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## The Modernization of the Enforcement of Articles 81 and 82 EC: A Legal and Economic Analysis of the Commission's Proposal for a New Council Regulation Replacing Regulation No. 17

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# The Modernization of the Enforcement of Articles 81 and 82 EC: A Legal and Economic Analysis of the Commission's Proposal for a New Council Regulation Replacing Regulation No. 17

Wouter P.J. Wils

## **Abstract**

The purpose of this Essay is to analyze the proposed new regime for the enforcement of Articles 81 and 82 of the EC Treaty, compared with the current situation under Regulation No. 17, in the light of the four dimensions which have just been identified. The issue of timing of legal intervention is discussed first. Indeed, the most important aspect of the proposed reform is the abandonment of the current (pretence at) ex ante enforcement through prescreening and the move to a pure system of ex post enforcement through deterrence. The following section looks at the role of the competition authorities of the Member States (hereafter also called "national competition authorities") versus the European Commission. The proposed reform facilitates the enforcement of Articles 81 and 82 EC by the national competition authorities, by removing the Commission's current monopoly for the application of Article 81(3), while providing for increased cooperation among the competition authorities of the different Member States and the Commission within a coherent network. The next section considers the role of private parties in the enforcement of Articles 81 and 82 EC, and the role of national courts. The main change here is that the proposed new regulation empowers national courts, when called upon to apply Article 81(1), to apply also Article 81(3) themselves. The following section deals with sanctions, in respect of which no major changes are proposed by the Commission. The final section contains a short conclusion.

# THE MODERNIZATION OF THE ENFORCEMENT OF ARTICLES 81 AND 82 EC: A LEGAL AND ECONOMIC ANALYSIS OF THE COMMISSION'S PROPOSAL FOR A NEW COUNCIL REGULATION REPLACING REGULATION NO. 17

*Wouter P.J. Wils\**

## INTRODUCTION

On September 27, 2000, the European Commission submitted to the Council a proposal for a new regulation, pursuant to Article 83 of the EC Treaty<sup>1</sup>, implementing Articles 81 and 82 of the EC Treaty (“the proposed new regulation”).<sup>2</sup>

### *A. The Provisions of the EC Treaty*

Article 81(1) EC prohibits all agreements or concerted practices between undertakings that restrict competition within the common market and affect trade between Member States, while

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1. Consolidated version of the Treaty establishing the European Community, O.J. C 340/3 (1997), 37 I.L.M. 79 [hereinafter Consolidated EC Treaty], *incorporating changes made by Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts*, Oct. 2, 1997, O.J. C 340/1 (1997) [hereinafter Treaty of Amsterdam] (amending Treaty on European Union (“TEU”), Treaty establishing the European Community (“EC Treaty”), Treaty establishing the European Coal and Steel Community (“ECSC Treaty”), and Treaty establishing the European Atomic Energy Community (“Euratom Treaty”) and renumbering articles of TEU and EC Treaty).

2. 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”) [hereinafter Proposed New Regulation], COM(2000)582final, OJ C 365 E/284 (2000). This is the first time that a Community regulation is proposed with both a full title and a short title, in application of the Inter-institutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation, O.J. C 73/1 (1999), ¶ 8.

Article 81(3) allows for the prohibition to be declared inapplicable to any agreement or category of agreements that contribute to improved production or distribution or promote technical or economic progress, while allowing consumers a fair share of the resulting benefit, provided that the restriction of competition is indispensable to the attainment of these objectives, and that the agreement does not afford the undertakings concerned the possibility of substantially eliminating competition.<sup>3</sup> Article 82 EC prohibits, insofar as it may affect trade between Member States, any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it.<sup>4</sup>

The Treaty itself does not set out how these prohibitions are to be enforced.<sup>5</sup> Article 83 EC instead delegates to the Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament, the task to lay down "the appropriate regulations or directives to give effect to the principles set out in Articles 81 and 82."<sup>6</sup> The second paragraph of Article 83 EC further indicates that these implementing regulations shall be designed "to ensure compliance with the prohibitions laid down in Article 81(1) and in Article 82 by making provision for fines and periodic penalty payments" and "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."<sup>7</sup>

### B. *Regulation No. 17*

On the basis of Article 83 EC (then Article 87 of the E.E.C. Treaty), the Council adopted in 1962 Regulation No. 17,<sup>8</sup> which has governed the enforcement of Articles 81 and 82 EC ever since. Articles 3, 15, and 16 of Regulation No. 17 empower the Commission, where it finds that there is infringement of Article

3. Consolidated EC Treaty, *supra* note 1, art. 81 (ex Article 85).

4. *Id.* art 82 (ex Article 86).

5. Apart from the word "prohibited" in both provisions, and Article 81(2), which provides that "any agreements . . . prohibited pursuant to this Article shall be automatically void."

6. Consolidated EC Treaty, *supra* note 1, art. 83 (ex Article 87).

7. *Id.*

8. Council Regulation No. 17/62, 13 J.O. 204 (1962), O.J. Eng. Spec. Ed. 1959-62, at 87.

81 or Article 82 EC, to require the undertakings concerned to bring such infringement to an end, and to impose fines and periodic penalty payments.<sup>9</sup> Article 2 allows the Commission, upon application by the undertakings concerned, to issue negative clearances, i.e., to certify that, on the basis of the facts in its possession, there are no grounds under Article 81(1) or Article 82 EC for action on its part in respect of an agreement or practice.<sup>10</sup> As to the application of Article 81(3) EC, Article 4(1) of Regulation No. 17 provides that agreements falling under Article 81(1) EC, in respect of which the parties seek application of Article 81(3), must be notified to the Commission.<sup>11</sup> Article 6(1) of the Regulation adds that exemption decisions pursuant to Article 81(3) cannot take effect at a date earlier than the date of notification.<sup>12</sup> This condition of prior notification does not apply to agreements falling within Article 4(2) of the Regulation. The latter provision initially covered only a few relatively unimportant types of agreements, but since 18 June 1999 it includes all vertical agreements.<sup>13</sup> Also for these agreements, however, Article 9(1) of Regulation No. 17 provides that the Commission has sole power to declare Article 81(1) inapplicable pursuant to Article 81(3) EC.<sup>14</sup> According to Article 9(3) of the Regulation, the competition authorities of the Member States are competent to apply Article 81(1) and Article 82 EC (at least if empowered to do so by their national laws),<sup>15</sup> but only as long as the Commission has not initiated a procedure regarding the same agreement or practice.<sup>16</sup> Regulation No. 17 does not regulate the powers of national courts.<sup>17</sup> The Court of Justice has however held that the prohibitions of Articles 81(1) and 82 EC tend by their very nature to produce direct effects in relations between individuals, and that these Articles thus create direct rights with

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9. *Id.* arts. 3, 15, & 16.

10. *Id.* art. 2.

11. *Id.* art. 4(1).

12. *Id.* art. 6(1).

13. Council Regulation No. 1216/99, *amending* Regulation No. 17/99, O.J. L 148/5 (1999).

14. Council Regulation No. 17/62, art. 9(1).

15. In eight of the 15 Member States (namely Belgium, France, Germany, Greece, Italy, the Netherlands, Portugal, and Spain), national law currently empowers national competition authorities to apply Community competition law.

16. Council Regulation No. 17/62, art. 9(3).

17. *Postbank v. Comm'n*, Case T-353/94, [1996] E.C.R. II-946 (CFI) ¶ 66.

respect to the individuals concerned that the national courts must safeguard.<sup>18</sup>

C. *Main Difference Between the Proposed New Regulation and Regulation No. 17*

The main difference between the proposed new regulation and Regulation No. 17 concerns the application of Article 81(3) EC. In line with the White Paper that the Commission published in 1999 ("White Paper"),<sup>19</sup> the proposed new regulation replaces the current notification and authorization system by a directly applicable exception system.<sup>20</sup> Apart from this central point, a number of other changes are proposed, not all of which are discussed in this paper.<sup>21</sup>

D. *Fundamental Dimensions of Law Enforcement — Outline of this Essay*

In his 1993 article on the optimal structure of law enforcement,<sup>22</sup> Professor Shavell distinguishes three basic dimensions according to which methods of law enforcement can differ. The first dimension is the timing of legal intervention. Intervention may take place before an undesirable act is committed. Alternatively, legal intervention may come about after the act has been committed, or after harm has occurred. The second dimension of legal intervention is the form of the sanctions, the main choice being between monetary sanctions and imprisonment.

18. *BRT v. SABAM*, Case 127/73, [1974] E.C.R. 62 (C.J.), ¶ 16.

19. See White Paper on Modernization of the Rules Implementing Articles 85 and 86 of the EC Treaty, O.J.C 132/1 (1999) [hereinafter White Paper].

20. See *id.* ¶¶ 79-81. The White Paper suggested an exception for partial-function production joint ventures, to which the notification procedures of the EC Merger Regulation (*see infra* note 24), would be extended. The proposed new regulation does not provide for this exception. According to the explanatory memorandum accompanying the proposed new regulation, this question "will be further examined in the context of the forthcoming reflections on the revision of [the EC Merger Regulation]." Proposed New Regulation, *supra* note 2.

21. The most important points not dealt with in this paper are the proposal concerning the relationship between Articles 81 and 82 and national competition laws (Article 3 of the proposed new regulation) and the proposal to give the Commission the power, subject to judicial authorisation, to carry out inspections (the proposed new regulation no longer uses the somewhat bizarre word "verifications" used in Regulation No. 17) at the homes of directors, managers, and other staff of undertakings (Articles 20(2) (b) and 20(7) of the proposed new regulation).

22. S. Shavell, *The Optimal Structure of Law Enforcement*, 36 J.L. & ECON. 255 (1993).

The third dimension relates to the role of private parties versus public agents in enforcement. In a federal or quasi-federal context a fourth dimension may be added concerning the role of central versus local enforcement agents.

The purpose of this Essay is to analyse the proposed new regime for the enforcement of Articles 81 and 82 EC, compared with the current situation under Regulation No. 17, in the light of the four dimensions which have just been identified.

The issue of timing of legal intervention is discussed first. Indeed, the most important aspect of the proposed reform is the abandonment of the current (pretence at) *ex ante* enforcement through prescreening and the move to a pure system of *ex post* enforcement through deterrence. The following section looks at the role of the competition authorities of the Member States (hereafter also called “national competition authorities”) versus the European Commission. The proposed reform facilitates the enforcement of Articles 81 and 82 EC by the national competition authorities, by removing the Commission’s current monopoly for the application of Article 81(3), while providing for increased cooperation among the competition authorities of the different Member States and the Commission within a coherent network. The next section considers the role of private parties in the enforcement of Articles 81 and 82 EC, and the role of national courts. The main change here is that the proposed new regulation empowers national courts, when called upon to apply Article 81(1), to apply also Article 81(3) themselves. The following section deals with sanctions, in respect of which no major changes are proposed by the Commission. The final section contains a short conclusion.

## I. *THE TIMING OF LEGAL INTERVENTION: EX ANTE ENFORCEMENT THROUGH PRESCREENING OR EX POST ENFORCEMENT THROUGH DETERRENCE?*

### A. *The Two Alternatives and the Current Situation*

#### 1. Two Methods of Enforcement

As to the timing of legal intervention, the legislator has a basic choice between two methods to enforce substantive rules,<sup>23</sup>

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23. The term “substantive rule” is used here to refer to the underlying material content of the legal rules. For instance, legally speaking, the EC Merger Regulation

such as the prohibition of agreements, which appreciably restrict competition without redeeming virtue (Article 81 EC), the prohibition of abuse of a dominant position (Article 82 EC) or the prohibition of concentrations, which create or strengthen a dominant position (EC Merger Regulation):<sup>24</sup> ex ante enforcement through prescreening or ex post enforcement through deterrence.

Ex ante enforcement through prescreening means that, when an undertaking contemplates a merger or acquisition that may create a dominant position, a contract that may appreciably restrict competition without having any redeeming virtue, or some commercial behaviour which may constitute an abuse of a dominant position, a decision is taken in advance on the lawfulness of the contemplated action. Under the alternative method of ex post enforcement through deterrence, no enforcement action is taken in advance. The undertaking is left alone to decide whether it commits the contemplated action, but it is induced to respect the substantive rule by the threat of a sanction being imposed afterwards in case of violation.

Some combination of both methods could be imagined. One possibility is optional or voluntary prescreening, leaving the undertaking the choice whether or not to submit its proposed action for prescreening, combined with ex post enforcement through deterrence for those actions which are not submitted for prescreening.

## 2. The Current Situation

### a. Merger Control

The EC Merger Regulation is a clear example of ex ante enforcement through prescreening: its system of mandatory prior notification, suspension and final decision within strict

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does not itself contain a prohibition of concentrations that create or strengthen a dominant position. Instead, it contains an obligation to notify proposed concentrations and a prohibition to put them into effect before notification, during the Commission procedure and thereafter if the procedure results in a decision finding that the concentration will create or strengthen a dominant position. These obligations are the reflection of the choice of an enforcement system based on mandatory prior notification and advance clearance. As the purpose here is precisely to analyse such procedural choices, we rather start from the underlying substantive rule.

24. Council Regulation (EEC) No. 4064/89, O.J. L 257/13 (1990), *amended by* Council Regulation (EC) No. 1301/97, O.J. L 180/1 (1997).



time limits ensures that the question of the legality of a proposed concentration is normally settled definitively before the concentration is put into effect.

b. Article 82

On the other hand, Article 82 EC is almost entirely enforced *ex post* through deterrence. It is true that Article 2 of Regulation No 17 provides for a possibility of negative clearance: upon application by the undertakings concerned, the Commission may certify that, on the basis of the facts in its possession, there are no grounds under Article 81 for action on its part in respect of an agreement, decision, or practice. There is however no obligation for undertakings, which hold or may hold a dominant position, to request such negative clearance for any act or behaviour that may be abusive. A request for negative clearance does not have any suspensive effect, and the Commission is not bound by any time limit for adopting its decision. The Commission is not even obliged to take a decision, having wide discretion to refuse to deal with cases that lack sufficient Community interest.<sup>25</sup> A negative clearance decision does not definitively settle the question of legality under Article 82 either. Since it only certifies that, on the basis of the facts in the Commission's possession, there are no grounds for action on the Commission's part, the Commission could later reassess the case in the light of new facts, whereas national courts and the competition authorities of the Member States remain free to apply Article 82 according to their own judgment. In practice undertakings that hold or may hold a dominant position rarely request a negative clearance before adopting some behaviour that could possibly be abusive. They rather decide whether or not to adopt the contemplated behaviour taking into account the threat of fines inflicted by the Commission or national competition authorities or damages awarded by national courts when a violation of Article 82 is later found.

c. Article 81

As to Article 81 EC, Regulation No. 17 provides for a hybrid system of optional prescreening at the undertakings' choice, combined with *ex post* enforcement through deterrence.

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25. See *Automec v. Comm'n*, T-24/90, 1992 E.C.R. II 2250 (CFI), ¶ 85.

There is no obligation to notify agreements that fall or may fall under Article 81(1) to the Commission. Just as for Article 82, there is a possibility to ask for negative clearance, i.e., a certification by the Commission that on the basis of the facts in its possession, there are no grounds for it to intervene under Article 81(1), but the Commission may decline to deal with the case, and a negative clearance decision has only limited value.

A distinction has to be made between agreements referred to in Article 4(2) of Regulation No. 17, which since June 13, 1999 include most prominently vertical agreements,<sup>26</sup> and all other agreements.

