

Decentralization of EC Competition Law: Reform of Regulation No. 17

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1. General introduction

The European community, as an economic unity, quite different from the federalized United States, carried out a system of effective competition rules to push and hoped to finally achieve successful integration of the common market. In the *Walt Wilhelm* cases¹, the features of the EC competition law stated in 1969 as the followings: ‘While the Treaty’s primary object is to eliminate by this means² the obstacles to the free movement of goods within the common market and to confirm and safeguard the unity of that market, it also permits the Community authorities to carry out certain positive, though indirect action with a view to promoting a harmonious development of economic activities within the whole Community, in accordance to Article 2 of the Treaty.’³

As stated in the Treaty of Rome, the objective of the European Economic Community (EEC) is to establish the common market. ‘The community shall have as its task, by **establishing a common market** and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.’⁴ Establishing a Common Market implies not only the removal of all the obstacles to movement of goods, persons, services and capital, but also the establishment of a fair competition system to prevent the re-erection of trade barriers by firms. Thus Article 3 of the treaty provides to maintain a system ‘ensuring that competition in the internal market is not distorted’. Consequently, the EC Treaty sets out a series of effective competition rules⁵ and builds up the basic structure of European competition system. Article 81 and 82 constitute an essential part of the community competition policy. In order to effectively enforce them, the council adopted **Regulation 17/62**, which was based on the direct applicability of Article 81 (1) and prior notification of restrictive agreements and practices for exemption under Article 81 (3). This means the Commission, National Courts and National Competition Authorities can all apply Article 81(1). However, the power to apply Article 81(3) was granted exclusively to the Commission. This **centralized authorization system** has been proved effective to establish a ‘culture of competition’ in Europe and has applied for over 40 years without any significant modifications.

It is well known that whether the Community can effectively implement competition policy is crucial to the development of the European Community. However, under the present centralized authorisation system, the Commission has faced more and more **difficulties** in performing its duty in recent years. With the development of the community, this system is no longer appropriate for community with 25 member states. ‘Regulation 17 was designed to meet the twin challenges of competition policy, to enhance community integration and to stimulate competition to drive the economy. However, competition policy enforcement needs to adapt to the modern setting, particularly the continued enlargement of the community.’⁶ Facing this largest enlargement in the history, the European Union have to guarantee that business are able to operate under the same competition policy constrains through out the EU, despite the marked divergences between economic development and competition background that will exist within the member states’ borders. Furthermore, ‘to overcome the structural problems that limit the competitiveness and hamper the growth opportunities of the European economy, the EU has set to itself **an ambitious economic reform agenda** (part of the so-called Lisbon strategy). This process of economic reform aims at making EU markets more open and competitive in order to foster sustainable growth.

¹ See, Case 14/68, *Walt Wilhelm v. Bundeskartellamt* [1969] ECR 1; CMLR 100

² Competition (Article 81) as a means

³ See, super note 1, at Para 4

⁴ The EEC was originally formed with six member states. In 1998 the EC had 15 member states and formed part of the European Union. See, Ian Ward, *A Critical Introduction to European Law*, 1996, London, Butterworth; Paul Craig and Grainne De Burca, *EU Law, Text, Cases and Materials*, 1998, London, Oxford Press.

⁵ This includes: Article 81 sets out the rules applicable to restrictive agreements, decisions and concerted practices, Article 82 regulates abuses of dominant positions, Article 86 regulates the behavior of public undertakings; Article 91 regulates dumping and Article 87-89 regulates State aid. Articles 81 and 82 constitute an essential part of the Community’s competition policy

⁶ See, Barry Rodger, Angus MacCulloch, *Competition Law and Policy in the EC and UK*, 2002, Cavendish, at page 52

A more efficient competition policy is an essential element to this process.⁷ Thus the **demand to amend Regulation 17/62** and decentralise enforcement of EC Competition rules became compelling. Finally, the Commission submitted the final proposal for Council to replace Regulation 17/62 by a new Regulation, which will change the centralised system to **decentralised system**. Undoubtedly, decentralisation has been chosen as the future model of EC Competition enforcement and the Community will utilize this instrument to enact its updated economic policy throughout the Internal Market. On 16th December 2002 the Council adopted **Regulation (EC) No. 1/2003** on the implementation of rules on competition laid down in Articles 81 and 82 of the Treaty. With the enlargement of the European Union, the 40-years-old Regulation 17/62, as one of the cornerstones of EC competition law, replaced by a new European Regulation on the enforcement of EC competition law on 1 May 2004. 'It is a change to be welcomed and timely.'⁸ 'For the community to have started with the authorization system and to evolve towards a legal exception system would be a natural and historically justified crescendo.'⁹ This is not only a replacement of regulation, but also a radical reform of EC competition law enforcement. This reform devolved the responsibility of enforcement of competition law from the European Commission to the National Competition Authorities and National Courts. It is an important step to the modernisation of European competition law and should make the enforcement of competition law more efficient.

However, not surprisingly, on the one hand, the new Regulation still faces the existing problems, because the temptation of seeking excessive **economic benefit** still motives firms to work against the competition law; on the other hand, the reform raises a number of **questions of interpretation**, such as the degree of centralisation and decentralisation of the power in the enforcement of the EC competition law and the degree of the effectiveness of the new reform in practice.

This article will focus on the changing balance between the European Commission and national competition law jurisdiction in applying Articles 81, 82 and the decentralization of the enforcement within European Union. The purpose is to analyze the basic principles related to the reform and its effect for current and future competition proceedings. It will first sketch some **background knowledge** which aims to analyse the motive to promote the decentralised enforcement of Article 81 and 82; the basic changes of the new regulation will be given in this part as well. Following that, this essay will try to give out main **goals** of the reform and its **impact** on National Competition Authorities and Commission. Subsequently, surrounding the public debate of this reform, two questions will be addressed in the next part under a comparison between the U.S. antitrust model and the European competition system. Firstly, in this section, this essay will give an analysis of whether the elimination of the system of prior notification and the Commission's monopoly over Article 81(3) will give rise the **legal uncertainty**; Secondly, the effect of the new Regulation on **private enforcement** will be discussed in this section. Finally, this essay will focus its discuss on economic approach of the competition law.

2. The Background of the European Reform

In order to better manage the enlargement of the internal market to 25 Member States on 1st May 2004, the modernization of European competition law is an on going process which checked all EC competition law. It is aimed to strengthen the Commission's ability as "competition watchdog" in the enlarged EU.

2.1 The Necessity of the Reform ----- Problems of Enforcement of Article 81 under Regulation 17/62

Nowadays, the background of the EC Competition policy is quite different. The EU has grown to 25 Member States with more than 500 million people from the original six Member States; **globalization** also presents new challenges to the Competition Authorities. Furthermore, although the Commission has made great contributions to the uniform enforcement of competition policy, the fact is that in the centralised enforcement system many problems existed and impeded the enforcement. In order to better understand the reform, this section will try to answer what are the practical problems about the enforcement of Article 81 under Regulation 17/62.¹⁰

⁷ See, Mario Monti, *European Union Competition Policy After May 2004*, 2003, at <http://www.eurunion.org/news/speeches/2003/031024mm.htm>

⁸ See, D.G.Goyder, *EC Competition Law*, oxford university, 2003, 4th edition, at page 549

⁹ See, Ehlermann, Claus-Dieter, *The Modernization of EC Antitrust Policy, A Legal and Cultural Revolution*, 2000, Common Market Law Review 37, at page 537

¹⁰ This has been mentioned in a number of articles. Such as: Bright, *Deregulation of EC competition policy: Rethinking Article 85(1)*, in Hawk (Ed.), 1994, Fordham Corporate Law Institute 505; Ehlermann, Claus-Dieter, *The Modernization of EC Antitrust Policy, A Legal and Cultural Revolution*, 2000, Common Market Law Review 37, at page 537; James S Venit, *The Future of Competition Law*, in Ehlermann and Laudati (Eds.), *European Competition Law Annual 1997*, at page 567.

As the Commission and the European Court of Justice have interpreted the prohibition set out in Article 81 (1) EC too broadly, a large number of agreements between undertakings have in the past been deemed to fall under the prohibition of Article 81(1), and therefore have been automatically null and void, unless individually exempted, subject to a block exemption regulation¹¹ or subject to a pending notification to the Commission seeking exemption under Article 81(3). Regulation 17/62 established the **Commission's monopoly** to apply Article 81(3). Only the Commission had the power to declare Article 81(1) inapplicable to a restrictive agreement or practice by applying Article 81(3). '...the Commission shall have sole power to declare Article 81(1) inapplicable pursuant to Article 81(3) of the Treaty.'¹² Except for the notifications pursuant to Article 4(2) of Regulation 17/62¹³ and the block exemption regulations, the only way to apply Article 81(3) is the agreement had been formally notified¹⁴ to the Commission.

In addition, the only way in which parties could ensure immunity from fines for a breach of Article 81(1) was to notify the agreement to Commission. This means '...all agreements potentially falling within Article 81 (1) EC must be notified to the Commission for assessment if they are to benefit from a negative clearance or an exemption according to Article 81 (3) EC and, as of the date of notification, from an immunity from fines until a decision of the Commission to the contrary.'¹⁵ In the contrast to the Commission's monopoly for the application of Article 81 (3) EC, Articles 81 (1) and 82 EC can be enforced in private actions in national courts and can also be applied by national competition authorities¹⁶. Furthermore, the DG IV has to deal with the examination of notifications and applications of exemption with its **limited resources**¹⁷, instead of focusing on its more important enforcement agenda to ensure the competition rules are respected and to effectively protect competition in the EU.¹⁸ 'In practice the Commission is hopelessly short of the resources necessary to enforce the competition rules throughout the Community while at the same time discharging its other duties, such as the development of petition policy and the draft of new legislation.

In any one year Commission is capable of publishing 20 formal decisions at most, minute number compared with the volume of agreements notified to it and complaints received by it.¹⁹ As noted in the White Paper, 'the ex ante control mechanism inherent in the authorization system set up by Regulation No. 17/62 resulted in undertakings systematically notifying their restrictive practices to the Commission which, with limited administrative resources, was very soon faced with the impossibility of dealing by formal decision with the thousands of cases submitted.'²⁰ To sum up, firstly, those problems have 'resulted in a low level of private enforcement of competition law rules and in complicated rules of interaction between national proceedings and investigations by the Commission.'²¹ The Commission has been unable to finish the satisfactory volume of notifications for a long time. Therefore, undertakings have had to suffer lengthy delays before obtaining exemption decision they require.

