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Institutions: who enforces competition law?

Contents

1 Introduction

So far, we have observed one institution's enforcement of EC competition law: the European Commission. The discussion of controversial mergers in chapters 1 and 8 provided strong indications that the institutional makeup of the Commission plays a determining role in the final outcome. To some, this is evidence of the way EC competition law is corrupted to serve illegitimate aims, while to others, the deliberative process of decision-making is justified by the

way competition law is embedded within the EC Treaty and should be used to serve the wider aims of the Community, not merely to preserve consumer welfare. While the political aspect of competition decisions came under severe scrutiny in the 1990s, in particular by German scholars and practitioners,[1] developments since that time within DG Competition (that segment of the Commission that carries out the operational aspect of law enforcement) have brought some changes to the nature of competition law enforcement. These include increased economic sophistication and growing attention to new theories of anticompetitive effects. These trends were caused by DG Competition interacting with US antitrust enforcers, and by the increased number of economists working in DG Competition, culminating in the creation of the post of Chief Competition Economist in 2003.[2]

The growth of economic analysis and expertise is analogous to that which occurred in the United States in the early 1960s, where increasing numbers of economists in the DOJ and FTC affected the direction of antitrust law, facilitating the success of the Chicago School views in the 1970s.[3] However, the increased reliance on economic theories by DG Competition is unlikely to have the same radical effects that a similar process had in the United States. This is because the Commission, not DG Competition, has the last word in controversial cases, and it has not embraced the economics-oriented approach of DG Competition, while US antitrust agencies have greater policy and operational independence. Thus, as we observed in chapters 2 to 4, while DG Competition is clearly committed to a 'more economics based approach', this has not led to the complete exclusion of public policy considerations in competition cases.

If one accepts the premise hinted at in the above paragraphs, that the composition of institutions enforcing the rules can shape the law, the upshot must be that if the institution in charge of competition enforcement is altered radically, the substantive interpretation and application of competition law will be affected. In this chapter we examine this claim by considering the potential impact of Regulation 1/2003, the so-called Modernisation Regulation, on competition law.[4] This Regulation makes three significant changes to the enforcement of Article 81.[5] The first is that Article 81(3) is

[1] For a concise review of the German criticisms, see M. Dreher 'Do We Need a European Competition Agency?' in G. Wilson and R. Rogowski (eds.) *Challenges to European Legal Scholarship: Anglo-German Essays* (London: Blackstone Press, 1996) pp. 95–101.

[2] See ch. 3.

[3] See generally M. A. Eisner *Antitrust and the Triumph of Economics* (Chapel Hill: University of North Carolina Press, 1991).

[4] Regulation 1/2003 on the Implementation of the Rules on Competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1. This is based on EC Commission *White Paper on Modernisation of the Rules Implementing Articles [81] and [82] of the EC Treaty* (28 April 1999) COM(99)101 final (hereinafter White Paper on Modernisation).

[5] Only the second of these changes affects Article 82, and there are no effects on the application of the ECMR even if the White Paper on Modernisation had suggested that the scope of the ECMR

deemed to have direct effect, and so can be applied by national institutions (namely competition authorities and courts).[6] The second is to 'Europeanise' competition law by requiring that National Competition Authorities apply EC competition law when reviewing business activities that affect trade between Member States.[7] This means that from 1 May 2004, when Regulation 1/2003 came into force, the Community moved from having one competition authority (DG Competition) to twenty-six (DG Competition plus all National Competition Authorities). The third change is that the system of *ex ante* notification and exemption is abolished (firms cannot notify agreements to the Commission or to National Competition Authorities to obtain an individual exemption).[8] It means that parties bear the burden of determining on their own whether the conduct they are planning complies with EC competition law, and risk fines if their assessment of their measures' competitive impact is wrong. Taken together, this means that enforcement of competition law changes in two ways: the identity of the enforcer (EC Commission, or National Competition Authorities, or national courts) and the nature of enforcement (*ex post* enforcement by the competition authorities, and claims for damages by parties injured by anticompetitive behaviour).

The background to Regulation 1/2003 is sketched in section 2. The Regulation is often presented as a revolutionary and welcome change.[9] A slightly different view is taken here. In section 2.1 we note that the Commission had been attempting to change its enforcement procedures since the early days of competition law enforcement, and so the Regulation is merely the final and decisive step towards a different policy model from that which had been put in place in 1962. In section 2.2 we note that even before Regulation 1/2003 there had been a trend among the Member States to redraft national competition laws in ways that mimic the EC rules. This development helps to explain why Member States accepted Regulation 1/2003: most had already anticipated the primacy of Community competition law in their national laws.[10] In section 2.3 we consider in more detail the key features of

should be widened to allow more joint ventures to be considered under the merger procedures (para. 79).

6 Articles 1, 2 and 6 Regulation 1/2003. Some have questioned whether giving Article 81(3) direct effect by declaration is sufficient and have indicated that Treaty reform was necessary. See T. Wissmann 'Decentralised Enforcement of EC Competition Law and the New Policy on Cartels' (2000) 23 *World Competition* 123, 139–40; M. Gustafsson 'Some Legal Implications Facing the Realisation of the Commission White Paper on Modernisation of EC Antitrust Procedure and the Role of National Courts in a Post-White Paper Era' (2000) *Legal Issues of European Integration* 159.

7 Article 3 Regulation 1/2003.

8 German Monopolies Commission *Cartel Policy Change in the European Union?* 16 September 1999, para. 80 (available at www.monopolkommission.de).

9 C.-D. Ehlermann 'The Modernisation of EC Antitrust Policy: A Legal and Cultural Revolution' (2000) 37 *Common Market Law Review* 537.

10 J. Temple Lang 'Decentralised Application of Community Competition Law' (1999) 22 *World Competition* 3, noting that the developments at national level allowed the formulation of the Commission's proposals in the White Paper on Modernisation.

the Regulation and assess the degree to which this so-called revolution was necessary and sufficient to achieve more effective enforcement of EC competition law.[11] In section 3 we consider the new actors in the field of public enforcement, considering the roles of the Commission, National Competition Authorities and the European Competition Network. In section 4 we canvass three possible consequences of modernisation. The first is the elimination of politics from competition law, probably a desired consequence of modernisation. The second is the erosion of national sovereignty over economic policy: competition law is one tool that Member States may utilise to steer national industrial development, but modernisation reduces the possibilities of this; instead the application of EC competition law means all Member States must accept the Community's economic vision for the role of competition law. The third consequence is that Member States might react against these two developments and undermine the modernisation of competition law by applying other rules of law to govern industrial behaviour. Finally, in section 5 we consider what role private enforcement may play in EC competition law and suggest that although the ECJ's jurisprudence has only developed recently, the Court has started on the wrong foot, failing to filter meritorious and unmeritorious plaintiffs.

2 The background to modernisation

2.1 The Commission's perspective

Until 1 May 2004, competition law enforcement was based on Regulation 17/62.[12] The main rule that served to centralise enforcement in the hands of the Commission was in Article 9(1), which provided that the Commission was the only body able to grant exemptions under Article 81(3). It meant that while national courts and NCAs (the latter only if empowered to do so by national law) could apply Article 81(1), they had no competence once the firm had notified the agreement to the Commission. And once the Commission had granted an exemption, one could not apply stricter national competition laws to prohibit the agreement.[13] The effect of this was to incapacitate national courts and NCAs because they were unable to apply Article 81 in full.

11 Those looking for a more upbeat assessment can consult: J. S. Venit 'Brave New World: The Modernisation and Decentralisation of Enforcement under Articles 81 and 82 of the EC Treaty' (2003) 40 *Common Market Law Review* 545.

12 Council Regulation No. 17 of 6 February 1962, First Regulation Implementing Articles 85 and 86 of the Treaty [1962] JO L13/204.

13 See Case 14/68 *Walt Wilhelm v. Bundeskartellamt* [1969] ECR 1. One difficulty with the Court's approach is that while it is clear that the grant of an individual exemption prevents the application of national law, the Court did not clarify whether the grant of negative clearance following a notification would prevent the application of national competition law, and the grant of a comfort letter was something that national courts might have regard to but did not bind them. Thus the Court's approach did not preclude the parallel application of EC and national competition law in all circumstances.

Moreover, the Commission's wide interpretation of Article 81(1) contributed to centralising enforcement in the Commission's hands. In chapter 2 we argued that the Commission interpreted a restriction of economic freedom as a restriction of competition. There we suggested that this was in line with an ordoliberal interpretation of the role of competition law. Another possible explanation of this reading is that it served the Commission's desire to centralise enforcement.[14] Had the Court in *Consten and Grundig* accepted the arguments in favour of a rule of reason, this would have made it possible for national courts to apply Article 81(1) more effectively because only agreements whose overall effect was anticompetitive would require assessment and exemption under Article 81(3). The effect of this could have led to significantly fewer notifications, less intervention by the Commission, and greater involvement by national authorities.[15] Moreover, it could have led to the application of stricter national competition law and to regulatory diversity among Member States. Instead, centralised enforcement would facilitate the application of a uniform competition law across the EC, something of value in a Community where historically Member States had supported cartels.[16] In fact, the Commission's White Paper on Modernisation in 1999 (which proposed the current regime) noted that the utility of centralised enforcement lay in the creation of a 'culture of competition' throughout the Community.[17] This serves as an extreme example of how an institution shaped the development of substantive law principles to favour its policy choices, opting for a controversial interpretation of Article 81(1) to facilitate the uniform application of EC competition law and the development of the internal market characterised by free competition.

Nothing in the Treaty required the institutional makeup established in 1962: centralisation was a conscious decision by the Member States.[18] Today the work of DG Competition might be taken for granted by many, but one must bear in mind that the powers which the Commission obtained under Regulation 17/62 were (and to a certain extent still are) unique.[19] The Commission can

[14] See I. S. Forrester 'The Modernisation of EC Antitrust Policy: Compatibility, Efficiency, Legal Security' in C.-D. Ehlermann and I. Atanasiu (eds.) *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford: Hart Publishing, 2001) pp. 77, 97; B. Van Houtte 'A Standard of Reason in EEC Antitrust Law: Some Comments on the Application of Parts 1 and 3 of Article 85' (1982–3) 4 *Northwestern Journal of International Law and Business* 497, 509; D. Waelbroeck 'Antitrust Analysis under Article 85(1) and Article 85(3)' 1997 *Fordham Corporate Law Institute* 693, 696 (Hawk ed. 1998).

[15] I. Forrester and D. Norall, 'The Laicization of Community Law: Self-Help and the Rule of Reason' (1984) 21 *Common Market Law Review* 11, 41.

[16] H. G. Schröter 'Cartelization and Decartelization in Europe, 1870–1995: Rise and Decline of an Economic Institution' (1996) 25 *Journal of European Economic History* 129.

[17] White Paper on Modernisation, Executive Summary, para. 4.

[18] Ehlermann 'Modernisation' pp. 538–40; G. Tesauro 'Some Reflections on the Commission's White Paper on the Modernisation of EC Antitrust Policy' in Ehlermann and Atanasiu *European Competition Law Annual 2000.*

[19] As suggested in chapter 7, there are certain other provisions that empower the Commission to regulate firms that are designed in a manner similar to competition laws.

implement competition policy largely independently of the Council and the Member States, and impose financial penalties on firms for breach of the rules. This contrasts with the traditional Community method whereby the EC legislates and leaves implementation and enforcement to Member States and national courts. However, centralised Commission enforcement faced two challenges: one practical and one political.

The practical challenge arose as early as one year after the introduction of Regulation 17/62: by then the Commission had received notifications of over 35,000 agreements.[20] It did not have the staff to address all these notifications in an efficient manner, and in many cases there were significant delays between notification and decision. As the years went on the number of notifications increased but DG Competition's resources did not. This had two consequences. First, competition enforcement was inefficient. For example, in the period 1994–7 the Commission managed to reach a formal decision in only 95 cases, while 1,755 cases were closed informally, so only approximately 5 per cent of cases received full treatment.[21] Moreover, at the time the White Paper on Modernisation was published, only nine notified agreements had been subsequently prohibited by the Commission between 1962 and 1999.[22] This small figure suggests that most agreements that were notified were largely innocuous and the Commission's resources were wasted. (In part of course this wastage was the Commission's own doing given its interpretation of Article 81(1).) Second, the Commission was unable to develop its enforcement priorities because it had to react to notifications. Again taking the 1994–7 period, the Commission received 1,022 notifications and 620 complaints about anticompetitive behaviour but commenced only 251 cases on its own initiative.[23] The Commission adopted a range of mechanisms to counter these problems, but none were deemed to be completely satisfactory. We can discern three phases in the Commission's attempts to reduce its workload while attempting to ensure the uniform application of EC competition law.

In the first phase, from the mid-1960s to the 1980s, the Commission deployed three strategies to reduce the time spent on notifications. First, it developed a de minimis rule whereby agreements of minor importance were deemed not to infringe Article 81.[24] This removed some agreements from its

[20] D. G. Goyder *EC Competition Law* 4th edn (Oxford: Oxford University Press, 2003) p. 41.

[21] EC Commission *Twenty-seventh Report on Competition Policy* (1998) pp. 337–8.

[22] Wissmann 'Decentralised Enforcement' p. 128. However, this number does not take into account how many conditional exemptions were granted, that is cases where the Commission required amendment to the agreement before approval. As we saw in chapter 3, this is a very powerful tool for the Commission.

[23] *Twenty-seventh Report on Competition Policy* (1998) pp. 337–8.

[24] The first was Commission *Notice on Agreements of Minor Importance* [1970] OJ C64/1. The current version is Commission *Notice on Agreements of Minor Importance which do not Appreciably Restrict Competition under Article 81(1) of the Treaty establishing the European Community (de minimis)* [2001] OJ C368/15.

reach, which also facilitated the Commission's policy of favouring cooperation among small and medium-sized firms. Second, it drafted Block Exemption Regulations (the first regulation was in 1967). These identified certain types of agreement and detailed which contract clauses were contrary to EC competition law and which were lawful. Parties whose agreements fell within the four corners of the Block Exemption were granted automatic exemption.[25] However, as discussed in chapter 10, the early Block Exemptions were highly prescriptive, so that firms wishing to benefit from these would have to rewrite their contract to ensure that it complied. Their commercial interests were compromised by the need for legal security.[26] Third, it developed procedures for settling notifications informally. These took the form of 'comfort letters' issued to firms that had notified their agreements. A comfort letter was designed to provide the firms with reassurance that their agreement did not infringe EC competition law or that it would probably benefit from an exemption. However, this practice was criticised for offering firms little comfort: the letter did not bind national courts or competition authorities so the firm still faced the risk of its agreement being challenged under national competition law.[27] Thus firms faced a stark choice: modify their agreement so as to fit within a highly prescriptive Block Exemption (and therefore potentially skew the commercial purpose of their agreement), or notify to the Commission and face uncertainty either because of delays should the Commission decide to issue a decision granting exemption under Article 81, or because the response took the form of a comfort letter. It is little wonder that some advised firms not to notify and to hope that the Commission would not challenge the agreement.[28] These measures failed in two respects: they did not reduce the Commission's workload, and they did not provide a workable system for firms.

