COUNCIL REGULATION 1/2003: COOPERATION BETWEEN THE COMMISSION AND NATIONAL COMPETITION AUTHORITIES

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While the spirit of Regulation 1/2003 is decentralization, the formal structure of the new system is rather more about parallelism. Although it may be regrettable that principles on such an important issue as case allocation have not been made binding, concerns about inconsistent application appear somewhat more complicated. The various cooperation mechanisms (such as the ECN) are nonetheless designed to ensure substantial national authority participation in the enforcement and to coordinate it adequately. At the end of the day the success of the system will depend on the degree of active cooperation characterized by sincerity and mutual trust among the enforcers.

Introduction

December 16, 2002 stands as a milestone for EC competition law, since that day brought to an end nearly a decade of efforts by the adoption of Regulation 1/2003, the new regulation for the implementation of Articles 81 and 82 of the EC Treaty.[1] The entry into force of the Regulation in May of next year will mark the end of the present *ex ante* (notification-based) system in favor of an *ex post* (legal exception) regime where it is hoped that the Member States, in the name of decentralization, will take a greater part in competition law enforcement by the strengthening of their powers provided for by the Regulation.

As the title indicates this paper will deal with the interplay between the Commission and the national competition authorities, and in particular how the Regulation arranges for the coordination of public enforcement. Clearly this topic includes countless issues, but the paper will focus mainly on case allocation and uniform application of EC competition law by the Commission and national authorities (without, however,

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[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, [2003] O.J. L1/1.

claiming to cover everything). It will only incidentally go into aspects related to exchange of confidential information and mutual assistance with investigations.[2]

Considering that the new Regulation entails that EC competition law will be enforced by at least 15 national competition authorities and the Commission, all with more or less similar enforcement rights, the success of the system as far as public enforcement is concerned will depend profoundly on the success of a new kid in town, the European Competition Network (or the ECN).[3] This Network – set up in October 2002 and comprising the Commission and the competition authorities of the 15 Member States plus 10 acceding countries – will, it is hoped, be a central player in the public enforcement of EC competition law.

The ECN is the forum in which key issues such as allocation of cases, exchange of information and mutual assistance in investigations will be on the agenda. It could thus fairly be assumed that the degree of uniformity in EC competition law enforcement will also depend on this new figure.

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[2] To mention just a few of the numerous articles and papers produced on these topics, see for example Voelcker and Charro, *EC modernization regulation* in Competition Law Insight, Issue 3 2003 p. 20, Mavroidis and Neven, *The Modernisation of EU competition policy: Making the network operate* in Cahier de Recherches Economiques (Université de Lausanne), 00/17 (2000), Carlin and Haegeman, *European Competition Network* in Competition Law Insight, Issue 4 2003 p. 8, Bourgeois and Humpe, *The Commission's Draft "New Regulation 17"* in (2002) ECLR 23/2 p. 43, Ehlermann and Atanasiu, *The Modernisation of E.C. Antitrust Law: Consequences for the Future Role and Function of the E.C. Courts* in (2002) ECLR 23/2 p. 72, Jones, *Regulation 17: The Impact of the Current Application of Articles 81 and 82 by National Competition Authorities on the European Commission's Proposals for Reform* in (2001) ECLR 22/10 p. 405, Todino, *Modernisation from the Perspective of National Competition Authorities: Impact of the Reform on Decentralised Application of E.C. Competition Law* in (2000) ECLR 21/8 p. 348, Venit, *Brave new world: The Modernization and decentralization of enforcement under Articles 81 and 82 of the EC Treaty* in (2003) CMLRev. 40 p. 545, various papers (available on the Commission's website) submitted in connection with the Conference on "The Reform of European Competition Law" in Freiburg, 2000, and several working papers (available on www.iue.it) relating to the 2000 EU Competition Workshop/Proceedings at the European University Institute, Florence.

[3] See Recital 15 of the Regulation, the Joint Statement of the Council and the Commission on the functioning of the network of competition authorities of December 10, 2002, and para. 91 of the White paper on modernisation of the rules implementing articles 85 and 86 [*now 81 and 82*] of the EC Treaty – Commission programme No. 99/027 - approved on April 28, 1999.