For the latter the situation is the following: If an agreement falls under Article 81(1) EC, and is not covered by a block exemption regulation, the parties to it must notify the Commission of the agreement if they want to obtain an exemption under Article 81(3). The Commission has an obligation to adopt a decision, either granting or refusing the exemption, depending on whether the conditions of Article 81(3) are fulfilled, but there is no fixed time limit within which the decision has to be taken.<sup>27</sup> In practice, many exemption decisions are never taken, the notifying parties accepting an informal "comfort letter" indicating that the agreement appears to fulfill the conditions for exemption. A formal exemption decision will then only be taken if and when, at some later point in time, the parties insist on obtaining one, typically because their agreement is contested before a national court. Subject to judicial review by the Community Courts, an exemption decision is binding upon national courts and competition authorities. However, exemption decisions are only valid for a specified period,<sup>28</sup> after which a renewal can only be granted upon new notification.

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26. See Council Regulation No. 1216/1999, art. 4, O.J. L 148/5 (1999) (defining vertical agreements as those "agreements . . . entered into by two or more undertakings, each operating, for the purposes of the agreement, at a different level of the production or distribution chain, and [relating] to the conditions under which the parties may purchase, sell or resell certain goods or services").

27. According to the case law, the decision must be taken within a reasonable period. In *Dutch cranes* (SCK and FNK v. Comm'n, T-213/95 and T-18/96, 1997 E.C.R. II 1746), the Court of First Instance held that, in the circumstances of the specific case, 46 months was a reasonable period.

28. Of the 19 exemption decisions adopted by the Commission from 1993 to the end of 1997, six specified a duration of five years, eight a duration of 10 years, two seven years, two around 13 years, and one 30 years. One of the 10-year exemptions was a renewal of an earlier exemption of the same duration.

Crucial is that the starting date of the exemption cannot be earlier than the date of notification. Given that agreements that fall under Article 81(1) and do not benefit from an exemption are void pursuant to Article 81(2) EC, this creates an incentive for the parties to notify the Commission of their agreement before they put it into effect, at least if they care about the enforceability of the agreement and can reasonably believe that it fulfills the substantive conditions of Article 81(3).

As to *ex post* enforcement, fines can be imposed by the Commission or by national competition authorities and damages can be awarded by national courts when violations of Article 81 are found.<sup>29</sup> If an agreement has been notified to the Commission in order to seek exemption under Article 81(3), no fines can be imposed for the period from the notification until the decision granting or rejecting the exemption. This is, however, unlikely to create a significant incentive for parties to notify the Commission of their agreements before they put them into effect, because the Commission's constant practice is to impose fines only for clear-cut violations of Article 81, and if such a clear case were ever notified, the Commission would no doubt make use of Article 15(6) of Regulation No. 17, which empowers it to put an end to the immunity from fines by informing the undertakings concerned that after a preliminary examination it is of the opinion that the agreement falls under Article 81(1) and does not fulfill the conditions of Article 81(3).

If one looks at how the system works in practice, it appears that not much real *ex ante* enforcement through prescreening takes place: Only a limited number of agreements are notified to the Commission nowadays. For the last five years (1995 to 1999), the average was 233 per year. There exist no doubt far more agreements which the undertakings concerned choose not to notify.<sup>30</sup> As to the agreements that are notified, the Commission's decision on their legality often comes years after the agreement was put into effect. As a mechanism of *ex ante* enforcement through prescreening, the notification system under Regulation No. 17 is thus more pretence than reality.

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29. See *supra* note 15 and accompanying text (referring to national competition authorities); see *infra* Part II.B & C (referring to national courts).

30. See also C. Ehlermann, *The Modernization of EC Antitrust Policy: A Legal and Cultural Revolution*, 37 COMMON MKT. L. REV. 537, 546 (2000).

For vertical agreements and other agreements referred to in Article 4(2) of Regulation No. 17, the rule that the starting date of the exemption cannot be earlier than the date of notification does not apply any more since June 18, 1999. There is thus no need for undertakings to notify the Commission of their agreements before they are put into effect so as to preserve their civil enforceability. The practical result is that enforcement is entirely *ex post*. The Commission will only be asked to exercise its exclusive competence to grant exemptions pursuant to Article 81(3) when the issue arises in civil litigation before national courts.

### B. *Which Enforcement Method is Best Suited?*

#### 1. Criteria for Choosing Between the Two Enforcement Methods

*Ex ante* enforcement through prescreening would function perfectly (in the sense that it would guarantee full respect of the substantive rule at no cost) if (1) the authority that takes the prescreening decision distinguishes without error between those contemplated actions which will turn out to violate the substantive rule and those which do not, (2) the prescreening procedure is costless (for the parties concerned and the taxpayer) and fast, (3) the prescreening decisions are binding and final in that the undertaking abides by them and that they settle once and for all the question of the legality of the action, and (4) all proposed actions likely to violate the substantive rule are submitted to the prescreening procedure.

Conversely, *ex post* enforcement through deterrence works perfectly if (1) the undertaking<sup>31</sup> knows with certainty whether

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31. Under Regulation No. 17 only undertakings can be fined for violating Articles 81 and 82 EC, not individual decision-makers (unless in the case of single traders or professionals who have not incorporated their business, as the undertaking then coincides with the natural person; the persons referred to in Article 3(1) (b) of the EC Merger Regulation are in a comparable situation). The proposed new regulation does not alter this situation. See *infra* note 155 and accompanying text. This creates an additional condition for perfect deterrence, namely the presence of adequate incentives within the undertaking for the individual decision-makers. See A. Polinsky & S. Shavell, *Should Employees Be Subject to Fines and Imprisonment Given the Existence of Corporate Liability?*, 13 INT'L REV. L. & ECON. 239 (1993); G. Werden & M. Simon, *Why Price-Fixers Should Go to Prison*, ANTITRUST BULL. 917 (1987); W. Wils, *The Undertaking as Subject of EC Competition Law and the Imputation of Infringements to Natural or Legal Persons*, 25 EUR. L. REV. 99 (2000).

the action it contemplates violates the substantive rule, (2) there is certainty of detection, prosecution, and imposition of a sanction in case of violation, and certainty that no sanction will be imposed in case of non-violation, (3) detection, prosecution, and imposition of the sanction are costless (again both for the parties concerned and the taxpayer), and (4) the cost of the sanction to the undertaking exceeds its expected benefit of the action.

In the real world, the above listed conditions for either enforcement method to function perfectly are rarely, if ever, met, at least not fully, or not all of them simultaneously. The interest of such lists is precisely to identify the possible sources of problems that cause either the enforcement mechanism to be inadequate, in the sense that respect of the substantive rule is not guaranteed or only at high cost. In an earlier article, I systematically examined each of the conditions and possible problems.<sup>32</sup> From this analysis it can be concluded that four factors should guide the choice between ex ante enforcement through prescreening or ex post enforcement through deterrence for a given substantive rule: (1) credibility of deterrence, (2) relative knowledge and predictability of the substantive rule, (3) enforcement costs, and (4) the problems of adverse selection and distortion of enforcement priorities under voluntary prescreening.

## 2. First Factor: Credibility of Deterrence

For ex post enforcement through deterrence to work, the undertaking, when deciding whether or not to engage in some action that violates the substantive rule, should be faced with an expected sanction, which exceeds its expected benefit from the violation. The expected sanction depends on the probability of detection and punishment, and on the magnitude of the sanction imposed in case of detection and punishment. The magnitude of available sanctions is confined by natural limits (total wealth for monetary sanctions, lifetime for imprisonment) as well as by political or cultural limits. For those substantive rules for which the politically or culturally acceptable sanctions are relatively low compared to the potential benefits from violations

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32. W. Wils, *Notification, Clearance, and Exemption in EC Competition Law: An Economic Analysis*, 24 EUR. L. REV. 139, 144-150 (1999).

to the actors concerned, ex post enforcement through deterrence will thus not work.

#### a. Application to Merger Control

This first factor explains the choice for ex ante enforcement through prescreening in the area of merger control, already under the ECSC Treaty of 1951,<sup>33</sup> under the EC Merger Regulation, in the United States under the Hart-Scott-Rodino Act of 1976,<sup>34</sup> as well as in many other jurisdictions.<sup>35</sup> It would appear indeed that the problem of sufficiently high sanctions not being available for deterrence to be credible may be acute in the case of merger control. The expected benefit from concentrations, in particular the most anticompetitive ones, can be very substantial. The threatened sanctions would thus also have to be very substantial.<sup>36</sup> At the same time, the political or cultural ceiling on possible sanctions is relatively low. Anticompetitive mergers or acquisitions are not considered sufficiently objectionable by public opinion to warrant highly deterrent sanctions, such as imprisonment of the responsible decision makers, certainly not in Europe. Even in the United States, where imprisonment appears acceptable for price fixing or bid rigging, it does not appear to be so for anticompetitive mergers.

#### b. Application to Articles 81 and 82

The problem of deterrence not being credible is less important as a factor to choose between ex ante or ex post enforcement with regard to restrictive agreements and abuse of a dominant position than in the case of mergers. The expected benefits from violations may be lower. The political or cultural

33. Treaty establishing the European Coal and Steel Community, Apr. 18, 1951, art. 66(1), 261 U.N.T.S. 140 [hereinafter ECSC Treaty].

34. 15 U.S.C. §§ 18a, 1311-1314 (2001). Preclearance approval or disapproval of proposed mergers had already been proposed in 1913 by Senator Cummins: 49 Cong. Rec. 4126 (1913).

35. Even in French law, where, under Article 38 of the *relative à la liberté des prix et de la concurrence*, Law No. 86-1243 of Dec. 1 1986, the Minister can challenge at any time a concentration which harms competition, the undertakings concerned have the option of notifying their proposed concentration and obtaining a decision (express or implied) within strict deadlines. It also appears that the Minister has never exercised his power under Article 38 to challenge a concentration until long after its consummation.

36. All the more since the difficulty and cost of ex post litigation will result in not all violations being punished, so that sanctions must correspondingly exceed the expected benefit.

ceiling of acceptable sanctions is almost certainly higher, however, as these violations appear to be more widely regarded as deserving punishment. Deterrence may be difficult to achieve for some specific types of violations, in particular price cartels, which may be very profitable and are relatively easy to conceal,<sup>37</sup> but *ex ante* enforcement through prescreening cannot remedy this situation, since the ease of concealment will make the enforcement of any obligation to submit to prescreening equally unworkable.

### 3. Second Factor: Relative Knowledge and Predictability of the Substantive Rule

The second factor determining whether either *ex ante* enforcement through prescreening or *ex post* enforcement through deterrence is more suited for a given substantive rule relates to the knowledge and predictability of the substantive rule.

Under *ex post* enforcement, the undertaking, when deciding whether or not to engage in some action, has to assess itself, with the help of its legal advisors, the legality of its action under the substantive rule. For instance, when an undertaking with a strong market position decides on its pricing policy, it has to assess whether the pricing may amount to an abuse of a dominant position within the meaning of Article 82 EC. If the undertaking is not able to assess correctly whether or not the action it envisages will violate the substantive rule, errors will occur in two ways. On the one hand, the undertaking may end up committing a violation unwittingly. On the other hand, it may decide to abstain from a wealth-generating action in the false belief that it would be illegal.

Under *ex ante* enforcement, the prescreening authority has to assess the legality of the proposed action. For instance, if Article 82 EC were enforced under a system of prior notification and clearance by the European Commission, the Commission would have to assess whether the proposed pricing policy would amount to an abuse of a dominant position. If the prescreening authority is not able to assess correctly whether or not the notified action will violate the substantive rule, errors will again occur both ways: violations may be cleared on the one hand, and

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37. See *infra* note 163 and accompanying text.

harmless wealth-enhancing actions prevented on the other hand.

To decide whether *ex ante* or *ex post* enforcement is more suited for a given substantive rule, one should thus try to find out who is least likely to make errors in the advance assessment of whether an undertaking's envisaged action will violate the substantive rule: the undertaking itself, with its legal advisors, or the enforcement authority.

#### a. Errors

Errors in the advance assessment (by the enforcement authority in the case of *ex ante* enforcement, by the undertaking in the case of *ex post* enforcement) of whether an undertaking's envisaged action will violate the substantive rule can be due to two possible causes: limited access to information and neglect.

##### i. Limited Access to Information

The first possible cause of errors is incomplete access to the relevant information. To make a correct assessment of the compatibility of an envisaged action with the substantive law, one needs to know on the one hand what is precisely proscribed by that law. On the other hand, information is needed about the exact nature of the envisaged action, about the undertaking concerned, and about the markets in which it operates and in which the envisaged action will produce its effects. In the example used above, the advance assessment by either the undertaking itself or the Commission as to whether the envisaged pricing policy amounts to an abuse of a dominant position contrary to Article 82 EC would require information about what precisely constitutes a dominant position and what type of pricing policies constitute abuse under that provision, as well as information about what exactly the undertaking intends to do, what the characteristics of the market are and what exactly the undertaking's position is on the market.

As to information concerning the envisaged action, the undertaking concerned, and the relevant market conditions, it is rather obvious that the undertaking itself will generally have better access to this information than the enforcement authority. The informational disadvantage of the enforcement authority is likely to be much more pronounced in the context of prescreen-



ing than in the context of ex post investigations, because in the former situation the authority must decide without the benefit of the information generated by the action itself.<sup>38</sup>

As to information about the law, the undertakings with their legal advisors on the one hand and the enforcement authority on the other hand should in principle have equal access. Indeed, both statutory provisions (treaty articles, regulations) and case law are publicly available. The fact that the law may be formulated as a general standard rather than as detailed rules,<sup>39</sup> with Article 82 of the EC Treaty, does not really matter. As long as the standard has not been transformed into more detailed rules by authoritative court decisions, everyone is equally faced with the task of interpretation on the basis of the underlying conceptions. The fact that the law may change over time does not lead to a different conclusion either. Assuming that such changes reflect new events, evolving societal preferences, and novel information, there is no reason to assume that the undertakings concerned and their counsel should have an informational disadvantage compared to an enforcement authority.

One can however imagine two special situations in which the enforcement authority would have an informational advantage over the undertakings and their counsel concerning the precise content of the law, which could provide an argument for ex ante enforcement through prescreening. The first situation is where an entirely novel, revolutionary law is introduced, which goes against well-established conceptions and practices of the business and legal communities. In the beginning, it may not be realistic to rely on the undertakings' self-assessment under such a new law, all the less if the law takes the form of a rather general standard, thus requiring for its interpretation an understanding of the underlying conceptions, which by assumption are foreign to those undertakings and their counsel. In such a situation, an enforcement authority dedicated to the new law and its underlying conceptions would have a clear informational advantage, possibly justifying ex ante enforcement of the new law through prescreening by that dedicated authority. Over time this infor-

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38. See W. Landes & R. Posner, *The Economics of Anticipatory Adjudication*, 23 J. LEGAL STUD. 683, 690 (1994).

39. See L. Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L. J. 557 (1992) (describing the distinction between standards and rules).

mational asymmetry will however disappear when the law and its underlying conceptions get disseminated in the business and legal communities. Indeed, the operation of the prescreening procedure constitutes itself a dissemination mechanism, in that the undertakings and their counsel who notify their proposed actions get educated by the authority in the process.

The second situation that one could imagine in which the enforcement authority would have an informational advantage over the undertakings and their counsel as to the precise content of the law is that where the law is not really a rule of law but rather a tool for the enforcement authority to take discretionary political decisions. If the content of the law depends on discretionary political decisions by the enforcement authority, this would constitute an argument in favour of *ex ante* enforcement.