¹¹ The agreements which reach the requirements of the block exemptions will be exempted from the application of Article 81(1) without any prior notifications. For example, Regulation No. 1400/2002 on agreements in the motor vehicle sector; Regulation No. 2659/2000 on R&D agreements; Regulation No. 358/2003 on agreements in the insurance sector; Regulation No. 2658/2000 on specialization agreements; Regulation No. 283/2000 on maritime transport consortia. However, these block exemptions of the commission are not as effective as expected. For example, Regulation 2790/1999, The Vertical Restraints Regulation

¹² See, Article 9(1) of Regulation 17/62

¹³ Under Article 4(2) of Regulation 17/62, certain categories of agreements do not require notification. For example, domestic agreements, vertical agreements, agreements imposing unilateral restrictions on the exercise of industrial property rights, agreements on standards, joint research and development and manufacturing specialization provided the parties' share for the products concerned is below 15% and their turnover below euro200 million.

¹⁴ Agreements already in existence at the date when Regulation No. 17/62 entered into force (13 March 1962), so-called "old agreements," duly and timely notified, benefit from provisional validity, i.e. have to be given full legal effects under the law applicable to the contract, until the Commission has taken a decision on the application of Article 81 (3). See case 13/61, De Geus v. Bosch, [1962] ECR 45.

¹⁵ See, F. Montag and A. Rosenfeld, *A Solution to Problems? Regulation 1/2003 and the Modernization of Competition Procedure*, 2/2003 ZWeR 107 at pages 119-120

¹⁶ However, not all national authorities have the power to apply them. For example, see Case 13/61, De Geus v. Bosch [1962] ECR 97.

¹⁷ In 2000, the House of Lords made a plea for the increase in DG IV's resources. See, *Reforming EC Competition Procedures*, Fourth Report of the Select Committee on the European Union, 15 Feb. 2000, Para 100.

¹⁸ See, Schaub and Dohms, *DasWeissbuch der Europ'aischen Kommission ueber die Modernisierung der Vorschriften zur Anwendung der Artikel 81 und 82 EGVertrag*, 11WuW(1999), 1055-1070, 1056.

¹⁹ See, R. Whish, *Competition Law*, Butterworths, 1993, at pages 285-286.

²⁰ See, White Paper on modernisation of the rules implementing Article 85 and 86 of the EC treaty, [1999] OJ C132/1, [1999] 5 CMLR 208, at Para 24. The notifications the Commission received in 1998, 1999, 2000 and 2001 was 216,162, 101 and 94 respectively.

²¹ See, F. Montag and A. Rosenfeld,, supra note 15

Secondly, it caused the problem of administrative procedure. ‘The infringement procedure suffers from the fact that the Commission takes the role of investigator, prosecutor and judge in the same proceedings.’²² It performs the activities both of fact-finding and of legal evaluation.²³ As described by Paul Craig and Grainne de Burea²⁴ in their book: ‘the procedure for determining competition violations has been attacked by undertakings on more than occasion, one general complaint has been the commission combines function of prosecutor and judge.....’²⁵ As a result, the centralised system under Regulation 17/62 no longer serves the purpose of effective supervision of competition, and it is often described as a poor tool in enforcement of competition law.

2.2 The Possibility of the Reform

Furthermore, the following conditions made the reform of the enforcement of the EC competition law became possible:

Firstly, at the commission level, the commission has, after many years’ effort, developed a comprehensive competition policy and has **clearly established basic principles and well-defined details**; the Commission and the Court of Justice have established **a large body of case law**; as the White Paper stated: ‘Community policy provides solutions to the problems of the modern economy, whether in terms of action against the most harmful cartels or as regards technology licenses or the distribution of goods and services.’²⁶ In addition, many different kinds of general instruments have been adopted, such as the group exemptions and guidelines planned on both vertical and horizontal agreements.²⁷ Briefly speaking, as ‘any reform must endeavour to ensure that a reasonable level of legal certainty is maintained for undertakings’, these conditions provide a satisfactory level of legal certainty for the undertakings to ‘assess their restrictive practices themselves’.²⁸

Secondly, at the member states level, most member states now have adopted national competition laws based on EC competition rules and set up effective antitrust authorities to implement them. ‘These national competition policies “form part of a coherent whole with the Community system”’.²⁹

Thirdly, from the legal angle, Article 81 (3) can be decentralised enforced by the member states. As we have discussed before, the **procedural bifurcation** of Article 81 was one most serious practical problem under Regulation 17/62. The question here is whether it is possible or not to transform the system of prior authorization into a regime of directly effective exemption. This is asking whether Article 81 (3) is capable of direct effect. At first, if we simply look at the wording of Article 81(3), it is worth mentioning that Article 81(3) does not state clearly by using the word ‘authorize’ or ‘authorization’.³⁰ Then, the Court of Justice has visibly stated with respect to Article 84 that ‘until the entry into force of the provisions adopted in pursuance of Article 83, the authorities in Member States shall rule on the admissibility of agreements, decisions and concerted practices ... in accordance with the law of their country and with the provisions of Article 81, in particular paragraph 3 ...’.

Furthermore, in accordance with the Court’s judgment in the *BRT/SADAM* case, the term ‘authorities’ ‘include[s], in certain Member States courts especially entrusted with the task of applying domestic legislation on competition...’.³¹ It is obvious in the light of what pointed above that the direct enforcement of Article 81 (3) is possible. Secondly, it was seen arguable that Article 81(3) requires a complex weighting and balancing of a wide range of often opposing interests, which are not limited to strictly economic, competition oriented considerations, but include the taking into account of non economic values, such as social, cultural, industrial and environmental ones. Therefore, at this point, some opponents held the opinion that this feature of Article 81 (3) is more appropriate for an administrative authority and incapable of direct effect. However, the suitability of Article 81 (3) for direct application by the National Courts and National Competition Authorities can not be addressed without asking what the purpose and the nature of Article 81 (3) are.

²² See, *ibid*

²³ See, Alison Jones and Brenda Sufrin, *Texts, Cases and Materials on EC Competition Law*, 2001, Oxford University, at page 851; also see: A Pera and M Todino, *Enforcement of EC Competition Rules: Need for a Reform?* Fordham Corporate Law Institute 125, 1996, at page 144

²⁴ See, Paul Craig and Grainne De Burca, *supra* note 4

²⁵ See, Case 100-103/80, *Musique Diffusion Francaise v commission* (1983) ECR 1825, 3 CMLR 221

²⁶ See, White Paper on modernisation, *supra* note 20, Para 4

²⁷ See, *ibid*, Para 51

²⁸ See, *ibid*.

²⁹ See, *supra* note 14, Para 4

³⁰ For example, Article 65 ECSC Treaty clearly requires a prior decision of the High Authority.

³¹ Case 127/73, *BRT v Sabam* [1974] ECR 51, at paras 15,16

As what has been given in the White Paper, the purpose of Article 81(3) is 'to provide a legal framework for the economic assessment of restrictive practices and not to allow application of the competition rules to be set aside because of political considerations.'³² Furthermore, the wording of Article 81 (3), 'with its cumulative requirements that (i) consumers receive a fair share of the benefits to production, distribution or technological progress realized by the exempted agreement or practice and (ii) the parties to the agreement or practice do not have or attain market power, does not support the contention that Article 81(3) introduces or even leaves space for non-competition goals.'³³ Given the quasi legislative nature of non-competition goals and their injection of considerations alien to competition law analysis, it would arguably be preferable that broader socio-political factors should not be relevant to the Article 81(3) assessment and should not play a role in the decentralized enforcement of Article 81.³⁴ To sum up, Article 81 (3) is limited to the consideration of purely competition factors and therefore is possible to have a direct effect.

Thirdly, Some opponents argued that according to Article 83(2) (b), the regulations giving effect to the principles set out in Article 81 'shall be designed in particular ... to lay down detailed rules for the application of Article 81(3), taking into account the need to ensure effective supervision on the one hand and to simplify administration to the greatest possible extent on the other'. It means that these words become largely obsolete in a regime of a directly effective exemption.³⁵ However, in fact, the White Paper envisages a series of regulatory mechanisms that reduce the risks resulting from the direct effect of Article 81(3) and these might very well find their legal base and justification in Article 83(2) (b).³⁶ Fourthly, the 'Court of Justice has accepted the direct effect of numerous provisions despite exceptions, conditions and qualifications, such as those contained in Article 30, which requires a balancing and weighting of opposing interests, many of which being of a non economic nature.'³⁷ Fifthly, the Court has recognized the direct effect of some provisions which are as difficult to apply as Article 81(3). For example, Article 86(2) provides an exception to Articles 81 that goes even further than Article 81(3).

In conclusion, it is possible to move from the existing system of prior authorization to a regime of direct applicability.

2.3 The Basic Changes of the Reform

For the interest of customers and the European economy, the new reform provided a more decentralised enforcement of article 81 and 82 by member states' Courts and Competition Authorities. It is an important step of the more cooperation between member states. This reform includes not just Articles 81 and 82 EC, but all other areas of EC competition law such as merger control and state aid, and covers numerous pieces of secondary legislation as well as non-legislative measures. A clear task of the modernisation operation in the field of enforcement is entrusted to the National Competition Authorities: The result of the proposed system will be increased enforcement of Community competition rules, as in addition to the Commission, National Competition Authorities and National Courts will also be able to apply Articles 81 and 82 in their entirety. 'National Competition Authorities, which have been set up in all Member States, are generally well equipped to deal with Community competition law cases. In general, they have the necessary resources and are close to the markets. ...It is a core element of the Commission's proposal that the Commission and the National Competition Authorities should form a Network and work closely together in the application of Articles 81 and 82. The Network provides an infrastructure for mutual exchange of information, including confidential information, and assistance, thereby expanding considerably the scope for each member of the Network to enforce Articles 81 and 82 effectively. The Network also ensures an efficient allocation of cases based on the principle that cases should be dealt with by the best placed authority.'³⁸

The major changes that took effect on 1 May 2004 are:

Firstly, the elimination of the notification and exemption system for the application of Article 81(3). Under Regulation 17/62, the full application of Article 81(3) EC was reserved to the Commission and its Directorate General Competition (here after DG IV). Firms had to notify their restrictive agreements to the Commission in order to obtain an exemption.

³² See, white paper on modernisation, supra note 20, Para 57

³³ See, James S. Venit, Brave new world: The modernization and decentralization of enforcement under Articles 81 and 82 of the EC treaty, Common Market Law Review, New York, 2003, at page 547

³⁴ See, White Paper on modernisation, supra note 20, para 56, 57.'

³⁵ Mestm"acker, "Versuch einer kartellpolitischen Wende in der EU", 17 EuZW, 523, at 525/526

³⁶ See, F. Montag and A. Rosenfeld, supra note 15

³⁷ See, ibid

³⁸ See OJ 2000, C 365.

