INSTITUTIONAL SYSTEM OF EUROPEAN COMMUNITY ANTITRUST LAW

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Abstract
The article provides thorough account of the gradual development of the European Community antitrust policy and operation of the Community institutions from the initial period of the 1960' to the continuing transformation of its antitrust law and the fundamental changes brought about by establishment of the internal market and enactment of Regulation 1/2003.
First, the main institutional features of the previous enforcement framework are set out. The following section discusses an alternative institutional framework that was proposed in order to alleviate the perceived problems. The remainder of the article reviews the modernization of European Community antitrust law's institutional framework, in particular Regulation 1/2003- a legislative text that, with the exception of the Merger Control regulation, is considered as the most important legislative instrument for the powers of the European Commission.

Key words: *antitrust, European Community, European Commission, competition.*

Introduction

The European Commission's institutional characteristics as well as the European Community antitrust law's procedural rules have had a fundamental influence on the European Community's antitrust policy as well as on the interpretation of the substantive rules.(Schaub,1997, p.263) The reform of European Community antitrust law, set out in the Commission White Paper on Modernisation[1] and consequently with the enactment of Regulation 1/2003 was focused on one aspect: amending the procedural rules with regard of articles 81 and 82 of the Treaty

[1]White Paper on Modernisation of the Rules Implementing Arts. 81 and 82 of the E.C. Treaty [1999] OJ C132/1.

establishing the European C. Those rules prior to 2003 were laid down in Council Regulation No. 17. [2]

The newly adopted Regulation 1/2003 brought changes in the enforcement system of EU competition law such as the abandonment of the notification system and transformation of Article 81(3) into a legal exception directly applicable by all enforcers and national judges. The regulation also set out mechanisms for cooperation between the European Commission and national authorities and courts, provided for new types of decisions and expanded the Commission's remedial and investigative powers in competition cases

This article focuses on a discussion of the institutional system within which the Community antitrust law operated from European Community's inception, the continuing transformation of EC antitrust law and the fundamental changes brought about by establishment of the internal market and enactment of Regulation 1/2003. At present the Community institutions are responsible, firstly, for legislation and policy-making and secondly, for antitrust law enforcement. In antitrust law these two duties are closely intertwined. Much of what can be considered antitrust policy-making is actually determined and developed by enforcement action. The discussion of the modernization of EC antitrust policy's institutional framework shall therefore focus on enforcement of antitrust policy.

Following a short discussion of the institutions responsible for antitrust legislation and policy-making, the rest of the article focuses on institutional and procedural features of EC antitrust law enforcement, prior to Regulation 1/2003. First, the main institutional features of the previous enforcement framework will be set out. The next section discusses an alternative institutional framework that was proposed in order to alleviate the perceived problems. Finally, the remainder of the article will review the modernization of EC antitrust law's institutional framework, in particular Regulation 1/2003- a legislative text that, with the exception of the Merger Control regulation[3], is considered as the most important legislative instrument for the powers of the European Commission.

European community antitrust legislation

The EC Treaty sets out in Articles 81 and 82 the substantive antitrust rules that regulate commercial practices. These rules relate to coordinated and cooperative behaviour and to unilateral conduct. Article 81(1) prohibits

[2] EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty

[3] Council Regulation (EEC) N 4064/89 on the control of concentrations between undertakings.

agreements “that have as their object or effect the prevention, restriction or distortion of competition and which affect trade between member states”.

Article 81(3), however, exempts from this prohibition agreements that satisfy the following four cumulative conditions: “they contribute to improving the production or distribution of goods or to promoting technical or economic progress; consumers receive a fair share of the resulting benefits”; the anti-competitive effects are indispensable to obtaining the pro-competitive benefits; and they do not eliminate competition in respect of a substantial part of the products in question.

Article 82 prohibits abusive conduct by one or more that hold a dominant position and where the conduct affects trade between member states. No specific exemption exists for this type of conduct. However, as a practical matter, consideration will be given to whether there exists an objective justification for the allegedly abusive conduct and, if so, whether the conduct is proportionate to the objective sought.

The Council, as the Community's general legislature, is the competent institution for making substantive antitrust law. Apart from adopting the Community's Merger Control Regulation in 1989 the Council has refrained from adopting substantive antitrust legislation. Instead it delegated to the Commission the power to adopt block-exemption regulations which declare Article 81(1) inapplicable to certain categories of agreements and concerted practices. The main policy line which can be detected in the Commission's antitrust policy on the basis of block-exemption regulations is the promotion of cooperation between small- and medium-sized enterprises (SMEs). The Commission favored co-operation between SMEs, primarily on the basis of the European Commission Notice on agreements of minor importance which do appreciably restrict the competition under Article 101(1) of the Treaty on the functioning of the European Union (De minimis notice), but also by specific provisions in block-exemption regulations protecting the interest of SMEs.