## ii. Neglect

The second possible cause of errors in the advance assessment of whether an undertaking's envisaged action will violate the substantive rule is neglect. Indeed, even with access to all relevant information, the enforcement authority (in the case of *ex ante* enforcement) or the undertaking with its legal advisors (in the case of *ex post* enforcement) may fail to make a correct assessment, because of accident or neglect. Those who believe in incentives and markets should assume that there is rather less risk of errors through neglect in the case of self-assessment by the undertakings and their counsel than in case of prescreening by an enforcement authority, given that undertakings will have a strong incentive not to make mistakes and that counsel operate on competitive markets.

## b. Uncertainty and Risk-Bearing Cost

In case of *ex post* enforcement through deterrence, undertakings support some risk-bearing cost to the extent that they are uncertain about how the law will be applied to their action *ex post*. For instance, an undertaking with a strong market position may want to introduce some novel distribution system or method, which will require a substantial investment, which will only be recouped over many years. Even on the basis of all available legal and factual information, and with the help of the best counsel it can hire, the undertaking may remain uncertain as to

whether five or ten years later its action would turn out to violate Articles 82 or 81 EC, with the risk that it would not be able to recoup its investment. This uncertainty may make the investment less attractive. Does this constitute an argument against ex post enforcement? I do not think so.

It might be inappropriate to let the undertakings shoulder this competition law risk in a situation where the content of the law would depend on discretionary political decisions, or where existing information about the law would not be made publicly available.

Provided however that the law is a real rule of law, and that all existing information about its content is made publicly available, the competition law risk is not fundamentally different from all other risks related to the investment. Indeed, the undertaking is likely to face many other risks, in particular market risks, arising from uncertainty with regard to such factors as the level of future demand, technological change, behaviour of competitors, and prices of inputs, but also risks relating to its own management and labour, and various other regulatory or legal risks.<sup>40</sup>

As for all these other risks, it is generally best that the competition law risk is internalized by the undertaking itself. Indeed, the efficient level of investment is induced when investors bear all real costs and benefits of their decisions.<sup>41</sup> Insulating undertakings from real competition law risks would actually lead to over investment. In the above example: if there is a real risk that five or ten years from now the distribution method will turn out to violate competition rules, the undertaking should fully consider this risk in its decision. Indeed, assuming that competition law at each point in time adequately reflects societal preferences, there would be a real harm to society if this violation occurred, and this possible harm should be fully taken into account in the undertaking's investment decision.

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40. See Ian Forrester, *The Modernization of EC Antitrust Policy: Compatibility, Efficiency, Legal Security*, Paper presented at the Fifth EUI Competition Law and Policy Workshop (June 2-3, 2000), at <http://www.iue.it/RSC/competition/papers.htm>.

41. L. Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 529 (1986).

### c. Summing Up on the Second Factor

Ex post enforcement through deterrence is generally to be preferred over ex ante enforcement through prescreening because undertakings, with the help of their legal advisors, can be expected to make less errors in the advance assessment of their action under the substantive rule than prescreening authorities, in particular because undertakings have easier access to all relevant information. An argument in favour of ex ante enforcement could only be made in two special situations, where an entirely novel, revolutionary law is being imposed or where the content of the law depends on discretionary, political decisions of the enforcement authority. The fact that undertakings support risk-bearing costs due to uncertainty about the future application of the law does not constitute an argument against ex post enforcement. Provided that the law is a real rule of law, and that all existing information about its content is made publicly available, this risk-bearing cost reflects the efficient internalization of a real cost in the undertakings' investment decisions.

### d. Application to Merger Control

It could be argued that the problem of the prescreening authority's difficulty in getting access to all relevant information may be less serious with regard to mergers, because of the one-off structural nature of the action to be controlled (as opposed to the more continuing behavioural nature of the actions to be controlled under the other competition rules). If the prescreening authority has sufficient powers to oblige the undertakings concerned, as well as third parties, to answer factual questions,<sup>42</sup> the authority arguably does not have too serious an informa-

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42. Under the EC Merger Regulation and its implementing rules, the European Commission has such strong powers: The notification must include answers to a substantial number of factual questions contained in the notification form. If the information is found incomplete, the time limits for the Commission's decision and the corresponding suspension of the concentration only start running at the day of completion. The Commission can during the procedure request all necessary information not only from the notifying parties but also from third parties, if necessary under the threat of fines and periodic penalty payments. The Commission also makes a public announcement when it receives a notification, so as to invite interested third parties to come forward with relevant information. Finally, the Commission may later revoke its decision authorizing the concentration if the decision was based on incorrect information for which one of the undertakings concerned is responsible or where it has been obtained by deceit. *See* Council Regulation (EEC) No. 4064/89, O.J. L 257/13 (1990).

tional disadvantage, given that most if not all relevant information appears to be objectively verifiable and not easy to conceal.

#### e. Application to Articles 81 and 82

Conversely, the informational deficit of the prescreening authority is likely to be worse in the case of Articles 81 and 82 than for mergers, because of the more continuing behavioural nature of the actions to be controlled. Ex ante enforcement would thus generally not be a good option.

The historical choice for a notification system in Regulation No. 17 with regard to Article 81 can however be understood by reference to the two special situations identified above in which the enforcement authority could have an informational advantage over the undertakings and their counsel concerning the precise content of the law, possibly justifying ex ante enforcement through prescreening.

#### i. Article 81 is No Longer Revolutionary Today

At the time Regulation No. 17 was adopted, the prohibition on restrictive agreements was entirely revolutionary in Europe. The prohibition on abuse of a dominant position, first in the E.C.S.C. Treaty of 1951<sup>43</sup> and subsequently in Article 86 of the E.E.C. Treaty of 1957 (now Article 82 EC),<sup>44</sup> was not without precedent: in Germany, for instance, an "Ordinance against the Abuse of Economic Power" had been enacted in 1923.<sup>45</sup> On the contrary, the prohibition on restrictive agreements first laid down in Article 65 of the E.C.S.C. Treaty<sup>46</sup> and then also in Article 85 of the E.E.C. Treaty (now Article 81 EC),<sup>47</sup> was "a fundamental innovation in Europe."<sup>48</sup> Before the Second World War, cartels were a wide-spread and highly esteemed institution throughout Europe.<sup>49</sup> The insertion of the prohibition on re-

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43. ECSC Treaty, *supra* note 33.

44. Consolidated EC Treaty, *supra* note 1, art. 82 (ex Article 86).

45. K. Nörr, *Law and Market Organization: The Historical Experience in Germany From 1900 to the Law Against Restraints of Competition (1957)*, 151 J. OF INSTITUTIONAL AND THEORETICAL ECON./ZEITSCHRIFT FÜR DIE GESAMTE STAATSWISSENSCHAFT 5, 10 (1995).

46. ECSC Treaty, *supra* note 33, art. 65.

47. Consolidated EC Treaty, *supra* note 1, art. 81 (ex Article 85).

48. J. MONNET, MÉMOIRES 413 (1976).

49. H. Schröter, *Cartelization and Decartelization in Europe, 1870-1995: Rise and Decline of an Economic Institution*, 25 J. EUR. ECON. HIST. 129, 137-40 (1996) (noting that Yugoslavia was the only European country where cartels were prohibited at that time).

strictive agreements in European law, as well as around the same time in German national law, was due to American influence, if not pressure.<sup>50</sup> As an entirely new and revolutionary import, the meaning of the prohibition on restrictive agreements must have been rather unclear to most European business people and lawyers. In the early phase of the application of Article 81, this factor thus pleaded for *ex ante* enforcement.

The situation has however changed since. Article 81 is no longer revolutionary today: after several decades of application, European business people and lawyers have acculturated; virtually all Member States have now also adopted similar provisions in their national laws.<sup>51</sup> The novel character of Article 81 can thus no longer justify *ex ante* enforcement.

#### ii. Article 81(3) Does Not Depend on Discretionary Political Decisions

At the time Regulation No. 17 was adopted, it may also have been considered that the application of Article 81(3) depended or should depend on discretionary political decisions. Indeed, without the benefit of subsequent case law and practice, this Treaty provision could have been read in two different ways. Under the first reading, Article 81(3) is nothing but a codified form of the American rule of reason. Indeed, Article 81 is the European equivalent of Section 1 of the Sherman Act.<sup>52</sup> Whereas the latter reads as a single rule prohibiting all agreements in restraint of trade (similar to Article 81(1)), it has been interpreted by the courts as condemning only unreasonable re-

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50. See MONNET, *supra* note 48, 356-7, 411-13; see also D. SPIERENBURG & R. POIDEVIN, *THE HISTORY OF THE HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY*, 26-28 (1996); V. BERGHAFN, *THE AMERICANIZATION OF WEST GERMAN INDUSTRY 1945-1973* (1986) (providing a detailed description of the strong resistance to be overcome in Germany). In the national laws of other European countries, a similar prohibition on restrictive agreements was introduced much later: for instance in the Netherlands only in 1997.

51. The Central and Eastern European countries lining up for accession to the EU have also already adopted similar national laws in preparation. Indeed, the Europe Agreements between the EC and the accession candidates oblige these countries to apply the principles of Articles 81 and 82 and to harmonize their national competition law with EC competition law. See, e.g., Europe Agreement between the European Communities, and their Member States, of the one part, and the Republic of Poland, of the other part, arts. 63 & 69, O.J. L 348/1 (1993).

52. 15 U.S.C. § 1 (2001).

straints.<sup>53</sup> Article 81(3) simply codifies this case law. Under this first reading, there is of course no scope for discretionary political decisions in the application of Article 81(3), the American rule of reason being a true rule of law. Under the second reading, which could draw on the word “may” in the text of Article 81(3) (“The provisions of paragraph 1 may, however, be declared inapplicable in the case of . . .”),<sup>54</sup> the application of Article 81(3) would not be a right whenever the four conditions listed therein are met, but rather depend on a discretionary political decision. In the perspective of this second reading, an argument could be made in favour of *ex ante* enforcement.

There can be no doubt any more today that the first reading is the right one. In almost 40 years of application of Regulation No. 17, the Commission has never refused an exemption when the four conditions of Article 81(3) were met, nor has it granted an exemption for other reasons than the fulfilment of those conditions.<sup>55</sup> As to the Community Courts, the underlying conception of the case law is that fulfilment of the conditions entitles an undertaking to the benefit of Article 81(3).<sup>56</sup> Notwithstanding the Courts’ declarations as to the “margin of discretion” which the Commission would enjoy in the “complex economic appraisals” it makes under Article 81(3),<sup>57</sup> the case law shows how punctiliously the Courts control the assessment made by the Commission in accepting or refusing the fulfilment of a condition.<sup>58</sup> In French, the working language of the Courts, the Courts have

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53. See, e.g., *Standard Oil v United States*, 221 U.S. 1 (1911).

54. Consolidated EC Treaty, *supra* note 1, art. 81(3) (ex Article 85).

55. G. Marengo, Does a Legal Exception System Require an Amendment of the Treaty?, Paper presented at the Fifth EUI Competition Law and Policy Workshop (June 2-3, 2000), at <http://www.iue.it/RSC/competition/papers.htm>.

56. In *Matra v Comm’n*, T-17/93, 1994 E.C.R. II-595, ¶ 85, the Court of First Instance considered that “in principle, no anticompetitive practice can exist which, whatever the extent of its effects on a given market, cannot be exempted, provided that all the conditions laid down in Article 81(3) of the Treaty are satisfied and that the practice in question has been properly notified to the Commission.”

57. *Metro v. Comm’n*, Case 26/76, 1977 E.C.R. 1875 (C.J.), 45, 50; *CB and Europay v. Comm’n*, Cases T-39/92 and T-40/92, 1994 E.C.R. II-49 (CFI), ¶ 109.

58. See Marengo, *supra* note 55; S. Kon, *Article 85, Para. 3: A Case for Application by National Courts*, 19 CML REV. 541 (1982); *contra* R. Wesseling, *The Commission White Paper on Modernisation of E.C. Antitrust Law: Unspoken Consequences and Incomplete Treatment of Alternative Options*, E.C.L.R. 420 (1999), who seems to overlook the reality of the Commission’s decisional practice and of the judicial review exercised by the Community Courts when he claims that “the ECJ has repeatedly endorsed Commission decisions which took into account non-competition concerns when determining whether an

never used the term "*marge de discrétion*" but instead "*marge d'appréciation*," suggesting no more than a margin of economic assessment. Such margin exists equally in the application of Article 81(1),<sup>59</sup> or Article 82, as they require equally complex economic assessments. This is not a political discretion, and it can thus not support an argument for ex ante enforcement.

#### 4. Third factor: Enforcement Costs

The third factor determining whether ex ante enforcement through prescreening or ex post enforcement through deterrence is more suited for a given substantive rule relates to enforcement costs. The relevant measure is the overall social cost, including the costs borne by the undertaking, the decision-making authority and any other third parties involved. The cost of prescreening one proposed action can generally be expected to be lower than the cost of the ex post prosecution or litigation of one action.<sup>60</sup> Prescreening will, however, involve a much higher number of cases. Ex post enforcement can in principle be limited to those cases that have turned out to be violations of the substantive legal rule,<sup>61</sup> whereas prescreening will inevitably cover a much wider group of proposed actions. Under ex post enforcement there will of course also be the cost of self-assessment by the undertakings concerned. This cost is however likely

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agreement fulfilled all four conditions" and that "there is a large degree of administrative, or policy discretion involved in the implementation of Article 81(3)."

59. *Remia v Comm'n*, Case 42/84, 1985 E.C.R. 2566 (C.J.), 34; *BAT and Reynolds v. Comm'n*, Cases 142 and 156/84, 1987 E.C.R. 4487 (C.J.), 62; *Bagnasco*, Cases C-215/96 and C-216/96, 1999 E.C.R. I-179 (C.J.), 50.

60. There are three reasons for this: First, more information will be available ex post and this is likely to make the administrative or legal procedures more lengthy and complex and thus more costly. Second, the stakes are likely to be higher in an ex post procedure. In the prescreening procedure, the undertaking has the expected benefit from its proposed action at stake, whereas in an ex post procedure its stake lies in avoiding the sanction being imposed on it. Deterrence requires that this sanction exceed the expected benefit, to an extent inversely related to the probability of detection and punishment. Where the stakes are higher, more will be spent on legal and expert help. Finally, it may be easier to limit through procedural rules, in particular deadlines, the excess provision of legal and expert arguments in a prescreening procedure because of the need for the procedure to be fast. The first and second of these reasons are variations on those identified. See W. Landes & R. Posner, *supra* note 38, at 692 (providing analysis focused on tort-like situations). On the problem of excessive spending on litigation, see S. Shavell, *The Fundamental Divergence between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575, 608-611 (1997).

61. Or even to a fraction of these cases if the sanction can be increased by the corresponding multiple.



to be lower than the overall cost (borne by the undertaking, the authority, and possibly involved third parties) in case of prescreening, because there is no need to convince a no doubt critical authority, which may want to cross-check the facts as presented to it by the undertaking requesting the clearance.

#### a. Application to Merger Control

In comparing the suitability of *ex ante* or *ex post* control for mergers, enforcement cost considerations do not appear to go decisively either way. *Ex post* litigation is likely to be expensive (indirectly because of the possible substantial benefits of concentrations, via the resulting high sanctions and correspondingly high stakes in the litigation), but *ex ante* enforcement is also costly, in particular because of the amount of information to be provided in the notification (necessary so as to overcome the prescreening authority's informational disadvantage). It appears feasible, however, to define with reasonable precision and without excessive over-inclusivity the group of proposed actions which have to be submitted for prescreening.