The share of the application of Article 81(3) with national antitrust authorities was considered to be 'dangerous and incompatible with the necessary coherence and consistency of EC competition law and policy.'³⁹ The new system eliminates the commission's monopoly over the grant of exemptions according to Article 81(3).⁴⁰ The commission will no longer be obliged to give individual exemptions under, except for mergers and joint ventures coming under the merger regulation. National authorities will have power to withdraw the benefit of group exemptions, but will not otherwise be free to prohibit agreements subject to a group exemption. More group exemptions and more guidelines from the Commission to align the actions of national authorities applying Community law, and national law based on Community law.

Secondly, the enforcement system will be decentralized. Under the effect of the first change, the new system gives the national authorities power to apply Article 81(3) without any previous administrative decision. National courts now have the power and obligation to rule on the applicability of Article 81(3) to agreements in litigation in which damages for breach of Article 81. 'Article 81 in its entirety can thus be applied by the Commission, National Courts and National Competition Authorities, extending the potential for effective enforcement.'⁴¹ 'The direct applicability of Article 81(3) EC implies more potential for application of the EC competition rules by Member States' Courts and competition authorities.'⁴²

Thirdly, the EC competition rules will apply to all cases that have an effect on trade between member states.⁴³ National courts and competition authorities should not draw their decision only based on national law; they should be free to use the EC competition law and the evidence obtained by the Commission. Additionally, they need to give other national authorities the evidence they have obtained. Furthermore, in order to ensure the consistent application of the EC competition law, national courts and competition authorities should form the Commission when they plan to apply EC law. This means the EC competition has become 'the law of the land' and has given 'Article 81 supremacy over national competition law, where the agreement in question may affect trade between Member States.'⁴⁴

Fourthly, the reform also required to enhance the cooperation between competition authorities each other and with the Commission. With the development of economy and the enlargement with the Europe, the cooperation between member states and coherent application of the rules are essential. The new reform introduced a range of **new powers and obligations** to enhance the cooperation of the commission, the competition authorities of member states and the acceding countries in the European Competition Network. However, the reform does not address the fundamental problems of the **administrative procedure** which has pointed above. The Commission continued having a multiple role as investigator, prosecutor and judge in the same proceeding.

3 The Goal and the Practical Effect of the Reform

The main purpose of the new regulation is to facilitate the Commission to 'refocus its activities on the most serious infringements of Community law in cases with a Community interest.'⁴⁵ The meaning of this is twofold: on the one hand it is aimed to create a **decentralized, effective, closer coordinated and uniform system** of the enforcement of European Competition Law between member states in the integrated market; on the other hand it aspired to **strengthen the investigative and enforcement powers of the Commission** by reducing the workload of the Commission and enable it to focus on the most serious infringements of EC competition law in cases with a Community-wide interest. The following section will examine the effect of the reform in order to find out whether these goals of the reform can be reached.

3.1 Decentralisation of Article 81

3.1.1 Legal Grounds of the Decentralisation

Decentralized enforcement of the European Competition law comes from the basic principle of subsidiary⁴⁶ of Community law which was formally used in the Community law since the Maastricht

³⁹ See, Ehlermann, *Implementation of EC Competition Law by National Anti-Trust Authorities*, 1996, ECLR, at 93-95

⁴⁰ At the same time, the new regulation also strengthened the investigatory powers of the Commission. See, section 3 of this article.

⁴¹ See, supra note 20.

⁴² See, Philip Lowe, Current Issues of EU Competition Law – the New Competition Enforcement Regime, North Western Journal of International Law and Business, at: http://europa.eu.int/comm/competition/speeches/text/sp2003_035_en.pdf

⁴³ See, Article 3(1) of Regulation 1/2003.

⁴⁴ See, James S Venit, supra note 33, at page 547

⁴⁵ See, White Paper on modernisation, supra note 20, Introduction, Para 13

⁴⁶ Subsidiary has been defined as: "the principle that a central authority should have a subsidiary function, performing only those tasks, which cannot be performed effectively at a more immediate or local level. See, C.S. Kerse, *E.C. Antitrust Procedure*, 1998, 4th edition, London, Sweet and Maxwell page 370.

Treaty.⁴⁷ Competition scholars declare that decentralisation is a more appropriate expression than subsidiarity in this context, though the Commission often uses these two expressions interchangeably in its reports on Competition Policy.⁴⁸ When decentralisation developed into an important Community legal principle, it brought about a number of questions concerning the respective roles of the Commission and National Authorities in order to ensure that each case is dealt with in its best way. The principle of decentralisation has been developed in many cases at the community level.⁴⁹ For example, the *Automec v. Commission* case in 1992⁵⁰. *Automec* was an Italian motor dealer which BMW refused to continue to supply after the expiry of its contract. *Automec* raised a complaint against BMW to the Commission according to Article 81. The Court of First Instance upheld the Commission to give different degrees of priority to different cases in the light of the degree of 'Community interest' that the case presented.

Here the Italian Court was already involved in a case brought by *Automec* against BMW which involved the contractual relationship between the parties within the framework of then block exemption for motor dealing. Therefore, the Court of First Instance upheld the Commission's decision to refuse to carry out an investigation of this case on the ground that this case can be best resolved by the Italian Court without any destroy of the Community interest. The judgment of *Automec* (No.2) clearly indicated that the Commission have the right to reject a case because can be better dealt with by a national court. Following the decisions made by the Court in these cases, the decentralisation principle became applicable and enforceable in European community. In order to make this principle been interpreted more clear and detailed, the Commission issued a cooperation Notice in 1993 indicating that its own resources were inadequate to carry out its all responsibilities and that it was having to give priority to cases of particular political, economic, or legal significance to the Community. Other Cases it would be dealt with by National Courts, to award damages and costs to injured parties and to hear simultaneously claims under both national law and Community law. It is the duty of Commission and Member States to cooperate with each other.

Furthermore, the Commission in its 24th Competition Report (1994) provided three kinds of cases to be dealt with by a National Authority: '1) their effect is located mainly within a single Member State. However, if an agreement or practice implemented mainly in a Member State raises a question of Community interest, the Commission will initiate proceedings on the basis of Article 9(3) of Regulation No. 17; 2) the case involves infringements of Article 81 1) that do not satisfy the criteria of Article 81 (3) and also involve infringement of Article 82; 3) at national level the parties can be given effective protection. Most importantly, the new regulation made Article 81(3) can be decentralized applied by national courts and national competition authorities.' By that time, decentralization based on the principle of the Treaty has gradually become an applicable and enforceable EC Competition rule. The following two parts will examine whether the decentralization brings any problems to the consistency and the efficiency of the enforcement of Article 81.

3.1.2 The Consistency of the Decentralized Application of Article 81

Undoubtedly, the Commission's exemption monopoly is an essential and powerful tool to guarantee the consistency of EC Competition policy. 'The ability of the National Competition Authorities and the National Courts to apply Article 81(3) will, in the short run, represent some **loss of 'control'** by the Commission over the development of competition law.'⁵¹ The decentralised enforcement by the National Courts and the National Competition Authorities increased the importance to govern the cooperation between these actors to ensure the consistent enforcement. For that reason, the elimination of the Commission's centralised enforcement of Article 81 (3) increased the risk of the **divergent decisions** and the **consistency of application** of EC competition law. Therefore, the real questions here are that whether the reform endangers the consistent application of Article 81 and how to ensure the consistency of the application of competition law throughout the EU.

⁴⁷ As Article 3b stated: 'The community shall act within the limit of the powers conferred on it by this Treaty and of the objects assigned to it therein. In areas which do not fall within its exclusive competence, the community shall take action, in accordance with the principle of subsidiary, only if so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.'

⁴⁸ See, Whish, *The Enforcement of EC Competition Law In The Domestic Courts*, 1994, 2 ECLR

⁴⁹ See, Case 234/89, *Delimitis v Henninger Brau AG* (1991) E.C.R. I-935, (1992) 3 CMLR 210; Case C-250/92, *Gottrup-Klim v Dansk Landbrugs Grovvaeresskab AmbA* (1994) E.C.R. I-5641; Case T-353/94, *Postbank NV v Commission* (1996) E.C.R. II-921

⁵⁰ See, case T-24/90, *Automec v. Commission*, 1992, 5, CMLR 431

⁵¹ See James S Venit, supra note 33, at page 559; also see, Ehlermann Claus-Dieter and Atanasiu Isabela, *European Competition Law Annual 2000, 2001*, Hart Publishing.

As James S Venit pointed that ‘the discussion on the consistency of the application of Article 81 has mainly focused on two related, but conceptually different issues. On the one hand, commentators have been concerned about **consistency in the interpretation of the substance of Article 81 in general**, i.e. under decentralization will Article 81 mean the same thing in Athens as in Brussels, Helsinki or, for that matter, Vilnius (**‘substantive consistency’**)? The second principal concern focuses on **‘parallel application’** - the possibility that under the new regime, different Authorities can simultaneously apply Article 81 to the same agreement or practice, whether or not they come to a different result.’⁵²

3.1.2.1 the National Competition Authorities ---- the Parallel Application

The issue arises from the cooperation with and coordination of National Competition Authorities mainly concerns the **parallel application**.⁵³ This ‘more serious coherence issue’ arises from that different National Competition Authorities could apply Article 81 to the same agreement, but coming to different conclusions.⁵⁴ The inconsistent issue arises here also concerns about how to allocate cases between National Competition Authorities and the Commission. With respect to this issue of National Competition Authorities, the new regulation provides a number of instruments to ensure the uniform application of EC competition law. Firstly, the information and consultation Network. Article 11 of the new Regulation provides the creating an information and consultation Network.⁵⁵ Article 12 presents that information exchanged within the Network can only be used for the purpose of applying Article 81 or 82 and in respect of the subject-matter for which it was collected by the transmitting authority. The goal of the Network is that, in this new world of **parallel competence** to apply EU competition rules, each case is dealt by the best placed authority within the Network.

It aims to ensure both an efficient division of work and an effective and consistent application of EC competition rules. Within this Network, the Commission and the National Competition Authorities can systematically **cooperate and coordinate** their enforcement activities, ensuring a high degree of coherence. The Network is a forum for discussion and cooperation in the application and enforcement of EC competition policy. The Commission believes that ‘information of this kind together with any correspondence that may take place with the National Authorities should ensure that the consistency of competition policy can be preserved without requiring machinery to impose solutions to conflicts in the application of Community law’.⁵⁶ Under this Network, the Commission and National Competition Authorities exchange information with each other. Articles 14 of the Regulation states that the Commission continue to be required to consult the Advisory Committee before it take decisions.⁵⁷ Indisputably, ‘reinforcement of the role of the **Advisory Committee**’ by the new Regulation is a excellent tool to ensure the consistency of enforcement of Article 81 and 82 through **‘proper functioning of the Network** between the Commission and the Member States’. The statement of the Council and the Commission on the functioning of the Network of Competition Authorities⁵⁸ sets out a number of relatively concrete guidelines about how to allocate cases within the Network.