Division of labor between public enforcers of EC competition law

The powers of the Commission vs. those of national authorities

In order to understand the concerns related to case allocation and uniform application of EC competition law, it is useful to have an idea of how the Regulation arranges for public enforcement as far as the basic competences are concerned.

The Regulation sets out in detail the powers of the Commission to take an assortment of decision when applying substantive law: Finding and termination of infringements (Article 7); interim measures (Article 8); approval of commitments (Article 9); and declaratory findings of inapplicability (Article 10). As far as national competition authorities are concerned, they are authorized by Article 5 to apply Articles 81 and 82 in their entirety and to take decisions ordering the termination of infringements, interim measures, accepting commitments, imposing sanctions and 'non-action' decisions (without constitutive effect). Apart from such powers explicitly granted, the Regulation leaves it to a large extent to national law to determine procedures and sanctions.

The Regulation thus creates a system of *parallel enforcement of the substantive rules*. However, as has been widely noted, granting national competition authorities the right to apply Article 81.3 is not in itself sufficient to guarantee *decentralized enforcement*.[4] National authorities, in so far as they have been authorized to do so, have historically applied Articles 81.1 and 82 very rarely, and this will need to change radically if we are ever to speak of decentralization. Possibly Article 3 of the Regulation will have an effect in this direction since it requires national authorities to apply EC law whenever they apply national law to practices affecting trade between Member States.

Be that as it may, it has always been stressed that decentralization will be achieved not only by granting new powers to national authorities but also by the new role of the Commission. In this role the Commission will aim at setting EC competition policy, guaranteeing uniform application of EC competition law, and focusing on hardcore infringements. In addition to the right to take decisions (cf. above), there are several mechanisms in the Regulation which are designed to enable the Commission to pursue its guardian role, some of which are embodied in Article 11. Under this provision the

[4] Cf. Mavroidis and Neven, cit. p. 3, who state that "[t]he modernization is not concerned with the allocation of competence. It reorganizes enforcement. The Commission simply adds new partners to exercise an exclusive Community competence."

Commission has the right to be informed of cases initiated at the national level and to be consulted whenever a national authority intends to adopt a decision (whether regarding an infringement, commitments or withdrawal of a block exemption). Moreover, the Commission will have far-reaching power to adopt block exemption regulations as well as notices and guidelines. Additionally, the Commission will have the (already notorious) right to withdraw cases from the national authorities.

Another important point to remember in this regard is that decisions by the Commission have, and will naturally continue to have, Community-wide effect whilst those of national authorities will only have effect on a national level. Hence, despite the new role of the Commission, the Regulation does not bring about decentralization of the Commission's full powers. Instead, the role of the national authority will be more that of an agency with territorially restricted competences. This is not uncomplicated since even where national authorities handle cases it is, due to the effect on trade criterion, almost by definition likely that the alleged infringement produces effects in more than one Member State.[5] Allegedly this means that national authorities, when punishing infringements, will not be able to do so effectively (since damage may have been done outside its jurisdiction).[6] As we shall see, these elements raise issues of case allocation and uniform application of law.

Some, including, it appears, industry, have continuously favored a clear and binding 'one-stop shop' system, where a decision of a national authority is enforceable in all Member States, arguing that, for all practical purposes, national competition authorities, when dealing with transactions under EC competition rules, will be enforcing rules applicable in all Member States. It has also been argued that, in other areas of EC law, departures from the principle of territorial limitation of Member State enforcement have already been accepted (notably when applying the principle of mutual recognition). Why would this, they say, be unacceptable for the enforcement of EC competition rules?[7]

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[5] Indeed, rumor has it that a majority of the cases handled by the Commission has had an economic impact in more than one Member State.

[6] Empirically it seems as if there are different views on this among national competition authorities.

[7] See Bourgeois and Humpe, cit. p. 49. Another interesting suggestion was to introduce a 'non-opposition' system under which national authorities and the Commission could oppose a national decision within a certain period of time. If no objection is raised, the decision would automatically acquire a Community-wide effect. Cf. Summary of observations on the White Paper, DG Comp document of February 29, 2000, para. 6.3.