#### b. Application to Articles 81 and 82

In the case of Articles 81 and 82, enforcement cost considerations clearly go against generalised *ex ante* enforcement. The problem is that the numbers of contracts and business decisions that would have to be notified and prescreened in a pure system of *ex ante* enforcement would be immense: to be sure to catch all potential violations of Articles 81 and 82, an enormous number of contracts, board decisions, and actions taken by the leading officers of companies of some size would have to be screened.

The authors of Regulation No. 17 must have been aware of the risk of a huge number of notifications, and the resulting impossibility for the Commission to deal with them swiftly. Indeed, no time limit was provided for the Commission's decision:<sup>62</sup> the undertakings are free to implement the notified agreement and when the Commission later adopts an exemption decision, this decision can have retroactive effect back to the date of notifica-

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62. According to later case law, the decision must, however, be taken within a reasonable period. *See supra* note 27.

tion.<sup>63</sup> In the meantime the undertakings benefit from immunity from fines.<sup>64</sup> These modalities made the notification system much more manageable, but the price to be paid is that violations may go on undisturbed for quite some time.<sup>65</sup>

Those modalities that make the notification system manageable for the Commission, and thus reduce some of the administrative cost, do not however affect the number of notifications made and the corresponding cost borne by the notifying parties. In the first years of the application of Regulation No. 17, almost 40,000 agreements were notified to the Commission. From 1967 on, the Commission adopted a number of block exemption regulations, which exempt entire categories of agreements.<sup>66</sup> The cost of notifying these agreements is thus avoided. On the other hand, a price may be paid: as block exemption regulations clear entire categories of agreements defined in the abstract, errors may be made in that certain agreements which would appear to violate the substantive rule are exempted, upon individual analysis. For instance, from May 1, 1967 until May 31, 2000,<sup>67</sup> all ex-

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63. This retroactive effect was not provided for in the Commission's original proposal (document IV/COM(60)158 of 28 October 1960), it was introduced later during the discussions in the Parliament and the Council by way of a compromise meant to accommodate France, which had taken a position against *ex ante* enforcement, and thus allowing the necessary agreement to be reached in the Council vote. See A. Deringer, *Les règles de la concurrence au sein de la C.E.E. - Analyse et commentaires des articles 85 à 94 du traité*, 59 *REVUE DU MARCHÉ COMMUN* 256, 261 (1963), and 69 *Revue du Marché Commun* 245, 246 (1964).

64. So-called "old agreements," i.e., agreements that were already in existence on February 22, 1962, the date of entry into force of Regulation No. 17, provided that they were notified to the Commission before November 1, 1962, and even benefited from provisional validity.

65. For the most extreme cases of blatant violations being notified and consequently immunized from fines until the day the Commission deals with the notification, a possibility of withdrawal of immunity was provided for in Article 15(6) of Regulation No. 17. An admittedly not representative example of an agreement that was notified to the Commission in 1962 and has been implemented until 1998 without its legality having been settled is the industry-wide agreement governing retail prices for books in the Netherlands. See *KVBBB v. Free Record Shop*, Case C-39/96, 1997 E.C.R. I-2303 (C.J.).

66. Over the years, block exemption regulations were adopted for exclusive distribution agreements, exclusive purchase agreements, motor vehicle distribution and servicing agreements, franchising agreements, technology transfer agreements, specialization agreements, research and development agreements, as well as for certain types of agreements in the insurance and transport sectors.

67. The former date is that of entry into force of Comm'n Regulation No. 67/67, O.J.L 847/67 (1967). The latter is the date until which Comm'n Regulation (EEC) No. 1984/83, which succeeded Regulation No. 67/67, was prolonged by Article 12(1) of Comm'n Regulation (EC) No. 2790/1999, O.J.L 336/21 (1999). By virtue of Article

clusive purchase agreements were block exempted, irrespective of the market power of the undertakings concerned.<sup>68</sup>

It should be recalled that, even outside the scope of the block exemption regulations and of Article 4(2), Regulation No. 17 does not impose an obligation to notify agreements falling under Article 81(1) EC. Undertakings can thus avoid the cost of notification by choosing not to notify. In practice many undertakings appear to make this choice. They will then however pay a different price in that their agreement, if it is indeed found to fall under Article 81(1), will not be legally enforceable, even if it meets the substantive conditions of Article 81(3).

#### 5. Fourth Factor: Specific Problems with Voluntary Prescreening: Adverse Selection and Distortion of Enforcement Priorities

Specific problems arise when *ex ante* enforcement through prescreening is not mandatory, but optional or voluntary, leaving undertakings the choice of whether or not to submit its proposed action for prescreening.

Rational undertakings will try and exploit the choice offered so as to get away with violations. For those actions that are certain or quite likely to constitute violations but for which *ex post* enforcement does not work, for instance because the probability of detection is low or the threatened sanction is insufficiently high, the undertaking will have no reason to ask for prescreening. On the other hand, the undertaking may have nothing to lose, at least if it does not have to pay for prescreening, in submitting for prescreening actions that it is deterred from taking at its own risk, because it knows that they are sufficiently likely to be detected and sanctioned as violations *ex post*. There may be a chance that they get cleared *ex ante*, either just by accident or, more importantly, because the prescreening authority has insufficient information *ex ante* to assess the action correctly.

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12(2), agreements already in force on May 31, 2000 continue to benefit from the exemption until December 31, 2001.

68. Block exemption regulations usually provide for a possibility to withdraw the benefit of the exemption for an agreement that does not meet the substantive conditions of Article 81(3), but doing so is administratively costly, with the result that the Commission used this power only once in more than thirty years. See Langnese-Iglo, O.J. L 183/19 (1993) (Comm'n). Moreover, the withdrawal only affects the future.

In a situation where the authority which deals with prescreening notifications is also responsible for the ex post enforcement for those actions which are not submitted for prescreening, and unless the authority has unlimited resources, the rational use by the undertakings of their choice of whether or not to submit an action for prescreening will also result in a distortion of the authority's enforcement priorities. Ideally, an enforcement authority should devote its resources in priority to the most serious infringements. However these are precisely those not likely to be voluntarily notified for prescreening. Unless the enforcement authority has the discretion not to deal with the prescreening notifications it receives, its enforcement priorities will thus be distorted.

a. Application to Merger Control

Given that prescreening under the EC Merger Regulation is not voluntary but mandatory, problems of adverse selection and distortion of enforcement priorities do normally not arise.<sup>69</sup>

b. Application to Articles 81 and 82

To the contrary, adverse selection and distortion of enforcement priorities appear very serious problems indeed under Regulation No. 17.<sup>70</sup>

The most serious infringements of Article 81, price or market-sharing cartels, are never notified to the Commission. Nor do undertakings ever request a negative clearance for the worst abuses of a dominant position. The notifications that the Commission receives tend to reveal either no infringement at all or only relatively minor problems. In almost four decades of application of Regulation No. 17 there have been only nine decisions in which a notified agreement was prohibited without a complaint having been lodged against it.<sup>71</sup> However, notification related work does consume about half of the resources of the parts

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69. Some adverse selection could happen at the margin, to the extent that undertakings could structure a virtually identical operation as a joint venture falling under the Merger Regulation or rather as some other agreement that falls outside.

70. The problem was already anticipated in 1961 by the Economic and Social Committee in its Opinion of March 28, 1961 (one of its two conflicting opinions on the draft Regulation No. 17), cited in White Paper, *supra* note 19, at 43.

71. White Paper, *supra* note 19, at ¶ 77.

of the Commission's Directorate General for Competition not dealing with mergers or state aid.

The problem cannot be solved by giving more resources to the Directorate General for Competition, however desirable that may otherwise be. Indeed, if more resources were available, notifications would be dealt with more swiftly, and this would make notification more attractive to industry. Many agreements that fall under Article 81(1) and benefit neither from a block exemption nor from Article 4(2) of Regulation No. 17, while being likely to meet the substantive conditions of Article 81(3), are not notified today, notwithstanding the resulting unenforceability. If the Commission provided a better prescreening service, more of these agreements would be notified.

#### 6. Conclusion as to Articles 81 and 82

The conclusion of the above is that *ex ante* enforcement through prescreening is generally and thoroughly unsuited for Articles 81 and 82. Deterrence may be difficult to achieve for some types of violations, in particular price cartels, which may be very profitable and are relatively easy to conceal, but *ex ante* enforcement through prescreening cannot remedy this situation, since the ease of concealment will make the enforcement of any obligation to submit to prescreening equally unworkable. On the other hand, *ex ante* enforcement is likely to lead to more errors than *ex post* enforcement because of the informational disadvantages from which the prescreening authority suffers, and it entails substantially higher enforcement costs. Voluntary prescreening is to be avoided because of the problems of adverse selection and distortion of enforcement priorities.

Nor can a system of voluntary notification be justified by any need to protect investments against the risk of a future finding of incompatibility with Articles 81 or 82. Indeed, provided that all existing information about the content of these legal rules is made publicly available and that they are not applied in an arbitrary way, this risk-bearing cost reflects the efficient internalization of a real cost in the undertakings' investment decisions.

If the choice for a (very hybrid) notification system at the time of the adoption of Regulation No. 17 can be understood as reflecting the revolutionary novel character of the prohibition of restrictive agreements, as well as possibly a conception of Article

81(3) as a tool for discretionary political decisions, these considerations are no longer relevant today.

This conclusion is confirmed by the relatively happy experience of the United States, where the prohibitions equivalent to Articles 81 and 82 have always been enforced exclusively *ex post* through deterrence, as well as by the fact that, before the publication of the White Paper,<sup>72</sup> the enforcement regime under Regulation No. 17 has constantly been criticised precisely on those aspects related to the (attempts at) *ex ante* enforcement.<sup>73</sup>

### C. *The Proposed New Regulation*

#### 1. Clear Choice for *Ex Post* Enforcement

The proposed new regulation clearly opts for *ex post* enforcement for the whole of Articles 81 and 82. Indeed, Article 1 of the proposed new regulation clearly states that "agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which do not satisfy the conditions of Article 81(3), and the abuse of a dominant position referred to in Article 82, shall be prohibited, no prior decision to that effect being required."<sup>74</sup>

The proposed new regulation does not provide any more for any possibility to notify agreements to the Commission, nor for exemption decisions. Applications for negative clearance are also no longer provided for.

As for the transition to the new enforcement system, Article 35 of the proposed new regulation provides that notifications and applications for negative clearance made under Regulation No. 17 shall lapse as from the date of application of the new regulation, and that the validity of individual exemption decisions adopted by the Commission under Regulation No. 17 shall also come to an end no later than on that date.<sup>75</sup>

Finally, under the proposed new regulation the competition authorities of the Member States are not allowed either to set up or keep a prescreening mechanism for the application of Arti-

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72. See White Paper, *supra* note 19.

73. See A.O. B. Hawk, *System Failure: Vertical Restraints and EC Competition Law*, 32 C.M.L.R. 973 (1995); V. KORAH, *EC COMPETITION LAW AND PRACTICE* 150-151 (6th ed. 1997); E. Tucker, *Europe's Paper Mountain*, *FIN. TIMES*, Feb. 11, 1998, at 13.

74. Proposed New Regulation, *supra* note 2, art. 1.

75. This transitional regime was announced in the White Paper, *supra* note 19, ¶ 129.

cles 81 and 82 EC. This follows from Article 1 cited above, as well as from Article 5 of the proposed new regulation which provides that the competition authorities of the Member States (only) "have the power in individual cases to apply the prohibition in Article 81(1) of the Treaty where the conditions of Article 81(3) are not fulfilled, and the prohibition in Article 82. For this purpose, acting on their own initiative or on a complaint, they may take any decision requiring that an infringement be brought to an end, adopting interim measures, accepting commitments or imposing fines, periodic penalty payments or any other penalty provided for in their national law. Where on the basis of the information in their possession the conditions for prohibition are not met they may likewise decide that there are no grounds for action on their part."<sup>76</sup>

## 2. Block exemptions

If the proposed new regulation does away with all individual exemption decisions, it keeps the instrument of block exemption regulations.<sup>77</sup>

As explained above,<sup>78</sup> block exemption regulations were initially adopted as a instrument to reduce the huge number of notifications which the Commission could not handle administratively. This historical justification is of course no longer relevant under the proposed new enforcement regime, when notifications will no longer exist.

In the new context, block exemption regulations can however still be justified as a mechanism to save on enforcement costs. Indeed, for any category of agreements (1) which are very frequently concluded in business practice, (2) for which a full

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76. Proposed New Regulation, *supra* note 2, art. 5. As to national courts, see *infra* Part III.B & C.

77. Their adoption is even facilitated in that Article 28(1) of the proposed new regulation gives the Commission a general power to adopt such regulations, following the procedure set out further in Article 28, whereas currently the Commission has more limited powers under Council Regulation No. 19/65 O.J. L 36/533 (1965) (Special English Edition 1965-66, p. 35) modified by Council Regulation No. 1215/1999 O.J. L 148/1 (1999), Council Regulation No. 2821/71 O.J. L 285/46 (1971) (Special English Edition 1971 - III, p. 1032), Council Regulation No. 3976/87 O.J. L 374/9 (1987), Council Regulation No. 1534/91 O.J. L 143/1 (1991) and Council Regulation No. 479/92 O.J. L 55/3 (1992), which would all be repealed by Article 41 of the proposed new regulation.

78. See *supra* note 66 and accompanying text.

individual assessment would, in the overwhelming majority of cases, lead to the conclusion that the conditions of Article 81(3) are fulfilled, and (3) which can be sufficiently clearly defined, the cost saving at the level of self-assessment by the undertakings when concluding these agreements as well as at the level of ex post litigation is likely to outweigh the cost of adopting the block exemption regulation.

This justification depends crucially on block exemption regulations being sufficiently well chosen and narrowly tailored so as to cover only those types of restrictions for which a full individual assessment would indeed in the overwhelming majority of cases lead to the conclusion that the conditions of Article 81(3) are fulfilled. As already indicated above,<sup>79</sup> this has not always been the case in the past, when the urge to get rid of unmanageably high numbers of notifications has led to excessively generous block exemptions, such as the exemption for exclusive purchase agreements irrespective of the market power of the undertakings concerned. The recent new block exemption for vertical agreements, with its 30% market share threshold, certainly constitutes a major improvement in this respect.<sup>80</sup> In the same line, the opening up of the possibility, not only for the Commission, but also for the competition authorities of the Member States to withdraw the benefit of block exemptions in individual cases, as well as the possibility for the Commission to disallow the block exemption regulation in a certain market, recently introduced for vertical agreements<sup>81</sup> and generalized in Articles 29(2) and 30 of the proposed new regulation, should serve to obviate the risk that too many undesirable agreements will be exempted.

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79. See *supra* note 67 and accompanying text.

80. Comm'n Regulation No. 2790/1999 O.J. L 336/21 (1999). This regulation does not, however, affect the current block exemption for motor vehicle distribution agreements (Comm'n Regulation No. 1475/95 O.J. L 145/25 (1995)), which expires on September 30, 2002. According to Article 11(3) of the latter regulation, the Commission will draw up a report on its evaluation on or before 31 December 2000. Other current block exemptions which have been heavily criticised in the literature are those in the transport and insurance sectors; see A.O. R. Van den Bergh, *Modern Industrial Organisation Versus Old-fashioned European Competition Law*, 2 ECLR 75, 79-81 (1996); M. Faure & R. Van den Bergh, *Restrictions of Competition on Insurance Markets and the Applicability of EC Antitrust Law*, 48 KYKLOS 65 (1995).