In the early 1990s the Commission attempted a new route to reduce its workload, trying to deflect complainants from contacting DG Competition by galvanising enforcement at national level by involving NCAs and national courts.[29] It obtained support from the Court of First Instance, which ruled that the Commission did not have an obligation to investigate all complaints that it received, but could set its own enforcement agenda by taking up cases

[25] Regulation 1967/67 on the Application of Article 85(3) of the EC Treaty to Categories of Exclusive Distribution Agreements [1967] OJ L84/67.

[26] M. Siragusa 'Rethinking Article 85: Problems and Challenges in the Design and Enforcement of the Competition Rules' 1997 *Fordham Corporate Law Institute* 271, 282 (Hawk ed. 1998).

[27] Joined Cases 253/78 and 1 to 3/79 *Procureur de la République and Others v. Bruno Giry and Guerlain SA and Others* [1980] ECR 2327 paras. 12–13 and 18.

[28] C. Bright 'EU Competition Policy: Rules, Objectives and Deregulation' (1996) 16 *Oxford Journal of Legal Studies* 535.

[29] EC Commission *Notice on Co-operation between National Competition Authorities and the Commission in applying Articles 85 and 86 of the EC Treaty* [1997] OJ C313/3; EC Commission *Notice on Co-operation between National Courts and the Commission in applying Articles 85 and 86 of the EC Treaty* [1993] OJ C39/6.

that had Community interest.[30] The Commission thus indicated that it would focus its enforcement principally on cases that raised a new point of law and cases involving Article 86(1), while NCAs should consider cases where the effects are felt within their territories and those unlikely to qualify for exemption under Article 81(3).[31] However, these moves were unsuccessful: complainants were reluctant to seek remedies in the national courts (we explore the reasons in section 5 below), and NCAs were not as active as the Commission desired. According to the German Federal Cartel Office and the Federal Ministry of Economics, the following reasons explain why. First, the NCA could not apply Article 81 to controversial agreements which might require appraisal under Article 81(3) because only the Commission could at that time grant exemptions. This relegated the NCA to dealing with 'run of the mill' cases, a job that NCAs were not eager to take up. Second, in 1993, only a few Member States empowered the NCA to apply EC competition law, so decentralised application could not occur. And even in Germany, where the Federal Cartel Office had the power to apply Articles 81 and 82, the NCA preferred to apply German competition law.[32]

The third and final attempt to reduce workload occurred in the late 1990s and, in contrast to the two previous phases, the Commission engineered a substantive rather than a procedural change in policy: it reconsidered its system of Block Exemptions. As we noted above, the Block Exemptions that had been drafted so far were criticised for creating a 'straitjacket effect'; that is, parties had to make significant modifications to their contracts to 'fit' within the scope of a Block Exemption.[33] As we saw in chapter 10, the Commission embraced a radically different approach with the Block Exemption on vertical restraints in 1999. First, the Block Exemption has a market power screen whereby its application is restricted to firms below a given threshold. Second, the Block Exemption is significantly more permissive in that it contains only a brief list of agreements that are forbidden and gives the parties considerable latitude in designing agreements according to their commercial necessities. A similar approach has been applied to all other Block Exemptions. It had been suggested that this approach was likely to reduce the Commission's burden considerably as more firms would take advantage of the new Block

[30] Case T-64/89 *Automec Srl v. Commission* [1990] ECR II-2223 paras. 71–98. The Commission's decision not to take up a case is justiciable: see Case T-37/92 *Bureau Européen des Unions des Consommateurs and National Consumer Council v. Commission* [1994] ECR II-285, where the Commission's decision not to institute proceedings was quashed.

[31] *Notice on Cooperation between National Competition Authorities and the Commission* paras. 26 and 34–6.

[32] House of Lords Select Committee on the European Communities *Enforcement of Community Competition Rules* Session 1993–4, Memorandum by the Federal Cartel Office pp. 197–202.

[33] B. Hawk 'System Failure: Vertical Restraints and EC Competition Law' (1995) 32 *Common Market Law Review* 973.

Exemptions and so the number of notifications would fall.[34] However, it was impossible to judge the significance of this final effort on the Commission's workload because the Commission was eager to implement a more radical reform in the shape of Regulation 1/2003, which we consider more fully below. Nevertheless, the number of new cases between 1999 (the year of the first new-style Block Exemption) and 2004 (the final year when notifications were possible) shows a significant downward trend in the number of notifications when compared to the period 1989–98. In the latter period, the Commission received over 200 notifications a year, peaking at 368 notifications in 1995. In 1999, the number of notifications fell to 162, and in the first years of the new century, notifications fell significantly: 101 (in 2000); 94 (in 2001); 101 (in 2002); 71 (in 2003); and 21 (in 2004).[35] Moreover, the Commission had been working hard at reducing the backlog of cases: over 3,000 notifications were pending in 1980, but this figure had fallen to 1,204 in 1998 and 473 in 2004.[36] The Commission never clarified whether its limited resources would have remained insufficient even with this significant reduction in notifications that seems to have been caused, in part, by the new-style Block Exemptions.

The need to reform Regulation 17/62 resulted not only from what the Commission diagnosed as the inadequacy of the system of notification in an enlarging European Union. There was also a political challenge that arose in the mid-1990s soon after the Commission gained powers to regulate mergers. Certain Member States, in particular Germany, expressed concern about the infusion of politics in competition decisions, and the lack of transparency in the Commission's decisions.[37] German commentators began to demand a radical institutional reform: the creation of a European Cartel Office, operating independently of the EC Commission and able to deliver decisions based exclusively on legal principles.[38] This request is in line with the position taken in this chapter: that the institutional change can have an effect on the direction of competition policy, both in its priorities and in its interpretation of the rules.[39] While the proposal for a European Cartel Office was never likely to be implemented, in particular because few Member States backed the project and because of the legal difficulties in creating independent regulatory agencies at Community level, Regulation 1/2003 can be read as a response to

[34] W. Möschel 'Guest Editorial: Change of Policy in European Competition Law?' (2000) 37 *Common Market Law Review* 495.

[35] See EC Commission *Twenty-sixth Report on Competition Policy* (1996) pp. 341–2; *Thirty-third Report on Competition Policy* (2003) p. 63; *Thirty-fourth Report on Competition Policy* (2004) p. 63.

[36] EC Commission *Thirty-third Report on Competition Policy* (2003) p. 63.

[37] See Dreher 'Do We Need a European Competition Agency?' pp. 95–101, reporting strongly worded criticisms from the German Cartel Office.

[38] C.-D. Ehlermann 'Reflections on a European Cartel Office' (1995) 32 *Common Market Law Review* 471.

[39] See also S. Wilks and L. McGowan 'Disarming the Commission: The Debate over a European Cartel Office' (1995) 32 *Journal of Common Market Studies* 259.

these criticisms: by surrendering enforcement to NCAs, the Commission was sending a signal that the political meddling by the Commissioners would wane.[40] Moreover, given that the Commission's workload seemed to be steadily diminishing since the late 1990s, it can be argued that the political demand for reform was stronger than the practical arguments which were at the forefront of the White Paper on Modernisation. In sum, the Commission's portrayal of an overworked Directorate General for Competition, unable to engage in a proactive competition policy, was overstated.

2.2 Europeanisation of national laws

In 1962, only Germany had a credible system of competition law. However, this picture changed radically from the mid-1980s. At the same time that the Commission was attempting to decentralise enforcement, significant moves were afoot within the Member States: a number of them amended national laws, aligning them to the EC provisions.[41] By 1999 all Member States except Germany had adopted national competition laws that were similar to Articles 81 and 82 and eight out of fifteen Member States (Belgium, France, Germany, Greece, Italy, the Netherlands, Portugal and Spain) conferred express powers on National Competition Authorities to apply Articles 81 and 82.[42] They were not compelled to take either of these measures by the Community and their reasons for reform are varied. Some Member States (e.g. Italy and Ireland) had no national competition laws; some (e.g. Spain, Greece and Sweden) adopted such laws in anticipation of joining the EC; others had an unsatisfactory competition policy. Among this last camp was the United Kingdom, where reform of the rules had been raised several times but the law was changed only in 1998.[43] The old rules were perceived to be too weak, and the role of ministers in competition decisions too prominent.[44] While existing Member States 'Europeanised' national competition laws without any obligations stemming from Community law, the countries seeking to gain access to the EU were required to put into place a system to enforce competition law and used the EC

[40] At the time Regulation 1/2003 was agreed Germany objected to it and wished for a Regulation that allowed for the application of stricter national law, with Article 81 serving as a minimum standard, but it was unable to gain enough support to block the coming into force of the Regulation. See L. McGowan 'Europeanisation Unleashed and Rebounding: Assessing the Modernization of EU Cartel Policy' (2005) 12 *Journal of European Public Policy* 986, 995.

[41] I. Maher 'Alignment of Competition Law in the European Community' [1996] *Yearbook of European Law* 223.

[42] U. Zinsmeister, E. Rikkers and T. Jones 'The Application of Articles 85 and 86 of the EC Treaty by National Competition Authorities' [1999] *European Competition Law Review* 275.

[43] I. Maher 'Juridification, Codification and Sanction in UK Competition Law' (2000) 63 *Modern Law Review* 544.

[44] S. Eyre and M. Lodge 'National Tunes to a European Melody? Competition Law Reform in the UK and Germany' (2000) 7 *Journal of European Public Policy* 63.

model to achieve this.[45] The effect of all this legislative activity was that the norms of EC competition law were spreading into the national laws of the Member States even before Regulation 1/2003 was being discussed.

Some have suggested that the reason for this kind of spontaneous harmonisation was the emergence of an 'epistemic community' of legal professionals which cajoled Member States into updating national laws and bringing these into line with EC competition law.[46] Moreover, it has been suggested that pressure from business associations, like the Confederation of British Industry, the EU branch of the American Chamber of Commerce, the European Round Table of Industrialists and the German Business Association, also affected national governments and led to calls for the alignment of national competition law to the EC model.[47] Certainly businesses would favour this kind of harmonisation because it reduces their risks and costs by having one set of rules applied consistently. However, business did not obtain a complete harmonisation, rather a hybrid model: some rules (notably those relating to agreements under Article 81) were aligned but Member States retained their own merger rules, special sector-specific exemptions, and other competition provisions different from Articles 81 and 82.[48] Accordingly, it might be best to summarise these legislative developments as the result of a common competition culture across Europe rather than as harmonisation,[49] and yet this would be to ignore the significant efforts of some Member States to ensure that national law did not contradict EC competition law. In several national laws, interpretive provisions were inserted to guarantee a high degree of uniformity in the application of the law. Three examples will illustrate this. The Italian Act (which entered into force in 1990) sets out rules that are worded like Articles 81 and 82 (save the effect on trade requirement), and provides that if the practice in question is one to which Articles 81 and 82 apply, then only EC competition law is applicable.[50] This means that the Italian Act is only applicable in cases that have no effect on inter-state trade, and even in those

[45] See generally J. Fingleton, E. Fox and D. Neven *Competition Policy and the Transformation of Central Europe* (London: Centre for Economic Policy Research, 1996); F. Vissi 'Challenges and Questions around Competition Policy: The Hungarian Experience' (1995) 18 *Fordham International Law Journal* 1230.

[46] F. van Waarden and M. Drahos 'Courts and (Epistemic) Communities in the Convergence of Competition Policies' (2002) 9 *Journal of European Public Policy* 913.

[47] McGowan 'Europeanisation Unleashed' p. 998; H. Vedder 'Spontaneous Harmonisation of National (Competition) Laws in the Wake of the Modernisation of EC Competition Law' (2004) 1 *Competition Law Review* 5, 10.

[48] Eyre and Lodge 'National Tunes'; D. Hay 'Is More Like Europe Better? An Economic Evaluation of Recent Changes in UK Competition Policy' in N. Green and A. Robertson (eds.) *The Europeanisation of UK Competition Law* (Oxford: Hart Publishing, 1999).

[49] Vedder 'Spontaneous Harmonisation'.

[50] Article 1(1) Law No. 287 of 10 October 1990 (Gazzetta Ufficiale del 13 Ottobre 1990, n. 240). The NCA has powers to apply Articles 81 and 82 under Article 54(5) Law No. 52 of 6 February 1996 (Gazzetta Ufficiale del 10 Febbraio 1996, n. 34). English language texts are available at www.agcm.it/index.htm. For commentary, see M. Siragusa and G. Scassellati-Sforzolini 'Italian and EC Competition Law: A New Relationship' (1992) 29 *Common Market Law Review* 93.

instances when Italian law applies, the Act provides that the law should be interpreted by reference to legal principles established by the EC.[51] A softer harmonising approach is taken by the Irish competition legislation (which was first enacted in 1991) which merely provides in the long title of the Act that the legislation is designed to prohibit anticompetitive practices 'by analogy with Articles 81 and 82'.[52] An intermediate route was selected by the UK. After setting out prohibitions worded like Articles 81 and 82, the Competition Act 1998 incorporates a 'consistency principle' in section 60 whereby the decision-maker must ensure that the substantive application of UK law follows the legal principles established in the EC Treaty and by the European Court, and also has regard to decisions and statements made by the Commission.[53]

Another significant development in the Member States is that NCAs grew in prestige. It has been suggested that the creation of independent National Competition Authorities was to a large extent a symbolic exercise, demonstrating commitment to free market values by the state, with the expectation that the agencies would not be very active. But governments' expectations were confounded: several national competition agencies have become powerful and highly regarded enforcement institutions.[54] This is because the agencies were given enough political independence to be insulated from national politics and they developed technocratic expertise in law and economics, thereby narrowing the criteria they used to enforce the laws, further excluding political considerations. This development (uneven across the Member States) is significant because it served to embed the 'culture of competition' in the Member States, and it made the Member States support an enhanced profile for NCAs.

If we take these national developments together (alignment of national laws along the EC standard, conscious efforts to ensure that laws are interpreted in line with EC competition law, the growth of prestige and expertise of NCAs), the implementation of Regulation 1/2003 by the Council of Ministers becomes both possible and palatable. It is possible because the Community is able to trust NCAs: they have developed independently of government and are highly professionalised. In other words, they can be trusted to apply competition law in a non-political manner. Moreover, the spontaneous convergence of national laws minimised the risks of the application of stricter national competition law, so creating a level playing field of decentralised competition law enforcement was feasible. Implementation of Regulation 1/2003 is palatable, to Member States, because the NCAs had already been applying rules with a view to ensuring that the application of national law was comparable to that of EC law, so the Regulation would not be seen as revolutionary by the NCAs or

[51] Article 1(4) Law No. 287 of 10 October 1990.

