European and National Enforcement of EU Competition Law: Sharing the Sovereignty?

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In this gathering I suspect there is little need to draw attention to the importance of EC competition law. But if it *was* necessary, one need only point to the fine imposed two weeks ago by the European Commission upon a cartel in the automotive glass market. The total fine was €1,384 million, the highest single fine imposed by the Commission to date, including a fine of €869 million upon Saint-Gobain, a French manufacturer, which is the highest single fine imposed for a breach of competition law anywhere in the world. To bring the matter closer to home, it also included a fine of €113.5 million for Asahi, a Mitsubishi company; it would have been double that but for a reduction owing to Asahi's cooperation in the Commission investigation. And this is on top of a fine of €65 million for Asahi in 2007. The arm of EC competition law is now a long one.

Community competition law is of coursed a many-headed beast, and we could spend many more days discussing various of its aspects. My concern here is Regulation 1/2003,[1] and the revolution it has brought about in the enforcement of the law. In particular, the decentralisation programme first proposed by the Commission in its 1999 White Paper,[2] which came into force with Regulation 1/2003 in May 2004 and marked a major departure from the previous scheme of (excessive?) centralised control. We now have decentralisation, enforcement of the rules by 27+ administrative authorities, and countless national courts. It is now shared. And it is very, very unlikely that we could ever go back to the way it was. The question now is, what have we done?

We didn't know at the beginning how the competition rules of Article 81 and 82 would be enforced. That was left intentionally vague by the Treaty, and of course we know nothing in 1958 of the direct effect of Community law, whether the courts would be involved at all. The decision was made in 1962 with the adoption of Regulation 17[3] that we would follow the centralised route. Articles 81 and 82 were to be enforced first and foremost by the Commission. And most important, we would follow the German model of central administrative, quasi-judicial authorisation of the exemption power of Article 81(3), exclusive authority to grant exemption being conferred upon the Commission.[4] The role of national administrative authorities – if they existed – was purely secondary, and the role of national courts unaddressed and unknown.

This centralised system was seen to be wholly necessary in guiding the discipline, new for some, of competition policy and competition law. It was applauded by no less than Professor Robert Bork:

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1 Reg. 1/2003 OJ 2003 L/1/1.
2 White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, OJ 1999 C132/1.
3 Reg. 17/62 JO 1962, p 204.
4 Art 9(1): 'Subject to review of its decision by the Court of Justice, the Commission shall have sole power to declare Article 85(1) inapplicable'.

> 'In antitrust, it is possible to think the European Community has wisely not followed the American example but has instead centralized all enforcement in a single government agency'.[5]

But it was immediately apparent that it was inefficient. The Commission simply did not have the resources necessary to discharge its responsibilities. Hence, the revolution of 1999.

At the heart of the changes was the surrender of the Commission monopoly of the power of exemption under Article 81(3), henceforward to be 'decentralised'. It meant the replacement of the German system with a (French) system of *exception légale*: that is, an agreement, decision or practice which is prohibited by Article 81(1) is nonetheless valid from the date of its formation or adoption, without need of notification and authorisation ('no prior decision to that effect being required'),[6] provided that it satisfies the criteria for exemption laid down in Article 81(3); and the determination of whether this is so is to fall within the competence no longer solely of the Commission, but also of both national administrative authorities and national courts.

This is what was truly revolutionary about Regulation 1/2003. The Commission had long guarded its monopoly under Article 81(3). According to the 1999 White Paper, this monopoly, and the consequent plethora of notifications to it, has been justified in order to enable the Commission to establish the uniform meaning and parameters of Article 81(3) – 'to build up a coherent body of precedent cases, and to ensure that the competition rules are applied consistently throughout the Member States'.[7] Now however, following more than 35 years of Commission activity and case law of the Court of Justice the law is 'clarified' and 'more predictable',[8] it consists of a 'set of clear rules'[9] and the conditions for exemption under Article 81(3) 'have been largely clarified by case-law and decision-making practice and are known to undertakings'.[10] The centralised system of Regulation 17 is therefore 'cumbersome, inefficient and impose[s] excessive burdens on economic operators'[11] and is `no longer consistent with the effective supervision of competition'.[12] The White Paper therefore supports the adoption of a 'directly applicable exemption system' and '*ex post* control'[13] whereby legislation adopted under Article 83 would scrap the notification system (except for partial function production joint ventures, previously subject to Article 81 but now absorbed into the Merger Regulation[14]) and require that all national competition authorities and all national courts before which Article 81(1) was raised also apply Article 81(3). The whole of Article 81, sundered by Regulation 17, would therefore be reunited, parties could rely directly upon Article 81(3), and restrictive practices prohibited by Article 81(1) but which meet the criteria of Article 81(3) would be valid and enforceable from the time they were concluded without need of a prior decision to that effect. Similarly, restrictive practices which meet the criteria of Article 81(3) and so are valid *ab initio* would cease to be valid if, and at the point at which, the conditions for exemption were no longer fulfilled. In other words, Article 81(3) would become directly effective.