81. Articles 1a and 7(2) of Regulation No. 19/65 as added by Article 1(2) and (4) of Council Regulation No 1215/1999 O.J. L 148/1 (1999) and Article 8 of Comm'n Regulation No. 2790/1999 O.J. L 336/21 (1999).



### 3. Guidelines and Notices

In the White Paper, the Commission announced that it “intends to draw up more notices and guidelines to explain its policy and provide guidance for the application of the Community competition rules by national authorities.”<sup>82</sup>

Over the decades of application of Regulation No. 17, the Commission has published a number of notices, the earliest being the 1962 notice on exclusive dealing contracts with commercial agents,<sup>83</sup> and the most important being the notice on agreements of minor importance.<sup>84</sup> As with the block exemption regulations, the main purpose of these notices appears to have been to reduce the number of notifications to the Commission, by setting out which agreements in the opinion of the Commission do not fall under Article 81(1). When the notification system is abolished, the notices obviously lose this function.

Under the proposed new enforcement regime, notices or guidelines can still serve two functions: First, they can be an instrument for the Commission, or a national competition authority, to set out publicly how it intends to make use of its prosecutorial discretion, so as to guide the undertakings' behaviour accordingly.

Indeed, the Commission is entitled to apply different degrees of priority in dealing with the complaints submitted to it, in particular on the basis of the concept of sufficient Community interest.<sup>85</sup> A fortiori, it can choose which cases to pursue at its own initiative. The case law has also confirmed that “fines constitute an instrument of the Commission's competition policy,” and that “it must thus be allowed a margin of discretion when fixing their amount, in order that it may channel the conduct of undertakings towards observance of the competition rules.”<sup>86</sup>

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82. See White Paper, *supra* note 19, at ¶ 86.

83. See O.J. 139/3921 (1962). This notice has recently been replaced by the guidelines on vertical restraints, at [http://europa.eu.int/comm/competition/antitrust/legislation/vertical\\_restraints/guidelines](http://europa.eu.int/comm/competition/antitrust/legislation/vertical_restraints/guidelines).

84. Over the years, the Commission published four versions of this notice: O.J. C 64/1 (1970), O.J. C 313/3 (1977), O.J. C 231/2 (1986), and O.J. C 372/13 (1997). Other notices were published concerning cooperation agreements (O.J. C 75/3 (1968), corrected by O.J. C 84/14 (1968)), subcontracting agreements (O.J. C 1/2 (1979)), and cooperative joint ventures (O.J. C 43/2 (1993)).

85. *Automec v. Comm'n*, T-24/90, 1992 E.C.R. II-2250 (CFI), at ¶¶ 83-85.

86. *Martinelli v. Comm'n*, Case T-150/89, 1995 E.C.R. II-1186 (CFI), ¶ 59; *Van Megen Sports v. Comm'n*, Case T-49/95, 1996 E.C.R. II-1822 (CFI), at ¶ 53; *Volkswagen*

Of course, the Commission could just exercise these margins of discretion on a case by case basis, and let undertakings gradually learn about its policy and adapt their conduct accordingly. The result may however be reached more quickly and at lower cost (especially for the undertakings trying to understand the Commission's policy) if the policy is announced through a notice or guidelines.

Examples of notices that serve this function are the Commission notices on the non-imposition or reduction of fines in cartel cases<sup>87</sup> and on the method of setting fines.<sup>88</sup> The recent guidelines on vertical restraints also partially serve this function, especially the chapter on withdrawal and disapplication of the block exemption regulation.<sup>89</sup> In the White Paper, the Commission announced that it will publish a notice clarifying the concept of sufficient Community interest, so that complainants can more easily determine whether they would be better advised to address their complaint to the Commission or rather at the national level.<sup>90</sup>

The second function that guidelines or notices could still serve is that of explaining the law. All the more now that the Commission is giving up its exclusive competence to apply Article 81(3), there can be no doubt that giving authoritative interpretations of the law is the task of the Court of Justice, together with the Court of First Instance and in cooperation with the national courts. The Commission can however make a valuable contribution by collecting, ordering, and disseminating available information about the law, thus reducing the cost, and enhancing the accuracy of the self-assessment by undertakings, and of ex post enforcement proceedings. The recent guidelines on vertical restraints<sup>91</sup> constitute a good example. Drawn up on the basis of wide consultations involving competition experts from the Member States (as well as the Community's partners in the

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v. Comm'n, Case T-62/98, Judgment of 6 July 2000, not yet published in E.C.R. (CFI), ¶ 335.

87. O.J. C 207/4 (1996); see also W. Wils, *The Commission Notice on the Non-Imposition or Reduction of Fines in Cartel Cases: A Legal and Economic Analysis*, 22 E. L. REV. 125 (1997).

88. O.J. C 9/3 (1998); see also W. Wils, *The Commission's New Method for Calculating Fines in Antitrust Cases*, 23 E. L. REV. 252 (1998).

89. O.J. 139/3921 (1962), *supra* note 83, ¶¶ 71-87.

90. See White Paper, *supra* note 19, at ¶ 119.

91. See *supra* note 83 and accompanying text.

European Economic Area), industry, and the legal profession, they present in a readily accessible form current general understanding of the European law on vertical restraints. The Commission notice on the definition of relevant markets for the purposes of Community competition law<sup>92</sup> can be considered similarly useful.

#### 4. Non-infringement Decisions

Article 10 of the proposed new regulation empowers the Commission to adopt decisions in which it finds that, on the basis of the information in its possession, Articles 81 or 82 do not apply to a certain agreement or practice.<sup>93</sup> The Commission can only take such decisions "for reasons of the Community public interest," and "acting on its own initiative." As explained in recital 13 of the proposed new regulation and in the White Paper, these non-infringement decisions will only be taken in exceptional cases, where a transaction raises a new question. They would be of a declaratory nature, and would have the same legal effect as negative clearance decisions have at present.<sup>94</sup>

The idea is thus certainly not to introduce a new system of voluntary notification for prescreening. Indeed, non-infringement decisions cannot be taken upon application of the undertakings concerned. Moreover, contrary to the exemption decisions under Regulation No. 17, they are not of a constitutive but only of a declaratory nature. Thus, they do not immunize against later findings of infringement by national courts or national competition authorities,<sup>95</sup> or even by the Commission itself if circumstances have changed or new information becomes available.

Within a system based on ex post enforcement, the justification for such non-infringement decisions may again be one of efficient dissemination of information about the law. Imagine that the Commission, either on the basis of a complaint or on the basis of its own suspicions of violation of Articles 81 or 82,

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92. O.J. C 372/3 (1997).

93. As to Article 81, this may be either because the conditions of Article 81(1) are not fulfilled, or because those of Article 81(3) are met.

94. See White Paper, *supra* note 19, ¶¶ 88-89.

95. Article 16 of the proposed new regulation does however require national courts and competition authorities to give deference to Commission decisions. See *infra* note 153 accompanying text.

has opened an investigation against an agreement of practice. At the end of the investigation, the Commission may find out that upon thorough analysis the agreement or practice does not violate those provisions, and that the file can thus be closed. It will have to inform the undertaking or undertakings concerned of this closure, which can be done by simple letter. If the opening of the investigation had been made public, a press release may also be indicated to reverse the earlier publicity. In the overwhelming majority of cases the precise reasons why the agreement or practice was found not to constitute a violation would be factual and case specific. Writing the reasoning down in a decision would thus not serve any purpose. In those exceptional cases however where a new question is raised, for which there are no precedents in the case law, which has also not been dealt with in guidelines, and which is likely to come up in other cases in the future, the cost of drafting and publishing a reasoned decision could be outweighed by the benefit in terms of reduction of the cost and increase in the accuracy of the self-assessment by undertakings and of ex post enforcement proceedings in future other cases.

### 5. Reasoned Opinions

In the explanatory memorandum accompanying its proposal for the new regulation, the Commission announces that it:

[W]ill remain open to discuss specific cases with the undertakings where appropriate. In particular, it will provide guidance regarding agreements, decisions or concerted practices that raise an unresolved, genuinely new question of interpretation. To that effect, the Commission will publish a notice in which it will set out the conditions under which it may issue reasoned opinions. Any such system of opinions must not, however, lead to companies being entitled to obtain an opinion, as this would reintroduce a kind of notification system.<sup>96</sup>

As explained above,<sup>97</sup> advance assessment of the legality of envisaged actions should in principle be left to the undertakings themselves, with the help of their legal advisors. The Commission should not be involved for at least three reasons: First,

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96. Proposed New Regulation, *supra* note 2, Explanatory Memorandum.

97. *See supra* Part I.B.3.c.

whenever it comes to applying the law to the specific agreement or practice, envisaged by the undertakings concerned in the markets in which they operate, the Commission will inevitably suffer from an informational disadvantage. Second, whereas the Commission, like any enforcement authority, should as a matter of priority devote its limited resources to the most serious infringements, the agreements and practices on which it will be asked to give its advance opinion will never fall in that category. Third, the efficient level of investment being that induced when investors bear all real costs and benefits of their decisions, the cost of ensuring compliance with competition law should be borne by the undertaking itself.

Any role for the Commission could only be justified by considerations of efficient dissemination of information about the law, in line with the justifications for guidelines and non-infringement decisions given above.

For the Commission to publish a reasoned opinion could be justified by considerations of efficient dissemination of information about the law if (1) the opinion only deals with abstract questions of interpretation of the law, not the application to the agreement or practice which the undertaking which submitted the question to the Commission is considering, (2) the question is one not dealt with in the case law or in guidelines, (3) the question is one that the Commission can provide information on without spending many resources, and (4) the question is likely to be of importance for the assessment of a considerable number of other agreements and practices in the future, for which the reasoned opinion would substantially decrease the cost or increase the accuracy at the level of the self-assessment by the undertakings concerned and at the level of ex post enforcement proceedings.

## 6. Register of Restrictive Agreements

Finally, Article 4(2) of the proposed new regulation would empower the Commission to introduce a registration obligation for types of agreements, decisions, or practices caught by Article 81(1). The detailed provisions, including possible sanctions for non-compliance with the registration obligation, are to be determined in a Commission regulation. The proposed article does however state that the registration of an agreement or practice

shall confer no entitlement on the registering undertakings, and does not stand in the way of possible prohibition or fining decisions.

The idea does not originate with the Commission, but was launched, in the course of the discussions following the publication of the White Paper, by Dr. Böge, the president of the *Bundeskartellamt*, the German competition authority.<sup>98</sup> The objective is to enhance the effectiveness of ex post enforcement by creating transparency as to the existence of restrictive agreements and thus facilitating ex officio proceedings by the Commission and national competition authorities, complaints by third parties before these authorities, as well as private enforcement. The proposal is inspired by a provision in the German Act on Restraints of Competition, which requires registration of certain types of joint purchasing agreements between small and medium-sized enterprises which benefit from a legal exception to the cartel prohibition.<sup>99</sup>

It is certainly right that the effectiveness of ex post enforcement through deterrence crucially depends on the ability of the enforcement authorities or private complainants to detect infringements. Measures that facilitate the detection of infringements, without this benefit being outweighed by excessive administrative cost or other perverse effects, should thus certainly be welcomed.

The crucial question is however whether a registration obligation could be devised which really facilitates the detection of infringements without excessive administrative cost or other perverse effects. A registration obligation will certainly not facilitate the detection of the most serious (hard core) infringements of Article 81, such as price cartels, which will never be registered, even if the registration obligation is backed up with the threat of a fine.<sup>100</sup> The register could thus only be helpful for the detection of non-hard-core infringements. This raises a double problem. The first problem is that non-hard-core infringements can typically not be established on the mere basis of the content or

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98. U. Böge, *The Modernisation of EC Antitrust Policy*, Paper presented at the Fifth EUI Competition Law and Policy Workshop (June 2-3, 2000), at <http://www.iue.it/RSC/competition/papers.htm>; see also *Kartelle im Internet ankündigen* (interview with Dr. Böge, *Süddeutsche Zeitung* Nr. 183, Aug. 10, 2000, p. 21).

99. *Gesetz gegen Wettbewerbsbeschränkungen* §§ 4(2), 9(4), BGBI I-2512 (1998).

100. See *infra* note 162 and accompanying text.

object of the agreement, but rather require a full analysis of the actual conditions in which the agreement functions.<sup>101</sup> In this respect, the register, however, will not be helpful. The second problem relates to the risk of distortion of enforcement priorities. Ideally, an enforcement authority should devote its resources as a matter of priority to the most serious infringements. If the register were to lead to many complaints against less serious infringements, the need for the Commission and national competition authorities to deal with these complaints, if only to conclude that they do not deserve to be pursued, could constitute a drain on their scarce resources and thus have a perverse effect on the overall effectiveness of *ex post* enforcement. Finally, even using the latest information technology, the administrative cost of the registration obligation is unlikely to be negligible.

The experience with the registration obligation for certain joint purchasing agreements under German law, which only entered into force on January 1, 1999, with a transitional period,<sup>102</sup> may however over the coming years show the above somewhat skeptical assessment to be wrong. The proposed new regulation is well adapted to this uncertainty, in that it does not itself introduce any registration obligation but rather empowers the Commission to do so, when considered appropriate, at a later time.

## II. *THE RESPECTIVE ROLES OF THE COMMISSION AND THE COMPETITION AUTHORITIES OF THE MEMBER STATES*

### A. *What the Proposed New Regulation Does Not, and What it Does*

It is important from the outset to be clear about what exactly the proposed new regulation will change as to the respective roles of the Commission and the national competition authorities.

#### 1. No Sharing of the Exemption Monopoly

The proposed reform is not about the Commission sharing with the national authorities its current monopoly for granting

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101. See *Eur. Night Serv. et al. v. Comm'n*, Cases T-374/94, T-375/94, T-384/94, T-388/94, [1998] E.C.R. 3196, ¶ 136.

102. Gesetz gegen Wettbewerbsbeschränkungen §131(2), BGBI I-2512 (1998).

exemptions under Article 81(3) EC. Indeed the power to grant individual exemptions is not reallocated but entirely removed. In the proposed new system, no authority or court, European or national, will have the competence to adopt constitutive positive decisions which immunize an agreement and the parties to it against attack by other competition authorities or in other courts. Rejections of complaints or closures of *ex officio* proceedings by the Commission or by national competition authorities do not prevent findings of infringement by other authorities or national courts.<sup>103</sup> As to national courts, the principle of *res judicata* implies that a final judgment rendered by a court of competent jurisdiction on the merits of an action for failure to execute a contract or for tort is conclusive as to the rights of the parties, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action. It does not however prevent subsequent action by competition authorities or by other private parties.

The proposed new system thus does not involve any form of multiple *ex ante* enforcement. Different authorities could either clear or block a proposed transaction, with all the ensuing problems of multiple notifications, conflicting decisions, or forum shopping by undertakings seeking clearance from the laxest authority.<sup>104</sup>

## 2. Multiple Ex Post Enforcement

What the proposed new regulation will do is facilitate prosecution of infringements of Articles 81 and 82 by national competition authorities, i.e., multiple *ex post* enforcement.

Under Regulation No. 17, the competition authorities of the Member States have only rarely prosecuted infringements of Articles 81 or 82. This inactivity can be explained by two factors. The first is that in only half of the Member States national law

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103. The rejection of a complaint or the decision not to intervene may of course have some persuasive value, if well reasoned. In the case of non-infringement decisions adopted by the Commission pursuant to Article 10, Article 16 of the proposed new regulation also requires from national authorities and courts a degree of deference, as they should endeavour to avoid conflict. Proposed New Regulation, *supra* note 2, art. 16.