In order to fully answer the concerns arising from the asymmetry described above, an in-depth harmonization of national authorities and procedures making national authorities integrated far beyond what the ECN envisages would probably have been required. Moreover, there are limits to how far one could have gone 'vertically', since under Article 85 of the Treaty, according to the interpretation of the Court of Justice,[8] the Commission must always have the right to apply Articles 81 and 82. A 'real' decentralized system (where national authorities under certain defined circumstance have the legal right to adopt decisions without the interference of the Commission) would thus not have been possible absent an amendment to the Treaty itself.[9]

The role of the European Competition Network

As suggested above, the powers of the Commission and national authorities are similar in the sense that both types of authority have the competence to apply the substantive rules in the entire EU, whereas the decisions of national authorities will only have national effect.

So, the foundations of the system laid down by the Regulation do not provide a clear division of labor between the enforcement bodies, nor are there any obvious mechanisms which can guarantee uniform application. The ECN, briefly described above, will have great responsibility for bringing order in this system. While it is true that too great an involvement of the Commission would be at odds with the objective of decentralization,[10] the Member States should through the ECN (presumably coordinated by the Commission) be provided with a forum not only for influencing the Commission's policy work but also for ensuring that they get a piece of the enforcement cake. Indeed, the purposes of the ECN are quite similar to those of the Commission itself, and include promoting effective protection of competition by ensuring that available resources are used optimally to combat the most harmful practices, contributing to a consistent application of competition law throughout the EU, and guiding the development of Community competition policy.[11]

[8] C-344/98 *Masterfoods* [2000] ECR I-11412.
[9] Some have indeed suggested fully-fledged harmonization of national procedural law (including sanctions), for which Article 83 of the EC Treaty would provide an adequate legal basis.
[10] Bourgeois and Humpe, cit. p. 47.
[11] Cf. a speech by Mario Monti entitled *EU Competition Policy*, given at the Fordham Annual Conference on International Antitrust Law and Policy, 2002.

Although not clear from the wording of the Regulation, consultations and information exchanges as provided for, *inter alia*, in Article 11 will be the fuel of the ECN machinery.

The silence of the Regulation: principles of case allocation

While providing for the parallel application of Articles 81 and 82, the Regulation does not set out a clear and binding system for how cases are to be allocated between the Network members. Even though few would oppose a 'one-stop shop' regime (at least for the majority of cases),[12] this is not guaranteed with at least 16 authorities having the power to intervene in any given case where trade between (any!) Member States is affected (save for the Article 11.6 path).[13]

Bringing order to such a system clearly requires principles for case allocation, all the more so to achieve decentralization and avoid multiple control, and it hence comes as no surprise that some Member States originally called for including at least the main principles of case allocation in the text of the Regulation itself (instead of in a notice).

Although it is understood that neither the Commission – nor the ECN it is assumed – will act as a 'clearing house' for case allocation, according to the Joint Statement cases, irrespective of origin, will be dealt with by 'an authority, or by authorities, able to restore or maintain competition in the market'.[14] In order to determine which authority is 'best placed to act', the ECN will take into account all relevant factors *in particular the markets in which the main anti-competitive effects are felt and which authority is most able to deal with a case successfully depending on the ability to gather evidence, to bring the infringement to an end and to apply sanctions effectively*. More concretely, the Joint Statement envisages that (i) if only one Member State is affected by the alleged infringement, single action is preferred, while (ii) where two or three are affected the Network will agree on either single action or plural action (in which case one authority should be the leader). If instead (iii) more than three Member States are affected, the Commission is likely to be the best placed authority.[15]

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[12] Arguably, however, a 'one-stop shop' regime would require a far-reaching harmonization of national procedures and sanctions, such as the possibility to impose fines extraterritorially. Cf. above.
[13] As noted by Mavroidis and Neven, cit. p. 9, there can be no doubt that for example the Portuguese authority could assert competence over an agreement between an Italian and a Danish undertaking which only affects trade between those countries.
[14] Joint Statement, footnote 3 above, para. 15.
[15] Joint Statement, footnote 3 above, paras. 16-19.

Unless there is a *clear and detailed* understanding among the Commission and national authorities about each other's suitability to 'restore or maintain competition in the market', these passages from the Joint Statement, in practice, mean little more than nothing.