[52] Irish Competition Act 2002.

[53] A. Robertson 'UK and EC Competition Laws: Will They Operate in Complete Harmony?' in Green and Robertson *Europeanisation*.

[54] S. Wilks and I. Bartle 'The Unanticipated Consequences of Creating Independent Competition Agencies' (2002) 25 *West European Politics* 148.

by the electorate. On the contrary, Regulation 1/2003 complements and strengthens the pre-existing Europeanisation of competition law. Some have seen these national developments more cynically, however, and argued that business support for the reforms was a tactical ploy designed to remove from the statute books strict national competition laws, and governmental acquiescence to business demands was a means to rein in the power and activism of National Competition Authorities.[55]

2.3 Regulation 1/2003

So far we have seen that the key reforms in Regulation 1/2003 are the last chapter in a series of attempts by the Commission to decentralise enforcement and give DG Competition greater autonomy to set its enforcement priorities, and that the Commission was able to press for such radical change at least in part because of Europeanisation of competition law at national level, and possibly as a response to criticisms about the political meddling of the Commission in competition cases. We now query the extent to which these changes were necessary and sufficient to achieve a more efficient enforcement process by reviewing in detail the three key aspects of the reform: direct effect of Article 81(3); abolition of the notification/exemption system; and application of EC competition law over national law. In the White Paper on Modernisation three objectives were canvassed by which we might measure the effectiveness of the new system: rigorous enforcement of competition law; effective decentralisation and consistent enforcement; and easier administrative burdens on firms without sacrificing legal certainty.[56]

Declaring the direct effect of Article 81(3) was seen as necessary to galvanise NCAs, as this was the major stumbling block to decentralised enforcement. Their involvement would allow the Commission to increase its ability to take on cases of Community interest and become more proactive. The result is to multiply the number of agencies able to enforce EC competition law, leading to more rigorous enforcement. As we noted in chapters 2 and 4, this reform by itself was insufficient because of the risk that NCAs would reach divergent results by applying this provision in different ways, so that the Commission has had to intervene to narrow down the interpretation of Article 81(3). However, it remains to be seen whether all NCAs will apply the law in the same way or if divergences make competition law enforcement less predictable for firms, and thus less efficient. We consider additional mechanisms that the Commission has developed to avoid this risk below: suffice it to note that merely conferring direct effect was not sufficient. Moreover, as NCAs were already applying national competition law moulded upon the EC norms, it is not clear why

[55] H. Ullrich 'Harmonisation within the European Union' [1996] *European Competition Law Review* 178, 182.
[56] White Paper on Modernisation para. 42.

empowering them to apply EC competition law enhances the effectiveness of competition law enforcement.

Abolishing the notification procedure was seen as essential for the Commission to redeploy its resources and develop a proactive enforcement policy. This argument seems overstated, for several reasons. First, the backlog of notifications which the Commission had received was falling in the years leading up to Regulation 1/2003,[57] and more efficient management of the backlog could have eliminated the Commission's heavy workload. Second, the claim was not consistent: why does *ex ante* notification under the ECMR not cause comparable harm to the Commission's priorities?[58] Moreover, as we suggested earlier, the Commission's work priorities could have been streamlined automatically with the coming into force of the new Block Exemptions. Wernard Möschel, then Chairman of the German Monopolies Commission, suggested that the argument that the abolition of notification was necessary because of the Commission's limited resources was probably not intended to be taken seriously, referring to a comment by a Commission official that the proposed modernisation would go ahead even if the personnel in DG Competition was doubled.[59] Therefore it is wrong to say that the lack of direct effect of Article 81(3) and the notification procedure were jointly responsible for an ineffective and reactive competition policy. It was the Commission's inefficient management of notifications, combined with its unreasonably wide conceptualisation of what restricts competition under Article 81(1), that led to the system's ineffectiveness. This means that the reason why Regulation 1/2003 was implemented had little to do with abandoning a system that could not work, but rather the Commission was refusing to make the current system work well, and it wished to opt for a solution that brought EC antitrust law in line with a US-style enforcement policy of *ex post* application of competition law coupled with deterrence elements.[60] A substantive policy change is inherent in the procedural reform.

However, a working, efficient system of notification/exemption would have been worth keeping. If the number of notifications was bound to fall with the new-style Block Exemptions, the Commission would have been able to respond to parties entering into novel types of agreements where the ability to self-assess was more limited.[61] Administrative ease and legal certainty are more consistent with a limited scope for notification than with no notification system at all.

[57] *Twenty-fourth Report on Competition Policy* (1994) Annex III, reporting a drop from over 3,000 pending cases in 1980 to 1,052 in 1994; *Thirty-third Report on Competition Policy* (2003) p. 63, reporting a fall from 1,204 pending cases in 1998 to 473 in 2004.
[58] Möschel 'Guest Editorial'. [59] Ibid. p. 496.
[60] This is the gist of the critique of the German Monopolies Commission *Cartel Policy Change in the European Union?*
[61] For similar arguments, see M. Paulweberer 'The End of a Success Story? The European Commission's White Paper on the Modernisation of European Competition Law' (2000) 23 *World Competition* 3, 36–41.

The third major plank of Regulation 1/2003, the application of EC competition law at national level and the exclusion of divergent national competition rules, can be said to be crucial to ensure coherent enforcement across the Member States. To a certain extent, one might query whether Regulation 1/2003 needed to make express provision for this because the vast majority of Member States had already aligned their competition laws with those of the Community, so substantive divergence resulting from the application of national law might have been minimal. Moreover, as we suggest below, a degree of substantive divergence might well be beneficial. Nevertheless, when the Commission originally proposed that EC competition law should apply exclusively (as in the Italian model summarised above), the larger Member States that had retained certain distinctive features in their national laws vetoed this, so a compromise was necessary.[62] The first two paragraphs of Article 3 provide as follows:

> 1. Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81(1) of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Article 81 of the Treaty to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article 82 of the Treaty, they shall also apply Article 82 of the Treaty.
>
> 2. The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty, or which fulfil the conditions of Article 81(3) of the Treaty or which are covered by a Regulation for the application of Article 81(3) of the Treaty. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.

Article 3(1) contains an obligation to apply Articles 81 and 82 in parallel with national competition law (so there is no exclusive application of EC competition law). The first sentence of Article 3(2) is designed to ensure the supremacy of EC competition law in cases of parallel proceedings – thus stricter national law cannot be applied. So if an agreement does not infringe Article 81, stricter national competition law cannot apply to enjoin it. However, this was not enough to satisfy all Member States, and the French government in particular insisted on the second sentence of Article 3(2). This is because French competition law has two special rules that are stricter than Article 82. One, which we considered in chapter 10, is the abuse of economic dependence, and the

[62] H. Gilliams 'Modernisation: From Policy to Practice' (2003) 28 *European Law Review* 451, 463.

other is a rule that prohibits the sale of consumer goods at a price that is significantly below cost even when the firm has no dominance.[63] Back in 1993 this latter provision was the subject of the famous *Keck* ruling and Advocate General van Gerven explained the policy behind this prohibition:

> French experience in detecting and penalizing sales at a loss shows that this type of sale is primarily used as an offensive technique by the big distribution networks which are highly concentrated in France. Furthermore, most of the infringements committed against the prohibition of resale at a loss do not in practice involve newly-launched products but well-known consumer products (washing powder, coffee, drinks, jams) the usual price of which is known by consumers. It would therefore follow that the rules on resale at a loss ... are general rules for regulating the market which do not have as their purpose the regulation of trade flows between the Member States but are the result of a choice of economic policy, which is to achieve a certain level of transparency and fairness in conditions of competition.[64]

In *Keck* the law survived the challenge of the EC's internal market rules, and the French fought hard to preserve this law during the negotiations leading to Regulation 1/2003 even though it is seldom invoked.[65] Germany's competition law also embodies rules that regulate unilateral conduct more aggressively than Article 82, and Article 3(2) means that these rules too have survived Regulation 1/2003.[66] In so far as national competition laws are concerned then, Article 3(2) limits the possibility of divergence in so far as Article 81 is concerned, but tolerates stricter competition laws that apply to unilateral conduct.

The third paragraph of Article 3 goes further by allowing national laws that prohibit acts that constitute 'unfair trading practices' whether they are unilateral or not:[67]

> 3. Without prejudice to general principles and other provisions of Community law, paragraphs 1 and 2 do not apply when the competition authorities and the courts of the Member States apply national merger control laws nor do they preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles 81 and 82 of the Treaty.

This provision codifies the Court's views in two cases that arose from Germany where the Court held that a rule of German 'unfair competition law' (not

[63] Article L420–5 Code du Commerce.

[64] Joined Cases C-267/91 and C-268/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097, Opinion of Advocate General Van Gerven of 28 April 1993, para. 3.

[65] The two provisions (abuse of economic dependence and the rule against below-cost selling) are applied in less than 1 per cent of the competition law cases. L. Idot 'France' in D. Cahill (ed.) *The Modernisation of EU Competition Law Enforcement in the EU* (Cambridge: Cambridge University Press, 2004) 151, 155.

[66] S. 19 Act Against Restraints of Competition, as amended 1 July 2005 (an English version of the Act is available at www.bundeskartellamt.de).

[67] Recital 9 Regulation 1/2003.

German antitrust law) could be applied by national courts to declare an agreement void even if that agreement was lawful for the purposes of Article 81. The background to the dispute is a rule in German unfair competition law whereby a selective distribution system can only be enforced between the manufacturer and the distributor if the distribution system is 'impervious'; that is, the manufacturer must ensure that no unauthorised distributor can sell the goods in question. If the manufacturer fails to ensure that the distribution system is impervious so that the authorised distributors face competition from unauthorised distributors, the former are no longer bound by the sale restrictions in their contract. This rule is designed to protect the distributors who are subject to the selective distribution agreement. The rule is based on fairness considerations: distributors in a selective distribution network have onerous obligations (e.g. to have attractive premises and expert staff) which means they must set high retail prices to recoup costs. It would be unfair on them if the manufacturer were then to sell the same goods to members outside the network who can set lower retail prices because they have no comparable obligations. The ECJ held that the criterion of 'imperviousness' was irrelevant for the application of Article 81, but that national courts could still apply this criterion under national law to declare the agreement void.[68] This means that when there is a 'diagonal' conflict (that is, a conflict between EC competition law and a national rule of law that is not based on national competition law) the national law rule can apply to declare a contract invalid even if the contract is not void under Article 81.[69] To give an example based on English law, if two parties enter into an agreement which is lawful under Article 81, but void under national contract law because of economic duress, then the national rule applies to render the agreement unenforceable.

The difficulty in applying Article 3(3) is to determine which rules of national law are not to be considered 'competition law' rules. The examples used here are borderline: economic duress could be compared to the abuse of a dominant position by a situational monopoly, so perhaps similar policies animate that doctrine; the German example is more borderline (the rule can be rationalised on the basis of free-rider arguments familiar to competition lawyers), and the ECJ seems to have assumed that national law could apply because the rule in question did not fall within the statute on what in Germany is called 'cartel law'. Moreover, the borderline between what is competition law and what is not might be the subject of greater controversies in the future, especially as the current vogue is to see EC competition law as designed to promote 'consumer welfare'. Could this mean that rules of national consumer law can no longer apply to regulate agreements if these agreements are lawful under Article 81?

[68] Case C-41/96 *VAG-Händlerbeirat eV v. SYD-Consult* [1997] ECR I-3123 paras. 12–14.

[69] R. Wesseling 'The Commission White Paper on Modernisation of EC Antitrust Law: Unspoken Consequences and Incomplete Treatment of Alternative Options' [1999] *European Competition Law Review* 420, 429–30.

Alternatively, can Member States circumvent the primacy of EC competition law by drafting stricter national laws and labelling them 'consumer protection' or 'unfair practices' laws? If the latter, one might be excused for questioning whether the effects of these exceptions to the primacy of EC competition law are potentially so extensive as to frustrate the goal of excluding the application of national competition laws.

Taking all that has been said in this section together, it is debatable whether Regulation 1/2003 was necessary to achieve efficient enforcement and that it will actually lead to more effective enforcement. More generally, in the White Paper on Modernisation the Commission presented four other options for reform but none were given any serious consideration.[70] One option, for example, which had been suggested by the German competition authorities, was to empower NCAs to grant exemptions, so that the burden of the notification/exemption system was shared. This was rejected in the White Paper because the allocation of notifications could be troublesome and new Member States might struggle.[71] However, these two problems also affect the system that has been put in place, as we will see below when we look at case allocation. This option would have served to resolve the Commission's overload and allowed it to pursue an active competition policy while guaranteeing parties who were bona fide uncertain as to the legality of their agreement a better opportunity of having this reviewed and exempted. Another option, reading Article 81(1) in a more economically enlightened manner, as the Court of Justice had repeatedly suggested, was rejected because it would have rendered Article 81(3) redundant, although as we noted in chapter 2 this argument is not convincing. On the contrary, had the Commission begun to interpret Article 81(1) so as to catch only agreements truly likely to harm economic welfare, fewer parties would feel the need to notify and obtain exemptions. However, as Rein Wesseling put it, the Commission was 'married to one idea' and paid scant attention to alternative reform projects, avoiding any meaningful debate over alternative solutions to achieve more effective enforcement of the law.[72]

3 The new enforcement structure

3.1 The Commission

The major implication of modernisation is that the Commission has freed itself from the burden of reviewing harmless agreements and is capable of setting its priorities. It intends to focus upon serious infringements (e.g. cartels) and enforce state aid rules with more rigour. This could be a significant change. In the period 1989–96 the Commission had begun 'own initiative' enforcement

[70] Wissmann 'Decentralised Enforcement' pp. 149–53.

[71] White Paper on Modernisation paras. 58–62.

[72] R. Wesseling 'The Draft Regulation Modernising the Competition Rules: The Commission is Married to One Idea' (2001) 26 *European Law Review* 357.

action in only 13 per cent of the cases; the rest of its activity was reactive (the result of either complaints or notifications).[73] The Commission's new policy priority is complemented by greater enforcement powers. First, Regulation 1/2003 empowers the Commission to carry out unannounced inspections in private homes as well as company headquarters; it may seal premises and offices to ensure evidence is not destroyed, ask for oral explanations and even, if the parties consent, carry out interviews.[74] It has been suggested that the increase in investigatory powers that the Council granted to the Commission is a tacit endorsement of the Commission's commitment to prioritise cartel enforcement.[75] Second, the Commission has been increasing the level of fines set for cartel infringements,[76] a policy which has been backed by the ECJ.[77] Third, as we saw in chapter 9, it has imitated the United States in offering leniency to firms that 'confess' to being party to an anticompetitive agreement. While the enforcement powers and the penalties are not as significant as those provided for in the United States and in some EC Member States (e.g. criminal penalties are available for infringements of UK competition law) they provide a coherent shape to the Commission's new enforcement policy.[78] As we suggested above, it is arguable that a major reason for Regulation 1/2003 is to shift the Commission's enforcement policy towards a US-style model based on deterrence. This, rather than the inadequacy of the old system, is a better explanation for Regulation 1/2003. To a certain extent, this change in enforcement policy pre-dates the reform. In a major speech the competition Commissioner, Neelie Kroes, noted that in the four years after 2001 (that is, three years before the coming into force of Regulation 1/2003) the Commission adopted thirty-one decisions against cartels, imposing fines of nearly 4 billion euros. These numbers amount to 35 per cent of all cartel cases since 1969.[79] Thus the deterrence-based model had already been embraced while the Commission was supposedly locked into the inadequacies of Regulation 17/62.