The modernisation package does not amend the substantive rules that regulate anti-competitive practices. Rather, modernisation relates to the reform of the procedural rules that render the European Community antitrust law operative.

Enforcement procedures

The most important task for the Community antitrust body is to implement its policy by enforcing the existing antitrust laws. This enforcement process is essential to the discussion of the institutional and procedural framework for antitrust policy at the Community level. However, such a general review of the institutional and procedural in "antitrust cases" is challenging keeping in mind that there are huge differences between the different type of cases.

The procedural and institutional model which was employed was based on Article 81 cases which covers all agreements between companies, decisions by associations of companies and concerted practices which may affect the trade between member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. Generally speaking, when Article 81 of the Treaty is applied four procedural phases can be identified: observation, investigation, prosecution and decision. In the first phase, the Commission obtains knowledge of behavior or agreements which potentially restrict competition within the internal market. There were three typical ways in which this occurred. Firstly, the Commission could be alarmed from complaints, secondly, from investigation into particular economic sector by its own initiative and finally, by notification from the parties to the agreement. Still, the Notification to the Commission's Directorate-General for competition matters by the parties to the agreement was the most common way for obtaining information in the current system.[4] In cases where the initial information obtained gave rise to the suspicion that an infringement of Community antitrust law occurs or has occurred, procedures enter into the second phase – investigation phase.

Regulation 17 granted broad powers to the Commission to obtain the information it considers essential. In addition to its competence to request information from undertakings, the Commission possesses powers to carry out the investigations it considers necessary to fulfill its duties in ensuring compliance with Community antitrust law.[5] On the basis of this information, the Directorate for Competition forms an opinion on the question whether the conduct contravened the Community antitrust law. If the answer is negative and there are no grounds for continuing the proceedings on the basis of the facts, the investigation is terminated. Consequently, the whole file is then officially closed by so-called negative clearance decision or on the basis of a comfort letter, which usually meant that the letter sent by the European Commission in response to most notification, advising the notifying parties that the Commission saw no grounds for action against agreement or commercial arrangement as notified under Article 101 of the treaty on the Functioning of the European Union.

[4]Alternatively, DG Competition is alerted by complaints, often lodged by competitors of the companies involved, or by investigations into specific sectors of the economy on its own initiative.

[5]See Arts. 11 and 14 or Reg. 17 and Arts. 11 or the Merger Reg. for parallel provisions with respect to merger cases.

If, conversely, an infringement of Community antitrust law was suspected the procedure goes to the next phase: phase of prosecution. If it is concluded that an infringement of Community antitrust law occurred the Commission proceeds to the next phase, to a formal decision requiring termination of any infringements—or, in the case of mergers, prohibiting the merger.

It is obvious that the Commission concentrated autonomous powers in the area of enforcing the antitrust law. All four procedural phases take place within the Commission, specifically the Directorate for Competition. Therefore, reflecting the phases of Community antitrust law procedure, the Commission may be perceived simultaneously as police, investigator, prosecutor and judge.(van Bael, 1986)

However, this institutional and procedural design has come under increasing examination. The criticism is directed at the institutional design as well as at the procedures. The main line of the criticism is linked to the institutional design that merged four separate phases of the legal process in one institution. Consequently, it became obvious that the problem related to deficiency of procedural, substantive and institutional transparency in EC antitrust law procedures.

Basically, there were two principal aspects of concern of the institutional and procedural regime. The first, relates to the fairness of the antitrust law procedures in which the same institution was responsible for prosecution and decision-making. The second is more policy-related and concerns the lack of transparency with respect to decision-making within the European Commission. As to the first aspect of critique, commentators pointed out that the principal sense of injustice lies in the fact that the same persons who suspect anti-competitive behavior substantiate their concern in a statement of objections and subsequently decide whether their earlier objections were justified. As a result, the margins of discretion for the individual case handler in deciding whether a restriction of competition occurs are very broad.[6]

Another problem of procedural fairness arises in the prosecution phase. Undertakings which have been accused of infringements of Community antitrust law in the statement of objections could reply to the charges in writing or orally at the hearing which takes place within the Directorate for Competition. In order to allow them to prepare their defense, companies have access to the Commission's files. The main problem of procedural fairness resides in the fact that the Directorate for Competition, the prosecuting institution, determines which documents a company will have access to for preparing its defense.

[6] See note 1.