This was a bold step indeed. It has been likened to 'a lifelong devout Catholic suddenly converting him/herself to Protestantism',[15] and must be read as an admission - according to the president of the

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[5] Bork, *The Antitrust Paradox: A Policy at War with Itself*, Free Press (1993), p 439.
[6] Reg. 1/2003, Art 1(2).
[7] White Paper, para 76.
[8] para 48.
[9] para 51.
[10] para 78.
[11] para 42.
[12] para 9.
[13] paras 69 ff.
[14] paras 79-81.
[15] Nazerali and Cowan, 'Modernising the Enforcement of EU Competition rules – Can the Commission Claim to be Preaching to the Converted?' [1999] ECLR 422, 422.

Bundeskartellamt, a 'capitulation'[16] - that administration of the old system was well beyond the Commission's resources and ability. But alongside the changes to Article 81(3) were equally fundamental changes to enforcement generally. Regulation 1/2003 proposed and requires not only the enforcement of Article 81(3) but also the vigourous enforcement by national (administrative) competition authorities (NCAs) *and* by national courts of the entirety of Articles 81 and 82. One indication of the surprise and lack of preparedness of this proposal was that, at the time, there were only 8 (out of 15) member states which had created national administrative authorities competent to enforce Articles 81 and 82. They would have to do so, as would the 10 countries in the accession queue, for whom the whole culture of competition was a new phenomenon. Once created, the NCAs would then be expected to pursue anticompetitive conduct with the vigour, and the impartiality, which the Commission would wish. How then to ensure this would be so? And was the Commission confidence and enthusiasm misplaced?

Uniformity

Under the new regime the competition rules are enforced by the Commission, by its fellow NCAs and by the courts. The great risk of this, and the excuse which justified the previous highly centralised system, is, uniformity. How to ensure that the Commission, 27+ NCAs and countless national courts get it pretty much the same. For if they don't, Community law will apply differently from member state to member state – or even within a member state – and this runs contrary to a fundamental principle of the law, equality before it.

As a means of securing uniformity, Regulation 1/2003 makes the Commission *primus inter pares*: under Regulation 17, an NCA (*if* it existed and *if* it applied Articles 81 and 82) could be pre-empted by the launch of Commission action,[17] and this has been retained under Regulation 1/2003:

> 'The initiation by the Commission of proceedings for the adoption of a decision … shall relieve the competition authorities of the Member States of their competence to apply Articles 81 and 82'.[18]

Further, an NCA is bound by ('cannot take decisions which would run counter to') an existing Commission decision.[19] This is clear enough when dealing with a particular case, but gives rise to a host of practical difficulties in the context of similar, or very similar, cases, and whether in this context a previous Commission decision is binding upon the national authority, is merely persuasive, or is of no consequence.[20]

Otherwise uniformity is sought to be secured by a system of compulsory 'close cooperation'[21] between Commission and NCAs: the Commission is obliged to forward to the NCAs the 'most important documents' collected with a view to taking action, and other documents upon request;[22] an NCA must inform the Commission of any action it intends to take 'under Article 81 or Article 82'[23] and forewarn

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[16] 'Perspektiven des Europäischen Kartellrechts', a position paper delivered by Dr Dieter Wolf to the Frankfurter Institut - Stiftung Marktwirtschaft und Politik, 8 July 1999.

[17] Reg. 17, Art 9(3).

[18] Reg. 1/2003, Art 11(6).

[19] Art 16(2).

[20] See e.g. the judgment of the House of Lords in the United Kingdom in *Inntrepreneur Pub Company* v *Crehan* [2006] UKHL 38, [2007] 1 AC 333.

[21] Reg. 1/2003, Art 11(1).

[22] Art 11(2). This is a substantial change from previously, for it jeopardises the confidentiality purported to be protected (Art 28) but was better protected under Reg. 17 – for example, the disappearance of the bar to using information provided the Commission to make out an infringement of national competition law.