[73] EC Commission *Twenty-sixth Report on Competition Policy* (1996) pp. 341–2.

[74] Procedures fall outside the scope of this book. For an outline, see D. Chalmers, C. Hadjemmanuil, G. Monti and A. Tomkins *European Union Law: Text and Materials* (Cambridge: Cambridge University Press, 2006) pp. 940–57. For greater detail, see C. S. Kerse and N. Kahn *EC Antitrust Procedure* 5th edn (London: Sweet & Maxwell, 2005); L. Ortiz Blanco (ed.) *EC Competition Procedure* 2nd edn (Oxford: Oxford University Press, 2006).

[75] Venit 'Brave New World' p. 568.

[76] EC Commission *Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No. 1/2003* (2006) (available at http://ec.europa.eu/comm/competition/antitrust/legislation/fines.html), which increase the amount of fines to enhance the deterrent effect of competition law.

[77] E.g. Joined Cases C-189/02P, C-202/02P, C-205/02P – C-208/02P and C-213/02P *Dansk Rørindustri A/S and Others v. Commission*, judgment of 28 June 2005 upholding the Commission's fine even though it deviated from the fining Guidelines.

[78] EC Commission 'A Proactive Competition Policy for a Competitive Europe' COM(2004)213 final para. 4.1.

[79] N. Kroes 'The First Hundred Days' speech, 7 April 2005, available at http://ec.europa.eu/comm/competition/index_en.html.

In addition to acting as a cartel buster, the Commission also has three major additional tasks to perform. The first is to dictate the development and direction of EC competition law.[80] This is accomplished by the publication and renewal of soft law instruments and Block Exemptions. The second task is to assist firms that are planning agreements but are uncertain about the competition law implications, and the third is to monitor the performance of NCAs. We have seen examples of the first task in earlier chapters, and we consider the second task here and the third in sections 3.2 and 3.3 below.

Recall that one major gap in the new system is that parties are unable to notify agreements *ex ante*. While the notification/exemption system was not perfect (it was time consuming and laden with uncertainty) it offered parties some legal security, which they now lack. As we suggested above, if the notification system had been managed efficiently, there would have been no case for abandoning it. It is amusing that the Commission itself recognised the value of *ex ante* notification in a recent case before the CFI. The parties had been granted an exemption in 2003 but were dissatisfied because it was not granted for a long enough period, so they appealed to the CFI to have the Commission's exemption quashed, principally on the grounds that the Commission had misinterpreted Article 81(1). One of the Commission's arguments was that the parties should be content with the exemption because it gave them 'legal certainty' which they would have to forgo if the appeal was successful because Regulation 1/2003 brought to an end the system of prior notification.[81] This is an extraordinary (if not scandalous) admission that a system of *ex ante* regulation brings benefits to some kinds of agreement, but it has now been lost. It also reveals that the Commission is still aware that firms find it next to impossible to understand what constitutes an anticompetitive agreement under Article 81(1), so the claim that the absence of a notification system can be traded off because parties have enough legal certainty to assess for themselves whether the agreement complies with Article 81 is one which even the Commission now doubts. Moreover, in this case, presumably decided while the Commission was busy writing its Guidelines on the interpretation of Article 81(3), the CFI disagreed with the Commission's own assessment of what is meant by a restriction of competition. So even the principal enforcer is still struggling to work out what triggers Article 81(1). This is in striking contrast to what the Commission was saying in the White Paper on Modernisation about the increased degree of legal certainty that has now emerged that would allow firms to plan. The upshot is that firms will require ever increasing legal and economic advice

[80] Based on Article 85 EC and Case C-344/98 *Masterfoods Ltd v. HB Ice Cream Ltd* [2000] ECR I-11369 para. 46.

[81] Case T-328/03 *O2 (Germany) GmbH & Co. OHG v. Commission*, judgment of 2 May 2006, para. 42, discussed above at pp. 37–9.

before implementing agreements, and this favours larger firms with greater economic resources.[82]

The Council and the Commission responded to the risk of legal uncertainty in two ways: by attempting to clarify the substantive meaning of Article 81, and by creating procedures that allow for a substitute to *ex ante* notification. The substantive clarification of Article 81 can be witnessed by the fact that the Commission used the final years of Regulation 17/62 to publish a vast number of individual exemptions in a range of markets so that parties and NCAs are aware of how Article 81(3) operates.[83] In addition, it sought to restrict the scope of Article 81(3) so that public policy considerations are excluded from its ambit. These are designed to make the application of Article 81 more predictable and to aid business in a system without *ex ante* notifications. Nevertheless these two measures are unlikely to be of help when parties engage in practices not foreseen by the guidelines. Moreover, because competition cases are intimately fact specific, it has been argued that general guidelines and precedents are unlikely to provide sufficient legal security to those planning an agreement.[84]

At a procedural level, Regulation 1/2003 provides three additional substitutes for the now defunct notification system. The first is in Article 9 under which firms are able to offer 'commitments' to the Commission whereby they promise to modify their behaviour when the Commission intends to take action against them. This allows the parties to negotiate a solution with the Commission after the agreement has been implemented and investigated by the Commission. Thus, there is still scope for some form of consultation with the Commission. However, the paradox is that the Commission has settled highly controversial cases where a formal decision would perhaps have been preferable for the sake of transparency to indicate the nature of the Commission's policy.[85] Moreover, as with comfort letters, commitment decisions do not appear to bind National Competition Authorities.[86] Nevertheless, the Article 9 route seems to be the functional equivalent of a notification/exemption system.[87]

[82] Gilliams 'Modernisation' p. 472; F. Montag and A. Rosenfeld 'A Solution to the Problems? Regulation 1/2003 and the Modernization of Competition Procedure' (2003) *Zeitschrift für Wettbewerbsrecht* 106 (also available at: www.freshfields.com/practice/comptrade/publications/pdf/Regulation12003.pdf).

[83] E.g. *Simulcasting* [2003] OJ L107/58; *Austrian ARA* [2004] OJ L75/59; *CECED* [2000] OJ L187/47; *UEFA Champions League* [2003] OJ L291/25.

[84] Möschel 'Guest Editorial'.

[85] Case COMP/37.214 *Joint Selling of the Media Rights to the German Bundesliga* [2005] OJ L134/46; Case COMP/39.116 *Coca-Cola* [2005] OJ L253/21.

[86] Recital 22 Regulation 1/2003. But see Montag and Rosenfeld 'A Solution to the Problems?' p. 152, who argue that national courts should be bound.

[87] See L. Ritter and W. D. Braun, *European Competition Law: A Practitioner's Guide* 3rd edn (The Hague: Kluwer Law International, 2004) p. 227.

The second substitute for *ex ante* notification is Article 10, which is worth citing in full:

> Where the Community public interest relating to the application of Articles 81 and 82 of the Treaty so requires, the Commission, acting on its own initiative, may by decision find that Article 81 of the Treaty is not applicable to an agreement, a decision by an association of undertakings or a concerted practice, either because the conditions of Article 81(1) of the Treaty are not fulfilled, or because the conditions of Article 81(3) of the Treaty are satisfied. The Commission may likewise make such a finding with reference to Article 82 of the Treaty.

The preamble suggests that the intention behind this provision is to clarify the law, in particular when the parties engage in practices for which there is no precedent. Thus, the 'public interest' is to promote legal certainty and to ensure coordinated enforcement.[88] However, this phrase is quite elastic and may allow the Commission to protect agreements which benefit the economy or on other public policy grounds. Having attempted to seal off the use of Article 81(3) as a tool for public policy, the Commission might reintroduce this risk with Article 10 of Regulation 1/2003.[89]

The third substitute is a suggestion in the Regulation's preamble that the Commission is still able to offer informal guidance to parties where a case gives rise to 'genuine uncertainty'.[90] Such informal guidance is reminiscent of the 'comfort letters' that the Commission would issue, and while the Commission has emphasised that this guidance would be provided only when the legal issues are novel and unresolved and of Community interest, the guidance, like comfort letters, does not bind national courts or competition authorities.[91] This procedure allows for continued dialogue between industry and the regulator but it is a further recognition that a shift to an *ex post* enforcement policy needs to be balanced by an effective *ex ante* notification system.

It remains to be seen whether these methods of granting some form of guidance are going to be workable. They present three challenges. The first is whether the guidance is sufficient for parties. The second is the extent to which they can be used to negotiate or impose upon parties obligations that have nothing to do with the anticompetitive effects but are designed to open markets. As noted in chapter 4, the first Article 9 settlement on football broadcasting rights raised questions as to the relevance of cultural and industrial policy. The third risk is whether the Commission's workload might be

[88] See also Draft Regulation implementing Articles 81 and 82 EC [2000] OJ C365E/284, Explanatory Memorandum Article 10.

[89] Montag and Rosenfeld 'A Solution to the Problems?' p. 115, who note that the European Parliament was in favour of interpreting Article 10 as a public policy measure to achieve wider Community ambitions.

[90] Recital 38 Regulation 1/2003.

[91] Commission *Notice on Informal Guidance relating to Novel Questions concerning Articles 81 and 82 of the EC Treaty that Arise in Individual Cases* [2004] OJ C101/78 paras. 5, 24 and 25.

affected so that these procedures remove resources from its central activity, fighting hard-core cartels.

3.2 National Competition Authorities

National Competition Authorities are expected to take on more cases than the Commission, and the UK government suggests this places NCAs in the 'driving seat for much competition law enforcement'.[92] In particular they will address local competition law infringements where they have a comparative advantage because of their familiarity with the local markets and are better placed to regulate national markets than the Commission.[93] The degree to which this division of labour will provide effective enforcement depends on three variables: whether the Commission has managed to save resources with Regulation 1/2003; whether enforcement among the twenty-six competition authorities can be coordinated effectively; and whether NCAs enforce competition law with equal determination. On the first point, we have seen above that the Commission has considerable responsibilities under the new system. We consider the second variable, coordination, in section 3.3 below. It is too soon to make any observations about the third variable, but some preliminary observations may be attempted. First some NCAs are less politically independent than others,[94] second some have fewer resources and less expertise (e.g. it was reported that the seven members of the Belgian competition authority had resigned in protest because resources were woefully inadequate),[95] and third, as a result, some will have more prestige than others. The upshot is that enforcement may be more intensive and sophisticated in states with stronger and more well-resourced competition authorities (e.g. the UK, Germany and Italy) and less so in states where competition authorities lack the resources or expertise to enforce competition law actively. In less than two years since the operation of the network began differences were already beginning to appear. Between 1 May 2004 and 30 June 2006, the three busiest competition authorities were the French (ninety-four cases), the German (sixty-four cases) and the Dutch (forty-four cases); while twelve Member States' NCAs initiated fewer than ten cases.[96] Diversity in the composition of NCAs is acknowledged under Regulation 1/2003 so long as the NCA is able to carry out the tasks under the Regulation.[97]

[92] Department of Trade and Industry 'Modernisation – A Consultation of the Government's Proposals for Giving Effect to Regulation 1/2003 and for Re-alignment of the Competition Act 1998' (April 2003).

[93] Temple Lang 'Decentralised Application'.

[94] A. Riley 'EC Antitrust Modernisation: The Commission Does Very Nicely – Thank you!' [2003] *European Competition Law Review* 659–61, suggesting that there is less political independence in the new Member States' authorities.

[95] Forrester 'Modernisation' p. 106.

[96] Statistics are complied at the ECN's homepage: http://ec.europa.eu/comm/competition/antitrust/ecn/ecn_home.html.

[97] Article 35 Regulation 1/2003.

Whether this diversity will continue and whether it can cause damage to the Community interests remains to be seen.

Even if NCAs are equal in terms of resources, however, it may be questioned whether creating twenty-five additional authorities can lead to more effective enforcement. It has been suggested that difficult cases always require lengthy appraisal whether at national or Community level, so that the application of competition law by NCAs is not likely to lead to faster or cheaper enforcement at least in the short run. Difficult cases in front of inexperienced authorities can also lead to diverging interpretations; moreover, the NCAs are entitled to set diverse enforcement priorities. This suggests that under the new system there may not be, at least for a transitional period, a level playing field for firms.[98]

Moreover, the involvement of NCAs is subject to one further uncertainty even in the easy cases of a flagrant breach of competition law. In order for the application of EC competition law to be engaged, the practice must affect trade between Member States. It follows that the anticompetitive effects will occur in the Member State where the NCA is located and in other Member States as well. However, the penalties that the NCA can impose seem to be restricted to effects felt in its territory, and the NCA has powers to enforce the law only against firms located in its territory. If so, this would risk undermining the rigorous enforcement of EC competition law because the NCA would not be able to impose a fine reflecting the entire harm of the infringement.[99] The alternative, that once the first NCA reaches a decision, the other NCAs where the agreement causes harmful effects will institute their own proceedings, may violate the firm's rights (in breach of the *ne bis in idem* rule which prevents multiple prosecution and punishment for the same offence),[100] but moreover seems a highly inefficient use of resources. It remains to be seen whether the European Competition Network will elaborate solutions to this issue.

3.3 The European Competition Network

The European Competition Network (hereinafter the ECN) was established in 2002, when Regulation 1/2003 was agreed.[101] The ECN is not an administrative body, but a forum where the Commission and NCAs meet to carry out two formal tasks: allocating cases among the NCAs (coordination of enforcement) and ensuring the coherent application of the rules (coordination of results).[102]

[98] Gilliams 'Modernisation', noting the transitional problems.

[99] See further R. Smits 'The European Competition Network: Selected Aspects' (2005) 32 *Legal Issues of Economic Integration* 175, 184–8.

[100] W. Wils 'The Principle of "Ne Bis in Idem" in EC Antitrust Enforcement: A Legal and Economic Analysis' (2003) 26 *World Competition* 131.

[101] Council of the European Union, Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities, 10 December 2002, available at http://register.consilium.eu.int; document number 15435/02 ADD1.

[102] A. Schaub 'Continued Focus on Reform: Recent Developments in EC Competition Policy' 2001 *Fordham Corporate Law Institute* 31 (Hawk ed. 2002).