104. Because of such problems, *ex ante* enforcement tends to go together with a monopoly of a single enforcement authority. The EC Merger Regulation and the application of Article 81(3) under Regulation No. 17 are examples.



empowers national competition authorities to apply Articles 81(1) and 82.<sup>105</sup> As to those countries which have a national authority empowered to apply Community competition law, the other factor explaining the lack of prosecution of infringements of Article 81(1) is that the Commission's power to grant exemptions under Article 81(3), combined with Article 9(3) of Regulation No. 17, discourages national authorities from taking up Article 81(1) cases.<sup>106</sup> Indeed, whenever a national competition authority starts prosecuting an infringement of Article 81(1), the undertakings concerned may decide to notify their agreement or practice to the Commission, which, being under a legal obligation to act upon the notification, risks being forced to initiate a procedure, thus taking away the national authority's competence. In its 1997 notice on cooperation between national competition authorities and itself, the Commission tried to reduce this problem by announcing that "it considers itself justified in not examining as a matter of priority" such "dilatatory notifications."<sup>107</sup> This attempted solution is however not always easy to implement, and its legality is yet to be tested in the Community Courts.

The proposed new regulation removes both obstacles to prosecution of infringements of Articles 81 and 82. As to the first problem, Article 36 of the proposed new regulation obliges Member States to designate the competition authorities responsible for the application of Articles 81 and 82 of the Treaty, and to take the measures necessary to empower those authorities to apply those Articles. As to the second problem, it disappears with the notification system being abolished. It is true that Article 11(6) of the proposed regulation still provides that the initiation by the Commission of proceedings for the adoption of a decision relieves the competition authorities of the Member States of their competence to apply Articles 81 and 82, but this should not discourage action by the national authorities. Indeed, in almost four decades of application of Regulation No. 17, the Commission has, as far as I know, never knowingly and

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105. See *supra* note 15 and accompanying text.

106. See A.W. Kist, *Coherence and Efficiency in the Decentralised Enforcement of EC Competition Rules: Reflections on the White Paper on Modernisation*, Paper presented at the Fifth EUI Competition Law and Policy Workshop (June 2-3, 2000), at <http://www.iue.it/RSC/competition/papers.htm>.

107. Comm'n Communication, O.J. C 313/3 (1997), ¶¶ 55-57.

willingly removed a case from a national authority that wanted to continue dealing with it, in the absence of a notification. As there will be no notifications any more, and given that under Article 11(3) of the proposed new regulation the Commission will be informed of all cases taken up by national authorities, those authorities should thus not feel discouraged from prosecuting infringements of Articles 81 and 82 EC.

Prosecutions by national competition authorities of infringements of Articles 81 and 82 are also facilitated by two other provisions in the proposed new regulation. Article 12(1) allows for the exchange of all types of information between the Commission and national authorities and the use of this information as evidence by the receiving authority. National authorities could thus use evidence of infringements passed on to them by the competition authorities of other Member States or by the Commission. Currently, Article 20(1) of Regulation No. 17 prevents the national competition authorities from using as evidence information supplied by the Commission.<sup>108</sup>

In the same spirit, Article 21(1) of the proposed new regulation creates the possibility for national competition authorities to carry out any fact-finding measure under their national law on behalf and for the account of the authorities of other Member States. National competition authorities will thus be able to help each other in collecting evidence of violations of Articles 81 and 82 EC.

### B. *Why Should National Authorities Prosecute Violations of Articles 81 and 82?*

The question could be asked why prosecution by national competition authorities of violations of Articles 81 and 82 should be encouraged. Why not leave this task exclusively to the Commission? Three reasons can be given:

The first reason is one of resources. By adding those of the competition authorities of the Member States, substantially more resources can be devoted to the detection and punishment of

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108. *Asociación Española de Banca Privada et al.*, Case C-67/91, [1992] E.C.R. 4820. That this impossibility flows from Regulation No. 17 and not from a higher legal norm is confirmed by *Postbank v. Commission*, T-353/94, [1996] E.C.R. 946 (holding that national courts, whose relationship with the Commission is not regulated by Regulation No. 17, can fully use information provided to them by Commission).

violations of Articles 81 and 82.<sup>109</sup> Given the limited resources of the Commission, and the current inadequate level of effective deterrence, this is certainly to be welcomed. This first reason is however not a very profound one, as the same result could be obtained by increasing the resources of the Commission's Directorate General for Competition.

The second reason is that for cases where the relevant markets are local, national, or regional, the competition authority or authorities concerned are likely to have better access to the relevant information than the Commission.

The third and most profound reason is that multiple enforcement is likely to lead to more innovation in the interpretation and application of the law. Enforcement by several authorities is likely to be more creative, innovative, and adaptive to change than enforcement by a monopolist authority.<sup>110</sup>

### C. *Criteria for Allocating Cases*

In a system of multiple enforcement the question may arise: who is best placed to investigate and prosecute a given case? The Commission? A national competition authority? Or the competition authorities of two or more Member States working together?

Three sets of factors could determine the answer: the geographical scope of the relevant market and the location of the evidence, the remedial and sanctioning powers of the different authorities, and their available resources. For cases where the relevant markets are local, national, or regional, the competition authority or authorities concerned are likely to have better access to the relevant information than the Commission. Conversely, the Commission is better placed to deal with cases of a European dimension. The location of evidence is also relevant, as the competition authorities of the Member States normally have investigatory powers only on their own territories. Remedial and sanctioning powers are relevant, as the authority that deals with the case should be able to effectively order termina-

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109. According to figures cited in the White Paper, in 1998 there were around 1222 officials responsible for investigating antitrust cases in the Member States as opposed to 153 in Commission. See White Paper, *supra* note 8, ¶ 44.

110. See E. Fox, *Modernization: Efficiency, Dynamic Efficiency, and the Diffusion of Competition Law*, Paper presented at the Fifth EUI Competition Law and Policy Workshop (June 2-3, 2000), at <http://www.iue.it/RSC/competition/papers.htm>.

tion of the violation and to impose sufficiently high sanctions to deter. Finally, the respective available resources of the different authorities will obviously play a role.

These factors do not necessarily always point the same way for the investigation and collection of evidence on the one hand and the taking of a decision and imposition of sanctions on the other hand. It may also happen that it becomes clear only at a later stage in the proceedings that the authority, which initially appeared well placed to deal with the case, is not the best placed to bring it to an end.

Three new provisions in the proposed new regulation may facilitate a rational allocation of cases: Article 21(1), which creates the possibility for the competition authority of one Member State to carry out fact-finding measures on behalf and for the account of the authority of another Member State; Article 12, which allows authorities to exchange all information and make subsequent use of it, and thus makes possible not only the transfer of evidence but also the transfer of entire cases from one authority to another; and Article 24(3), which provides that the running of the limitation period for proceedings by the Commission is interrupted not only by certain investigatorial or procedural acts taken by the Commission itself, but also by such acts taken by national competition authorities.<sup>111</sup>

Given that the question of who is best placed to deal with a given case depends on a number of factors specific to each case, the absence of any rule in the proposed new regulation as to which authority could or should deal with which type of cases should be approved. It is no doubt useful that the Commission and the authorities of the Member States work out some arrangement between them, but such arrangement should remain flexible and informal.

In the explanatory memorandum accompanying the proposed new regulation, the Commission announces a notice on cooperation between competition authorities that may contain some general indications on the allocation of cases between the Commission and the competition authorities of the Member States. Similar indications can currently be found in the 1997

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111. Currently, acts by national authorities can only interrupt the running of the period if they are taken at the request of the Commission. *See* Council Regulation No. 2988/94, O.J. L 319/1 (1974).

Commission notice on cooperation between national competition authorities and the Commission.<sup>112</sup>

#### D. *Possible Problems with Multiple Ex Post Enforcement*

Even if multiple enforcement is much less likely to cause problems in a system of ex post enforcement than under ex ante enforcement,<sup>113</sup> some possible problems should be considered.

##### 1. Duplication

The first possible problem is duplication. It would certainly be wrong to try and avoid any instance where two or more authorities pursue the same case. In quite a few situations it may be desirable for more than one authority to take up the same case, or for a second authority to take up a case after a first authority has abandoned it. Indeed, action by more than one authority at the same time may be necessary in order to conduct a full investigation of all the facts, or in order to ensure adequate remedies or sufficiently strong deterrence. It may also make sense for a second authority to take up a case abandoned by a first authority, if the second authority has reasons to believe that it can do a better job than the first. It is precisely in this way that some of the benefits of multiple enforcement in terms of more effectiveness and innovation can be brought about.

Duplication is, however, to be avoided if it means that several authorities each do exactly the same job, without any added value in terms of better enforcement results. One can be confident that in general the national competition authorities and the Commission will be anxious to avoid such pointless duplication, as it would waste some of their scarce resources.

To be able to avoid duplication, however, each authority needs to know which cases the other authorities are already dealing with. It must also be ensured that complainants cannot force an authority to pursue a case that is already adequately being dealt with, or has adequately been dealt with by another authority.

The proposed new regulation contains the necessary provisions in this respect: Article 11(3) obliges national competition authorities to inform the Commission about all proceedings be-

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112. Comm'n Communication, *supra* note 88, O.J. C 313/3 (1997).

113. *See supra* note 104.

ing opened. Combined with Article 12, which allows all exchange of information between the Commission and the national authorities, this provides the necessary legal basis for setting up an information system (intranet) through which all national authorities and the Commission would be informed about all the cases being dealt with by any authority in the network. As to the problem of complainants forcing authorities into wasteful duplication, Article 13 of the proposed new regulation allows for both the suspension of a pending investigation and the rejection of a complaint on the ground that another authority is dealing or has dealt with the same case.

Finally, the old rule of Article 9(3) of Regulation No. 17, maintained in Article 11(6) of the proposed regulation, according to which national competition authorities lose their competence to deal with a case when the Commission opens an investigation, excludes duplication between the Commission and a national authority. It could also be used in those no doubt rare cases where more than one national authority would want to pursue the same case, without any possible added value in terms of better enforcement results. If the national authorities concerned were not able to find between them a satisfactory arrangement as to who should take the case, the Commission could step in and take the case itself.

## 2. Conflicting Decisions

Under the proposed new regulation no authority will take any constitutive positive decisions, comparable to the exemption decisions under Regulation No. 17 or the clearance decisions under the E.C. Merger Regulation. Both the Commission and the competition authorities of the Member States can either take negative decisions (ordering termination of an infringement and/or imposing sanctions) or decide not to take such negative decision. In the latter case, the authority may close its file informally without any decision, or in the form of a decision stating that there is no reason for it to intervene, or in the form of a rejection of a complaint. The Commission may also adopt a non-infringement decision pursuant to Article 10 of the proposed new regulation.

There is obviously no conflict between a negative decision of one authority and the non-intervention of a second authority

if the closure of the file or the rejection of the complaint is based on an assessment of the second authority's enforcement priorities, rather than on a substantive judgment as to whether a violation of Articles 81 or 82 exists. There is no conflict either where the different authorities concerned did not have the same facts in their possession.

Only if the decision not to intervene or the rejection of a complaint is based on the authority's judgment, on the basis of all the facts, that there is no substantive violation, could there be said to be a conflict, meaning that two authorities have a different view as to the application of Articles 81 or 82 to the same facts.

Such conflict is, however, not really problematic. There is no question of undertakings being confronted with conflicting legal orders which they cannot simultaneously respect, since decisions not to intervene, rejections of complaints, and non-infringement decisions do not contain any order. There is no question either of the full effect (*effet utile*) of any decision being undermined by the other one, again because decisions not to intervene, rejections of complaints, and non-infringement decisions do not contain any order addressed to any undertaking or person, and do not require any execution.

The mere fact that it becomes apparent that two authorities have a different view as to the application of Articles 81 or 82 should not as such be regarded as problematic. Indeed, in a system where Articles 81 (as a whole) and 82 have direct effect, neither the Commission nor the national competition authorities are supposed to possess the one and only true understanding of the law. Reasonable people can disagree about the interpretation of the law. This is normal, and even desirable, to the extent that it allows creativity and innovation and thus ultimately a richer and better understanding of the law. Excessive divergences will not be long lived, as in the end all cases can reach the Court of Justice, which ensures overall consistency. The undertakings concerned have enough of an incentive to bring the necessary appeals for those cases that deserve to reach the Court of Justice.

As I do not consider that conflicting decisions pose a problem in a system of ex post enforcement, I do not personally see

any need for mechanisms to reduce the incidence of conflicting decisions.

Those who are concerned about conflicting decisions will however find that the proposed new regulation contains quite a few provisions which would tend to reduce the incidence of conflicting decisions or could be used to that effect: Article 11(3) obliges national authorities to inform the Commission about all cases they deal with, and Article 11(4) provides for a mandatory consultation of the Commission on all envisaged negative decisions. Article 12(1) makes it possible for this information and consultation to involve all other national authorities. Under Article 11(6), the Commission can withdraw a case from a national authority, and according to Article 16 the competition authorities of the Member States shall use every effort to avoid conflict with Commission decisions. These provisions, which I believe are justified largely for other reasons, namely the avoidance of duplication and of national bias, could be used by the Commission so as to minimize or even exclude all incidences of conflicting decisions. I believe that such ambition would be unwise, not only because there is no need to do this, but also because it would detract Commission resources from other work.

### 3. National Bias

A third possible problem with multiple enforcement relates to the risk of national bias. I have no reason to suspect that the competition authorities of the fifteen Member States would not be sufficiently independent or professional to avoid bias in favour of national interests. The issue should however be considered, if only because, even in the absence of any real national bias, there may be a problem of perceptions. In particular, undertakings or persons unhappy with a decision of a competition authority of another Member State may be led to believe that they were the victims of national bias.

One could distinguish two situations of national bias. The first would be where the authority of a Member State is excessively severe in that it wrongly prohibits or punishes, at the request of a national complainant, the behaviour of a foreign undertaking, for instance aggressive competition on the merits by a foreign dominant undertaking, harming less efficient national competitors. The second situation would be where the authority



of a Member State is excessively lax in that it refuses to act upon complaints by foreigners against violations committed by domestic undertakings, for instance complaints by foreign entrants about foreclosure of distribution channels by the domestic incumbent.

The second situation is less of a problem, because the foreign complainants always have the alternative to bring their complaint before the Commission, national courts, or possibly the competition authority of another Member State. The first situation is much more problematic. The proposed new regulation adequately addresses the issue, however, in that Article 11(4) obliges national competition authorities to consult the Commission before adopting a negative decision, with the possibility for the Commission to take away the case from the national authority by application of Article 11(6). Even if it is unlikely that the Commission will often, or ever, have to use this mechanism, its presence will have a preventive effect, to the extent necessary, as well as reassure against perceptions of national bias.

At a deeper level, the proposed new regulation, with its potential of much closer and more intensive exchange and cooperation within a network of national competition authorities and the Commission, tends to reduce the risk of national bias. Indeed, if there exists a problem of bias in favour of national interests, it must be because the competition authorities of the Member States would each be accountable or feel accountable to narrowly domestic constituents.<sup>114</sup> By making all national competition authorities and the Commission act in close cooperation, as Article 11(1) envisages, the proposed new regulation will tend, over time, to make national authorities feel accountable towards the other authorities in the network, and susceptible to their peer pressure, which will reduce any risk of national bias.<sup>115</sup>

#### 4. Forum Shopping

The fourth and last possible problem with multiple enforcement is forum shopping. Under *ex ante* enforcement forum

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114. See P. Mavroidis & D. Neven, *The White Paper: A Whiter Shade of Pale. Of Interest and Interests*, Paper presented at the Fifth EUI Competition Law and Policy Workshop (June 2-3, 2000), at <http://www.iue.it/RSC/competition/papers.htm>.