In any event, the first situation can reasonably be expected to arise where all companies involved in an infringement are situated in one and the same Member State (A) and the infringement has virtually no effects outside that State. In such a case it should be possible for a single national authority to successfully order the termination of the infringement as well as punish it adequately. But will this also be the case where we add to the facts that Member States (B) and (C), although less than Member State (A), are also affected by the infringement? Presumably the answer depends on more than a few elements, such as the nature of the infringement (abuse, number and 'whereabouts' of agreements etc.) and the possibilities not only of imposing a fine but also of collecting it. Again, without a comprehensive knowledge about how each and every national authority will approach infringements of Articles 81 and 82, it is virtually impossible to speak intelligently about these issues. Suffice it to say that it will be interesting to see the degree, if any, of extraterritoriality reflected in fines imposed by national authorities. Equally interesting will be to see the extent to which national authorities, in cases where such extraterritoriality cannot be found (a guess is that it will not), will actually rely on each other's decisions in cases where little supplementary investigative effort is needed to punish the same companies twice. Presumably such reliance would be simpler in cases where the relevant geographic market covers both Member States.

In any event, where an agreement produces substantial effects in the territory of several Member States, it is probably too much to hope for that all but one authority would step back (cf. Article 13 under which a national authority is entitled but not obliged to close its file when other authorities are dealing with the same case). Indeed, time will tell to what extent national authorities will be willing to surrender their competence in cases where the Member States of such authorities are clearly affected by an infringement albeit less than other Member States. In what circumstances will the national authority which started an investigation be ready to agree that, although it took the initiative to start a case (clearly finding it important), another authority is 'best placed' to act?

When, then, would the Commission be best placed to act? What can the Commission do that the national authorities cannot? In general, the Commission is responsible for

setting competition policy, hence it would arguably be best placed to act where novel cases arise. Apart from this it can reasonably be expected (as indeed envisaged by the Joint Statement) that where many Member States are affected by a certain agreement or sets of agreements or abuses of a dominant position, single action by the Commission, with the investigative assistance from national authorities, is preferable, if perhaps for no other reason than in order to impose the right sanctions.[16]

Whatever the criteria for case allocation will be, let us back up a bit. The allocation principles will of course not come into play if cases are not reported to the ECN in the first place. To start with, the workability of the system clearly requires national authorities to take the obligation stemming from Article 11.3, namely to inform the ECN/Commission before or without delay after initiating the first formal investigative measure, very seriously. For obvious reasons only cases where trade between Member States is affected will be reported. Due to the unclarity of this criterion[17] it would probably at least initially be wise for national authorities to report rather too much than too little, since otherwise EC cases may remain outside the information system. Also, it is interesting to note that Article 11.3 merely states that such information 'may' be made available to the other national authorities. Will this leave room for inappropriate discretion for a Member State to refuse to supply information which may be against the 'interests of that State'?[18]

Once the existence of a case has been made known to the ECN, it is of utmost importance that (re-)allocation be handled and decided quickly. Failure in this respect would be a great deterrent to some of those on which the new system depends, namely complainants. The indicative time limit of up to three months as given in the Joint Statement seems to be rather on the long end of the scale. It might be noted in this connection that there is no possibility for parties or complainants to challenge a case allocation decision. Surely, one would have less reason for demanding such a right in a completely harmonized regime, but in a system where a case could get re-allocated from a 'lenient' country to a Member State with wholly different sanctions, a little more is at stake.[19] Hence at least a right to be heard would not have been too much to

[16] Furthermore the Commission might be the 'best placed' authority in cases of 'system failure', namely where there is disagreement within the ECN on who should act. Indeed, this may be a candidate case for application of Article 11.6 (withdrawal of cases), cf. below.
[17] A notice on the application of the effect on trade criterion can, however, be expected at the end of 2003.
[18] Cf. below under "Uniform application of Articles 81 and 82 in public enforcement".
[19] For an overview of the sanctions available in the Member States, see Jones, cit. p. 406 *et seq*.

ask for,[20] but it remains to be seen whether the public enforcers will be willing to discuss these issues at least informally with companies.

Moreover, in cases of re-allocation but also generally speaking, the Regulation (Article 12) provides for significant exchange and use of confidential information which has been obtained by the Network members with the aim of applying Articles 81 and 82. If things go as planned, an enormous amount of information will circulate from one enforcer to another through the ECN.