[23] Art 11(3).

it at least 30 days prior to taking any formal decision;[24] thus can the Commission intervene if it sees fit. The Commission has adopted a notice on the manner with which it cooperates with NCAs addressing allocation of work and the provision of assistance to and from the Commission and amongst the NCAs themselves.[25] An investigation by any one authority is sufficient grounds for another to suspend its own and to reject a complaint.[26] Underpinning this extensive collaboration is a 'network of competition authorities' (European Competition Network, or ECN) initiated informally at the time of the adoption of Regulation 1/2003 by a joint statement of the Council and the Commission.[27] Made up of the Commission and the 27 national authorities, the ECN now boasts annual meetings between the Director-General of DG Competition and the heads of all NCAs to discuss important policy issues, 'plenary meetings' for discussion of general issues, working groups and 13 sectoral subgroups.[28]

In order to support the NCAs and the national courts in their new task, the Commission adopted six notices on various ways in which it would cooperate with them and how they ought to cooperate amongst themselves. They address:

- cooperation within the network of competition authorities;[29]
- cooperation between the Commission and national courts;[30]
- the handling of complaints;[31]
- guidance relating to novel questions on Articles 81 and 82 ('guidance letters');[32]
- the concept of effect upon trade;[33] and
- the application of Article 81(3).[34]

The key question then becomes, whether any of this works.

At the very outset there are a number of problems:

Regulation 1/2003 provides expressly that 'competition authorities of the Member States shall have the power to apply Articles 81 and 82 of the Treaty in individual cases' and lists the decision-making powers of NCAs in this respect.[35] This puts into operation the decentralisation programme and authorises NCAs to enforce Articles 81 and 82. But Article 5 does not do this by itself. What happens in an NCA does not exist? Well, it must, because the Regulation says so: member states are obliged to 'designate' the NCA (or NCAs) 'responsible for the application of Articles 81 and 82',[36] and by implication, create it if it doesn't exist. To this extent the member states control the matter still. And even in an NCA exists, it may well still require an underpinning in national law to give it the power the Regulation wishes it to exercise. For example, in Cyprus the Commission for the Protection of Competition (*Επιτροπή Προστασίας Ανταγωνισμού*) was not designated a 'competition authority' in

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24 Art 11(4).

25 Commission Notice on cooperation within the Network of Competition Authorities, OJ 2004 C101/43; buttressed by Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ 2004 C101/65.

26 Reg 1/2003, Art 13.

27 Council of the EU, Doc 15432/02 Add 1, 10 December 2002. The ECN thus has no formal basis and creates neither rights nor obligations.

28 For banking, securities, insurance, food, pharmaceuticals, professional services, healthcare, environment, energy, railways, motor vehicles, telecoms and media.

29 OJ 2004 C101/43.

30 OJ 2004 C101/54.

31 OJ 2004 C101/65.

32 OJ 2004 C101/78.

33 OJ 2004 C101/81.

34 OJ 2004 C101/97.

35 Reg 1/2003, Art 5.

36 Reg 1/2003, Art 35.

accordance with Article 35, and so cannot apply Articles 81 and 82. In the Czech Republic, jurisdiction over telecommunications was expressly transferred away from the Czech Office for the Protection of Competition (*Úřad pro Ochranu Hospodářské Soutěže*), rendering it incapable (in Czech law) of acting in that field; the Commission responded with the initiation of enforcement proceedings under Article 226 of the Treaty in order to compel the Czechs to re-amend the law, and they did so in 2007. Most surprisingly, under the GWB the *Bundeskartellamt* could adopt orders to terminate infringements of Articles 81 and 82, but there was no power to impose a fine (as there was for a breach of German competition law), until the law was amended in 2005.[37] An NCA *may* be able to cope absent national law. In Belgium, for example, the *Autorité belge de concurrence* has begun to accept commitments analogous to Article 9 for Commission, even though there is no power under Belgian law to do so. They rely upon the Regulation to give it that power. But we cannot count on this.

This is only the beginning. Part of the decentralisation strategy is to seek to ensure the widest possible enforcement of Articles 81 and 82. The Regulation therefore not only creates the power for national authorities to do so, it imposes an obligation upon them to do so. Article 3(1) provides:

> 'Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices … which may affect trade between Member States … they shall also apply Article 81 of the Treaty to such agreements, decisions or concerted practices'[38]

and

> '[w]here the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article 82 of the Treaty, they shall also apply Article 82'.

This presumes a vigorous enforcement of relevant national law, which may or may not be the case; and it works relatively well if the two are coordinated, but less so if they are not. There are especial problems in two areas.