These two kinds of coordination are necessary because Regulation 1/2003 did not establish a system whereby the decision of one NCA binds others. Instead, to use the Commission's jargon, there is a system of 'parallel competences'.[103] This means that, in theory, an agreement could be reviewed independently by more than one NCA and each could reach a different result. To avoid this outcome, which would frustrate the aims of the reform programme, the Commission expects that cases can be allocated via the ECN and has published a prescriptive notice to regulate case allocation, and there are safeguards to ensure rules are applied consistently. We consider these two forms of coordination in turn.

Coordination of enforcement is provided for in the Notice on Cooperation within the Network of Competition Authorities. The basic principle is that each case should be taken up by either a single NCA, or several NCAs acting jointly, or the Commission.[104] This leads to one decision per case and avoids inconsistent outcomes (but, as suggested above, it is not clear whether from a deterrence perspective the NCA is able to impose fines for all the anticompetitive effects). The reason why a system of exclusive competences was not established is probably because Member States wanted to remain free to apply competition law independently of other NCAs.[105] This is confirmed by the political declaration establishing the ECN, where, while Member States agree to cooperate with other NCAs and the Commission on the basis of 'equality, respect and solidarity', they also declare the independence of each NCA.[106]

In practice, the ECN will not operate to allocate cases, but to reallocate them, because a competition case will first be taken up by one NCA whose first duty is to notify the Commission and other NCAs that it has commenced an investigation.[107] Only at that moment might a case be reallocated, and this can occur for two reasons: first, the NCA itself seeks reallocation (e.g. because it realises that there is another NCA that is better placed or because it wishes to cooperate with another NCA); second, another NCA or the Commission might request that it address the case in question. In order to decide which NCA should act, it is determined which NCA is 'well placed' on the basis of three criteria: the effects of the infringement in question occur in its territory; it is capable of issuing an appropriate remedy; it is able to obtain the relevant

[103] Commission *Notice on Cooperation within the Network of Competition Authorities* [2004] OJ C101/43 (hereinafter Notice NCA) para. 1.
[104] Ibid. para. 5.
[105] The most that was agreed is that if one NCA is acting, then other NCAs and the Commission are entitled to use that fact to reject a complaint on the same infringement. Article 13 Regulation 1/2003.
[106] Joint Statement of the Council and the Commission para. 7.
[107] Article 11(3) Regulation 1/2003 (NCA's duty to inform the Commission); Article 11(2) (Commission's obligation to inform other NCAs) and Notice NCA paras. 16–17 (NCA's duty to inform the ECN).

information.[108] The Commission is deemed to be better placed than NCAs when the agreements have effects covering more than three Member States or when the case raises issues of Community interest or a new legal issue.[109] Cooperation among NCAs continues once the case has been allocated in that information that NCAs have about the firms under investigation may be exchanged.[110]

While these efforts to coordinate enforcement are designed to make allocation predictable,[111] certain potential risks arise. First, there is a risk of under-enforcement: a well-placed competition authority may take no action, either because the anticompetitive behaviour in question is seen to be in the national interest (e.g. an export cartel) so the NCA refuses to prohibit it, or because, while willing to address the issue, it lacks resources to take action. Second, there is a risk of duplication of enforcement: if two or more NCAs want to act on the same infringement, there is nothing in the ECN procedures that establishes a formal way to allocate a case to one NCA. The risk for a firm is that its actions are evaluated in an uncoordinated manner, with different results in different Member States.[112] However, some have suggested that parallel enforcement is incompatible with the principle that penalties cannot be imposed twice for the same infringement, so that while it is possible for NCAs to investigate a case jointly, only one NCA is entitled to impose a penalty.[113] These risks of duplication and under-enforcement should make one query the degree to which Regulation 1/2003 can lead to a more effective application of EC competition law.[114] The Commission had predicted that reallocation would be rare and it reported that in the 180 new cases in 2005 there were few reallocations (without unfortunately reporting the number of reallocations).[115]

In contrast to the informal 'network' structure put into place to ensure coordination of enforcement, the process for coordination of outcomes is hierarchical, because while there is little to ensure cooperation among the NCAs, the Commission controls the decision-making practice of each NCA. First, an NCA may not reach a decision that is contrary to a Commission decision.[116] Second, before adopting a decision, the NCA must send a draft to the Commission, and at this stage the Commission may make comments or take the drastic step of removing the case from the NCA and initiate proceedings itself.[117] Formally, there seems to be more scope for the ECN to comment on case allocation than on the substantive application of the law. In fact, the

[108] Notice NCA para. 8. [109] Ibid. paras. 14 and 15.
[110] Article 12 Regulation 1/2003; Notice NCA paras. 26–30.
[111] Joint Statement of the Council and the Commission para. 13.
[112] See S. Bammer 'Concurrent Jurisdiction under Regulation 1/2003 and the Issue of Case Allocation' (2005) 42 *Common Market Law Review* 1383, 1402–8.
[113] Wils 'Principle of "Ne Bis in Idem"'.
[114] In 2004 reallocation occurred in fewer than 1 per cent of 298 cases. EC Commission *Thirty-fourth Report on Competition Policy* (2004) para. 105.
[115] EC Commission *Thirty-fifth Report on Competition Policy* (2005) paras. 210–14.
[116] Article 16(2) Regulation 1/2003. [117] Article 11(4)–(6) Regulation 1/2003.

ECN seems to be sidelined by provisions that certain anticipated decisions may be referred (by an NCA or a Member State) to the Advisory Committee.[118] Thus the ECN seems to have little role to play in the development of substantive law, where the Commission plays a monitoring role.

The system affords the possibility of coordination to a much greater extent than the powers available to federal competition authorities in the United States.[119] This might be necessary given the relative inexperience of certain Member States with competition law, although it does undermine the Commission's claim in the White Paper on Modernisation that there is a 'culture of competition' in the EU. Arguably such control mechanisms would be less relevant if this culture were better embedded in national laws. In fact in 2005 the Commission said that the ECN was serving as a means to create a competition culture among the Network members.[120] Moreover, the Commission's determination to control the results that NCAs reach stands in contrast to the assertion in the White Paper on Modernisation that there is 'abundant case law, clearly established basic principles and well-defined details'.[121]

A more general reflection is warranted about the functioning of the ECN, and that is to consider what assumptions underlie networks and how far the Commission has designed a system with the potential to contribute to delivering effective enforcement. On one level, it has been argued that a well-functioning network requires three conditions: mutual trust and cooperation; professionalism; and a common regulatory philosophy.[122] Judged against these standards, the ECN is not perfect. While there is some degree of trust (the members are committed, at a political level, to the idea of one NCA per case), the Commission's right to veto NCAs by taking a case away from them and the ability of one NCA to institute independent proceedings should it disagree with another NCA point to a lack of complete trust among the members of the ECN. There is a good degree of cooperation (especially with the provisions for exchanging information) but the Commission seems to retain its role as principal. All NCAs are increasingly professionalised, although Regulation 1/2003 does not require that an NCA should be independent of government control, which could weaken the role of the network. The Commission believes that there is a common regulatory philosophy after forty years of centralised competition law enforcement; however, as we said before, this statement is not consistent with its re-interpretation of

[118] Article 14(7) Regulation 1/2003; Notice NCA paras. 61–2.

[119] T. Calvani 'Devolution and Convergence in Competition Enforcement' [2003] *European Competition Law Review* 415, 422; P. J. Slot 'Is Decentralisation of Competition Enforcement Dangerous? Drawing Lessons from the US Experience' 2001 *Fordham Corporate Law Institute* 101 (Hawk ed. 2002).

[120] EC Commission *Thirty-fifth Report on Competition Policy* (2005) para. 204.

[121] White Paper on Modernisation para. 3.

[122] G. Majone 'The Credibility Crisis of Community Regulation' (2000) 38 *Journal of Common Market Studies* 273, 297–8.

Article 81(3). While the conditions for a successful network might not be perfect, it may be suggested that the presence of the ECN itself will make each NCA accountable to the others and eager to ensure the success of the network and the effective enforcement of competition law. Thus the network might strengthen itself as the members have an incentive to maintain their reputation in the eyes of their colleagues.[123] Trust, cooperation and a common regulatory philosophy can emerge through the working of the network.[124] However, one flaw in the Commission's design for the ECN is its excessive zeal in holding NCAs to account, which may lead to too much homogeneity in the performance of NCAs.[125] This criticism is based on the fact that the ECN gives the Commission hard law powers to control the NCAs when a less rigid scheme of accountability would be preferable, so as to allow a degree of regulatory diversity. It has been suggested, for example, that the ECN could function as a forum for comparing and evaluating the performance of the NCAs and that this would allow each NCA to have greater autonomy while creating a system where, incrementally, the methods of enforcement can converge by the dissemination of 'best practices'. Moreover, diversity may be necessary as conditions of each market vary, requiring diverse regulatory efforts. In the latter case, it is worth remembering that one argument for Regulation 1/2003 is that NCAs have a better understanding of local markets. This should imply greater autonomy when such markets are regulated, and less oversight by the Commission.

4 Side effects

We noted some of the practical challenges that the current system of enforcement faces above. We suggested that Regulation 1/2003, far from being necessary and revolutionary, was part of an incremental re-orientation of competition law enforcement, and a response to a more complex set of factors than just Commission overload, in particular a response to pressures from those wanting a European Cartel Office, and an interest in developing a new set of enforcement priorities. We also noted that the Commission's tasks go beyond the pursuit of hard-core cartels and extend to designing policy, guiding uncertain firms planning agreements that are not in their nature anticompetitive, and monitoring NCAs. As for the latter, we suggested that the coordination among NCAs is incomplete and that the ECN might not be designed in an ideal manner because, rather than devising some form of network governance, whereby the ECN becomes a locus for the development of competition policy, the Commission seems to retain a primary role. In this section the net is cast a

[123] Ibid. p. 298.

[124] D. Marsh and M. Smith 'Understanding Policy Networks: Towards a Dialectical Approach' (2000) 48 *Politics* 4.

[125] P. Nicolaides 'The Political Economy of Multi-tiered Regulation in Europe' (2004) 42 *Journal of Common Market Studies* 599.

little wider, to consider how far Regulation 1/2003 challenges the nature and role of competition law.

4.1 Juridification

Some scholars have argued that one feature of modern states is the increased 'juridification' of social and economic life. By this they mean that more areas of human activity are subjected to legislation, enforcement by regulatory authorities and judicial control.[126] Imelda Maher has used this concept to reflect upon the reform of UK competition law in 1998, where the juridification of competition policy seems to have occurred in a fairly dramatic manner: gone is discretionary ministerial control over how to regulate restrictive practices, gone is a 'public interest' standard in the legislation and in come agencies freed from state control, with increased investigatory powers and applying legal standards that are more easily susceptible to judicial review.[127] Regulation 1/2003 can be said to force the juridification of competition law across the EU in that it requires that Member States designate independent competition authorities to apply Articles 81 and 82.[128]

If juridification replaces politics with law (or, to use Professor Teubner's more elaborate words, it constitutionalises the economic system) it also gives greater prominence to technocratic methods for addressing competition problems, and economic theories come to the fore. Doctrine becomes subservient to the insights of economics, and the 'public interest' goals of competition law as administered by a state-centred system vanish. This phenomenon is clearly visible in the British system and is likely to repeat itself across Europe as a result of Regulation 1/2003. It might be argued that there is nothing serious at stake: after all, markets are best governed by rules that are sensitive to the way markets work, and if juridification of competition law is necessary to allow institutions to regulate markets more effectively, it should be welcomed. Juridification might even be what the Commission wished to achieve with Regulation 1/2003: by placing the bulk of enforcement in the hands of independent agencies, it responded to the criticisms of its own politicised decision-making institutional makeup. The problem is that while NCAs may well apply legal standards in a narrow technical manner, the Commission remains the supreme enforcer and public policy considerations can still be identified, either via Article 81(3) decisions, or via the procedures that the Commission has under Articles 9, 10 and 16 of Regulation 1/2003 that we discussed above. Juridification is incomplete.

[126] See generally G. Teubner 'General Aspects' in G. Teubner (ed.) *Juridification of Social Spheres* (Berlin: De Gruyter, 1987).
[127] Maher 'Juridification'. [128] Article 35(1) Regulation 1/2003.

4.2 Europeanisation of economic governance

Professor Wilks has suggested a provocative perspective from which to challenge Regulation 1/2003: modernisation is not about empowering national competition authorities, rather a strategic move through which the Community's economic policy (based on neoliberal ideas about how markets work) is imposed on Member States.[129] The argument is plausible in that, as we noted above in section 3, NCAs must first and foremost apply EC competition law, they must subject their decisions to scrutiny by the Commission, and considerable soft law measures have been put into place to secure a uniform interpretation of EC competition law among the NCAs. This deprives governments of the power to apply national law to carry out various forms of industrial policy. This critique suggests that Regulation 1/2003 places DG Competition in a position comparable to the European Central Bank. Just as the ECB dictates monetary policy for national central banks, so the Commission dictates the direction of competition policy for NCAs to implement. Thus, the decentralisation of enforcement achieved by Regulation 1/2003 gives the Commission more power over the development of competition law in the EC than the system of compulsory notification in Regulation 17/62. In effect, this Regulation can be characterised as forcing 'convergence by stealth', turning NCAs into branches of DG Competition.[130] As Möschel had put it, the effect of modernisation is that 'the organs of the Member States mutate into auxiliaries of the Commission'.[131] From this perspective, Regulation 1/2003 is part and parcel of the Community's industrial policy, premised upon the promotion of free markets.

This vision is not a threat for Member States whose economic policy is broadly in tune with the Commission's but it can provide a source of tension with Member States who see their sovereignty over economic policy taken away by the Commission's increased efforts to remove economic governance from the Member States. The anticipated risk that this creates is of tension and conflict between the Commission and Member States who are antagonistic to the Commission's policy. It remains to be seen whether some reaction akin to that of the Polish government in response to EC merger law (which we discussed in chapter 8) will manifest itself in controversial Article 81 cases.

4.3 The rebirth of national laws?

In a provocative reflection which tallies with the two themes broached above, Professor Ullrich has suggested that the reduction in the scope of EC

[129] S. Wilks 'Agency Escape: Decentralisation or Dominance of the European Commission in the Modernisation of Competition Policy?' (2005) 18 *Governance* 431; see also Riley 'EC Antitrust Modernisation'.
[130] McGowan 'Europeanisation Unleashed' pp. 1001–2.
[131] Möschel 'Guest Editorial' p. 497.

competition law which has been brought about by the substantive changes that we discussed in earlier chapters (i.e. the use of the consumer welfare standard and economic theories of anticompetitive harm), combined with the marginalisation of national competition law brought about by Regulation 1/2003, could in turn stimulate the growth or rebirth of other doctrines in the Member States, in particular laws of unfair competition. That is, courts and Member States might react against the dominance of the Commission by recourse to other norms to reassert their understanding of what competition is about. This might occur with rules of law that may apply to contradict Article 81 but are in conformity with EC law by virtue of Article 3(3) of Regulation 1/2003. He argues, with reference to German law, that this development would complement EC competition law, in particular by protecting competitors and granting each their 'basic freedom of individual competition'.[132] These reflections are a reaction against the increasing use of economics in EC competition law and the abandonment of ordoliberal principles of discipline and pluralism.