It provides that ‘where an agreement or practice substantially affects competition in more than one Member State, the Network members will seek to agree between them who is best placed to deal with the case successfully.’⁵⁹ Furthermore, ‘in cases where competition in several Member States is affected and no National Competition Authorities can deal with the case alone successfully, the Network members should coordinate their action and seek to designate one competition authority as the lead institution.’⁶⁰ Secondly, the new Regulation gives out a series of Articles to ensure the consistency of the Articles between National Competition Authorities and the Commission. Article 11(6) provides the Commission has a right of pre-emption and can initiate proceedings, even in cases that are already being dealt with by National Competition Authorities. Article 16(2) presents when National Competition Authorities apply Article 81 to agreements, which are already the subject of a Commission decision, they cannot take decisions, which would run counter to the Commission decision.

⁵² See, James S Venit, supra note 33, at page 559

⁵³ The problem of parallel enforcement focuses mostly on the competition Authorities rather than the Courts. This is because that the national competition authorities are actively engaged in enforcement whereas the latter can only react to the cases brought before them. The same potential problem exists under U.S. law as well. See, Diane P. Wood, *Techniques of Judicial Federalism*, European Competition Law Annual 2000, 2001, Hart Publishing, at 627

⁵⁴ See, Bourgeois Jacques HJ and Humpe Christophe, *The Commission's Draft 'New Regulation 17*, 2002, ECLR, 43

⁵⁵ See, Commission Notice on cooperation within the Network of Competition Authorities (2004/C 101/03), OJ 2004 C 101/43

⁵⁶ see, White Paper on modernisation, supra note 20, at para.105

⁵⁷ National Courts can also request information from the Commission under Article 15.

⁵⁸ Joint Statement of the European Council and the European Commission on the Functioning of the Network of Competition Authorities, Council of the EU, Doc. No 15664/02 ADD 1 of 3rd March 2003, at page 7

⁵⁹ See, *ibid*, at Para 17

⁶⁰ See, *ibid*, at Para 18

Article 13 requiring a National Competition authority to suspend a proceeding or to reject a complaint if another National Competition Authorities is already dealing with the case Article 13(1) states the fact that one National Competition Authority is dealing with a case shall be sufficient ground for other National Competition Authorities that are considering the same agreement, to suspend proceedings or reject a complaint. Article 13(2) declares that the Commission or a National Competition Authority may reject a complaint in respect of an agreement, which has already been dealt with by another Competition Authority. On the one hand, there are no clear guidelines indicating the circumstances in which either a National Authority or the Commission should take up a particular case in the first place; on the other hand, as the Commissioner Monti pointed that this apparent gap in the Regulation allows greater flexibility for the allocation of cases between the Authorities.⁶¹

However, it must be pointed out here that all those rules can be seen as a kind of **interventionism**, which seems contrary to the ‘basic principle of mutual respect between Competition Authorities’ and therefore not suit for the ‘efficient function of the decentralized implementation of Article 81’.⁶² To sum up, even though the effectiveness of these rules still need examine by time, it is clear that the creation of the Network to guarantee the cooperation and coordination between national Competition Authorities and the Commission still is a major step towards right direction to ensure the consistency of the enforcement of EC competition law. ‘Moreover, although not provided for expressly in the Regulation, it is apparently the Commission’s intention to promote a one-stop shop principle, by developing a set of informal rules on which case allocation can be based.’⁶³

3.1.2.2 The National Courts ---- the Consistent Interpretation of EC Competition Law

With regard to National Courts, the concern of consistency is to ensure the **consistent interpretation** of EC competition law. The increased power granted to the courts clearly raises questions regarding the integrity and coherence of the law as it develops under the supervision of national courts in 25 different Member States. The possibility of inconsistent decision is a real question from this angle. Although the National Courts have already been applying Articles 81(1), and 82 for many years, the competence given by applying Article 81(3) will bring problems in consistency of applying Article 81 entirely. However, as the reasons have been concluded as the followings, this consistency can not become a crucial worry after reform because that the Regulation has sought to address this potential issue in several ways.

First, Article 16 of the new Regulation provides that National Courts must respect Commission decisions. This Article titled ‘Uniform application of Community competition law’, provides that when national courts rule on agreements, decisions or practices under Article 81 or 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. This rule codifies the “Masterfoods” case law,⁶⁴ which states that when an agreement under Article 81 has already the subject of a Commission decision, National Courts can not take decisions which would run counter to the Commission decision. Therefore, it ensures that conflicting decisions and thus inconsistencies of the enforcement of competition law can be avoided.

Second, National Courts must avoid adopting decisions which would conflict with a decision contemplated by the Commission in proceedings the Commission has initiated, and, in such cases, the National Courts may assess whether it is necessary to stay proceedings.

Thirdly, pursuant to Article 15 (1) and Article 15(3), both National Competition Authorities and the Commission have the ability to intervene before the National Courts as amicus curiae.⁶⁵ Article 15(1) of Regulation No. 1/2003 establishes a legal basis for judges of the Member States to ask the Commission for an opinion on questions concerning the application of EU competition law or for information the Commission holds. As prescribed in Article 15 (3), the Commission and National Competition Authorities may on their own initiative submit written observations and, with the permission of the respective court, oral observations in national court proceedings. Certainly, these opinions are important and necessary because they come from an expert agency and at least it is helpful to these National Courts with little experience of EC competition law.

⁶¹ See, Mario Monti, *European Competition Policy: Quo Vadis?*, speech given at the EU Commission/IBA Conference on EU Merger Control, Brussels, 7th December 2002, at http://europa.eu.int/comm/competition/index_en.html

⁶² See, Ehlermann, Claus-Dieter, supra note 9, at page 578

⁶³ See, James S Venit, supra note 33, at page 566; also see, Alexander Schaub, *Continued Focus on Reform - Recent Developments in EC Competition Policy*, Speech at Fordham Corporate Law Institute, 2001, at <http://www.usdoj.gov/atr/public/speeches/11148.htm>

⁶⁴ ECJ, Case C-344/98 Masterfoods Ltd v. HB Ice Cream Ltd, 2000, ECR I-11369

⁶⁵ See, James S Venit, supra note 33, at page 560

According to Article 15 (2) the national courts need to provide a copy of any written judgment of national courts deciding on an Articles 81 and 82 EC case to Commission⁶⁶ and therefore the Commission can constantly reviews the application of EC competition law by the National Courts.

Fourthly, the application of Articles 81 and 82 by the National Courts will ultimately be subject to review by the European Courts. This is helpful to preserve the consistency. Furthermore, ‘an increase in Community court rulings is likely to advance the coherent application of Article 81 as a whole merely by virtue of the increased number of decisions and judgments.’⁶⁷

Fifthly, the increased focus of the European Courts and the Commission on economic analysis should also contribute to increased substantive consistency in the application of Article 81.⁶⁸ Furthermore, the pre-emption right of the commission under article 11 (6) of the regulation could provide a safeguard against major divergences.

As a conclusion, these issues addressed in the new Regulation can undoubtedly ensure the consistency of the enforcement of EC competition law. However, these instruments also raise a number of legal issues which may be expected to solve by further improvements. In the first place, although these rules are useful, it is not binding. ‘Therefore, a court will always have the discretion to deviate from the notice subject, of course, to the ultimate decision of the ECJ.’⁶⁹ For example, the **amicus curiae** briefs by the Commission or a national Competition authority are no more than a legal opinion. ‘It would not be surprising if national judges, in particular those of specialist Competition courts or chambers within a court, do not make much use of the possibility to obtain amicus curiae legal opinions from the Commission or do not regard written submissions made by the Commission on its own initiative as de facto binding.’⁷⁰

In the second place, although Article 16 is an important and useful tool to safeguard the uniform application of Community Competition law, it is also has some question around it. For example, the scope of the obligation under Article 16 (1) has not yet been determined. Moreover, it is difficult for the national court to take into account future decisions, which the Commission may want to make in a proceeding⁷¹ when making its decision.

3.1.3 the Efficiency of the Decentralized Application of Article 81

Before we examine the efficient of the reform, it must be pointed out that the process of prior exemptions substantially made some contributes to the enforcement of Article 81. In other words it is to say that the regulation 17/62 is to some extend efficient. However, these contributes are limited. This centralized notification system established by Regulation No. 17/62 was well suited for a Community of six Member States. It enabled the Commission to build up a coherent body of precedent cases, and to ensure that the competition rules were applied consistently throughout the Community.⁷² However, the enlargement of the Community has changed the context thoroughly. Today, the Commission is faced with the serious problem that it does not have the resources to deal with all the agreements notified to it.⁷³

The statistics show ‘the large number of notifications (58% of all procedures) compared to the small number of negative decisions (nine decisions in 35 years of application of Regulation No. 17/62).’ And the evidence showed that there were less than 1 percent of notifications give rise to any real competition problems.⁷⁴ **‘An efficient exemption system would, therefore, lead to an even greater number of notifications of unproblematic agreements.’**⁷⁵ As Mrs. Margaret Bloom⁷⁶ pointed ‘... the sort of notification regime they have in Brussels has not been the best use of resources. We and Brussels are very keen to be able to target our resources on damaging anti-competitive behaviour ...’ Furthermore, the European Union welcomed 10 new Member States on 1st May 2004. A centralized notification system with prior authorisation by the Commission in a Community which now counts 25 Member States can not work efficient now.

⁶⁶ A similar obligation is imposed by Section 90 (1) ARC on German courts with respect to the German Federal Cartel Office.

⁶⁷ See, James S Venit, supra note 33, at page

⁶⁸ It will be discussed more detailed in the section 5.

⁶⁹ See, F. Montag and A. Rosenfeld, supra note 15, at page 115

⁷⁰ See, *ibid.* at page 116

⁷¹ For an in-depth analysis of the “Masterfood” judgment see *Bornkamm*, ZWeR 2003, 73

⁷² See, IP/04/441, Brussels, 30 March 2004.

⁷³ See, Council Regulation (EC) on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty Establishing the European Community, No. 1/2003, OJ 2003 (L 1)1.