(a) Notification: The Community having abandoned the notification/authorisation procedure in favour of a directly effective Article 81(3), most member states have followed suit in their own law, amending the system (if it existed) requiring notification and administrative authorisation in order to circumvent a prohibition equivalent to Article 81(1) in national law. But Regulation 1/2003 did not, and could not, require it, and eight member states (Belgium,[39] Bulgaria,[40] Denmark,[41] Spain,[42] Italy,[43] Cyprus,[44] Latvia[45] and Romania[46]) at first retained the old system. This would give rise to obvious problems in cases where both Article 81 and its national equivalent are breached by the same material infraction, Article 81(3) is satisfied, but an equivalent exemption provision of national law is not because of a procedural failure of notification. The remedy in the regulation is a system of 'parallel exemption' whereby national law may not be applied in a manner which sets aside an agreement or practice which maybe anticompetitive but which fulfils the conditions of Article 81(3) or falls within a block exemption.[47] But the result is some confusion, and friction at the points of fine tangency between

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37 Siebtes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen vom 7. Juli 2005, BGBl. I S 1954.
38 Reg 1/2003, Art 3(1).
39 Loi sur la protection de la concurrence, Art 7.
40 Закон за защита на конкуренцията, Чп. 11-13.
41 LBK nr. 785 af 8. august 2005 om Konkurrenceloven, § 8(2).
42 Ley 16/1989, Art 3, 4.
43 Legge Nº 287 del 10 ottobre 1990, Art 4.
44 Νόμος 207/89, άρθ 4(3), 5.
45 Konkurences likuma, 11. panta 2. punkts.
46 Legea concurentia nr. 21/1996, Art 5(3).
47 Reg 1/2003, Art 3(2).

Community law and national law – especially where the latter is more rigorous. In fact most member states have now fallen into line, leaving only four (Denmark, Greece, Italy and Latvia) still operating the old notification system.

(b) Leniency: The Commission leniency programme has borne much fruit since it was introduced in 1996,[48] betraying the existence of a number of cartels, some of them deeply entrenched. The stick is being wielded with greater vigour. But it is not difficult to appreciate the difficulty encountered in the co-application of Community and national law in a member state in which there is no leniency programme.

In September 2006 the ECN adopted a 'model leniency programme'[49] in order to ease the parallel handing of leniency applications within the network. In December the Commission amended its leniency notice for a second time,[50] partly to adapt it to the ECN model. But as with exemption this has no effect upon national law, and it remains that four member states (Denmark, Spain, Malta and Slovenia) have no leniency programme. Again, there are obvious problems for the co-application of a Community and national prohibition where leniency is sought from and granted by the Commission but is not, and cannot be, granted in the national arena. There is no equivalent of parallel exemption here. The problem is particularly insurmountable where the national prohibition is founded in criminal law and any question of leniency is a matter for the public prosecutor.

The European Competition Network

One of the unsung successes of the decentralisation programme is the European Competition Network (ECN), set up alongside Regulation 1/2003 and which underpinning the whole project. It comprises the Commission and the principal NCAs of each of the 27 member states. Note that is was not set up *by* Regulation 1/2003, and this is important. It was initiated at the coming into force of Regulation 1/2003 by a joint statement of the Council and the Commission; it therefore has no legal basis, it creates neither rights nor obligations, it lacks any powers and has no institutional arrangements. This flexibility is its greatest strength; for it is seen by its members as a tool at their service rather than a machinery for interference in their affairs. The ECN implements the formal cooperation mechanisms provided for in Regulation 1/2003, and has developed periodic 'plenary' meetings several times a year, a number of working groups and sectoral subgroups. It faces significant hurdles, not least linguistic, but has become a quietly effective tool of cooperation. Preliminary data (below) indicate a healthy working relationship amongst the administrative authorities within the ECN, and one which appears to be deepening. This constant interaction has led to significant 'spontaneous convergence' of national practice, and is some measure national laws. And this can be measured, as follows:

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48 Commission Notice on the non-imposition or reduction of fines in cartel cases, 1996 OJ 1996 C207/4.

49 ECN Model Leniency Programme, 26 September 2006; unpublished.

50 Commission Notice on immunity from fines and reduction of fines in cartel cases, OJ 2006 C298/17. The original 1996 notice was first amended in 2002; see OJ 2002 C45/3.