115. See G. Majone, *The Credibility Crisis of Community Regulation*, 38 J. COMMON MKT. STUD. 273, 296-98 (2000).

shopping can be a very serious problem indeed, as undertakings could try to have their proposed operation cleared by the most lax authority. There is no such risk under multiple ex post enforcement. The only possible forum shopping under ex post enforcement is by complainants who would tend to select the authority most likely to act upon their complaint, or try a second chance with another authority if their complaint has been rejected by a first authority.

Such forum shopping is very often not problematic at all. Indeed, it is desirable that complainants carefully select the authority best suited to deal with their complaint. There is nothing wrong either with an unsuccessful complainant trying again with a second authority that is willing and able to deliver a better enforcement result than the first.

Forum shopping appears only problematic either if it leads to wasteful duplication or if it exploits possible national bias. As explained above,<sup>116</sup> the proposed new regulation adequately addresses these problems.

#### IV. *THE ROLE OF PRIVATE COMPLAINANTS AND NATIONAL COURTS*

##### A. *The Role of Private Complainants in Public Enforcement*

Private parties harmed by violations of Articles 81 or 82 EC can play a double role in the enforcement of these prohibitions. They can themselves sue for damages or injunctive relief in the national courts. They can also instigate public enforcement by lodging complaints with the Commission or national competition authorities.

As to the role of complainants before the Commission, the proposed new regulation does not contain anything new. Article 7(2) merely repeats the basic rule currently laid down in Article 3 of Regulation No. 17, that any natural or legal person who can show a legitimate interest can lodge a complaint requesting the Commission to order termination of an infringement.<sup>117</sup> According to Article 34(b) of the proposed new regulation, the Commission in a further implementing regulation can deter-

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116. See *supra* Parts II.D.1 & 3.

117. Proposed New Regulation, *supra* note 2, art. 7(2).

mine more detailed rules.<sup>118</sup> In the White Paper the Commission proposed to submit itself to an obligation to inform the complainant within a time limit of four months as to whether it intends to take action on the complaint.<sup>119</sup> The Commission also announced the publication of guidelines clarifying the concept of sufficient Community interest, on the basis of which it determines its enforcement priorities, so as to guide complainants' choice of the forum in which to pursue their complaint.<sup>120</sup>

The proposed new regulation does not regulate the position of complainants before the competition authorities of the Member States, this matter being left to national law. The one exception is Article 13 which allows national competition authorities to suspend their proceedings or to reject a complaint on the basis that the same agreement or practice is being dealt with or has already been dealt with by the competition authority of another Member State or by the Commission.<sup>121</sup> As explained above,<sup>122</sup> this rule, which also applies to the Commission, serves to avoid wasteful duplication.

B. *Private Enforcement and the Role of National Courts: What the Proposed New Regulation will not Change, and What it Will Change*

1. Impact on Private Enforcement and on Contractual Litigation

Private enforcement of the prohibitions in Articles 81 and 82 in the strict sense, meaning actions for damages or for injunctive relief being brought in national court by third parties harmed by anticompetitive agreements or practices, is quite uncommon in Europe, certainly much less common than in the United States.

By abolishing the notification system and the exclusive competence for the Commission to apply Article 81 (3), the proposed new regulation removes an obstacle for private enforcement of Article 81, as it will no longer be possible to bring court proceedings in practice to a halt by lodging a notification with the Com-

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118. Proposed New Regulation, *supra* note 2, art. 34(b).

119. See White Paper, *supra* note 19, at ¶ 120.

120. *Id.* at ¶ 119.

121. Proposed New Regulation, *supra* note 2, art 13.

122. See *supra* Part II.D.1.

mission.<sup>123</sup>

As the experience with Article 82 shows, however, the relative absence of private enforcement is due to other factors as well.<sup>124</sup> These are partly cultural, related to a generally lower level of litigiousness and a weaker competition culture, but also legal, linked to the unavailability of class actions, contingency fee arrangements, treble damages, or discovery procedures. The proposed new regulation does not attempt to remove any of these legal obstacles, which are part of national law.

If the proposed new regulation is thus unlikely to have a major, immediate impact with regard to actions for damages or for injunctive relief by third parties, it will certainly have important effects in the area of contractual litigation: When parties to a contract fall out with each other, the interested party may invoke incompatibility with Articles 81 or 82 EC to stop execution of the contract or to justify its earlier non-execution. Here the proposed new regulation will have a double effect. The first effect is that it will no longer be possible to invoke Article 81(2) EC to void agreements which are restrictive of competition in the meaning of Article 81(1) but which fulfill the four redeeming conditions of Article 81(3). The second effect is that national courts will themselves apply the four conditions of Article 81(3).

## 2. Agreements that Fulfill the Conditions of Article 81(3) Will No Longer Be Void

This first effect of the proposed new regulation results from the abolition of the notification system and the move to a pure system of ex post enforcement. It does not concern vertical agreements and other agreements covered by Article 4(2) of Regulation No. 17, since for those agreements the notification system is not applicable any more since 18 June 1999.<sup>125</sup> For other types of agreements, however, the current situation is that agreements that fall under Article 81(1) EC, that are not covered by a block exemption and that have not been earlier notified to the Commission, are void under Article 81(2), even if they fulfill the four conditions of Article 81(3). Many agree-

123. See White Paper, *supra* note 19, ¶ 100.

124. See Ehlermann, *supra* note 30, at 553.

125. See *supra* note 26 and accompanying text.

ments appear to be in this situation.<sup>126</sup> Under the proposed new regulation, agreements falling under Article 81(1) and not covered by a block exemption will only be void if the conditions of Article 81(3) are not fulfilled.

This change is obviously to be welcomed, as the enforcement of the material rule laid down in Article 81 EC, namely the prohibition on restrictive agreements without redeeming virtue, cannot possibly be served by rendering agreements that do not violate this prohibition unenforceable.

### 3. National Courts Will be Able to Apply the Four Conditions of Article 81(3) Themselves

Under Regulation No. 17, national courts cannot themselves apply the four conditions of Article 81(3). Even in the case of vertical agreements and other types of agreements covered by Article 4(2) of Regulation No. 17, for which the notification system is not applicable any more, national courts which are called upon to apply Article 81(1), by virtue of its direct effect, cannot themselves apply Article 81(3). They instead have to suspend their proceedings and wait for a decision of the Commission on whether or not the four conditions of Article 81(3) are met. Only if the conditions for the application of Article 81(3) are clearly not satisfied and there is, consequently, scarcely any risk of the Commission taking a different decision, may the national court continue the proceedings and rule on the agreement in question.<sup>127</sup>

The proposed new regulation will do away with this impossibility for national courts to apply themselves Article 81(3): Article 6 provides that "national courts before which the prohibition in Article 81(1) of the Treaty is invoked shall also have jurisdiction to apply Article 81(3)."<sup>128</sup>

This change is to be welcomed for several reasons. First, it is manifestly more economical to have one single decision-maker decide whether the same agreement falls under Article 81(1) and fulfills the conditions of Article 81(3). Both assessments require knowledge of largely the same facts, and in substance both

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126. See *supra* note 30 and accompanying text.

127. See *Delimitis*, Case C-234/89, [1991] E.C.R. 935, ¶ 50.

128. Proposed New Regulation, *supra* note 2, art. 6.

provisions are closely linked.<sup>129</sup> Splitting the assessment between the national court and the Commission slows down contractual litigation, increases its overall cost, and increases the risk of inconsistencies.

Secondly, all the resources that the Commission has to spend on making Article 81(3) assessments for the purposes of resolving contractual disputes are necessarily diverted from its other work. The Commission should rather spend these resources on the detection and punishment of the most serious infringements, such as secret price fixing or market sharing. For this task, the Commission is really needed, whereas the application of Article 81(3) in a contractual dispute can be perfectly left to the national courts.

Thirdly, entrusting national courts with the task of applying Article 81(3) has the benefit of consolidating the interpretation of Article 81(3) as a true rule of law. As already mentioned above,<sup>130</sup> this Treaty provision, read in isolation, could originally have been read either as a true rule of law or as a discretionary political tool. The case law and decisional practice of almost 40 years make it clear today that the first reading is the correct one. The proposed new regulation has the merit of consolidating this interpretation.<sup>131</sup>

#### 4. No Declaratory Judgements

By giving national courts “before which the prohibition in Article 81(1) is invoked” the competence “also” to apply Article 81(3), Article 6 of the proposed new regulation is designed to exclude the possibility for the parties to the restrictive agreement to take the initiative and bring an action in national court for a declaratory judgment, stating that the infringement does not infringe Article 81.<sup>132</sup> Indeed, such proceedings, which are the judicial equivalent of the administrative notification system being abolished, would be incompatible with the overall thrust

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129. See *Bosch v. Van Rijn*, Case 13/61, [1962] E.C.R. 52 (describing the provisions as “forming an indivisible whole”).

130. See *supra* Part I.B.3.e.ii.

131. See J. Burrichter, Application of Article 81(3) by National Courts – Remarks from the Point of View of a Practitioner, Paper presented at the Fifth EUI Competition Law and Policy Workshop (June 2-3, 2000), at <http://www.iue.it/RSC/competition/papers.htm>.

132. Proposed New Regulation, *supra* note 2, art. 6.

of the proposed reform.<sup>133</sup>

C. *Possible Problems with the Application of Article 81(3) by National Courts*

If the benefits of allowing national courts to apply Article 81(3) themselves are clear, some thought should be given to possible problems.

1. Complex Economic Assessments

The fact that the application of Article 81(3) may require complex economic assessments should not be a problem. As already argued above,<sup>134</sup> Article 81(3) is not different in this respect from Article 81(1), Article 82, or Article 86(2) EC, the application of which requires equally complex economic assessments to be carried out by national courts.<sup>135</sup> National courts also deal with many other problems and areas of law which are not less complex or technical than the application of competition law,<sup>136</sup> where necessary with the help of experts.

Article 15(1) of the proposed new regulation confirms the possibility, already currently existing under the Commission's 1993 Notice on cooperation between national courts and the Commission,<sup>137</sup> recently approved by the Court of Justice in *Van der Wal*,<sup>138</sup> for national courts to call upon the Commission as a legal or economic expert. Where national law provides for this possibility, national courts may also seek advice from national competition authorities. Especially where the relevant markets are national or local, national competition authorities may actually be better placed to help.

2. Forum Shopping

There is nothing about Articles 81 and 82 EC, or Article 81(3) in particular, that would suggest there to be more of a

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133. See *supra* note 76 and accompanying text.

134. See *supra* notes 56-59 and accompanying text.

135. See cases cited *supra* note 59 and accompanying text (discussing Article 81(1)); *Bronner v. Mediaprint*, Case C-7/97, [1998] E.C.R. 7819 (discussing Article 82). As to Article 86(2), see, e.g., *Corbeau*, Case C-320/91, [1993] E.C.R. 2563.

136. See *Ehlermann*, *supra* note 19, at 585.

137. Commission Communication, O.J. C 39/5 (1993).

138. *Netherlands v. Commission*, Cases C-174/98 P and C-189/98 P, [2000] E.C.R. 47, ¶¶ 20-25.

problem with forum shopping for these provisions than with regard to other areas of law. The existing general rules, in particular the 1978 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters,<sup>139</sup> should be sufficient.<sup>140</sup>

### 3. Inconsistent Judgements

Will the application of Article 81(3) by many national courts instead of solely the Commission lead to unacceptably more inconsistency in the application of that provision? I do not think so.

On the one hand, a monopoly does not necessarily guarantee its consistent use. The Commission's few formal exemption decisions may on the whole be consistent, but it is impossible to know whether the same could be said about the much more numerous comfort letters, that are not published and, in general, hardly, if at all reasoned, and which, because they are not acts of the Commission, but only of its services, are not subject to the same quality and consistency controls.<sup>141</sup>

On the other hand, national courts have been applying Articles 81(1) and 82 EC already, without particular problems of inconsistency. Indeed, in virtually all areas other than competition, EC law is applied by the many national courts.<sup>142</sup> The Court of Justice ensures the uniform application of EC law, mainly via the mechanism of requests by national courts for preliminary rulings. There is nothing about Articles 81 and 82 EC, or Article 81(3) in particular, which would suggest a greater threat of inconsistency than in other areas of EC law.<sup>143</sup>

Anyway, under the proposed new system there will be more

139. Brussels Convention on Jurisdiction and Recognition of Judgments in Civil and Commercial Matters, J.O. L 299/32 (1972), amended by O.J. L 304/77 (1978), amended by O.J. L 388/1 (1982), amended by O.J. L 285/1 (1989) [hereinafter Brussels Convention]; see also Commission Proposal for a Council Regulation, O.J. C 376 E/1 (1999).

140. See M. Siragusa, Modernization of EC Competition Law: Risks of Inconsistency and Forum Shopping, Paper presented at the Fifth EUI Competition Law and Policy Workshop (June 2-3, 2000), at <http://www.iue.it/RSC/competition/papers.htm>.

141. There is, for instance, no obligatory consultation of the Commission's Legal Service, nor consultation of the Advisory Committee.

142. See Ehlermann, *supra* note 30, at 575-577.

143. See *supra* Part I.B.3.e.i (explaining that the situation was different for Article 81 at the time Regulation No. 17 was adopted, because of the novelty of the prohibition on restrictive agreements in Europe at that time).



instruments available for ensuring consistency than in other areas of EC law. First, guidelines or notices such as the recent guidelines on vertical restraints tend to reduce inconsistency in that they facilitate national courts' access to available information about the law.<sup>144</sup>

Secondly, Article 15(3) of the proposed new regulation provides for a right for the Commission (as well as national competition authorities within their own Member States) to submit written or oral observations to national courts in relation to cases in which questions of interpretation of Articles 81 or 82 arise. As is apparent from Article 15(2), which provides for the Commission to receive copies of judgments of national courts applying Articles 81 or 82,<sup>145</sup> the Commission could in particular use this power to intervene as *amicus curiae* at the stage of an appeal against a judgment of a lower national court, which in the Commission's view would contain an erroneous application of Articles 81 and 82.<sup>146</sup>

The Commission's observations would obviously not be binding for the national court. The mechanism does not therefore endanger the independence of the national court. In fact something very similar already exists at the level of the Court of Justice when it decides upon requests for preliminary rulings from national courts. The Commission receives a copy of each such request and has the right to submit observations before the Court of Justice.<sup>147</sup> Article 15(3) only adds a possibility for the Commission to submit its observations directly to the national court even before the latter makes a request for a preliminary ruling to the Court of Justice. In some cases this could arguably be an efficient shortcut.

The instances in which there will be a real need in terms of ensuring consistency that would justify the Commission spending resources to intervene as *amicus curiae* before a national court will in all likelihood be rare. The text of the proposed Article 15(3) makes it certainly clear that the Commission can only make use of this power "for reasons of the Community pub-

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144. See *supra* note 91 and accompanying text.

145. Proposed New Regulation, *supra* note 2, art. 15(2).

146. It is not proposed that the Commission could itself lodge the appeal. This could as usual only be done by the party concerned.