Even though this, again, is probably key to the success of the modernization project, companies may not appreciate the increased exposure, as under Article 12 the information received by authorities can be used directly as evidence to establish the existence of an infringement of Community competition rules. At present companies are generally reluctant to provide any type of more or less confidential information even to a single authority. Although this paper will not deal with the numerous interesting problems relating to the exchange of confidential information, it seems particularly intriguing how confidentiality will be treated when information is passed on from one national authority to another. Save for a few safeguards,[21] the Regulation itself, it appears, is silent on this point, leaving ample room for national law. Hence, assume that the authority in Member State (A) carries out an inspection, and the information thus collected is passed on to the authority in Member State (B) (for reasons of re-allocation of the case or otherwise). What happens if some pieces of this information, for whatever reason, could not have been gathered under the laws of Member State (B)? Are there any procedural steps that could be taken by the company concerned, or is the information potentially 'untouchable' (save for the few limitations set by the Regulation) once it is passed on? Whatever the answers are, clearly the system presupposes that all current and acceding Member States provide adequate safeguards in these respects.

So, once a case has been (re-)allocated to one or more authorities considered 'best placed', it is of course fundamental that any other authority where the same case is pending close its file (at least temporarily). Article 13 provides a legal basis for doing so. Although providing that closing the file is merely optional was presumably an inevitable consequence of the idea that parallel action is sometimes adequate, it may seem regrettable that Article 13 does not provide for mandatory closing of the file

[20] See Carlin and Haegeman, cit. p. 10.
[21] See Article 12 (limitations as regards subject-matter and criminal sanctions); Article 22 (information gathered from investigations performed by other authorities) and Article 28 (professional secrecy).

once the issue of allocation has been settled.[22] Nonetheless, Article 13 is probably welcomed by national authorities in so far as it allows them to close the file without further ado if they so wish.

That an authority has been considered 'best placed' and hence in charge of the case does not, however, mean that the role of the ECN stops there. An important feature of the cooperation system is mutual assistance with inspections. Since the powers of national authorities in this respect do not extend beyond their respective territories, this possibility of indirect gathering of evidence is necessary as long as one is striving for organized, decentralized competition law enforcement. A peculiarity here, however, is that national authorities under Articles 20 and 21 cannot refuse to cooperate with the Commission when the latter has ordered inspections, while a national authority's assistance to another national authority is formally optional (Article 22). Since many a case will have a bearing on several Member States (because Articles 81 and 82 by definition apply solely where trade between Member States is affected), it might have been desirable to ensure that national authorities be obliged to cooperate with each other as well. Similar to Article 11.3, equally optional and discussed above, will this allow Member States undue discretion?

To sum up, will the above mechanisms allow the system to gain legitimacy among enforcers and, in particular, companies? Although promising, it will have to be made clearer than what follows from the Regulation and the Joint Statement. The forthcoming Commission notice on these issues may well provide the necessary additional guidance, although one might suspect that such unbinding rules will have to be so detailed and unambiguous as to be unfit for the form of a notice.

However, legitimacy also requires that, at the end of the day, EC competition law is applied consistently. Presumably, with greater uniformity of application, the less important it will be which authority handles which case. This leads us to the next section.

[22] Cf. Carlin and Haegeman, cit. p. 10, discussing the principle of *ne bis in idem* enshrined in Article 50 of the Charter of Fundamental Rights of the EU which could be deemed violated where an authority re-opens the case after another authority, having been considered 'best placed', has rejected a complaint after an in-depth investigation.

Uniform application of Articles 81 and 82 in public enforcement

Probably the most profound concern that has been expressed in relation to the new Regulation is that the system will lead to inconsistent application of Articles 81 and 82, to the detriment of legal certainty.

There are several forms of inconsistency that could arise. First, there can be conflicting decisions, i.e. inconsistency as regards the same subject-matter (whatever the word 'same' means). Secondly, inconsistency may relate to the application of competition law in general, i.e. the emergence of conflicting case-law. This latter form of inconsistency can, in turn, take different forms: The end results of infringement procedures can differ from one authority to another due to differences in procedures and sanctions (briefly touched upon above and not treated further), or inconsistencies can occur because of divergence in interpretation of the substantive rules ('substantive inconsistency'). Clearly, all of these forms can give rise to forum shopping, i.e. that one is keen to use (as a complainant or party) the authority which could most be expected to favor one's interests.[23] This assumes that the rules on case-allocation are not clear enough to rule out any third party influence on where a particular case will be dealt with.[24] As we have seen, they are not.