⁷⁴ See, House of Lords Select Committee on the European Union report on “Reforming EC Competition Procedures, February 2000

⁷⁵ See, Ehlermann, Claus-Dieter, supra note 9, at page 561

⁷⁶ The Director of Competition Policy at the UK Office of Fair Trading

In addition, one of the reasons the notification system was established is to provide information on the competitive situation in different markets in different Member States. However, the commission does not need to get such information through notification. 'Not only has DG IV acquired substantial knowledge of product and geographic markets through almost 40 years of applying Regulation No. 17/62, but it has also benefited from almost a decade of implementation of the Merger Regulation.'⁷⁷ It is clear that the efficiency of the Regulation 17/62 was extremely low and the change is necessary. As a result, the real questions here are whether a **larger** contribution would be made and whether the **efficiency** could be **improved** under the new regulation. In accordance with the White Paper, the objectives of the reform are "in the first place, to refocus [the Commission's] activities on combating the most serious restrictions of competition and, secondly, to allow decentralized application of the Community competition rules while at the same time maintaining consistency in competition policy throughout the Community. Lastly, the Commission considers that the procedural framework should ease the administrative constraints on undertakings while at the same time providing them with sufficient legal certainty."⁷⁸ All those objectives can be concluded to be one: increase the efficiency of the EC antitrust policy.

Article 1 of the new Regulation stated that no prior decision is required for Article 81(3) to be applicable to an agreement caught under Article 81(1). This means Article 81(3) will be **directly** applicable by national competition authorities and national courts. Therefore, it largely reduced 'the unusual degree of centralization (of) the competition sector compared with other areas of Community law'⁷⁹. Undoubtedly, it will significantly enhance the efficient application of Article 81.

Firstly, from the angle of the Commission, on one hand, the reform relieved the commission from large number of notifications and agreements which have no or little effect on competition so that it can exercise greater control over its own agenda; on the other hand, it ensures that the Commission would not lose super position over the broad field of competition law issues and established the supremacy of Community law over national law. 'The abolition of the notification system means that the Commission can re-focus its enforcement action in order to do more meaningful enforcement work for the benefit of consumers and the competitiveness of the European economy.'⁸⁰ This means that under the new regulation, the commission can refocus its resources on the more important and serious issues which present a real risk of distortions of competition at the EU level and therefore have the biggest negative impact on consumer welfare, such as market allocation, price and quota cartels⁸¹, merger control,⁸² abuses of dominant positions, resale price maintenance, liberalization and deregulation. 'Whilst under Regulation No. 17, the Commission has frequently acted on the basis of complaints and relied on them to advance the development of Community law, its ability to do so should be enhanced by the elimination of the requirement to review tedious notifications.'⁸³

However, this refocus does not mean that the Commission will withdraw from the prosecution of certain types of infringements. Indeed, the Commission have to rely more on complaints and own initiative investigations. A series articles in the reform have indicated that the commission still in its super position.⁸⁴ To sum up, without a doubt, the reform put the commission in a more efficient position not only to enforce the EC competition law by itself but also help the national courts and national competition authorities to share this task.

Secondly, from the angle of National Competition Authorities and National Courts, on the one hand, the new Regulation simplifies the procedural complexities of the application of Article 81; on the other hand, the cooperation between competition authorities and national courts, as a result of the new regulation 17, enhances the efficiency of the enforcement of competition law. Especially after the enlargement of the European community, it is impossible for the Commission alone to enforce the rules effectively.

⁷⁷ See, supra note 1

⁷⁸ See, White Paper on modernisation, supra note 20, Para 42

⁷⁹ See, Ehlermann, Claus-Dieter, supra note 9, at page 540

⁸⁰ European Competition Rules : The New Enforcement System for Articles 81 and 82 EC is soon to be Reality, at: http://europa.eu.int/comm/competition/speeches/text/sp2003_032_en.pdf

⁸¹ The issue of cartels is one of the most pernicious agreements among competitors. In fact, the commission has already start to focus on this issue before the reform: in 2001, the Commission adopted 10 cartel decisions, imposing total fines nearing EUR 2 billion; In 2002, this level of cartel-hunting activity continued with 9 cartel decisions adopted with total fines nearing EUR 1 billion. The reform will undoubtedly push the commission on this issue in the future.

⁸² It is also a key priority in our enforcement activities, as we wish to safeguard competitive market structures by preventing the creation or strengthening of dominant market positions through concentrations.

⁸³ See, James S Venit, supra note 33

⁸⁴ See, section (3) of this part

By decentralized application of Article 81(3), the National Competition Authorities and the National Courts will be able to rule on the applicability of both the substantive paragraphs of Article 81 and the 'Commission's powers of pre-emption'. This allows each actor forming part of the enforcement system to effectively apply the Community competition rules and to concentrate on what it does best. Therefore, the new Regulation effectively eliminates the legal no man's land created by notified agreements that are potentially exemptible and 'no agreement is per se excluded from the possibility of exemption'.⁸⁵

Furthermore, the horizontal cooperation between national competition authorities, which including the exchange of information and mutual assistance, offers them an opportunity to learn from each other. The creation of the network of competition authorities sets out the allocation of cases so as to avoid multiple controls, duplication of work or inefficient actions. This is also a valuable instrument to enforce the competition law more efficient for the reason that the parallel action by several competition authorities is a waste of limited resource and an additional burden for undertakings. Without doubt, the enhancement of the commission's investigation ability, together with the establishment of the joint responsibility of the Commission and national competition authorities and national courts to enforce the EU competition law 'will lead to a better and more effective sharing of enforcement tasks between the Commission and national authorities'.⁸⁶

Additionally, the efficiency of the enforcement of EC competition law here also concerns the issue whether the judges of national courts are sufficiently equipped to deal with the complex economic and legal questions under Article 81(3). It is clear the switch from a system of prior administrative authorization to a regime of the direct effect of Article 81(3) primarily affects the national courts. Under the new regulation, the National Courts can not just wait for a prior decision taken by the Commission or a National Competition Authority, they have to decide whether the conditions of Article 81(3) are fulfilled or not by themselves. It is correct that the application of Article 81(3) is not easy. However, there are plenty of reasons for us to convince it can be efficient managed under National Courts. First above all, the judges of National Courts are qualified to deal with the decentralization of Article 82 (3). The fact have proved that they have the ability to deal with the other areas of law which with complex economic appraisals, for example the intellectual property law. The second reason is the existing rules of judicial procedure are appropriate to efficient handle of competition law matters at national level. There still not the right time for requiring the approximation of national rules of judicial proceedings.

Thirdly, from the angle of undertakings, the new Regulation eliminates their **cost and burden** of the notification system. Some against parties pointed that 'the switch from a system of prior administrative authorization to a regime of direct effect of Article 81(3) would entail a change in the **burden of proof**'⁸⁷ and therefore the efficiency of the application will be decreased. In the old regime, the undertakings requesting an exemption decision had to show the conditions of Article 81 (3) are fulfilled to the Commission and had to consider the costly notify system. It imposed an undue burden on industry by increasing compliance costs and preventing undertakings from enforcing their agreements without notifying them to the Commission even if they fulfilled the conditions of Article 81(3).⁸⁸ The requirement of notification was particularly damaging to small and medium-sized enterprises for which the cost of notification could constitute a competitive disadvantage compared with larger firms.

Therefore, 'the Commission explored various options for reform and proposed the adoption of a fundamentally different enforcement system'⁸⁹, which culminated in the new Council Regulation No. 1/2003.⁹⁰ After the reform, 'the quid pro quo is that parking agreements with the Commission in a safe harbour notification will also no longer be possible. Rather, until such time as a court or regulator becomes involved, firms will have the sole responsibility for assessing the legal status of their agreements under Article 81(1) and (3). One consequence will no doubt be a greater demand for the sophisticated legal and economic analysis required for meaningful self-assessment.'⁹¹

⁸⁵ see, CFI Judgments in Case T-17/93, *Matra Hachette v. Commission*, [1994] ECR I-595, at Para 85

⁸⁶ see, Mario Monti, *supra* note 7

⁸⁷ See, James S Venit, *supra* note 33, at page 562

⁸⁸ See, White Paper, *supra* note 20, at Para 29

⁸⁹ Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No. 1017/68, (EEC) No. 2988/74, (EEC) No. 4056/86 and (EEC) No. 3975/87, COM 582 final (2000).

⁹⁰ See, *supra* note 73

⁹¹ See, James S Venit, *supra* note 33, at page 554. The economic analysis will be discussed in section 5 of this essay.

The Commission takes the view that undertakings are generally well placed to assess the legality of their actions in such a way as to enable them to take an informed decision on whether to go ahead with an agreement or practice and in what form.⁹² Consequently, the more active participation of the undertakings in the activities of the enforcement of the EC competition is undoubtedly a powerful push to the more efficient level.

Fourthly, as Article 81(1) and Article 81(3) have been made in the same procedure, the new regime enhances the procedural enforceability of relatively harmless agreements. Under the old regime, because of the procedural bifurcation of Article 81, there will leave some agreements suspended between validity and nullity until the Commission decided whether Article 81(3) applied.⁹³ The elimination of the procedural bifurcation by directly application of Article 81 (3) can be seen as a remove of the obstacle of the efficient enforcement.

Fifthly, as what we have discussed in the last section, the Commission has already introduced a series of rules to ensure the consistent enforcement of the competition law by the new regulation. This consistency is needed for effective functioning of the directly applicable Article 81 (3). 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’.⁹⁴

3.2 Strengthens the Enforcement Powers of the Commission

In order to improve the commission’s enforcement powers, the new regulation, on the one side, remained its central position of the enforcement of the European competition laws; on the other side, gave the commission some more extended powers to enhance its enforceable ability.

3.2.1 The Guardian Position of Commission

It must be pointed firstly, under the new regulation, the commission remains in control at the centre able to initiate both policy consultation and policy implementation. The Joint Statement⁹⁵ of the council and the commission stated: ‘the commission, as the guardian of the treaty, has the ultimate but not the sole responsibility for developing policy and safeguarding efficiency and consistency.’

3.2.2 The Extended Powers of the Commission

The new regulation therefore, provides some additional powers to the commission in some important respects in order to enhance the commission’s enforcement powers and maintain its central influence on policy.

Firstly, the commission, for the first time, has the power to carry out inspections in the private homes of executives or employees if a “reasonable suspicion” exists that books or records related to the business and the subject of the inspection are being kept there. However, the commission must first obtain a court order from the national court and the inspections must be carried out under the strict standards.⁹⁶

Secondly, the Commission has the power to seal any business premises and books or records during an inspection in order to ensure that documents are not removed or destroyed and will be able to impose fines if the seals are broken.⁹⁷

Thirdly, during inspections the Commission will have the power to ask for on-the-spot oral explanations concerning both facts and documents relating to the subject matter of the inspection. The Commission can impose fines if the undertaking fails to rectify an incorrect, incomplete or misleading answer.⁹⁸

Fourthly, the Commission has been given the ability to interview any consenting persons (legal or natural) to collect information relating to an investigation. However the Regulation does not give the Commission the power either to compel testimony or to impose fines if the answers are incorrect or incomplete.⁹⁹

⁹² Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters) (2004/C 101/06), OJ 2004 C 101/78.