A similar example that supports this analysis can be seen in the approach taken by the British Competition Commission (CC) acting under the powers of the Enterprise Act 2002. In two recent market investigations (over store cards and warranties for electrical goods) the CC concluded that there was a market failure that required regulatory intervention in scenarios where no action would be warranted under EC competition law.[133]

In the case of store cards, the concern arose when large department stores offered consumers a store credit card (which can normally be used only to make purchases in the store which issues it) with very high APRs (average percentage rates, a standard measure for the cost of a credit agreement). All store cards had high APRs, although there was no agreement among the stores to fix high rates. The CC found that there was no competitive pressure on retailers to reduce the APR; and while credit card APRs were much lower, this did not exert any competitive pressure on store cards. There was simply a market failure which harmed consumers. The remedy imposed was to require store cards to provide clearer and greater information for consumers about the APRs and the charges they were likely to incur.

In the case of warranties for domestic electrical goods, concerns arose about the sale of extended warranties in store. The larger retail outlets had their own electrical warranty which they offered to consumers. It was noted that unless the warranty was bought in store, consumers were unlikely to obtain warranties for the goods. The CC found little price competition on warranties (although there was considerable competition for the sale of the electrical

[132] H. Ullrich 'Anti-Unfair Competition Law and Anti-Trust Law: A Continental Conundrum?' EUI Working Paper in Law 2005/01 (available at http://cadmus.iue.it/dspace/) pp. 45–6.

[133] Competition Commission *Store Cards Market Investigation*, 7 March 2006; Competition Commission *Extended Warranties on Domestic Electrical Goods* Cm 6089 (2003).

goods) and concluded that the five largest retailers made excessive profits when selling warranties as a result of the market's imperfections (estimated at between £116 and £152 million more than would have been earned in a competitive market). This meant that consumers would pay a third less for the warranty in a competitive market. This market failure was remedied by imposing requirements on retailers to provide transparent information about the price of warranties, and to allow consumers to cancel a warranty easily, so as to facilitate their search for better offers.[134]

The puzzle with both of these decisions is that traditional competition law norms could not apply. This might suggest, as we have already hinted in chapter 9, that the market investigation powers of the Enterprise Act are a way of filling in the gaps of other competition rules. On the other hand, it might suggest that the perspective through which the CC acted in these two cases is quite different from that which would be adopted by a competition authority. Rather, the actions of the CC are more reminiscent of those of a consumer protection agency: consumers are portrayed as weak and ill informed and in need of safeguards to avoid incurring debts. It is a much wider conception of consumer welfare than that displayed by competition law enforcement. A competition lawyer would ask whether the store selling the card had market power and answer this in the negative: the consumer should shop around for the best credit deal; the fact that many consumers fail to do so is their fault, or a problem with the market, but not something for which the retailer is responsible. The excess profits earned by retailers are not a major antitrust worry either: in fact, as we noted in chapter 7, the EC Commission hardly bothers with pursuing excessive pricing cases. Likewise the remedies are quite remote from that which we see in competition cases and they look more like the kind of regulatory remedy one sees in consumer law, which prizes the provision of clear information to the consumer and the ability to cancel contracts freely. On the other hand, according to some economists, this is the direction that competition law should take, by focusing on factors that determine consumer habits.[135]

Just as Professor Ullrich noted how German unfair competition law might be deployed to extend the concept of competition beyond economic efficiency to guarantee economic freedom of businesses, the CC extends the notion of consumer welfare by considering a different kind of market failure (lack of information), which causes the same kind of harm that competition law safeguards. The expansion of national law may result in a richer domestic culture of competition than that which DG Competition is keen to create.

[134] The Supply of Extended Warranties on Domestic Electrical Goods Order SI 2005 No. 37.

[135] M. Waterson 'The Role of Consumers in Competition and Competition Policy' (2003) 21 *International Journal of Industrial Organization* 129 for an illuminating account.

5 Private enforcement

Modernisation envisages an increased role for damages claims by parties suffering from anticompetitive conduct.[136] While the European Courts proclaimed that Articles 81(1) and 82 have direct effect and granted actionable rights as early as 1974,[137] to date there has been little recourse to the courts. A major study in 2004 suggested that there was 'total underdevelopment' of damages actions for breaches of competition law, with approximately sixty cases since 1962.[138] This is a paltry record if compared with the United States where private actions outnumber public enforcement by a ratio of ten to one,[139] and where some commentators suggest that there is under-enforcement in spite of these larger numbers.[140]

We explore the possible role of private enforcement in the EC in the following way. First, we argue that the ECJ has failed to address a crucial question about the protective scope of competition law, by stating that anyone is free to claim damages. The effect of this is to allow claims by parties whose success frustrates the aims of competition law. Instead, we argue that only certain parties should claim: consumers and competitors. In section 5.2 we consider the difficulties in compensating consumers adequately. In section 5.3 we explore some of the reasons why a culture of private litigation might not emerge readily in the EC, and in section 5.4, we consider the relationship between modernisation and private enforcement.

5.1 The protective scope of competition law statutes

In any tort liability rule, the law imposes certain limitations on the right to claim. Some of the limits are created by rules of causation, but first the courts decide the kinds of plaintiffs that have a right to seek damages: the protective scope of tort. A well-known English tort case can help explain what this means. A ship-owner agreed to carry a number of sheep belonging to the defendant. The sheep were washed overboard because the ship-owner failed to secure them in pens, in breach of the Contagious Diseases (Animals) Act 1869. The owner of the sheep sought damages on the basis that the ship-owner was in

[136] See Recital 7 (noting that national courts have 'an essential part to play') and Article 6 Regulation 1/2003.

[137] Case 127/73 *Belgische Radio en Televisie and Société Belge des Auteurs, Compositeurs et Editeurs de Musique v. SABAM* [1974] ECR 51 para. 16; the right to damages was restated in Case C-282/95P *Guérin Automobiles v. Commission* [1997] ECR I-1503 para. 39.

[138] Ashurst Study on the conditions of claims for damages in case of infringement of EC competition rules, 31 August 2004 (available at http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/study.html).

[139] B. E. Hawk and J. D. Veltrop 'Dual Antitrust Enforcement in the United States' in P. J. Slot and A. McDonnell *Procedure and Enforcement in EC and US Competition Law* (London: Sweet & Maxwell, 1993) p. 27.

[140] See generally C. A. Jones *Private Enforcement of Antitrust Law in the EU, UK and USA* (Oxford: Oxford University Press, 1999).

breach of his statutory duties, but the court did not allow the claim. The aim of the statute was to protect the animals from disease, not to guarantee their safety. Had the sheep died from illness, a claim would have been allowed, but the loss in question did not fall within the protective scope of the statute.[141] An action for damages under Articles 81 and 82 is also an action for breach of statutory duty, so it is relevant to explore what the protective scope of these measures is.

There are two ways to explore the protective scope of competition law statutes. The first begins by suggesting that private litigation has a dual function: it protects the plaintiff and it deters further anticompetitive conduct.[142] This is supported by the fact that the plaintiff must prove both that the defendant's act restricts competition (now understood as a harm to consumer welfare), and that he has suffered a personal loss. Competition law does not protect an individual, but the market. Private litigation then should be allowed when the plaintiff's action helps to deter anticompetitive behaviour.[143] The second way to justify a right to damages is to explore what classes of person EC competition law protects. On this basis, all consumers should be entitled to claim because EC competition law protects consumer welfare. This was made quite clear in the Court's explanation of the harm caused by a cartel:

> Participation by an undertaking in anti-competitive practices and agreements constitutes an economic infringement designed to maximise its profits, generally by an intentional limitation of supply, an artificial division of the market and an artificial increase in prices. The effect of such agreements or of such practices is to restrict free competition and to prevent the attainment of the common market, in particular by hindering intra-Community trade. Such harmful effects are passed directly on to consumers in terms of increased prices and reduced diversity of supply. Where an anti-competitive practice or agreement is adopted in the cement sector, the entire construction and housing sector, and the real-estate market, suffer such effects.[144]

Note how the Court argues that the individuals harmed by a cartel are all those who purchased cement, and all consumers further down the line that suffer as a result of the higher prices in the industry. It follows from this that consumers should have a right to damages because they are the direct beneficiaries of

[141] *Gorris v. Scott* (1874) LR 9 Exch. 125.

[142] The Commission erroneously says that private lawsuits only safeguard the plaintiff's rights. EC Commission *Notice on Cooperation between National Courts and the Commission in applying Articles [81] and [82] of the Treaty* [1993] OJ C39/6 para. 4; EC Commission *Notice on the Cooperation between the Commission and the Courts of the EU Member States in the Application of Articles 81 and 82 EC* [2004] OJ C101/54 para. 4.

[143] See Case C-453/99 *Courage v. Crehan* [2001] ECR I-6297 paras. 26 and 27. On the significance of this case generally, see A. P. Komninos 'New Prospects for Private Enforcement of EC Competition Law: *Courage v. Crehan* and the Community Right to Damages' (2002) 39 *Common Market Law Review* 447.

[144] Joined Cases C-204/00P, C-205/00P, C-211/00P, C-213/00P, C-217/00P and C-219/00P *Aalborg Portland and Others v. Commission* [2004] ECR I-123 para. 53.

Article 81. Until recently, the Italian courts had refused to recognise the consumer's right to secure damages, but in a path-breaking judgment Italy's highest court has now recognised that competition law safeguards consumer interests.[145]

In sum, we can justify the right to damages for consumers on two alternative grounds: they have a 'subjective right' which is within the protective scope of Article 81, or their lawsuits deter unlawful agreements.[146]

The same two justifications can be invoked to establish that competitors have a right to seek damages. Recall that Article 82 is designed to protect competitors from the exclusionary tactics of dominant firms. Note also that, as we saw in chapter 10, vertical restraints can foreclose market access to other competitors. In these two scenarios the person that the law seeks to protect should have a right to damages. From a deterrence perspective, granting a right to damages to a person that is so directly injured by the anticompetitive action serves to protect those who are less directly affected, for example consumers or would-be entrants who may be deterred because of the dominant firm's exclusionary reputation.

However, the Court of Justice has not examined what the protective scope of the competition laws is in the manner suggested above, and has said that other parties are also able to claim damages for infringements of Article 81. In a recent judgment the Court simply proclaimed: 'any individual can claim compensation for the harm suffered where there is a causal relationship between the harm and an agreement of practice prohibited under Article 81 EC'.[147] With this conclusion the Court appears to suggest that there is no need to ask who is protected by Article 81, because anyone whose loss is caused by the breach of Article 81 can claim damages. However, this is an unreasonably wide basis upon which to ground liability. Suppose members of a cartel supplying a safety device to factories boycott one factory because it is trying to buy competing goods from outside the cartel and as a result an employee of that factory suffers injury. Can the Court really have intended that this victim (whose loss is caused by the cartel) should be entitled to make a claim against the cartel members under Article 81? While this example is deliberately far-fetched, a real scenario has occurred where the Court's failure to consider the protective scope of Article 81 has negative repercussions. This is the scenario in the litigation between Crehan and Inntrepreneur. Mr Crehan entered into a

[145] See R. Incardina and C. Poncibò 'The Corte di Cassazione takes "Courage". A Recent Ruling Opens Limited Rights for Consumers in Competition Cases' [2005] *European Competition Law Review* 445.

[146] In the United States, the 'protective scope' inquiry is carried out by considering whether the plaintiff has suffered 'antitrust injury'. This requires the court to decide what economic effects the law seeks to prevent followed by a determination of whether the plaintiff's injury flows from the effects that the law condemns. See generally R. W. Davis 'Standing on Shaky Ground: The Strangely Elusive Doctrine of Antitrust Injury' (2003) 70 *Antitrust Law Journal* 697.

[147] Joined Cases C-295-298/04 *Manfredi and Others v. Lloyd Adriatico and Others*, judgment of 13 July 2006, para. 61.

lease for two pubs owned by Inntrepreneur. One term of the lease was a 'beer tie' by which Crehan agreed to purchase beers specified by Inntrepreneur. Crehan's business failed, suffering losses between 1991 and 1993, when he surrendered the properties. He sought damages on the grounds that the beer tie infringed Article 81.

When his claim arrived in the English courts, the first doubt was whether a party that had entered into an anticompetitive agreement was entitled to damages, as under English law the right to damages is denied in these circumstances. The Court of Appeal sought guidance from the Court of Justice as to whether the same applied in EC competition cases, and the ECJ ruled that 'anyone' could seek damages, except if they were significantly responsible for the agreement. The Court advanced two hypotheses to illustrate which plaintiff was not significantly responsible: first when the plaintiff is in a weak position vis-à-vis the other party to the contract so that his freedom to negotiate is negated, second when the plaintiff is a distributor in a vast distribution network and the cumulative effect of all the contracts that the defendant manufacturer has entered into lead to an infringement of Article 81. In this context, the responsibility of avoiding the network effects is on the manufacturer, not on the individual distributors.[148] So Crehan could claim, being in a weaker position. The dispute then returned to the English courts for resolution. At first instance, the judge concluded that the agreement was not in breach of Article 81(1) and so damages could not be claimed.[149] In the Court of Appeal the plaintiff won damages because the Court relied on a decision of the Commission (*Whitbread*) that had ruled that a similar agreement was in breach of Article 81(1).[150] But the House of Lords quashed that ruling and reinstated the decision of the High Court, holding that the English courts were not bound to reach the same decision as the Commission in an analogous case.[151] As the House of Lords made no substantive analysis of the right to damages, it is worth returning to that part of the judgment of the Court of Appeal. It held that Crehan was entitled to damages on two grounds: first the losses incurred while running the two pubs, and second the value of the hypothetically successful pubs in 1993 had there been no unlawful beer tie. This calculation seems to be in line with recent case law of the ECJ, which provides that an injured party has a right to damages both for actual loss and for loss of profit.[152]

[148] *Courage v. Crehan* [2001] ECR I-6297 paras. 31–3.

[149] [2003] EWHC 1510 (Ch).

[150] [2004] EWCA Civ 637, relying on *Whitbread* [1999] OJ L88/26. It seems unusual to impose liability on Inntrepreneur by relying on *Whitbread* where the Commission decided that beer ties benefited consumers. As we saw in chapter 2, the Commission makes a partial competition assessment in Article 81(1) and a complete assessment under Article 81(3). Therefore, by applying only part of the *Whitbread* decision, the Court of Appeal failed to consider the overall effects of the beer tie. This point was not noted on appeal to the House of Lords.

[151] [2006] UKHL 38.

[152] *Manfredi*, judgment of 13 July 2006, para. 95.