This paper will not deal with inconsistency due to conflicting decisions. Allegedly, this issue is even more intriguing when it comes to the relationship between Community competition law and national competition law (Article 3 of the Regulation). It may be sufficient to say that, under Article 16.2, national authorities when applying Articles 81 and 82 'cannot' take decisions which would run counter to a Commission decision regarding the same agreement or practice.[25] Although this provision merely codifies the case-law of the Court of Justice,[26] being obliged not to adopt conflicting decisions is, of course, crucial. However, it is noteworthy that there is no similar obligation on the part of the Commission, which may at any time adopt a decision running counter to decisions of national authorities. The Joint Statement

[23] See, e.g., Voelcker and Charro, cit. p. 22.
[24] Forum shopping due to the lack of harmonization of national procedures and sanctions is, however, allegedly discouraged by the fact that the decisions of national authorities will lack Community-wide effect. – Should one authority take an unduly lenient view on a certain agreement, other authorities could intervene. That this would happen in cases of inconsistent application of substantive law, however, is not as obvious.
[25] Note also Article 13 (treated above) which provides a legal basis (but no obligation) for national authorities to close their files in cases where another authority has received a complaint or otherwise dealt with the case.
[26] Cf. the *Masterfoods* judgment, footnote 8 above.

nonetheless declares that the Commission 'will normally not – and to the extent that Community interest is not at stake – adopt a decision which is in conflict with a decision of an NCA after proper information pursuant to both Article 11.3 and 4 of the Regulation has been provided and the Commission has made no use of Article 11.6 of the Regulation'.[27]

In any event, that inconsistencies will arise is virtually inevitable,[28] even though many Member States already have national competition laws modeled on EC law and hence are familiar with the law.[29] I might venture to say, even without substantial factual evidence, that national authorities are at present inclined to take quite divergent approaches to some of the countless factors (such as the definition of the relevant market, to mention just one) to take into account when applying Articles 81 and 82 or their national law counterparts. The substantive competition rules are so flexibly worded that even where Community case-law exists it has been possible for national authorities to find a way to apply the rules inconsistently (whether intentionally or not). However, this is hardly a new problem, because inconsistent application of law is not unheard of even 'internally', i.e. within one and the same national authority.

There are, however, grounds to fear inconsistent application for reasons other than the mere fact that the number of enforcers will increase drastically. As has been noted in the legal literature, inconsistencies may arise because each and every enforcer of EC competition law is accountable to different constituencies.[30] While the Commission being the guardian of the EC Treaty is, simply put, responsible for European integration, national authorities can hardly turn a blind eye to national interests. In other words, it cannot be expected that national authorities will take much account of the effects of, for example, restrictive agreements outside their respective territories (and they may not even have the right to do so, cf. above on extraterritorial sanctions). And what is more, Article 81.3 has sometimes been viewed as a mechanism for the Commission to take interests other than those purely related to competition into account when considering restrictive agreements (such as promotion of integration). Will such interests now be in the hands of national authorities, or should one expect that Article 81.3 no longer leaves room for them?[31]

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[27] Joint Statement, footnote 3 above, para. 23.
[28] Cf. Venit, cit. p. 560 *et seq*., who nevertheless has identified several elements demonstrating that the concerns about inconsistent application may be exaggerated.
[29] However, the planned enlargement of the EU clearly adds an element here.
[30] Mavroidis and Neven, cit. p. 12.
[31] Cf. Venit, cit. p. 578 *et seq*.

This risk is by no means hypothetical, and it would probably be naïve to think that national authorities will be inclined without hesitation to strike down cooperation agreements or other conduct which are deemed to be good for their respective countries' economies. Using mergers as a reference, it is for example no secret that some Northern politicians (and industry) did not appreciate the Commission's decision in the *Volvo/Scania* case,[32] being only one of several decisions in which industry in Scandinavia has been given a hard time by the Commission (be it wrong or right).[33]

In any event, there are several mechanisms in the Regulation which are designed to favor uniform application (some of which have been touched upon above).