⁹³ See, Case C-234/89, Stergios Delimitis v. Henninger Brau AG, [1991] ECR I-935, at Para 51,55

⁹⁴ See Giuliano Marengo, *Consistent Application of EC Competition Law in a System of Parallel Competencies*, Freiburg, 2000.

at <http://europa.eu.int/comm/competition/conferences/2000/freiburg/speeches/marengo.pdf>

⁹⁵ See, Council Document no. 15435/02, 10 December, 2002; DG Comp Competition Policy Newsletter, No 1, 2003, Regulation 1/2003-a modernised application of EC Competition rules’, page 3-8

⁹⁶ See, Article 21 of the new regulation. The commission also need to proceed in accordance with the procedural safeguards laid down by the European court in earlier case law and recently confirmed in the Roquette case.

⁹⁷ See, Articles 20(2) (d) and 23(1) (e)

⁹⁸ See, Articles. 20(2) (e) and 23(1) (d). However, Art. 20(2) (e) of the Regulation does not completely eliminate the existing ambiguity as to the dividing line between ‘merely factua’ questions, and questions the response to which necessarily involves self-incrimination, which the Commission is not allowed to ask.

Fifthly, Maximum fines for breaches of the procedural rules will be increased to 1% of the undertaking's annual turnover.¹⁰⁰

However, 'it is notable that these expanded powers still fall far short of those of other authorities, most notably the Canadian competition authority and the U.S. Department of Justice whose enforcement arsenal is considerably strengthened by criminal sanctions imposable on firms and their employees....'¹⁰¹

4. The US model and the European new enforcement system of competition law

The US antitrust system has existed since the adoption of the Sherman Act¹⁰² in 1890 and has become 'the first jurisdiction in the world to adopt a modern system of competition law.'¹⁰³ Furthermore, the European competition, since it created, has been compared with the U.S. model which has successfully operated under the same framework of rules for more than 100 years. The reform of European competition law 'brings the European enforcement system closer to the U.S. model.'¹⁰⁴ It makes Article 81 can be enforced entirely both at community level and member states level. This is similar to the U.S. model which enforced both at federal level and state level.¹⁰⁵ 'The abolition of the procedural bifurcation of Article 81 and the ex ante authorization system brings EC competition law enforcement in line with the U.S.'¹⁰⁶ In the following section, we will examine the new regulation under the comparison with U.S. competition system.

4.1 Increased Legal Uncertainty?

Competition law should not only be a powerful tool to deal with the anti-competitive practices, it should also encourage those practices that promote competition and consumer welfare. 'An adequate level of legal certainty is therefore a legitimate and necessary objective.'¹⁰⁷ 'One of the most frequently asked questions about the new system is how it will affect the - limited, but nevertheless existing - degree of legal certainty afforded by Regulation 17/62.'¹⁰⁸ Although the commission's main focus is on the most serious infringements, one of the major goals of new reforms is to guarantee that, after 1st May 2004, undertakings do not have to face the problems of the lost of legal certainty. There has been considerable debated as to whether the elimination of the system of prior notification and the Commission's monopoly over Article 81(3) will give rise to an unacceptable degree of legal uncertainty.¹⁰⁹ However, in fact, the new Regulation rather establishes an adequate level of legal certainty for companies and reduces bureaucracy.

Firstly, we will carry out a comparison of the degree of legal certainty between the old and the new Regulation.

Under the new regulation, the undertakings, on the one hand, are no longer need to notify an agreement to the Commission in order to benefit from exemption under Article 81 (3) EC; however, on the other hand, they are no longer be able to ask the Commission for an exemption decision or formal negative clearance in order to avoid the risk of nullity of an agreement, or to obtain immunity from fines. The notification system to the commission has been seen as '**the safe harbour**'.¹¹⁰

⁹⁹ See, Article 19. The existence of this provision in parallel with Article 20(2) (e) of the Regulation creates a new ambiguity.

¹⁰⁰ See, Article 23(1) and 24.

¹⁰¹ See, James J Venit, super note 33, at page 566

¹⁰² This is an act to protect trade and commerce against unlawful restraints and monopolies. It was supplemented by the Clayton Act 1914, the Federal Trade Commission Act 1914 and the Robinson-Patman Act 1936.

¹⁰³ See, Katarina Pijetlovic, Reform of EC Antitrust Enforcement: Criticism of The New System is Highly Exaggerated, ECLR 2004, 25(6), at pages 356-369

¹⁰⁴ See, Mario Monti, supra note 7

¹⁰⁵ However, it is much different with the European model that there is no clear hierarchy between state and federal antitrust laws in U.S., so that state courts can apply both federal and state simultaneously.

¹⁰⁶ see, James S venit super note 33, at page 571

¹⁰⁷ See, Mario Monti, Competition Law Reform, London, June 12

http://europa.eu.int/comm/competition/speeches/text/sp2000_008_en.html

¹⁰⁸ See, F. Montag and A. Rosenfeld, supra note 15, at page 107

¹⁰⁹ See, A Shaub, *Modernization of EC competition law: Reform of Regulation No. 17*, in B. HAWK (ED.), 2000, Fordham University at chapter 10, at page 143; Ian Forrester, *Modernization of EC Competition Law*, 2000, 23 Fordham Int'l L.J 1028, at page 181

¹¹⁰ Under old regulation, undertakings assess the compliance of their agreements with the competition rules themselves before they notify an agreement to the Commission. As a result of this preliminary screening, the overwhelming majority of cases are not notified to the Commission. Only a relatively small number of cases (which still represent a great administrative burden for the Commission), where the respective undertakings and their advisers believe that there could be a real competition issue are notified. See, F. Montag and A. Rosenfeld, supra note 15

Under the old system very few agreements receive negative clearance or exemption decisions, and the vast majority are instead dealt with by means of an informal administrative '**comfort letter**'. Although comfort letters have no legal value, they nevertheless 'carry a certain degree of authority that a national court hearing an Article 81 EC case is de facto expected to take into account.'¹¹¹ The undertakings also can obtain the **limited degree of certainty** offered by those letters.

However, under the regulation 17/62, 'it is not clear that the centralization of power in the Commission's hands under Regulation No. 17 has always given rise to legal certainty...'¹¹² Under the notification system, most joint ventures are not notified and even in the cases they are, they have generally already been implemented. Therefore, it would become visible that notifications have not played a significant role when investment decisions are made. What's more, the voluntary notification system 'have not substantiated what are the specific types of agreement that raise real competition concerns and in respect of which self-assessment under [Article 81](#) as a whole cannot reasonably be expected'¹¹³ Therefore, whether undertakings bear greater risk than before in this area without the comfort blanket of an exemption and whether the problem of losing legal certainty is a critical disadvantage of new regulation are still issues which need to be discussed.

According to Article 1(2) of Regulation No. 1/2003¹¹⁴, agreements, decisions and practices that fall under Article 81(1) of the Treaty but meet the conditions of Article 81(3) are valid and enforceable. This means that undertakings can now rely on civil enforceability which can be seen as an advance on legal certainty.

In order to deal effectively with potential for uncertainty under the new system, the reform also addressed a number of rules, such as the creation of the **network** and vesting **pre-emptive powers** with the Commission. Under new regulation, the undertakings take their responsibility for assessing their own agreements within a legal system where the rules are made sufficiently predictable and the application of the rules is consistent. The Commission has put more emphasis on clarifying the rules by focussing on what is prohibited. In recent years, it revised the totality of its block exemptions regulations and produced guidelines on main types of business practices and agreements that can be caught by competition rules.¹¹⁵ Although not binding on them, the guidelines adopted by the Commission establish an analytical framework for the application of Article 81(3) with the purpose to develop a methodology for the homogeneous application of this Treaty provision.¹¹⁶ This undoubtedly facilitates the self-assessment of undertakings and provides an assured degree of legal certainty to them. In addition, the application of more economic approach will reduce the risk for many undertakings to be caught by Article 81(1).¹¹⁷

Moreover, the Commission does not only provide the guidance for undertakings in cases where there is real doubt as to the application of the competition rules, but also provides a system of opinions whereby undertakings can put questions to the Commission in cases where the existing general rules and measures and case practice do not provide sufficient guidance. Undertakings are required to submit an explanatory memorandum along with the questions. On that basis, the Commission will issue an opinion. This opinion will not only be helpful to one undertaking which hand in the questions, but also will contribute to the overall clarity of the rules because it would be reasoned and published. Compared with the comfort letter under old notification system which are neither reasoned nor published, this unquestionably provides more legal certainty to undertakings. It also means that the Commission therefore remains open to discuss specific cases with the undertakings and therefore put the Commission in a position to react to new developments and changing market conditions. Secondly, compared with the U.S. competition system, the new Regulation of EU goes a full step ahead of legal certainty 'not only in the development of brand new instruments for consistency, but also in already established institutional and legal arrangements'¹¹⁸ on which it is based.¹¹⁹

¹¹¹ See, Ritter, Braun, Rawlinson, *European Competition Law: A Practitioner's Guide*, 2nd Edition, 2000, page 135

¹¹² See, James S Venit, supra note 33, at page 572

¹¹³ See, Mario Monti, supra note 107

¹¹⁴ It provides that agreements and decisions caught by Article 81(1) of the EC-Treaty which satisfy the conditions of Article 81(3) shall not be prohibited, no prior decision to that effect being required.

¹¹⁵ A complete list embracing all block exemption regulations, notices and guidelines is available on the website of the Directorate General for Competition of the European Commission: <http://europa.eu.int/comm/competition/antitrust/legislation/>.

¹¹⁶ See, Dieter H. Scheuing, *The Approach to European Law in German Jurisprudence*, 2004, German Law Journal No. 6 <http://www.germanlawjournal.com/article.php?id=446>

¹¹⁷ See, Mario Monti, supra note 107

¹¹⁸ There are some 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. However, the protection of free competition is the one of the basic tools for attainment of the Community objectives related to the internal market. Therefore, it can be safely conclude that the competition will be far better protected in the Community than in the U.S.

