentators have been frustrated with the way in which the Commission points out that the adoption of rules similar to that of the United States will increase competitiveness of European companies to the highly competitive level of US companies.

I would argue that if US companies are competitive, it is despite the system [ . . . ]. I keep asking myself, why does Europe need to ape the unfortunate model of the US with all its uncertainties and difficulties.<sup>72</sup>

Indeed, whereas it might be true that the US model has successfully operated under the same framework of rules for more than 100 years this does not imply that it has been consistent. The issue of inconsistency and legal uncertainty surrounding the US competition system today is highlighted in the paragraphs below. But first it is necessary to turn briefly to the basic legal and institutional framework of antitrust.

71 An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies, 15 USC, July 2, 1890. It was supplemented by the latter statutes, the Clayton Act 1914, the Federal Trade Commission Act 1914 and the Robinson-Patman Act 1936.

72 See, e.g. speech of Stephen Walzer, Freiburg, 2000.

### Brief overview of the US antitrust laws and enforcement agencies<sup>73</sup>

The Sherman Act of 1890 was passed by the US Congress, which means that it is a part of federal law. Section 1 of the Act deals with restraints on trade and reads as follows:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations shall be considered illegal.

The Act does not define the meaning of restraints on trade. This provision has therefore been the subject of interpretation by the Supreme Court. Both federal laws and the interpretation by the Supreme Court are not binding on the states.<sup>74</sup>

States have their own antitrust statutes. All 50 states and the District of Columbia have enacted antitrust legislation. The statutes differ among the states: whereas some have enacted legislation modelled on federal acts many states have not done so. Due to its non-binding effect it is also possible that they might interpret the look-alike statutes as well as federal law differently.

The Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) are the authorities in charge of federal antitrust enforcement. The DOJ is the sole authority entrusted with enforcement of the Sherman Act. It acquires jurisdiction over cases affecting inter-state trade. The FTC was created by the Federal Trade Commission Act. Section 5(a) of this Act prohibits unfair methods of competition, and unfair and deceptive acts or practices in commerce. The FTC is not in charge of enforcing the Sherman Act, but the courts have held that s.5 is broad enough to cover any acts that might be found illegal under Sherman Act as well.

State antitrust enforcement relates to the cases that have a predominantly local or regional effect. State Att.-Gens have a power to enforce the federal antitrust laws. However, they may bring suits under both federal

73 For more information on the following para.see also: Jones and Sufrin, pp.18–27, Ehlermann, Claus D., and Loraine L. Laudati (eds.), “Federalism in Antitrust Enforcement: The United States’ Experience with a Dual Enforcement Regime” in *Robert Schuman Centre Annual on European Competition Law 1996* (Kluwer Law International, 1997), pp.205–226 available at and speech by James F. Rill, “Recent Trends and Developments in the Role of Federal and State Authorities in Antitrust Enforcement: Is Cooperation Working?” in *European University Institute, Robert Schuman Centre for Advanced Studies, 2000 EU Competition Workshop Proceedings* (Florence, Italy). Available at

74 For e.g. Supreme Court in Louisiana held that the US Supreme Court’s interpretation of the Sherman Act is to be considered persuasive but not binding, in case *Louisiana Power and Light v United Gas Pipe Line*, 493 So. 2d 1149, 1158 (1a. 1986).

and state antitrust statutes. They also may bring suits on behalf of their citizens to challenge restrictive conducts under federal law. A lot of cases today brought by state Att.-Gens are pursued in conjunction or co-operation with similar federal action. Certain relief may be obtained by the states under state laws that are not available under federal law. This creates an incentive for the Att.-Gens to apply concurrently national and federal laws, which is, as obvious from the portrait above, just one of the sources of inconsistency in the US system.

### *Inconsistency and legal uncertainty in the enforcement*

During the past 15 years the states have emerged as significant participants in the enforcement of US anti-trust law. "One of the dangers most frequently cited as potentially arising from increased enforcement activity of the states is the creation of uncertainty generated by inconsistent enforcement."<sup>75</sup> State and federal enforcement contain big differences as regards both substantive and procedural laws on which they are based. The most dangerous consequence of dual enforcement, as viewed by some commentators, is the development of multiple standards of prosecutorial discretion, conflicting substantive standards and inconsistent precedents. At the extreme, the uncertainty imposed by these differing standards may prevent businesses from undertaking "efficiency-enhancing transactions".<sup>76</sup> Finally, dual enforcement creates a duplication of effort by federal and state authorities, which results in waste of resources.