First, under Article 11.5 of the Regulation, the national authorities are given the general *right* to consult the Commission "on any case involving the application of Community law". However, if the current Notice on cooperation between the Commission and national authorities,[34] in combination with Article 10 of the Treaty, could ever be said to create an obligation to do so, the Regulation as binding EC law makes it clear that this is not the case. The significance of Article 11.5 will probably depend on the degree of more informal activity within the ECN.

Secondly, as stated earlier, Articles 11.3 and 11.4 contain fairly detailed directions on how the national authorities are obliged to inform the Commission before or without delay after commencing the first formal investigative measure and no later than thirty days before adopting a decision requiring that an infringement be brought to end, accepting commitments or withdrawing the benefit of a block exemption. Presumably this last obligation, albeit depending on the extent to which proposed decisions will actually be discussed, will be particularly important for consistency. Besides, pursuant to Article 14 the Commission 'shall' consult the Advisory Committee on Restrictive Practices and Dominant Positions prior to taking certain decisions. When discussing individual cases, the Committee will be composed of representatives of the national authorities, and the Commission 'shall take the utmost account' of its opinion. What is more important for the issue discussed here, however, is that Article 14 states that the Commission, at the request of a national authority, 'shall' include on the agenda of the

[32] Case COMP/M.1672, decision of March 14, 2000.
[33] Cf. Norberg and Holgersson, *Moderniseringen av EU:s konkurrensrätt – hot eller möjlighet?*, in Europarättslig tidskrift, p. 164.
[34] Commission notice on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Articles 85 [*now 81*] or 86 [*now 82*] of the EC Treaty, [1997] O.J. C313/3.

Advisory Committee cases that are being dealt with on the national level, and the Commission 'may' also do so on its own initiative.

Thirdly, pursuant to Article 10 the Commission, despite the legal exception system, may make declaratory findings of inapplicability in cases where "the Community public interest relating to the application of Articles 81 and 82 of the Treaty so requires".[35] It will be interesting to see if national authorities will provide something similar in the form of an informal negative clearance, comfort letter or even simpler form of guidance on the application of Articles 81 and 82. Should any authority do so, it would most likely be flooded with requests from companies seeking legal certainty.

Fourthly, the Commission will continue to issue block exemptions, guidelines and notices. By the end of 2003, notices can be expected on the following subjects: The functioning of the ECN; cooperation with national courts; opinions or guidance letters; complaints; the effect on trade criterion; and the application of Article 81.3. Clearly the last of these will be of great interest, but rumor has it that this notice will not be as concrete and directed towards individual types of agreement as the Guidelines on vertical and horizontal agreements.[36] However, time will tell how victorious these notices will be.

Whether these mechanisms will be sufficient to guarantee uniform application is, of course, impossible to say, but the ECN clearly has an important role to play here since it will serve as the vehicle for the Commission when performing its general duty under the Treaty to ensure efficient and uniform application of EC competition law. The Commission will also have the Article 11.6 ace up its sleeve, empowering it to withdraw cases from national authorities. Pursuant to the Joint Statement[37] the Commission, after the initial allocation period while a case is being dealt with by one or several authorities well placed to do so, will normally not intervene pursuant to Article 11.6 unless (i) ECN members envisage conflicting decisions in the same case; (ii) *members envisage a decision in clear conflict with consolidated case-law*; (iii) proceedings at national level are unduly drawn out; (iv) there is a need to adopt a Commission decision to develop Community competition policy; or (v) the national competition authority does not object.

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[35] The Commission will issue a notice on so-called 'guidance letters'.
[36] Commission Notice - Guidelines on Vertical Restraints, [2000] O.J. C291/1, and Commission Notice - Guidelines on the applicability of Article 81 to horizontal co-operation agreements, [2001] O.J. C3/2.
[37] Cit., para. 21.