¹¹⁹ See, Katarina Pijetlovic, supra note 103

Before the comparison between community new regulation and the U.S., first it is necessary turn briefly to the situation of the U.S. competition system. '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.'¹²⁰ In the U.S., there are differences of concerning both substantive and procedural laws between the state and federal enforcement. The most dangerous results of these differences are the development of multiple standards of prosecutorial discretion, conflicting substantive standards and inconsistent precedents.¹²¹

The dual enforcement makes negative effect of the undertakings and creates 'a duplication of effort by federal and state authorities, which results in waste of resources.'¹²² Hence, the legal uncertainties surrounding the undertakings operating in the US market today are a product of multiple scrutiny and inconsistent dual enforcement regime.¹²³ As the legal scholar pointed out that an inherent problem is here 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.'¹²⁴ Nowadays, there are several proposed solutions of inconsistent application of law in the US system of antitrust enforcement.¹²⁵ The U.S. system also is considered as an 'inefficient and wasteful as to use of resources'.¹²⁶ '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.'¹²⁷

Following the analysis of the problems in the US system, this part will turn back to the European Council's new Regulation. Under the comparison, it is safely to conclude that the European new regulation goes further than the U.S. antitrust law.; 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 as compared to the US system; the private enforcement is in a better situation in the EU than in the U.S.¹²⁸; the new regulation has an efficient information exchanging network; the Commission continues to be required to consult the Advisory Committee before taking decisions,¹²⁹ national authorities has the duty to inform community at the outset of proceedings as well as prior to taking the decision; Article 16 of the new regulation pointed out the obligation to avoid conflicting decisions.

Thirdly, the direct applicability of Article 81(3) in itself promotes legal certainty. Under the old regulation, only agreements that have been notified and exempted by a formal decision can benefit from [Article 81\(3\)](#). However, under the new regulation, the direct application of article 81 (3) 'massively legalizes agreements which fulfill the conditions of [Article 81\(3\)](#) without the need for a prior Commission decision.'¹³⁰ Therefore, on balance civil enforceability of agreements has been improved compared to the old system.

According to what has discussed above, we can use the following paragraph to conclude this section: 'when the new Regulation is considered in the light of existing supranational institutional structures in the Community, harmonization of substantive law on competition, and the prospective for further developments, one has to ask the question: what exactly were the critics [of lack legal certainty] so concerned about?'¹³¹ In addition, it is certainly that '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.'¹³²

4.2 Private Enforcement

As we have mentioned before, the reform brings the European enforcement system closer to the U.S. model. This closer is particularly relying on private action before national courts.

¹²⁰ See Ehlermann and Laudati (eds.), *Robert Schuman Centre Annual on European Competition Law* 1996, page.13

¹²¹ The dual system and lack of legal certainty of competition law in U.S. has not disintegrated the high level of competitiveness on the market.

¹²² These differing standards may prevent businesses from undertaking "efficiency-enhancing transactions". See, supra note 121

¹²³ See, Katarina Pijetlovic, super note 103.

¹²⁴ See, Salord, *Alban Concurrent Application, the April 1999 White Paper and the Future of National Laws*, 2000, ECLR 21

¹²⁵ See, Mark C. and James F. Rill, *International Antitrust and Intellectual Property: Global Dissonance and Convergence*, European Competition Law Annual 2003

¹²⁶ See, Katarina Pijetlovic, super note 45.

¹²⁷ See, www.ftc.gov/ftc/antitrust.htm

¹²⁸ See, Hawk and Denaeyer Stanton, *The development of Article 81 and 82: Legal Certainty*, at page 141

¹²⁹ Under Article 15 of the Regulation, national courts can also request information from the Commission, and both national competition authorities and the Commission may intervene as amicus curiae and receive information from the courts necessary to assess the case. Member States are also required to send copies of judgments relating to Article 81 and 82 to the Commission.

¹³⁰ See, Mario Monti, supra note 107

¹³¹ See, Katarina Pijetlovic, super note 103

¹³² See, *ibid*

However, the role of private enforcement remains the **major differences** between competition law enforcement in the EC and the U.S. Furthermore, it also brings one of the critics to the reform which stating that 'it is dangerous to follow such concepts without at the same time adopting those elements which ensure that private action is such a successful instrument of competition law enforcement on the other side of the Atlantic.'¹³³ Nowadays, the private enforcement continues to play an important, although sometimes controversial role in the U.S. competition law system. Private enforcement has been at the core of US antitrust law since its inception. The Sherman Act specifically provides for private actions for damages: 'Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act may sue therefore and shall recover threefold the damages by him sustained and the cost of suit, including a reasonable attorney's fee.'¹³⁴ 'The fear of **treble damage** actions is one of the most potent influences in securing compliance with anti-trust.'¹³⁵ Although the number of private cases brought in the anti-trust in the U.S. was small in early years¹³⁶, 'private actions continue to represent at least 90 per cent of all Federal anti-trust cases'¹³⁷

In the European Union, the concept of private enforcement did not be addressed in the Treaty of Rome.¹³⁸ However, the emphasis on the role of national courts and indirectly on private action is noteworthy and not totally new. Since the 1980s, the Commission has advocated greater use of the direct effect of Article 81(1), as demonstrated by the Notice on cooperation between the Commission and national courts,¹³⁹ which by several years precedes the Notice on cooperation between the Commission and National Competition Authorities.¹⁴⁰ Nonetheless, even after been introduced, it has long been seen by the European Commission as an additional tool in enforcing the competition rules. For example, in its 13th Report on Competition Policy the Commission stated: 'There is a widespread misconception among members of the public in Europe that only the Commission can enforce Articles 85 and 86 of EEC Treaty. The Court has also established that 'as the prohibitions of Articles 85(1) and 86 tend by their very nature to produce direct effects in relations between individuals, these Articles create direct rights in respect of the individuals concerned which the National Courts must safeguard.'¹⁴¹

At this time, The Commission is studying how to encourage actions before National Courts for enforcement of the prohibitions contained in Article 81 and 82.¹⁴² In this Regulation, '[the Commission] aims at promoting private enforcement through National Courts' by facilitating the application by National Courts of Article 81 through the way of the elimination of the Commission's Article 81(3) monopoly.¹⁴³ As the Commissioner Monti stated 'through a gradual increase in private law-suits, the courts in Europe should make an ever greater contribution to the over-all enforcement of the rules, leading to a situation more similar to that already prevailing in the U.S.'¹⁴⁴ However, the question arises in this part is that whether the decentralized enforcement of the European competition law could stimulate private enforcement? It is clear that the Regulation did not give out any provisions to encourage the development of third-party damage actions as an enforcement mechanism. Furthermore, it is more difficult to be invoked in euro defenses under the new regulation because it is not possible to invalidate an agreement merely by establishing that it is caught by Article 81(1) and has not been notified.¹⁴⁵

¹³³ See, *ibid*

¹³⁴ See, Section 7 of the Sherman Act

¹³⁵ See, A. D. Neale and D. G. Goyder, *The Anti-trust Law in the USA: A Study of Competition Enforced by Law*, Cambridge University, 1987

¹³⁶ For the first 60 year period from 1890 to 1949, there were just over 300 reported decisions and approximately 1,100 cases were commenced.

¹³⁷ See Clifford Jones, *Private Enforcement of Anti-trust law in the EU, UK and USA*, Oxford University, 1999

¹³⁸ Renamed the Treaty establishing the European Community by the Treaty of Amsterdam, and referred to as the EC Treaty.

¹³⁹ See, Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty, O.J. 1993, C 39/6

¹⁴⁰ Notice on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Articles 85 or 86 of the EC Treaty, O.J. 1997, C 313/3

¹⁴¹ See, European Commission 13th Report on Competition Policy, pp.135-136, paras 217-8.

¹⁴² See, Katherine Holmes, Public Enforcement or Private Enforcement? Enforcement of Competition Law in the EC and UK, 2004, European competition law review

¹⁴³ See the Commission's Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 (Regulation implementing Articles 81 and 82 of the Treaty), of 27 Sept. 2000, COM (2000) 582, available at www.europa.eu.int/comm/competition/antitrust/others/modernization/comm_2000_582/en.pdf

¹⁴⁴ . See Commissioner Mario Monti, *Antitrust in the U.S. and Europe: A History of convergence*, speech delivered at the Roundtable of the American Bar Association, Washington DC, 14 Nov. 2001, available at www.europa.eu.int/comm/competition/speeches

¹⁴⁵ See, James S Venit, *supra* note 33

Private enforcement through third-party damage actions is unlikely to increase rapidly because the Community and national legal orders lack a number of key elements to make private action attractive in the U.S. These including the legality of contingency fee arrangements¹⁴⁶; the treble damages¹⁴⁷; discovery procedures; the possibility of class actions, which may play a significant role where the damages of an individual party may be relatively small¹⁴⁸; joint and several liability of each defendant for the whole amount of damages, combined with the 'no contribution' rule, which prevents a defendant who has paid all the damages from seeking indemnity from other defendants¹⁴⁹; it also include the greater deterrent effect of criminal sanctions, that is to say, imprisonment, as opposed to purely administrative fines imposed on undertakings. They consider that these characteristics of US antitrust law by the European commission are neither desirable, nor do they have any realistic chance of being introduced in Europe.

5 the elimination of the procedural bifurcation--- Economics in EC Competition law

Under regulation 17/62, the Commission's monopoly over the application of Article 81(3) and the prior notification system spitted the consideration of the agreement under Article 81 as a whole. New regulation has an important impact on the substance of Article 81 by the **elimination of the procedural bifurcation** of Article 81. Although we can not say the new regulation has completely abolished the split between Articles 81(1) and 81(3), 'the significance of this split is considerably diminished when the entire Article 81 analysis is conducted by a single regulatory or judicial authority in a single procedure.'¹⁵⁰ The Commission described this issue in the White Paper 'the current division between paragraph 1 and paragraph 3 in implementing Article [81] as 'artificial' and 'counter to the integral nature of Article [81], which requires **economic analysis** of the overall impact of restrictive practices.'¹⁵¹ Furthermore, the goals of EC competition law are the ultimate value on efficiency and consumer welfare.¹⁵² 'Competition is a process whereby market actors participate in the economy without overwhelming constraints from private and public power. Accordingly, the aim of competition policy is the protection of individual economic freedom of action as a value in itself, and **economic efficiency** is the result of the freedom which competition law preserves. ...'¹⁵³ Without any doubt, '**economisation**'¹⁵⁴ of competition law policy is also in the central position of the modernisation of

the enforcement system of the Articles 81 and 82 of the EC Treaty as initiated by the Commission in White Paper and the subsequent Commission proposal¹⁵⁵ for a new procedural Regulation 17.¹⁵⁶ Under the consideration of the inherent economic nature of antitrust law, the White Paper noted that 'the analysis of the overall impact of restrictive practices, required by Article 81, is mainly an economic analysis.'¹⁵⁷ Under the new Regulation, an agreement can be invalidated only after a careful and complete economic analysis of all of its effects under both Articles 81(1) and 81(3).