147. Statute of the Court of Justice of the European Community, art. 20, 298 U.N.T.S. 147, as amended by Council Decision 88/591, O.J. C 215/1 (Aug. 21, 1989).

lic interest" and "on its own initiative," thus not at the request of the parties before the national court.<sup>148</sup> That the undertakings concerned have no right to make the Commission intervene as *amicus curiae* is essential to avoid a distortion of the Commission's work priorities similar to the one existing under the current notification and exemption system.

Finally, Article 16 also tends to reduce the risk of incoherent or inconsistent application of Articles 81 and 82. It provides that, "in accordance with Article 10 of the Treaty and the principle of the uniform application of Community law," national courts, as well as national competition authorities, "shall use every effort to avoid any decision that conflicts with decisions adopted by the Commission."<sup>149</sup>

In *Delimitis*, the Court of Justice said that "conflicting decisions would be contrary to the principle of legal certainty and must, therefore, be avoided when national courts give decisions on agreements or practices which may subsequently be the subject of a decision by the Commission."<sup>150</sup> It cannot, however, be deduced from this statement that national courts would have an obligation to avoid conflict with Commission decisions, certainly not in the context of the proposed new regulation. First, it should be noted that the Court carefully used a passive formula, saying that conflicting decisions must be avoided, but not saying that national courts have an obligation to avoid conflicts. Indeed, in the rest of the judgment, the Court only says that a national court "may decide to stay the proceedings," that "[a] stay of proceedings or the adoption of interim measures should also be envisaged," "that it is always open to a national court . . . to seek information from the Commission" and that "the national court may in any event . . . make a reference to the Court for a preliminary ruling,"<sup>151</sup> thus carefully avoiding imposing on the national court either an obligation to follow a definite course of action or any absolute obligation to avoid conflict. Second, the whole of the Court's reasoning starts from and is based on an analysis of the division of competence as laid down in Regulation

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148. See *supra* note 22 and accompanying text (explaining that the national court can always ask the Commission for expert advice on the basis of Article 15(1) of the proposed new regulation).

149. Proposed New Regulation, *supra* note 2, art. 16.

150. *Delimitis v. Henniger Brau*, Case C-234/89, E.C.R. I-992 (1991), at ¶ 47.

151. *Id.* at ¶¶ 52-54.

No. 17, characterised by the Commission's exclusive competence to apply Article 81(3).<sup>152</sup> Indeed, the question in *Delimitis* was how to reconcile the national courts' competence to apply Article 81(1) with the Commission's exclusive power to apply Article 81(3). This problem will not exist any more under the proposed new regulation.

By virtue of Articles 1 and 6 of the proposed new regulation, the whole of Article 81 will become directly applicable by national courts. In such context, an absolute obligation for national courts to avoid conflict with Commission decisions, even if these have not or not yet been confirmed by the Court of Justice,<sup>153</sup> would, I believe, be incompatible with fundamental principles of judicial independence and access to court.<sup>154</sup> The Commission's proposal on the contrary appears compatible with these principles in that it only requires national courts to give deference to the Commission's decisions without being bound.

## V. SANCTIONS

As to the types and nature of sanctions, the proposed new regulation does not depart very much from the current Regulation No. 17. A few points may, however, be mentioned.

### A. Fines

#### 1. Only Pecuniary Sanctions Imposed on Undertakings

Under Regulation No. 17, the Commission can only impose fines for violation of Articles 81 and 82 EC on undertakings.<sup>155</sup> Apart from the special case where the undertaking coincides with a natural person (a single trader or professional who has not incorporated his or her business), there is no possibility at Community level to impose sanctions, be it fines or imprisonment, on the individual actors who initiated or executed the in-

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152. *Id.* at ¶¶ 44-47.

153. On the contrary, it can be argued that the finding of an infringement by the Commission in a decision confirmed by the Court of Justice could not be subsequently put into question before a national court. See *Iberian UK Limited v. BPB Industries Ltd.*, [1996] 2 CMLR 601.

154. *Contra* E. Paulis, *Coherent Application of EC Competition Law in a System of Parallel Competences*, Paper presented at the Fifth EUI Competition Law and Policy Workshop (June 2-3, 2000), at <http://www.iue.it/RSC/competition/papers.htm>.

155. See W. Wils, *The Undertaking as Subject of EC Competition Law and the Imputation of Infringements to Natural or Legal Persons*, 25 E.L. REV. 99 (2000).

fringement. The proposed new regulation does not alter this situation.<sup>156</sup>

Member States can provide in their national law for personal fines or imprisonment in case of violation of Articles 81 and 82 EC. This is confirmed by Article 5 of the proposed new regulation, which allows national competition authorities to impose fines "or any other penalty provided for in their national law."<sup>157</sup> Article 12(2) does, however, limit the use of information obtained from the Commission or competition authorities of other Member States under Article 12(1) to proceedings leading to financial penalties.

## 2. The Criminal Law Nature of Fines

Article 22(5) of the proposed new regulation repeats Article 15(4) of Regulation No. 17, states that fining decisions taken by the Commission "shall not be of a criminal law nature."<sup>158</sup> This provision may have some relevance with regard to provisions of national law that would attach any consequence to the qualification of procedures or sanctions as "criminal."

It is not, however, decisive with regard to the question whether proceedings based on Regulation No. 17 or the proposed new regulation relate to "the determination of a criminal charge" in the meaning of Article 6 of the European Convention of Human Rights. Indeed, according to the case law of the European Court of Human Rights, the indications furnished by domestic law as to the criminal nature of the offence "have only a relative value," the notion of "criminal" as conceived of under

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156. From the perspective of effective deterrence, this appears regrettable; see *supra* note 31. Introduction of prison sanctions would however necessitate a more fundamental reform, in particular the transfer of the decisional power from the Commission to the Court of First Instance, transforming the Commission into a pure prosecutor, comparable to the US Department of Justice. Such reform has been advocated (on other grounds, related to efficiency and fundamental rights). See F. Montag, *The Case for a Radical Reform of the Infringement Procedure under Regulation 17*, 8 ECLR 428 (1996); Frank Montag, *Problems and Possible Solutions from a Practitioner's Point of View*, 1998 *FORDHAM CORP. L. INST.* 157 (B. Hawk ed. 1999); see also D. Waelbroeck & D. Fosselard, *Should the Decision-Making Power in EC Antitrust Procedures be left to an Independent Judge?—The Impact of the European Convention of Human Rights on EC Antitrust Procedures*, 14 *Y.B. EUR. L.* 111 (1994).

157. Proposed New Regulation, *supra* note 2, art. 5.

158. The regulation does not in any way prevent Member States from providing in national law for proceedings or sanctions "of a criminal law nature" imposed by national authorities.

Article 6 ECHR being “autonomous.”<sup>159</sup>

For Article 6 to apply in virtue of the words “criminal charge,” “it suffices that the offence in question should by its nature be “criminal” from the point of view of the Convention,” because it relates to “a general rule, whose purpose is both deterrent and punitive,” “or should have made the person concerned liable to a sanction which, in its nature and degree of severity, belongs in general to the ‘criminal’ sphere.”<sup>160</sup> As I have argued in detail elsewhere,<sup>161</sup> it appears difficult, if not impossible, to deny that the application of the criteria set out in the case law of the European Court of Human Rights leads to the conclusion that proceedings based on Regulation No. 17 (or the proposed new regulation), leading to decisions in which the Commission finds violation of Articles 81 or 82 EC, orders their termination and imposes fines relate to “the determination of a criminal charge” in the meaning of Article 6 ECHR.<sup>162</sup>

### 3. The Maximum Amount Of Fines

The proposed new regulation does not alter the ceiling of 10% of annual turnover for fines for infringements of Articles 81 and 82.<sup>163</sup> Article 22(1) does however raise the ceiling for fines for obstruction of investigations to 1% of annual turnover, in line with Article 47 of the ECSC Treaty.

### 4. Publication of Fining Decisions

Article 31 of the proposed regulation departs from Article

159. *Öztürk v Germany*, 73 Eur. Ct. H.R. 3, A/73 (1984), ¶¶ 52, 50.

160. *Lutz v Germany*, 123 Eur. Ct. H.R. 4, A/123 (1987), ¶ 55; *Bendenoun v France*, 284 Eur. Ct. H.R.4, A/284 (1994), ¶ 47.

161. W. Wils, *La compatibilité des procédures communautaires en matière de concurrence avec la Convention européenne des droits de l'homme*, 32 CAHIER DE DROITS EUROPÉEN 329 (1996).

162. See also K. Lenaerts & J. Vanhamme, *Procedural Rights of Private Parties in the Community Administrative Process*, 34 C.M.L. REV. 531, 557 (1997); *Rhône-Poulenc v Comm'n*, Case T-1/89, 1991 E.C.R. II 867, 885 (opinion of AG Vesterdorf); *Baustahlgewebe v Comm'n*, Case C-185/95 P, 1998 E.C.R. I 8422, ¶ 31 (opinion of AG Léger); *Hüls v Comm'n*, Case C-199/92 P, 1999 E.C.R. I 4383 (C.J.), ¶¶ 149-150.

163. In its comments of September 30, 1999 on the White Paper, the OECD Competition Law and Policy Division said that “it is somewhat disappointing that the White Paper does not propose any increase in fines for substantive offences . . . It is quite possible that fines limited to 10% of one year's turnover, are already inadequate to deter the more harmful types of horizontal agreements.” see also W. Wils, *E.C. Competition Fines: To Deter or Not to Deter*, 15 Y.B. EUR. L. 17, 40-43 (1995).

21(2) of Regulation No. 17 by expressly providing that the publication of Commission decisions should in particular specify the penalties imposed.<sup>164</sup> In the past some undertakings have (unsuccessfully) tried to dissuade the Commission from publishing the amount of the fine imposed on them, with the argument that the exact amount would constitute a business secret. It is clear that for fines to function as a deterrent, they should be given full publicity.

## B. Remedies

### 1. Termination Orders

Article 7 of the proposed new regulation departs from Article 3(1) of Regulation No. 17 in that it provides that, when ordering termination of an infringement of Articles 81 or 82, the Commission “may impose [on the undertakings concerned] any obligations necessary, including remedies of a structural nature.”<sup>165</sup> This should allow the Commission to order the break-up of an undertaking where this is necessary to bring to an end persistent abuse of a dominant position, following the recent example of the Microsoft case in the United States.<sup>166</sup>

### 2. Consent Decisions

Article 9 of the proposed new regulation provides that “where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertaking concerned offer commitments such as to meet the Commission’s objections, the Commission may by decision make those commitments binding on the undertakings.”<sup>167</sup> Articles 9(2) and 9(3) add that “irrespective of whether or not there has been or still is an infringement of Article 81 or Article 82 of the Treaty, such a decision shall terminate the proceedings.” The Commission may reopen the proceedings only where there has been a material change in any of the facts on which the decision was based, where the undertakings concerned act contrary to their

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164. As is apparent from the title of Chapter VI of the proposed new regulation, “penalties” cover fines and periodic penalty payments.

165. Proposed New Regulation, *supra* note 2, art 7.

166. *U.S. v. Microsoft Corp.*, 97 F. Supp.2d 59 (D.D.C. 2000).

167. Proposed New Regulation, *supra* note 2, art. 9.

commitments, or where the decision was based on incomplete, incorrect, or misleading information.

This new type of decision, inspired by the American consent decree, can be justified as an instrument to save enforcement costs in those cases where the (perceived) competition problem that made the Commission open its investigation can be solved by the commitments offered by the undertakings concerned, or at least reduced to such an extent that the case would no longer have a sufficient Community interest to justify further attention by the Commission, without a strong need to deter similar infringements through the imposition of fines.<sup>168</sup> The settlement can then save the costs that the Commission, the undertakings concerned, and the Community Courts would bear, if a decision finding an infringement were adopted by the Commission and subsequently appealed before the Community Courts.

As the consent decision would leave open the question of whether there was an infringement of Articles 81 or 82 EC in the first place, the undertakings concerned could not seek its annulment by the Court of First Instance on the ground that no infringement existed. The decision being based on consent, duress, or undue influence could however be possible grounds for annulment. The mere fact that the undertakings concerned risked becoming the addressee of a negative decision adopted by the Commission would obviously not suffice to vitiate consent.

As the consent decision would leave open equally the question whether an infringement of Articles 81 or 82 subsists notwithstanding the commitments, it would not protect the undertakings concerned against attack by national competition authorities or in national courts.<sup>169</sup>

Compliance with the commitments made binding in the consent decision could be enforced by third parties in national courts, and by the Commission with the fines and periodic penalty payments provided for in Articles 22(2)(c) and 23(1)(c) of the proposed regulation.<sup>170</sup> Absence of an infringement of Arti-

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168. The proposed Article 9 does not allow for fines to be paid as part of the consent settlement. Proposed New Regulation, *supra* note 2, art. 9.

169. In application of Article 11(4) of the proposed new regulation, national competition authorities would, however, have to consult the Commission before adopting a negative decision.

170. This is indeed the main novelty of the proposed new provision as compared to Regulation No. 17. Under Regulation No. 17, the Commission can equally settle a

cles 81 and 82 EC would not be valid grounds for defence. Nor would duress or undue influence be valid grounds for defence, if no application for annulment has been brought against the consent decision on those grounds within the two month period provided for in Article 230 EC.

### CONCLUSION

The enforcement of Articles 81 and 82 EC should ideally be designed in such a way that each of the available actors, being the Commission, the competition authorities of the Member States, the undertakings and their counsel, and the national and Community courts, fulfils the tasks corresponding to its comparative advantage, i.e., the tasks for which it is best placed, given the different tasks to be fulfilled, and given its competences and resources as compared to those of the other actors.

The Commission's comparative advantage lies in the prosecution and punishment of the most serious violations of Articles 81 and 82, such as secret price or market sharing cartels, more specifically those of a Community dimension. The comparative advantage of the national competition authorities lies equally in the prosecution and punishment of serious infringements, rather than those of a local, national, or regional dimension. The undertakings and their legal advisors are best placed to make the advance assessment of the legality of proposed business actions. National courts are best placed to resolve contractual disputes, and the Court of Justice, together with the Court of First Instance and in cooperation with the national courts, are best placed to provide authoritative interpretations of the law.

Compared to the current situation under Regulation No. 17, the Commission's proposal for a new regulation has the merit of allowing each actor to fulfil precisely the task corresponding to its comparative advantage. The result should be a more effective enforcement of Articles 81 and 82 EC, at a lower cost. Undertakings will save the cost of notifying their agreements to the Commission, or will no longer have to pay the alternative price of their agreements not being enforceable, even if they fulfil the conditions of Article 81(3). Contractual litigation will be facilitated by national courts being able to apply Article

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case. See, e.g., SWIFT, O.J.C 335/3 (1997). No specific sanctions are attached in case of non-respect of the commitments.



81(3). The competition authorities of the Member States will no longer be handicapped in their application of Community competition law by the Commission's exemption monopoly. The Commission will be free to devote more of its resources to its core task of detecting and punishing the most serious antitrust violations, in particular Community-wide cartels, thus raising deterrence.

Whether the latter potential will be fully realized, will in part depend on how the Commission makes use of the new regulation, assuming that it is adopted by the Council. Indeed, the proposed regulation also contains the potential for the Commission to continue spending many of its resources, or spend even more than its current resources on adopting non-infringement decisions, issuing reasoned opinions and intervening in cases handled by national competition authorities and national courts. There is, however, no reason to doubt that the Commission will have the wisdom to use the new regulation in such a way that its full potential for a more effective enforcement of the prohibitions laid down in Articles 81 and 82 EC will be realized. Indeed, more effective enforcement is precisely what the proposed reform is about.