Hence, the uncertainties surrounding the undertakings operating in the US market today are a product of multiple scrutiny and inconsistent dual enforcement regime. One author was particularly concerned with the question of double jeopardy, coming out of concurrent application, which in the United States actually serves the purpose of preserving state sovereignty.<sup>77</sup> He presented the argument as follows:

The Fifth Amendment forbids double jeopardy. However, the Supreme Court judgment in criminal cases<sup>78</sup> provided that dual system of enforcement did not constitute double jeopardy because different prosecutions were taken by different sovereign states and the Fifth Amendment was not created to prevent overlap in jurisdictions. This rule applies by analogy to antitrust

cases even when the effect is on inter-state trade and should be a matter of federal law. The same conduct thus may be guilty of and punished for infringement of different laws. Although state law cannot authorise what federal law forbids, it may forbid what is authorised on a federal level.<sup>79</sup> It may also sanction what has already been forbidden at the federal level. As the author of this argument pointed out, what interest in prosecution can the state have when the FTC finds a breach of federal law and, for example, makes a cease and desist order?<sup>80</sup> Finally, he concluded that there is an inherent problem of legal uncertainty in antitrust cases, as the undertakings have to assess the validity of state rules against the federal rules in order to see if there is a conflict. At the end of the day, they must comply with both rules.<sup>81</sup>

Even more surprising for the present author, however, is the way in which the problem of inconsistency is (not) addressed as if it was just an insignificant detail in the system. The US Supreme Court judgment in the case of *Cantor v Detroit Edison* illustrates this indifference towards inconsistency as well as lack of clear rules on distribution of powers. In that case the Supreme Court held that:

merely because certain conduct may be subject to both state regulation and to federal antitrust laws does not necessarily mean that it must satisfy inconsistent standards, but even assuming inconsistency, this would not mean that the federal interests must inevitably be subordinated to the states.<sup>82</sup>

In this kind of system one would expect that the co-operation between different enforcers would be on the high level. But the reality is far from that, as will be indicated in the following paragraph.

### *Modifications to the system*

Proposed solutions for the problems of inconsistent application of law in the US system of antitrust enforcement is experiencing include the following: there must be steps taken at both levels of government in order to

75 See Ehlermann and Laudati (eds.), *Robert Schuman Centre Annual on European Competition Law* 1996, p.13.

76 *ibid.*

77 Salord [2000] 2 E.C.L.R. 129.

78 Namely, *Abbate v United States* 359 US 187 (1959) and *Bartkus v Illinois* 359 US 121 (1959).

79 Similar to the Community practice on block exemptions, and the retention of the exclusive power to adopt positive administrative decisions by the Commission under the new Regulation.

80 p.130. Salord believed that it is about compensating for the expenses incurred during prosecution of violation.

81 From this it follows that if their business activities are a subject to more than one state's jurisdiction they will have to comply with more than two sets of laws depending in how many states they pursue their activities.

82 Supreme Court of the United States judgment in *Cantor, DBA Selden Drugs Co v Detroit Edison Co* 428 US 579.

ensure that the enforcement does not jeopardise the competitiveness of US companies through the imposition of excessive burdens. To do this, state and federal authorities should strive to co-ordinate enforcement policies and efforts. The closest to the co-operation that they have besides the submission of *amicus curiae* briefs is exemplified in the formation of the Executive Working Group for Antitrust and the development of Common Ground Conferences. The latter merely serves as a place where the federal and state antitrust enforcement authorities compare their notes on substantive areas. The former is composed of representatives from each level of enforcement, which co-ordinates overlapping enforcement activities to prevent duplication of effort (obviously without success), which means that it is aimed towards managing the resources. Through submission of briefs federal or state regulators are afforded the opportunity to present their views without generating the burden associated with initiating separate proceedings. Also this mechanism is aimed towards reducing budget.<sup>83</sup>

Despite the efforts to decrease the costs many commentators consider the system very inefficient and wasteful as to use of resources.<sup>84</sup> Overlapping jurisdictions and the possibility of parallel proceedings are indeed a waste of resources, but in the light of more serious concern they present a constant and confirmed threat that the federal and state authorities will reach divergent decisions. One member of the American Bar Association committee therefore called for a new legislation designed to pre-empt state laws in cases dealing with restraint on commerce between several states. A new protocol between the Justice Department, FTC and the states for allocation of antitrust cases is suggested to help save resources and have only one authority deal with the case, which would increase legal certainty.<sup>85</sup>

### *New Regulation in Europe: a well-learned lesson from the US experience*

Following this analysis of the problems that the undertakings in the US system face it is now useful to turn back to the European Council's new Regulation. At the start it must be recognised that the new Regulation goes a full step ahead in relation to the situation in the United States, not only in the development of brand new

instruments for consistency, but also in already established institutional and legal arrangements<sup>86</sup> on which it is based. In other words, everything that the US system needs in order to ensure consistent application and offer legal certainty, the post-modernised Community system will have. And more.