¹⁴⁶ For example, contrary to the rules in many EU Member States, a successful legal team in the U.S. may, pursuant to an agreement with its client, receive a significant part of the amount recovered.

¹⁴⁷ For example, a successful plaintiff is entitled to claim three times its actual damages.

¹⁴⁸ For example, in price-fixing cases

¹⁴⁹ this puts enormous pressure on defendants to settle, since the remaining defendants will, if they lose, be liable to pay all of the damages, even if their role in the infringement was relatively minor

¹⁵⁰ See, James S Venit, supra note 33,

¹⁵¹ see, white paper on modernisation, supra note 20

¹⁵² See Commissioner Monti: the Commission's 'ultimate goal is the promotion of economic performance and the protection of consumer welfare ...' See, commissioner Mario Monti, *European Union Competition Policy After May 2004*, 2003, at <http://www.eurunion.org/news/speeches/2003/031024mm.htm>

¹⁵³ Giorgio Monti, *Article 81 EC and public Policy*, 39 CML Rev. (2002), 1059

¹⁵⁴ 'Economisation' may be construed to have a double meaning here: Literally speaking, because the Commission expects to achieve through this modernisation of the rules to get their hands free to pursue important tasks of enforcement esteemed to be more urgent than the burden of dealing with (too) many notifications, tasks like the unravelling of international hard core cartels.(on 21st November 2001, the Commission imposed a record high fine of in total f 855 million on the members of the so-called 'vitamins cartel'. The main orchestrator of this cartel, the Swiss company Hoffmann-La Roche fetched an individual record high of EE 462 million, or some 2.6% of its worldwide annual turnover. At the time of writing of this contribution, the public version of the decision was not yet published in the 01) Metaphorically speaking, because these plans will lead to the introduction of a system of direct applicability of Article 81 of the EC Treaty as a whole and the resulting abolishing of the notification system as well as of the Commission's monopoly to issue individual exemption decisions pursuant to Article 9(1) of Regulation 17/62. See, Floris Vogelaaar, *Modernisation of EC competition law, economy and horizontal cooperation between undertakings*, Intereconomics, 2002 Vol. 37, Issue 1

¹⁵⁵ Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending certain sector specific Regulations, Brussels, OJ EC 2000, C365/1.

¹⁵⁶ See, Floris Vogelaaar, supra note 155

¹⁵⁷ See, White Paper on modernisation, supra note 20

‘To this extent, the new Regulation makes an important contribution to the Commission's overall modernization programme by removing a procedural obstacle to the reliance on sound economic analysis in competition cases.’¹⁵⁸ Since the early 1980s, ‘European competition law concentrated largely on the enforcement of certain forms of contract clauses occurring therein¹⁵⁹ and market behaviour.’¹⁶⁰ In order to determine whether the agreements fall within the scope of Article 81(1), there was an increasing emphasis on the need to examine agreements in their economic context.

After these years development, under the new ‘economisation’, an assessment of restrictive behaviour is on the basis of **economy oriented analytical notions** such as market position or market power, effect on the market and market structures. It has established that ‘in assessing the applicability of Article 85 (1) to an agreement, account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned.’¹⁶¹

In the Night Services¹⁶² case, it pointed out that the agreements need to be viewed in economic context, except these contains ‘obvious restrictions of competition such as price-fixing, market-sharing or the control of outlets ... in which case the restrictions may be weighed against their claimed pro-competitive effects only in the context of Article 81(3) ...’¹⁶³. Metropole judgment of the Luxembourg Court of First Instance ‘has reaffirmed that the application of Article 81(1) requires a rigorous analysis of the effects of a contested agreement on competition while Article 81(3) is reserved for weighing the pro- and anti-competitive effects of an agreement once the latter have been established under the Article 81(1) analysis.’¹⁶⁴ It hold that the system of application of Article 81(1) ‘cannot... be interpreted as establishing the existence of a **rule of reason**’¹⁶⁵ Any assessment of the economic balance of an agreement or concerted practice holding a restriction of competition is to take place within the context of the analysis under Article 81 (3).¹⁶⁶ Thus, some scholars conclude that the economic analysis of Article 81 consists of two parts: ‘first, there is the rather abstract definition of restrictions of competition in Article 81(1), and once an (appreciable) restriction of competition has been determined, there is, second, the economic balancing act of Article 81(3).’¹⁶⁷ To sum up, the new Regulation empowered the National Competition Authorities and the National Courts to apply Article 81 in its entirety.

This simplified the issues arising from the separation of Article 81(1) and Article 81(3).¹⁶⁸ On the strength of economic arguments and analyses, it should be assessed in each case what will be the most likely reactions of competitors, suppliers, purchasers and consumers, of the undertakings concerned and third parties, in short: of the ‘**market**’, before any case may be decided.¹⁶⁹ Now, market power is a crucial element to take into account in applying Article 81. Under the new regulation, undertakings with little market power do not have to worry about the **compatibility** of their agreements with EU competition law.

¹⁵⁸ See, *ibid*, Para 78. It states that "the Commission will adopt a more economic approach to the application of Article [81(1)], which will limit the scope of its application to undertakings with a certain degree of market power." Furthermore, Commissioner Monti has declared: ‘I should like to underline that an increased economic approach in the interpretation of our rules was, indeed, one of my main objectives when I took on my new responsibilities as Competition Commissioner three years ago. And we have already substantially increased our economic approach in all areas of competition policy.’ See Commissioner Monti, *EC Competition Policy*, speech delivered at the Fordham Annual Conference: International Antitrust Law and Policy, New York, 31 Oct. 2002, see, www.europa.eu.int/comm/competition/speeches/index_speeches_by_the_commissioner.html.

¹⁵⁹ see, See Case 75/84, *Metro SB-Gro[m]arkte GmbH & Co. KG v. Commission*, [1986] ECR 3021; Case 42/84, *Remia BV and others v. Commission*, [1985] ECR 2545; Case 161/84, *Pronuptia de Paris GmbH v. Pronuptia de Paris Irmgard Schillgallis*, [1986] ECR.

¹⁶⁰ see, Floris Vogelaar, *supra* note 155, at page 21

¹⁶¹ See Judgment of the CFI in Case T-112/99, *Metropole Television (M6), Suez-Lyonnaise des eaux, France Telecom and Television francaise I SA (TF1) v. Commission*, [2001] ECR II-2459 at para 76. See also Case 56/65, *Societe Technique Miniere v. Maschinenbau Ulm GmbH*, [1966] ECR 235 at 250.

¹⁶² See, *Joined Cases T-374/94, T-375/94, T-384/94 & T-388/94, European Night Services and others v. Commission*, [1998] ECR II-3141.

¹⁶³ See, *ibid*, at Para 136

¹⁶⁴ See, James S Venit, *supra* note 33,

¹⁶⁵ See, case T112/99, *Metropole Television (M6) v Commission* [2001] E.C.R. II-2459, paras 76-77

¹⁶⁶ See, *ibid*

¹⁶⁷ See, Floris Vogelaar, *supra* note 155

¹⁶⁸ See, White Paper on modernisation, *supra* note 20, at Para 46-47

¹⁶⁹ For example, in the context of joint ventures this analysis should consider factors like the degree of transparency of the market, cost structures, the homogeneity of the offer, and the elasticity of demand, the technological positioning of the parties involved and the existence of barriers to entry. See, Floris Vogelaar, *supra* note 155, at page 21

6. Conclusion

The new reform of the enforcement of the European competition law introduced a system of legal changes by which Member States and undertakings take more responsibility for enforcement. It reduced the bureaucratic burdens for undertakings, as they are no longer need to notify their agreements to the Commission. Clearly, on the other hand, undertakings bear greater responsibility than previously for determining whether they comply with European competition rules under the new regulation. According to what has discussed above, it is easy to conclude that the reform of the enforcement of European competition law has taken a firm step in the direction of stronger and more efficient enforcement of EC competition rules. This essay has proved that the reform is a necessary step in the development of EC competition law in its second section. However, like any major reform, the new reform creates new problems and challenges in practice which did not exist in the old system. Some mainly debates surrounding the reform has been examined in this essay.

Firstly, when concerning the question of the consistency of the decentralised enforcement of Article 81, it is undoubtedly that the cooperation between the Commission, the National Authorities and the National Courts ensures that the new enforcement system produces coherent and efficient enforcement. As pointed before, in this respect, instruments of consistency must be seen as aiming not at a deadly uniformity but at ensuring that the system to efficient enforce the competition rules. As some scholar pointed out '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.'¹⁷⁰ Secondly, the argument about 'decrease of efficiency' does not consider being valid as well. After the compared with the weak contribution of the past system of notifications and inspected of the efforts to improve the efficient of the new reform, we have no reason to give the new Regulation any criticizes at this point. Apart from these two debates, the fourth section of this essay moved to focus on the question of whether the reform reduced the legal certainty.

However, legal certainty is not an absolute concept. The comparison with the old notification system and the US competition system has clearly shown that the new regulation contained all the necessary tools to eliminate any concerns related to legal certainty. The question of the loss of legal certainty of the new regulation has been proved too over. The economic approach in EC competition law has been addressed finally in this essay. Although this is not an issue arise from the new regulation, the elimination of the procedural bifurcation requires an economic analysis on the overall impact of restrictive practices. After examined all these questions, we have to say it is of course much too early to pass judgment on whether this radical reform of the enforcement system for EC competition law will be a success.

Apart from what we discussed in this essay, the questions about reform in practice remain open, particularly regarding the practical application of the new system by the Commission, the National Courts and the National Competition Authorities, such as: What will the commission do if the national courts do not pay sufficient respect to its view? How much legal protection will competitors have if they are left in the cold after the decision of national competition authorities? Furthermore, it is regrettable that the new regulation also been argued the shorts of more radical measures, such as the criminalization of cartels¹⁷¹ and measures designed to encourage private damage actions. Moreover, the Commission did not carry out a more comprehensive review of the infringement procedure. It just simply increased its own powers of investigating and the level of fines.

As it is, the infringement procedure still has a number of legal and practical shortcomings. However, such a comprehensive legislative reform may just have been too ambitious leaving room for another reform in the future. Nevertheless, the new Regulation accelerates the development of Community competition law. It is not only a radical step, but also a remarkably courageous one. It demonstrates that the Commission is convinced it will be able to exercise a leading role in the further development of EC competition policy, even without the traditional exemption monopoly under Article 81(3). Although there are so many questions surrounding it, we also can expect that the future reforms and the revision in practice to complete it.

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¹⁷⁰ See, Katarina Pijetlovic, *supra* note103

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