The upshot of this protracted test case is that both the European and English courts believe that a person like Crehan has a right to damages. However, it is not clear why a distributor should have a claim against the supplier for breach of Article 81. The reason why the beer ties were found unlawful was that they foreclosed market access to other brewers. As we saw in chapter 10, foreclosure is one of the key harms that are caused by distribution agreements, so it would seem appropriate that the protective scope of Article 81 should extend to parties that are unable to enter the market. It is less clear why Crehan should fall within the protection of Article 81. As we did when considering the right to damages of consumers and competitors, we can use two methods to discover why Crehan has a right to damages: either he is within Article 81's protective scope, or his claim deters anticompetitive agreements.

To say that Article 81 protects distributors as well as competing brewers can be justified by reference to the Commission's views on beer ties in the *Whitbread* decision.[153] The Commission, considering a distribution contract similar to that between Crehan and Inntrepreneur, noted that under the beer supply agreement in question the lessee obtained a relatively inexpensive pub lease, while paying higher prices for the tied beer. The Commission was concerned that the beer tie could give the brewer the opportunity to 'cash in on his leverage vis-à-vis the tied customers' with the effect 'that the lessee who faces (unjustified) price differentials may not be in a position to compete on a level playing field'.[154] However, on the facts the Commission granted an exemption because the price charged to tied pubs was only slightly higher than that charged to other pubs and the lessee obtained other benefits to compensate for the higher beer price.[155] The lesson from these findings is that, according to the Commission, Article 81 protects distributors against sharp practices by powerful manufacturers. However, if we accept this, it means that Article 81 is not merely designed to protect consumer welfare, but also designed to safeguard weak parties who enter an anticompetitive agreement. Read in this way, the protective scope of Article 81 becomes very similar to that of Article 82: the protection of weaker parties. This goes against the Commission's attempts in recent years to narrow down the scope of Article 81 to a tool that safeguards consumer welfare. So if we were to say that Crehan's right to damages exists because distributors are protected by Article 81, then this would call into question, if not frustrate, the Commission's reorientation of Article 81 away from safeguarding economic freedom and towards protecting consumer welfare.[156]

[153] [1999] OJ L88/26. [154] Ibid. paras. 156 and 158 respectively. [155] Ibid. para. 168.
[156] The better view is that '[i]mprovident contracts are not antitrust problems simply because they were carelessly or naively made. The tenant who stupidly signs a lease permitting the landlord to vary the rent has not turned the landlord into a monopolist. To accept the contrary position turns antitrust into an engine for resolving contract disputes.' H. Hovenkamp *The Antitrust Enterprise: Principle and Execution* (Cambridge, MA: Harvard University Press, 2005) p. 203.

The second way of justifying Crehan's right to damages is to find that EC competition law protects competition in the sale of beer to pubs, and that by foreclosing competitors through beer ties, the price of beer is inflated and this higher price causes damage to beer purchasers, which in turn harms consumer welfare by pushing up the price of beer. And so Crehan has a right to damages because his lawsuit deters brewers from entering into agreements that cause foreclosure effects. According to this argument, anyone can claim damages provided that their action has a direct or indirect impact on parties who infringe Article 81, in that the award of damages deters them. If this is so, however, then the employee who suffers personal injury because a cartel boycotts his employer's firm should also be entitled to claim damages because that too would deter cartel members.

Of these two justifications (Crehan is a protected party or deterrence), the ECJ in *Courage v. Crehan* seemed to apply the latter. While the Court began by saying that Crehan has 'rights which the court must safeguard' its emphasis is not on why these rights should accrue to the individual, but rather that conferral of these rights strengthens the effectiveness of Article 81:

> Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.[157]

The upshot of this is that the reason why damages claims exist is to deter. This explains why in *Manfredi* the ECJ did not say anything about the 'protective scope' of Article 81, but merely held that 'any individual' (a phrase it repeated three times in as many paragraphs) can claim provided they can show that the breach caused them harm.[158]

The argument that we should allow anyone to claim damages provided that we believe that their lawsuit deters anticompetitive agreements seems too extensive, and undermines competition law. Consider the litigation in *Crehan* again. There, Inntrepreneur had been in constant discussion with the Commission, trying to come to an understanding as to how it could comply with EC competition law. In this scenario, can we really say that allowing a claim in damages by the distributor enhances the deterrent value of Article 81? Second, the passage quoted from *Crehan* above speaks of covert agreements; however, in this case the contract was far from covert. In fact, most distribution agreements are not covert, so it is not clear how many anticompetitive practices can be identified by giving distributors a right to damages. Third, as we saw above, in distribution contracts the effect is to harm the manufacturer's competitors, so the distributor does not necessarily suffer any

[157] *Courage* [2001] ECR I-6297 para. 27; see also paras. 23–6.
[158] *Manfredi*, judgment of 13 July 2006, paras. 59–61.

loss, consequently the incentive for him to seek damages stems from something other than the market foreclosure. The distributor will seek damages when the business does not go well, but if the manufacturer's foreclosure efforts are successful, distributors may well be the winners as competing shops close down. A fourth question, which the ECJ did not answer, is whether, having successfully obtained damages, the distributor can be sued in turn. Say a foreclosed brewer seeks damages, can this person obtain damages only from the other brewers or also from the distributors that accepted the anticompetitive agreement? In the United States it has been suggested that the distributor's right to damages does not give him immunity from claims by third parties.[159] If so, one must doubt whether any distributor would have an incentive to uncover an anticompetitive agreement as a way of claiming damages if this opens up the possibility of subsequent claims against him.[160] More generally, as we have seen in previous chapters, vertical restraints are among the least harmful of practices from a competition law perspective and lawsuits alleging infringements in this context should be viewed with suspicion.[161] Granting any individual the right to secure damages does not make any sense.

Another reason why we can object to the use of deterrence as the reason for allowing a person to secure damages is that it increases the obligations on the defendants and distorts the meaning of Article 81. It seems from *Courage* that a person who enters into a contract which might infringe Article 81 cannot bargain hard to close the deal (because if he does so then it follows that the other party is not significantly responsible for the breach and can later seek damages), and he must observe the market to make sure that the cumulative effect of all his contracts does not foreclose market access, otherwise any of his distributors can sue him for damages.[162] It seems that giving parties to a contract a right to damages creates a range of special responsibilities on the potential defendant that are quite alien to the nature of Article 81 and closer to those we find in Article 82 but more extensive: the manufacturer has a duty to negotiate with care.

Finally, a word of caution is necessary about the motivations of a plaintiff's actions. Competition law can be used as a strategy to harm competitors.[163] This is the converse of the theory that the Court and Commission have embraced whereby the use of the legal process can be an abuse of

[159] *Perma Life Mufflers v. International Parts Corp.* 392 US 134 (1968).

[160] These points are discussed in more detail in G. Monti 'Anticompetitive Agreements: The Innocent Party's Right to Damages' (2002) 27 *European Law Review* 282.

[161] T. E. Kauper, E. Thomas and E. A. Snyder 'An Inquiry into the Efficiency of Private Antitrust Enforcement: Follow-on and Independently Initiated Cases Compared' (1985–6) 74 *Georgetown Law Journal* 1163, 1164.

[162] The second obligation already exists but it merely empowers the Commission to withdraw the Block Exemption, if it originally applied. Article 6 Regulation 2790/99 on the Application of Article 81(3) to Categories of Vertical Agreements and Concerted Practices [1999] OJ L336/21.

[163] See generally W. J. Baumol and J. A. Ordover 'The Use of Antitrust to Subvert Competition' (1985) 28 *Journal of Law and Economics* 247.

dominance.[164] One has to be careful lest the right to damages is offered to parties who use it for their personal gain. In fact, this is a risk that has already been observed in several cases in the past. Many parties to anticompetitive agreements have used the courts to secure a declaration that the contract is void as a way of escaping liability for breach of contract, a practice known as a Euro-defence.[165] If it is inappropriate to use competition law to secure an avoidance of contractual liability, it is even more inappropriate to allow a claim in damages.[166]

In sum, the few judgments of the ECJ suggest that the right to damages for breaches of EC competition law has a private and a public dimension but that the two are indissoluble: the individual who has suffered loss is allowed to sue only because his claim safeguards the market by increasing the deterrent effect of the competition law. However, it may be queried how far claims by disgruntled distributors contribute to deter anticompetitive behaviour. It is unfortunate that the Court did not investigate more fully the protective scope of competition law and saw a claim in damages as merely a means to strengthen the application of EC competition law without seeing that its decision may well have the opposite effect: distorting the obligations imposed by Article 81.

5.2 Which consumers should claim?

It is not controversial that consumers should be entitled to secure damages, but it is more difficult to decide which consumers should have a right to damages. A hypothetical example can help visualise the difficulties. Say there is a cartel in the market for cement that causes the price to rise. A builder, Bob, buys cement from the cartel and builds a house for Aisha. Bob was also about to enter into a contract to build an extension to Charlie's house; however, once Bob gave Charlie the new quotation for the work (which took into account the higher cost of cement as a result of the cartel price) Charlie decided not to build the extension.

If we are committed to protecting consumer welfare, all three parties suffer loss as a result of the cartel. Bob, the builder, suffers two losses: first he pays more for the cement he buys, and second he loses business as a result of the higher price. Aisha pays more for her house, and Charlie suffers because he is unable to build his extension. Do they all have a claim?

[164] For example, in Case T-111/96 *ITT Promedia v. Commission* [1998] ECR II-2937 the Court said that vexatious litigation could be an abuse; in *Generics/Astra Zeneca* (decision of 15 June 2005) the Commission ruled that misuse of the patent system to delay market access to competitors constituted an infringement of Article 82.

[165] See R. Whish *Competition Law* 4th edn (London: Lexis Nexis, 2001) pp. 266–7 for a review of the attitude of UK courts to this tactic.

[166] Granted, this line of argument is also one that militates against claims by competitors of the defendant firm, but at least in this context we first have established that the competitor is directly protected by the competition laws.

Under US federal law the only person who can claim damages is the direct purchaser (Bob the builder who bought the goods directly from the cartel), but only for the extra price of the cement he buys, not for the lost contracts. The indirect purchaser (Aisha) cannot claim.[167] Moreover, it might be argued that the direct purchaser can mitigate his losses by 'passing on' the higher cement price to the homeowner, so that Bob would mitigate his losses by charging Aisha a higher price. However, US federal law does not reduce the damages awarded to the builder even if some of the losses have been avoided. In the jargon, there is no passing-on defence.[168] More generally, there is no evidence that would-be purchasers who are put off by the higher price (Charlie) have ever sought damages, or that a person like Bob has ever thought of claiming for lost business opportunities.[169] These legal principles sound perverse: if the aim of competition law is to safeguard consumer welfare, the law should provide that the indirect purchaser has a claim, and concomitantly that the passing-on defence applies to reduce the damages payable to the direct purchaser. Moreover, the person who is priced out of the market deserves compensation. Instead of compensating everyone for the losses suffered, the US system seems to overcompensate a few 'lucky' plaintiffs. But the seeming arbitrariness of the US rule is justified by the administrative ease with which it can be operated. The example we considered is quite simple. Imagine the effect of a cement cartel across the entire industry and with more vertical links: the number of indirect purchasers is immense, and each of their losses is quite small. How many indirect purchasers are likely to mount an action in these circumstances? Moreover, there is a 'floodgates' concern: should courts be deployed to safeguard each of these relatively small losses? And if indirect purchasers have a right to secure damages, it is only fair that the passing-on defence applies to reduce the amount that the defendant has to pay, otherwise the defendant is paying excessive damages.[170] Moreover, apportioning the damages among all plaintiffs would be cumbersome and increased complexity would reduce the incentive to litigate.[171] Therefore, the complex and costly logistics of a fair compensation system outweigh the benefits of a less fair system. In contrast, a more blunt rule that overcompensates some but leaves others uncompensated is more administratively efficient. The US federal rules have also been supported on grounds that they are more efficient from a deterrence perspective: first, the direct purchaser is the more effective enforcer because he is aware of the source of the loss and has better information regarding the infringement and his losses; second, if the loss is divided among several plaintiffs each

[167] *Illinois Brick Co. v. Illinois* 431 US 720 (1977).
[168] *Hanover Shoe Inc. v. United Shoe Machinery* 392 US 481 (1968).
[169] R. H. Lande 'Why Antitrust Damage Levels Should Be Raised' (2004) 16 *Loyola Consumer Law Review* 329, 338.
[170] Plus the difficulties of calculating how much of the losses are passed on, described as an insurmountable task by the Supreme Court in *Hanover Shoe*.
[171] *Hanover Shoe* 392 US 481 (1968) 492–3.

person's loss is so small that, given the difficulties in making a successful lawsuit against the defendant, the incentive to sue is diminished. Instead, if one plaintiff can expect a windfall upon success, then that person has a greater incentive to sue.[172]

Critics of the US position point out that it denies compensation to a wide range of victims,[173] and it places the right to sue on parties with the least incentive to make use of it, because direct purchasers are able to pass on the higher prices. As a result, many states have allowed indirect purchasers to claim under state antitrust laws.[174] This has added an intolerable layer of complexity because litigation on the same case takes place in different courts with different laws. The upshot is that the consensus among US commentators is that the mixture of conflicting federal and state systems is confusing and inefficient to such an extent that 'no rational person ever would have designed it from scratch in its current form'.[175]

The debate about whether indirect purchasers should be entitled to sue shows that there are three conflicting attributes that we seek in a damages regime: that it compensates fully, that it deters adequately and that it is simple to operate. Ease of operation is inconsistent with full compensation, and adequate deterrence is hard to achieve unless all harms caused by the anti-competitive behaviour are caught.[176] According to these considerations, the decision of the German legislator to allow claims only to direct purchasers and to abolish the passing-on defence on grounds of administrative ease is understandable even if it sacrifices the aim of full compensation.[177] The guidance from the ECJ as to whether the German approach is correct is unclear. On the one hand, given that the ECJ has ruled that 'anyone' is entitled to claim provided the losses are caused by the defendant, this means that both direct and indirect purchasers should be entitled to claim, and that also non-purchasers, who refuse to buy at the higher price, should have a right to damages. On the other hand, the ECJ's basis for conferring a right to damages

[172] W. M. Landes and R. A. Posner 'Should Indirect Purchasers Have Standing to Sue under the Antitrust Laws? An Economic Analysis of the Rule in *Illinois Brick*' (1979) 46 *University of Chicago Law Review* 602.
[173] See M. Denger and D. J. Arp 'Does Our Multifaceted Enforcement System Promote Sound Competition Policy?' (2001) 15 *Antitrust* 41.
[174] *California v. ARC America* 490 US 93 (1989), ruling that *Illinois Brick* does not pre-empt state laws allowing indirect purchaser suits. For discussion, see R. W. Davis 'Indirect Purchaser Litigation: ARC America's Chickens Come Home to Roost on the Illinois Brick Wall' (1997) 65 *Antitrust Law Journal* 375.
[175] Lande 'Why Antitrust Damage Levels Should Be Raised' p. 330.
[176] But see J. E. Lopatka and W. H. Page 'Indirect Purchaser Suits and the Consumer Interest' (2003) 48 *Antitrust Bulletin* 531 part IV, arguing that deterrence works less well when indirect purchasers are allowed to claim.
[177] S. 33(1)–(3) Act Against Restraints of Competition (as amended, in force from 1 July 2005). See N. Reich 'The "Courage" Doctrine: Encouraging or Discouraging Compensation for Antitrust Injuries?' (2005) 35 *Common Market Law Review* 35 for a discussion of the case law predating the amendment.

is that the plaintiff's action serves to deter future anticompetitive behaviour. Then it may be argued that if deterrence is best achieved by reserving the right to sue for direct purchasers, this could support the choice made by the German legislator. Unfortunately, there is insufficient empirical evidence to demonstrate what liability rule best deters.