Some Member States dislike this unrestricted right to withdraw cases, viewing it as an unfounded control mechanism. If the Commission, they say, is serious about decentralization, it should guarantee more involvement of national authorities. Although there are other ways for the Commission to ensure the Member States' observance of their Treaty obligations such as by initiating infringement proceedings under Article 226 (ex Article 169) of the Treaty, such action would probably not be adequate when dealing with flawed competition law application by Member States. Should an important case be decided manifestly wrongly by a national authority, irreparable damage may be done.[38] Although the Commission has envisaged that it will only apply Article 11.6 under exceptional circumstances, it can be hoped that its use – or threat of use – can put some pressure on national authorities when it comes to uniform application.

Again, it is very difficult at this stage to predict how these rules will work in practice. From a practitioner's point of view, however, it is clear that the whole modernization process adds another dimension to his or her work. As has been noted by speakers on theses topics, giving competition law advice to clients entails quite a bit of prediction about how the relevant competition authority would view the agreement, joint venture, practice etc. at issue. In doing this it will hardly be possible to disregard the fact that there will be at least another 15 new enforcers of EC competition law, all of which are not only formally competent to decide any given case with 'Community dimension' but are also inevitably capable of developing a body of case-law more or less divergent from one another.

Final remarks

We have seen that it is not clear how the non-binding case allocation system will work in practice, and that there is a risk of inconsistent application of law. Cooperation between the Commission and national authorities in this system of parallel powers will be fundamental for the success of the modernization project now embodied in Regulation 1/2003, and the malfunction of the forum for cooperation – the ECN – might even lead to its collapse.[39] Nonetheless, unwarranted bureaucracy which could

[38] A more fundamental reason for Article 11.6, however, is probably that the system laid down by the Regulation, as stated, is formally speaking about parallel application rather than decentralization. See footnote 4 above, and the *Masterfoods* judgment, cit.

[39] See Carlin and Haegeman, cit. p. 8, who correctly state that if the decentralization is not to result in total chaos, the authorities need to cooperate closely.

overburden the system must be avoided, because such concerns, after all, were one of the reasons for the modernization project in the first place.

The rationale for the need for cooperation is fundamentally that the Regulation – as clearly intended by the Commission albeit not without resistance from some Member States – establishes a very flexible system with no clear rules as to what will actually be dealt with by the ECN. Moreover, the system is flexible in the sense that various mechanisms under the Regulation are optional as opposed to mandatory[40], and it even leaves out of the Regulation altogether details on such fundamental issues as case allocation. Flexibility is positive only if handled with care, and hence it comes as no surprise that concerns have been expressed that the system of parallel powers will lead to inconsistent application of the competition rules.

Mutual respect and sincere and efficient cooperation between the members of the ECN will hence be crucial. That any meaningful cooperation will take place should by no means be taken for granted. For one thing, not all Member States, as it seems, were happy about the final text of the Regulation. Moreover, the Commission's efforts in the cooperation field so far (such as the 1997 Notice[41]) have led to remarkably modest results. But this is hardly the Commission's fault, for as has been reported elsewhere competition authorities even in 'related' countries such as those in the Nordic region (where even legislative cooperation in other fields has not been uncommon) have interacted very rarely in the actual enforcement of competition law. Moreover, the new system's success depends also to a great extent on overcoming linguistic and similar non-legal cultural differences that exist between Member States and their respective agencies. Clearly, such challenges do not make the objective of establishing a 'European competition culture' easier to achieve.

Moreover, at least initially companies may choose to direct themselves to the Commission. Complainants may feel that a Commission decision is preferable to a national one or they may simply not trust national authorities to 'argue' their case well enough in the ECN. And 'whistle blowers' may be inclined to apply for leniency 'centrally' (whatever the effect of this would be) with copies to each and every

[40] Such as Article 13 which merely allows (but does not oblige) national authorities to close their files when a case has been allocated to the 'best placed' authority, or Article 11.5 under which national authorities 'may' consult the Commission on cases involving the application of EC competition law, or Article 22 according to which Member States 'may' assist each other with investigations.
[41] See footnote 34 above.

national authority, instead of to the authority which in the parties' estimation will be considered 'best placed'.

So, while the new system as laid down by the Regulation and to be completed with guidelines and notices looks good in theory, it remains to be seen whether the Commission and its new enforcement partners together will be able to pull it off in practice.

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Keywords:

- Competition
- Modernization
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- Network
- Enforcement
- Allocation
- Uniform
- Application
- Information
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