Convergence of National Law and Regulation 1/2003

Major Change introduced by Regulation 1/2003 and/or Community practice		**Corresponding National Law**			
		Fully Convergent	Partially convergent	Amendments in train	No convergence
1.	Abolition of notification; *Exception légale* (Article 1)	AT, BE, CZ, DE, EE, ES, FI, FR, HU, IE, NL, LT, LU, MT, PL, SE, SI, SK, UK	PT	BG, CY, RO	DK, GR, IT, LV
2.	Parallel application of Community and national rules (Article 3(2))	AT, BE, BG, CY, CZ, DE, DK, EE, ES, FI, FR, GR, HU, IE, LT, LU, LV, MT, NL, PL, PT, SE, SI, SK, UK		RO	IT
3.	Power to impose structural remedies (Article 7)	AT, BE, CZ, DE, ES, GR, IE, MT, NL, SI, UK	FR, RO, SE	BG, CY	DK, EE, FI, HU, LT, LV, LU, PL, PT, SK
4.	Power to order interim measures (Article 8)	AT, BE, CZ, DE, ES, FI, FR, GR, HU, IE, IT, LT, LV, MT, NL, PL, PT, RO, SE, SI, SK, UK	LU	BG, CY	DK, EE
5.	Power to adopt commitment decisions (Article 9)	AT, BE, CZ, DE, DK, ES, FI, FR, GR, HU, IE, IT, LT, LU, NL, PL, SE, SI, SK, UK	LV	BG, CY, PT, RO	EE, MT
6.	Power to inspect non-business premises (Article 21)	AT, BE, CZ, EE, ES, FI, FR, GR, HU, IE, LU, LV, MT, NL, PL, RO, SE, SI, SK, UK	DE	CY, LT	BG, DK, IT, PT
7.	Informal guidance	AT, BG, BE, DK, DE, IE, ES, LV, NL, PL, PT, RO, SE, SI, UK	FI, IT, LT, SK	CY	CZ, EE, FR, GR, HU, LU, MT

By comparison, cooperation with the courts appears to be less successful, but this is culturally a different matter.

Sharing the Workload

Regulation 1/2003 requires NCAs to inform the Commission of new cases as and when they encounter them:

> 'The competition authorities of the Member States shall, when acting under Article 81 or Article 82 of the Treaty, inform the Commission in writing before or without delay after commencing the first formal investigative measure. This information may also be made available to the competition authorities of the other Member States.'[51]

This of course requires an NCA to assess, at an early stage, when they intend to 'act' under Article 81 or Article 82 (whatever that may mean). Presumably it does no apply where an NCA intends not to follow up a complaint (because in is unmeritorious). But it does require an NCA to determine early on, at least provisionally, whether a national matter of competition involves also the application of Article 81 or 82 – as of course they are required to do by Article 5. But it is not always an easy thing to do. One of the Commission notices provides a useful 'rule of thumb', a presumption that trade is not appreciably affected by an agreement of or practice where:
(a) The aggregate market share of the parties on any relevant market within the Community affected by the agreement does not exceed 5 percent, and
(b) In the case of horizontal agreements, the aggregate annual Community turnover of the undertakings concerned in the products or services covered by the agreement does not exceed € 40 million.[52]
This is a measure of the 'appreciability' necessary to trigger the application of the Community competition rules.[53] But it is a very rough and ready guide, for the effect on intra-Community trade is normally the result of a combination of several factors which, taken separately, are not necessarily decisive.

How far NCAs have used the Notice presumption is not clear. But the number of new case investigations initiated by NCAs and communicated to the network is considerable, as follows:

Number of case investigations initiated by NCAs of which the Commission has been informed pursuant to Article 11(3) of Regulation 1/2003

May-December 2004	200
2005	181
2006	144
2007	140
2008 (to 31 October)	131
Total May 2004 - November 2008	796

The most faithful NCAs may be identified from the following table:

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[51] Reg 1/2003, Art 11(3).
[52] Commission Notice – Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, paras 52-53.
[53] See Case 5/69 *Völk* v *Vervaecke* [1969] ECR 295.

Direction générale de la concurrence, de la consommation et de la répression des fraudes/Conseil de la concurrence (France)	159
Bundeskartellamt (Germany)	98
Mededingingsautoriteit (Netherlands)	66
Gazdasági Versenyhivatal (Hungary)	62
Konkurrencestyrelsen (Denmark)	52
Comisión Nacional de la Competencia (Spain)	43
Autorità garante della Concorrenza e del Marcato (Italy)	43
Office of Fair Trading (United Kingdom)	43
Total	566 (of 796)

Ensuring consistent application of Articles 81 and 82 EC: Article 11, paragraphs (3), (4), (5) and (6)

Regulation 1/2003 requires national competition authorities to inform the Commission

> '[n]o later than 30 days before the adoption of a decision requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption Regulation'.[54]

In practice, NCAs submit 11(4) information by filling out a specific form developed for this purpose, summarising the main aspects of the case and describing the proposed decision in some detail. A draft of the envisaged decision itself, or a preliminary document such as a statement of objections, accompanies the form. Article 11(4) is sufficiently flexible as to the relevant procedural stage and the type of document provided. The consequence is the frequency of prior information depends on the enforcement and procedural set-up in the various member states.