Namely, the envisaged mechanisms, such as allocation of cases to the best placed authority; the circulation of all relevant information through the network; the duty to consult the Advisory Committee before taking decisions imposed on the Commission and the equivalent duty to inform the Commission imposed on national authorities at the outset of proceedings as well as prior to taking the decision; the influence that the *amicus curiae* briefs will have on national courts, centralised policy-making, high level of Commission regulatory powers and especially the power to withdraw a case from the national authorities, the obligation under the new Art.16 to avoid conflicting decisions; the possibility of consulting the Commission on how to deal with cases, and finally the elimination of inconsistent application by means of the new Art.3, will all guarantee a higher level of legal certainty and a higher level of consistency as compared to the US system. Furthermore, when the new Regulation is considered in the light of existing supranational institutional structures in the Community, harmonisation of substantive law on competition, and the prospective for further developments, one has to ask the question: what exactly were the critics so concerned about?

### *Conclusion*

Despite the chaotic picture on inconsistency and legal uncertainty presented in this section, it remains the truth that the US antitrust system has inspired many other legal systems and has had a long and effective record of dealing with restraints on competition. The possible problems with incoherent enforcement of laws, dual system and lack of legal certainty as to interpretation of federal law has not disintegrated the system or interfered with the high level of competitiveness on the market. Likewise, it is the system that has developed a

<sup>86</sup> Here it might be useful to keep in mind the fundamental difference in the US and the Community antitrust policies. It seems that the US system takes far more care of preserving state sovereignty when adopting competition policies than about devising the most efficient way of protection of competition. On the other hand, the protection of free competition is the one of the basic tools for attainment of the Community objectives related to the internal market. It is therefore one of the basic pillars for the very existence of the Community and it is only natural to conclude that as such it will be far better protected in the Community than in the United States.

<sup>83</sup> See also speech by James F. Rill, Florence, 2000.

<sup>84</sup> See article by Chaney, Helen, "Why State Antitrust Enforcement is a Bad Policy" July 16, 2001. Available at [www.pacificresearch.org/pub/act/2001/act\\_01-07-16.html](http://www.pacificresearch.org/pub/act/2001/act_01-07-16.html)

<sup>85</sup> For protocol on Federal/State Co-operation see [www.ftc.gov/ftc/antitrust.htm](http://www.ftc.gov/ftc/antitrust.htm)

lot of new economic and competition concepts and theories, and it is famous for its unique teachings in the area.<sup>87</sup> Many features of the new regime reflect the current practice in the United States.<sup>88</sup> However, in the context of the European framework for enforcement under the new Regulation they will have more far-reaching effects in ensuring uniformity than the same practices could ever have under the structures of the US system. This proves that not only will the Community's modernised system confine itself to the level of consistency and legal certainty indispensable for functioning, but it will go even further to induce the convergence in the Member States' systems that will pave the way for more efficient attainment of the common market objectives.

## Conclusion

The reform of the Community antitrust rules is an intelligent project that will most certainly see pay-offs in the form of efficient and uniform application of the law. Not everyone would agree with this statement. The exclusive power to grant exemptions to the restrictive

agreements and practices that has rested with the Commission for the last 42 years was perceived as a safe harbour for companies, decentralisation of which would result in incoherent enforcement of Community law. Critics further claimed that where such decentralisation is accompanied by discontinuation of the prior administrative authorisation, as in the case of the new Regulation, the risk of incoherent application and loss of legal certainty is even greater. This article proved that such risk is not capable of undermining the functioning of the system in the post-modernised Community. Centralised policy-making, aided by the provision of Art.3 of the new Regulation, effectively ensures that all courts and authorities apply the Community law uniformly with the position of the Commission. Furthermore, the new mechanisms of information and co-operation with the strong characteristic of vertical control, provides an increased legal certainty and effective solution to all concerns related to consistency of application. The US system of antitrust enforcement was not only an example but also an authority that illustrated that certain gaps in the consistency of application are not the threat to the otherwise well co-ordinated system, directly proving the weakness and exaggeration of critics. It also provided a useful comparison to the Community's new regime. As it appeared, the new Regulation contained all the necessary tools to eliminate any concerns related to inconsistency when compared to the experience in the US system. Those who maintain, against all the evidence to the contrary, that the inconsistency under the new Regulation will cause serious problems in enforcement are usually those who under the mask of honest concern protect their national or personal interests.

<sup>87</sup> Teaching of the Chicago and Harvard school are often cited as authorities on economic/competition matters.

<sup>88</sup> *Amicus curiae* interventions, business review letters, decentralisation, *ex post* enforcement etc.