The debates summarised above will sound very familiar to tort lawyers. Any liability rule is imperfectly designed: its deterrence value is never explored, its ability to compensate fully is always compromised, and the operation of the tort system is extraordinarily expensive.[178] One solution often advocated in tort circles is to abolish liability rules in favour of a compensation scheme. An interesting variation of this is the policy of some US states to apply so-called *parens patriae* (i.e. the state as father of the people) powers to secure damages on behalf of the state's citizens.[179] When exercising these powers, the burden of litigation is upon the state but it secures damages on behalf of the citizens and then distributes the proceeds. In some cases the damages awards are distributed to persons that have suffered damage (whether direct or indirect purchasers) and sometimes the money is distributed in ways so as to benefit the injured consumers indirectly, a so-called *cy pres* (from French, meaning as close as possible) recovery procedure. For example, as part of the settlement against a price-fixing conspiracy for music CDs, $78.5 million worth of CDs was donated to libraries, schools and colleges; in a case against toy manufacturers and retailers $37 million was used to buy toys for needy children in the state.[180] This procedure allows for a more successful mix of full compensation, deterrence and administrative ease than the tort law avenue, although it depends on states being well financed and willing to take this kind of action.

5.3 Practical difficulties for claimants

We can divide claimants into two groups: those whose claim is a 'follow on' action after a competition authority has made an infringement decision and who thereby use the factual findings of the authority to help their claims, and 'stand alone' claims by parties who identify a breach of competition law without a prior finding by a competition authority. The Commission is eager to encourage both, and has recently identified some of the major hurdles in a Green Paper.[181] It is not yet clear whether some of the options canvassed by

[178] See generally P. Cane *Atiyah's Accidents, Compensation and the Law* 6th edn (Cambridge: Cambridge University Press, 2003) for an evaluation of the UK tort system.

[179] 15 USC 15(c).

[180] Comments of the Attorneys General of California, Arizona, Connecticut, the District of Columbia, Illinois, Louisiana, Massachusetts, Mississippi, New Mexico, the Northern Mariana Islands, Ohio, Oregon, Rhode Island, Utah, Washington and West Virginia on the Review of Damages Actions for Breach of the EC Antitrust Rules, available at www.naag.org/issues/pdf/EUCommentsLetter.pdf pp. 2–4.

[181] EC Commission *Green Paper – Damages Actions for Breach of the EC Antitrust Rules* SEC (2005) 1732.

the Commission will translate into a legislative proposal. The principal points are summarised below.

Follow-on claimants have a somewhat easier route to claim. In some jurisdictions (e.g. the UK and Germany) the national court is bound by the findings of a competition authority.[182] In Germany, a national court hearing a follow-on damages claim is bound by decisions of the EC Commission, the Bundeskartellamt and even of the competition authorities of other Member States.[183] This means that the plaintiff in a follow-on action merely has to show that the breach caused loss and to quantify that loss. Thus UK and German rules seem to be sufficient to encourage follow-on actions.[184] Follow-on lawsuits can make a significant dent in the profits of a firm embroiled in a cartel: for instance, actions in the aftermath of the prosecution of the vitamins cartel in the US gave rise to $1 billion in damages paid by seven plaintiffs (plus $122 million for counsel's fees), and in another case the defendants settled for $512 million before the prosecution had even been brought.[185]

The plaintiff in a stand-alone action instead bears the burden of identifying the breach. In order to promote stand-alone actions, one would need to facilitate access to information held by the parties and by competition authorities.[186] This can be problematic because access to evidence is restricted, in particular in civil law Member States, where the discovery rules are less generous than in common law countries. Moreover, even if information is available, a stand-alone action is more risky than a follow-on lawsuit because the result is uncertain. Accordingly, additional measures might be needed to encourage stand-alone claims. These might include altering the rules on cost awards (whereby the losing party need not pay the defendant's costs) and awarding punitive damages (e.g. double or treble damages),[187] which is said to increase deterrence and also to increase the number of willing litigants.[188] Nevertheless, the US experience leads us not to expect much from stand-alone actions, in particular in cases that are not hard-core cartels, as few plaintiffs have the resources to mount actions where a full economic analysis must be deployed to prove harm.

[182] S. 58A Competition Act 1998 (as amended by the Enterprise Act 2002). See B. Rodger 'Private Enforcement and the Enterprise Act: An Exemplary System of Awarding Damages?' [2003] *European Competition Law Review* 103.

[183] S. 33(4) German Act Against Restraints of Competition.

[184] An EC-wide application of this rule is canvassed in Option 8 of the Green Paper.

[185] S. W. Waller 'The Incoherence of Punishment in Antitrust' 78 *Chicago-Kent Law Review* 207. The reasons for settling beforehand are twofold: (1) one can settle for less since the outcome is uncertain; (2) the DOJ will not demand restitution of ill-gotten gains since compensation has already been paid.

[186] Options 1–7 and 9–19 of the Green Paper.

[187] Options 16 and 27 of the Green Paper.

[188] S. C. Salop and L. J. White 'Economic Analysis of Private Antitrust Litigation' (1985–6) 74 *Georgetown Law Journal* 1011, 1020–1.

5.4 Private actions and modernisation

On one view, private actions are necessary in order to ensure all the antitrust enforcement objectives are met. According to Harding and Joshua, enforcement has three objectives: injunctive (ending anticompetitive behaviour); restorative/compensatory (remedying the financial losses); and penal (punishing and deterring the firms).[189] Public enforcement cannot achieve the restorative/compensatory objective in its present form. Moreover, in the eyes of the Commission, private enforcement serves to achieve all three goals; thus it enhances the injunctive and penal roles of enforcement as well as compensating victims. In this light, private actions complement public enforcement of competition law.[190] In particular, the Commission is eager to see growth of both follow-on and stand-alone actions on the basis that NCAs do not have the resources to reach decisions on every private dispute. From this perspective, the Green Paper on damages is seen as a starting point for debates at national and Community level to decide how best to facilitate the growth of private litigation.

A less optimistic analysis is to suggest that the majority of damages actions against firms guilty of the more serious violations of competition law (e.g. cartels and abuses of dominance) are likely to be follow-on lawsuits. That is, parties will wait for a competition authority to make a finding and then use this as the basis for a claim in damages. This means that private enforcement is not an alternative to public enforcement but merely a way of compensating those who suffer harm.[191] However, it has been suggested that fines are too low, so that follow-on actions can increase the deterrent value of competition law. On this view, follow-on actions complement the activities of public authorities by increasing the scale of punishment, not the scope of enforcement. Moreover, given the procedural difficulties we have seen above, it is unlikely that stand-alone private lawsuits will unearth hard-core cartels. If so, this undermines the Commission's stated policy of seeing private enforcement supplementing public enforcement via stand-alone actions.[192] Instead, one is more likely to see stand-alone actions like Crehan's: Euro-defences and counterclaims for damages when business relations turn sour. As was suggested above, lawsuits by parties to anticompetitive contracts based on competition law are undesirable. This less optimistic appraisal is justified by looking at trends in the United

[189] C. Harding and J. Joshua *Regulating Cartels in Europe – A Study of Legal Control of Corporate Delinquency* (Oxford: Oxford University Press, 2003) pp. 229–30; see also K. Yeung 'Privatizing Competition Regulation' (1998) 18 *Oxford Journal of Legal Studies* 581, 586–92.

[190] Recital 7 Regulation 1/2003, a point repeated by Commission officials. See e.g. N. Kroes 'The Green Paper on Antitrust Damages Actions: Empowering European Citizens to Enforce their Rights', speech of 6 June 2006 (available at http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/index_en.html).

[191] K. Holmes 'Public Enforcement or Private Enforcement? Enforcement of Competition Law in the EC and the UK' [2004] *European Competition Law Review* 25.

[192] EC Commission Memo/05/489, What Types of Infringement does the Commission Think Private Damage Actions Should Enforce?

States where frequently the victims of a price-fixing conspiracy are follow-on claimants, taking advantage of the findings of a public enforcer,[193] and most stand-alone cases instead are launched by competitors in actions that look more like business tort suits.[194] If so, then the Commission's interest in encouraging private litigation should be tempered: stand-alone actions can risk undermining the substantive modernisation of EC competition law (e.g. *Crehan* runs against the reform of Article 81), and efforts should only be devoted to facilitating follow-on lawsuits.[195]

Another perspective from which to examine the relationship between private enforcement and modernisation is to consider how court proceedings interact with those of competition authorities. First, it seems that courts are not bound by commitment decisions that the Commission enters into under Article 9 of Regulation 1/2003. This recreates the same problem of uncertainty that existed with comfort letters. Second, courts are not bound by leniency schemes. So a party that settles with the Commission may still face private lawsuits. This problem is particularly poignant because it creates a risk that facilitating private litigation diminishes the incentive for parties to make leniency application (e.g. when the reduction of a fine through leniency programmes is less than the damages that the party is likely to have to pay).[196] Accordingly, the Commission is investigating how to reconcile leniency programmes with damages claims.[197] Some have also doubted the extent to which national courts will be capable of applying Article 81(3) given that it calls for complex economic analysis.[198] The standard response to this question is that courts have been asked to interpret Articles 81(1) and 82 for some time and that there is not a quantum leap between these and Article 81(3). However, this debate misses the point that national courts have little experience in applying competition law at all, so the difficulties of national courts are over the application of all parts of Articles 81 and 82.

[193] Taking advantage of 15 USC 16(a): 'A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant . . .'

[194] Waller 'Incoherence' p. 210.

[195] An even more pessimistic position is taken by W. Wils 'Should Private Antitrust Enforcement Be Encouraged in Europe?' (2003) 26 *World Competition* 473, suggesting the superiority of public enforcement by NCAs. See the robust response by C. A. Jones 'Private Antitrust Enforcement in Europe: A Policy Analysis and a Reality Check' (2004) 27 *World Competition* 13.

[196] In the United States this risk was resolved by s. 213 Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (Pub. L. No. 108–237), which provides that a firm which has made a successful leniency application is spared the burden of paying treble damages, and merely compensates victims for the losses they suffered.

[197] One option is to allow the defendant who has provided evidence under a leniency programme to gain a rebate on damages claims, another is not to make that defendant jointly and severally liable for the losses caused (Options 29 and 30 of the Green Paper).

[198] Gilliams 'Modernisation' p. 457.

Last, coordination between courts and the Commission is established to ensure consistent enforcement. However, unlike the ECN, where the Commission possesses considerable powers to prevent inconsistent decisions, the independence of the courts prevents comparably aggressive checks on national courts. Regulation 1/2003 provides for three forms of cooperation. First, the court may seek some assistance from the Commission (access to documents in its possession, or the Commission's opinion on economic, factual or legal matters); second, the court must transmit a copy of its judgment to the Commission; third, the Commission may act as amicus curiae to provide its opinion to the court.[199] The last is the closest the Commission can get to influencing the national court, and there may be a risk of less confident courts following the Commission's opinions. It is not clear whether, if the Commission is dissatisfied with a national court's decision declaring a practice lawful, it may begin its own procedures and declare the activity in breach of EC competition law.[200] These more lax forms of control suggest, paradoxically, that a more subtle 'network' is in place among the national courts: on the one hand, their autonomy allows courts to explore different solutions to comparable problems, and on the other, courts will be referred to judgments of foreign courts and this will facilitate an exchange of ideas which is not as likely under the ECN with the Commission's more hands-on control to ensure uniformity.

6 The challenges of institutional resettlement

Competition policy has been described as the EC's 'first truly supranational policy' because the Commission operates as an autonomous agency, free from interference from Member States, the Council or the European Parliament.[201] Regulation 17/62 gave the Commission more powers than the Member States foresaw and it allowed the Commission to design a competition policy for the EC largely free from adverse judicial scrutiny, the ECJ backing most of the Commission's interventions. After 1985 competition enforcement grew in volume and in diversity and the success of competition law led to calls for reform. The Commission wished for modernisation, ostensibly because of an overload of cases, but more probably in order to redirect its enforcement policy away from scrutinising notified agreements and towards regulating cartels. Certain Member States were concerned about the politicisation of decision-making, and decentralised enforcement was seen as a means of resolving this criticism, by placing independent NCAs at the front line of competition enforcement.

[199] Article 15 Regulation 1/2003.

[200] The Commission thought this was possible in the White Paper on Modernisation para. 102, but Regulation 1/2003 does not provide for this.

[201] L. McGowan 'Safeguarding the Economic Constitution: The Commission and Competition Policy' in N. Nugent (ed.) *At the Heart of the Union: Studies of the European Commission* 2nd edn (London: Macmillan, 2000) p. 148.

The procedural change comes together with a substantive change for competition law, at two levels: the priorities for enforcement have changed (away from reviewing cooperative contracts and towards hidden collusive agreements) and the substantive interpretation of the law is narrowed down, recourse to public policy considerations being replaced by an emphasis on effects on consumer welfare.

This substantive policy change is reinforced by the provisions of Regulation 1/2003 that strive to compel NCAs and national courts to apply Articles 81 and 82 in a harmonised manner and to the exclusion of national competition law. Whether or not enforcement is more efficient, control over the enforcement of competition law by the newly galvanised NCAs and courts is considerable. The so-called 'network' of NCAs seems to be a forum to facilitate the Commission's policy, by ensuring that there is only one authority in charge of any case and allowing the Commission the final word on any anticipated ruling of NCAs. Thus, while the institutional resettlement appears to decentralise enforcement, it merely decentralises the operational aspect of enforcement, leaving the policy aspect to the Commission. If we recall, looking back over the previous chapters on the substantive law, that the Commission is increasingly keen to view competition law as a means to achieve consumer welfare through competitive markets, then the effect of the kind of decentralisation we witness is to displace national economic policies in favour of a neoliberal, pro-consumer economic policy favoured by the Commission. This might be challenged by the growth of national competition cultures that safeguard a wider range of interests, and by private litigation which, in the aftermath of *Courage v. Crehan*, supports the launching of lawsuits that undermine the pro-consumer bias of modern EC competition law.