The ultimate instrument to ensure the consistent application of Articles 81 and 82 EC in cases dealt with by NCAs is Article 11(6), according to which

> '[t]he initiation by the Commission of proceedings … shall relieve the competition authorities of the Member States of their competence to apply Articles 81 and 82 of the Treaty. If a competition authority of a Member State is already acting on a case, the Commission shall only initiate proceedings after consulting with that national competition authority'.

This provision was taken from Regulation 17 with no change in substance, but it takes on far greater importance in a context where all NCAs have parallel competences to apply EC law. Article 11(6), in combination with the duty of NCAs to submit proposed decisions one month in advance (Article 11(4)), gives the Commission an effective tool to take over a case from a NCA, even at a late stage. It is not entirely clear, as a matter of law, whether the opening of proceedings by the Commission automatically deprives NCAs of the power to continue investigating the case under their own national law. The wording of Article 11(6) quite clearly refers to removal of the 'competence to apply Articles 81 and 82 of the Treaty' only. However the prevailing view seems to be that, once NCAs are deprived of 'their competence to apply Articles 81 and 82', they may not apply their national law either, as this would be in breach of Article 3(1), which requires NCAs to apply Articles 81 and 82 every time they apply national law.

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54 Reg 1/2003, Art 11(4).

Nevertheless, in practice NCAs will not carry on with a purely domestic case if the Commission opens proceedings, thus withdrawing the EC law part of the case from their hands, in particular in the case of agreements and concerted practices. since the convergence rule of Article 3(2) would still apply, the NCA would have little or no autonomy to decide the domestic case, and would be deprived of all the mechanisms of assistance, consultation and exchange of information of regulation 1/2003. In addition, the ne bis in idem principle would most likely prevent the NCA from applying an autonomous penalty for the breach of domestic law. It is indeed rather the ne bis in idem principle, and not Article 3(1) of the Regulation, that I see as a more serious argument against the possibility of continuing proceedings based on national law alone once the Commission has opened proceedings on the same facts.

The use of Article 11(6) to remove the competence of a NCA which has already submitted Article 11(4) information must be seen as a sort of 'nuclear option' within the network. In practice the Commission has never used it. Not surprisingly, as frequent recourse to this exceptional tool would undermine the system, introducing a hierarchical element in a supposedly equal partnership.

Judicial Enforcement: The Role of National Courts

What of judicial enforcement of Articles 81 and 82? We didn't know at the beginning whether the courts would have any role in enforcement of the competition rules. It might have been a wholly administrative procedure, the only judicial contribution being review by the Court of Justice of Commission action. And of course we knew nothing, in 1958, of direct effect. But *that* came in 1963,[55] and by 1974 we knew that Articles 81 and 82 *were* matters to be enforced in and by national courts.[56]

But here is the odd thing. The Court of Justice long resisted invitations to say exactly what this required of national courts. It particular, it refused to confirm that, as a matter of Community law, a breach of Articles 81 and 82 gives rise to a right in reparation for injured third parties. All it would say was that the nullity provided by Article 81(2) for an agreement prohibited by Article 81(1) is 'absolute'[57] and '[s]ince the nullity referred to in Article [81](2) is absolute, an agreement which is null and void by virtue of this provision has no effect as between the contracting parties and cannot be set up against [*n'est pas opposable aux*] third parties.'[58] Otherwise it left the civil consequences to be determined by national law.[59] Now this may be compatible with the national judicial autonomy which is a feature of the enforcement of Community law, but it leads to a serious risk of variation, disequilibrium and forum shopping. It was only in *Courage* v *Crehan*[60] in 2001 that the Court was compelled to pronounce a view. *Crehan* is now cited as authority for a right in damages for breach of Article 81. True, the Court said:

> 'The full effectiveness of Article [81] of the Treaty and, in particular, the practical effect of the prohibition laid down in Article [81](1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.
> …[A]ctions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.'[61]

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55 Case 26/62 *van Gend en Loos* v *Nederlandse Administratie der Belastingen* [1963] ECR 1.
56 Case 127/73 *Belgische Radio en Televisie v SABAM* [1974] ECR 51.
57 Case 22/71 *Béguelin* v *GL Import Export* [1971] ECR 949, at para 29; Case 319/82 *Société de Vente de Ciments et Bétons de l'Est* v *Kerpen & Kerpen* [1983] ECR 4173, at para 11.
58 Case 22/71 *Béguelin*, ibid, at para 29.
59 Case 319/82 *Kerpen & Kerpen*, *infra*, at para 12.
60 Case C-453/99 *Courage* v *Crehan* [2001] ECR I-6297.
61 at paras 26, 27.

But *Crehan* was an uncommon case, the damages sought by a party to the agreement (a lease to a tied house) owing to loss caused him by its oppressive terms. The Court appears to have presumed the existence of a remedy in damages in English law (which had not in fact been established, and the authorities indicted otherwise)[62] which was denied Mr Crehan solely because he was a party – albeit *non in pari delicto* - to the objectionable agreement. The Court went on to determine that '[t]here should not therefore be any absolute bar to such an action being brought by a party to a contract which would be held to violate the competition rules'.[63]

Crehan is therefore not direct authority for the availability of damages to injured third parties. That followed finally in 2006 in *Manfredi*,[64] in which the Court has now confirmed:

a) there is a remedy in damages for injury suffered by a third party by a breach of Article 81 where there is a 'causal relationship' between the two, causation to be determined by national law;
b) the principle of effectiveness requires that damages are available not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*); and
c) the principle of equivalence requires that exemplary damages be available if similar domestic remedies so provide, subject to prevention of unjustified enrichment.

This leaves the remedy still a matter for national law but bites fairly deeply into the freedom of manoeuvre that law continues to enjoy under it. Some variance remains, not least the determination of causation left still to national law. This is illustrated best by *Brasserie du Pêcheur*,[65] the seminal case in which the Court of Justice established a general right in reparation in circumstances in which member states unlawfully deprive a person of his of her Community law rights; the case involved two companies, a French company (Brasserie du Pêcheur SA) seeking damages from Germany and an English company (Factortame Ltd) seeking damages from the United Kingdom. Factortame eventually recovered damages (of some £55 million plus costs) in the English courts[66] but Brasserie du Pêcheur recovered nothing because it failed to meet the (higher) standard of causation required in German law.[67] It is true there is nothing in the Community to mirror the bonanza for lawyers which obtains in America as a function of the treble damages rule introduced by the Clayton Act;[68] yet there is still an invitation to forum shopping where a successful claim in some member states may result in exemplary damages (Ireland), and it others it cannot. Still, *Manfredi* may open the floodgates to a remedy which is still astonishingly underdeveloped. This is a course which now has the enthusiastic support of the Commission, which commissioned a major comparative study on damages for breach of Articles 81 and 82 from the law firm Ashurst, which produced its report in August 2004,[69] and published a Green Paper in December 2005,[70] and now a White Paper in April of this year,[71] to facilitate, and encourage, recourse to private damages actions.

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62 This is because a contract which infringes Art 81 is in English law not only void but illegal, so barring recovery by a party to it either in reparation or in restitution; see *Gibbs Mew* v *Gemmell* [1998] EuLR 588 (CA).
63 Case C-453/99 *Crehan*, at para 28.
64 Cases C-295 etc/04 *Manfredi* v *Lloyd Adriatico Assicurazioni* [2006] ECR I-6619.
65 Cases C-46 & 48/93 *Brasserie du Pêcheur* v *Germany* and *R* v *Secretary of State for Transport*, ex parte *Factortame* (No 3) [1996] ECR I-1029.
66 *Factortame* v *Secretary of State for the Environment, Transportation and the Regions* [2002] EWCA Civ 22, [2002] 2 All ER 838.
67 BGH, 24. Oktober 1996, BGHZ 134, 30.
68 15 U.S.C. § 15.
69 *Study on the conditions of claims for damages in case of infringement of EC competition rules*; consisting of a comparative report, an analysis of economic models for the calculation of damages, and a national report (with executive summary) from each member state.
70 Damages actions for breach of the EC antitrust rules, COM(2005) 672; see also the Commission Staff working paper, SEC(2005) 1732.

Regulation 1/2003 contains provisions on cooperation between Commission and national courts analogous to, but different from, the cooperation with and amongst NCAs. This is necessitated by the fact that administrative authorities and courts do fundamentally different jobs. First, the Commission cannot pre-empt the courts in the same way as it can an administrative authority, for that would be to deny the direct and prompt effect of Articles 81 and 82. The Regulation addresses this by providing that national courts are bound by an existing Commission decision[72] and 'must avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated'.[73] This is in large measure an attempt to codify the case law of the Court developed in the *Masterfoods* case.[74] The clear preference is that a court ought to defer to the Commission and so stay any civil/commercial proceedings in which there is a risk of incompatible outcome, but this solution does not always work well in practice. To assist, the Commission or an NCA may submit written observations to a court in the course of litigation before it and may, with permission, appear as *amicus curiae*;[75] this derives from German practice, in which the *Bundeskartellamt* appears frequently, and to persuasive effect, before national courts in cases in which the national competition law (the *Gesetz gegen Wettbewerbsbeschränkungen* (GWB)) is in issue.[76] Further, national courts must transmit to the Commission copies of any (written) judgment involving Community competition law[77] and may ask it for assistance and guidance on any relevant question or issue.[78] The Commission undertakes to provide them with informal 'guidance letters' when novel questions arise before them[79] and has adopted a specific notice on cooperation with them.[80]

But unlike the healthy administrative cooperation which seems to have developed within the ECN, the judicial limb has proven less effective. The number of judgments transmitted to the Commission, as required by Article 14(2), at present numbers a mere 164 cases, as follows:

Notifications made by national courts under Article 14(1) of Regulation 1/2003

France	42		Ireland	2
Germany	35		Portugal	2
Spain	33		Denmark	1
Netherlands	17		Italy	1
Belgium	17		Lithuania	1
Austria	10		Finland	1
Sweden	3			
United Kingdom	3	Total		168

We *know* this is underreported. Requests for assistance number in the teens. And the Commission has yet to be invited to appear before a national court as *amicus curiae*. Part of this is the jurisdictional difference between courts and NCAs. For example, the obligation that consideration of a breach of national competition law be extended to drawn in Articles 81 or 82 if they are joined, applies not only to NCAs but equally to the courts. But how are courts expected to do this? Courts respond to a suit

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71 Damages actions for breach of the EC antitrust rules, COM(2008) 165 final.
72 Reg. 1/2003, Art 16(1).
73 Ibid.
74 Case C-344/98 *Masterfoods* v *HB Ice Cream* [2000] ECR I-11369.
75 Reg 1/2003, Art 15(3).
76 § 90 II GWB.
77 Reg. 1/2003, Art 15(2).
78 Art 15(1).
79 Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters), OJ 2004 C101/78.
80 Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, OJ 2004 C101/54.

brought by a party, seeking a private remedy. It is not for the court to extend the action beyond that raised by the pursuing party or parties. And there is no better example than Ireland, in which, uniquely, breaches of national competition law *and* Articles 81 and 82 are criminal offences.[81] There have been several successful prosecutions for breaches of Irish law, some of which very probably edged into Community law. But how on earth is an Irish judge to draw in Community law when the matter is not raised by the public prosecutor? Or, how is a national criminal court in any other member state to draw in Community law when it is not a criminal matter there?

The creation of specialist national courts may be party the answer, for specialist judges speak the same language as their counterparts elsewhere. But that of course is a matter for national law, and it has not proved to be a wholly popular course:

Specialist national courts for civil proceedings in competition matters	YES	NO
	BE, DE, DK, ES, FR, SK, UK	AT, BG, CY, CZ, EE, FI, GR, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, RO, SE, SI

It remains that the Commission and national judges remain, in some measure, two solitudes. It remains to be seen if the Commission's enthusiasm for private enforcement can be translated into real progress.

Final comment

It must be borne in mind that not all competition law has been exposed to the great decentralisatation experiment. The Commission retains exclusive jurisdiction over mergers and takeovers which have a 'Community dimension',[82] although even here the matter has become slightly permeable.[83] Article 86 preserves significant Commission control over services in the general economic interest, and the whole field of state aids remains firmly under Commission control. These were matters which could not be entrusted to national authorities. But the general field is now given over to this new complex and polychephalous enforcement. And the die is now cast. Unless the Court of Justice is minded to find Regulation 1/2003 unlawful for inconsistency with Article 81, a possibility (and no more) suggested by the German and Austrian governments,[84] Community competition law underwent its most significant change in 40 years in May 2004. And if nothing else is certain, the genie is out of the bottle for good, for a Council of 27 (acting by qualified majority vote)[85] is unlikely ever to agree to the degree of centralised enforcement achieved by Regulation 17. The wisdom of it is not yet proven, but there is certainly not (yet) grounds for the despair that many predicted.

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81 Competition Act, 2002, ss 6 and 7.

82 Reg. 139/2004 OJ 2004 L24/1, Art 1.

83 See Arts 9 (the 'German clause') and 22 (the 'Dutch clause').

84 Stellungnahme der Bundesregierung zum Weissbuch der Europäischen Kommission über die Modernisierung der Vorschriften zur Anwendung der Artikel 81 und 82 EGV, 29. Oktober 1999; Österreichische Position zum Weissbuch der Europäischen Kommission über die Modernisierung der Anwendung der Art. 81 und 82 EG-V, undated.

85 EC Treaty, Art 83.