The question of the requirements of natural justice in the existing procedures needs to be addressed within the modernization of the Community antitrust law context. Without a doubt the combination of powers within the Commission offices goes counter to the requirements of Article 6 of the European Convention on Human Rights (ECHR).[7] the Article 6(1) states that in a case of procedures involving the determination of civil rights or any criminal charge, any party shall be "entitled to" be heard "by an independent and impartial tribunal". However, the European Court of Justice, on numerous occasions, held that the Commission is bound to respect the procedural guarantees provided by EC law, and it had done so, but that it could not be classed as tribunal within the meaning of Article 6 of ECHR.[8] The reasoning of the ECJ was unmistakable clear: the applicability of Article 6 depends on the nature of the decision-making body. Along the same line, the Advocate General Sir Gordon Slynn, in the *Pioneer* case emphasised that any "procedure before the Commission is not judicial but administrative"[9] and consequently Article 6 was not applicable to EC antitrust procedures. However, some legal writers have a tendency to think that it is the nature of the decision itself which resolves the dilemma of the applicability of Article 6

[7]Article 6 of the Convention provides: 1. in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the private life of the parties so require, or to the extent strictly necessary in the opinion of the court on special circumstances where publicity would prejudice the interests of justice. 2. Everyone charged with criminal offence shall be presumed innocent until proved guilty according to law. 3. Everyone charged with criminal offence has the following minimum rights: a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; b) to have adequate time and facilities for the preparation of his defence c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

[8]e.g. Cases 209-215 and 218/78 *Heintz van Landewyck Sarl and Others v. Commission* [1980] ECR 3125, para. 81. (Fedetab).

[9]Opinion of Advocate General Sir Gordon Slynn, Case 100-103/80 *Musique de diffusion francaise v. Commission* [1983] ECR 1920.

and therefore they consider that the reasoning in *Fedetab* and *Pioneer* not to be persuasive.(Forrester, 2000, p.1073) Further, this rationale reaffirms the dictum of the European Court of Human Rights in the Case *Tre Traktorer* when it basically stated that the crucial issue to be resolved in the applicability of Article 6(1) is whether the case involves a "determination" either of a "civil right" or of a "criminal charge".[10]

The Community's Court of First Instance provided a partial answer to the question whether the Article 6 of the ECHR should apply when it ruled that antitrust law enforcement procedures are guided by the principle of "equality of arms".[11] Reference to the principle was made in the context of matters relating to the opportunity for parties of antitrust law proceedings to have access to the Commission files. However, the meaning of the Court's reference to the principle and the scope of its consequences remain uncertain. (Ehlermann, Drijber, 1996) It appears that the applicability of the principle of the "equality of arms" in Community antitrust law implies that the current system will not stand. Still, it was not far from the truth to conclude that there cannot be equality between Directorate for Competition and the included private parties in procedures that were exclusively conducted by Directorate for Competition itself. In other words, it is unimaginable that arms were considered equal where one of the parties was competent to make the decision on the outcome of a battle.

The second major objection to Community antitrust law procedures identified above relates to a different aspect of the combination of functions

[10] Case *Tre Traktorer* AB A/159 [1989], para. 35. For the sake of comparison with the jurisprudence of the European Court for Human Rights, it must be mentioned that in the land marking judgment "*Ozturk*" (Case *Ozturk v. Federal Republic of Germany*, A73 European Court of Human Rights (ser.A) [1984]) the European Court clarified the notion of a "criminal charge". This judgement has particular impact on the scope of Article 6 of the ECHR. Namely, an act that is not classified in the group of the criminal acts, it can still be considered as such if the punitive and deterrent aspects characterize it as criminal offence. The question whether antitrust procedures are concerned with the determination of criminal charges was, somewhat, discussed by Advocate General Darmon in *Orkem* (Case 374/87, *Orkem v. Commission* [1989] ECR 3283) who considered that the undertakings which are accused of competition infringements might be subject to different rules (administrative proceedings) because *Ozturk* provided wide definition of the concept "criminal charge." Furthermore, the same issue was discussed in *Polypropylene* (Case T-1/89, *Rhone-Poulenc SA v. Commiss*ion [1991] ECR II-867) by Advocate General Vesterdorf who stated that the fines which may be imposed on undertakings pursuant to Article 15 of Regulation 17 do, in fact notwithstanding what is stated in Article 15(4), *have a criminal character*.

[11] Case T-36/91 ICI v. *Commission (Soda Ash)* [1995] ECR II-1874.

within the European Commission. To understand the critique, it is necessary to recall the dual nature of Community antitrust law decision-making. For that reason, one must recall that first the impact of an agreement, practice or merger, on competition is examined. Consequently, if competition was significantly reduced by the agreement or merger it is, in principle, prohibited by EC antitrust law. The Commission could then consider whether the restraints on competition were outweighed by positive effects. In addition, the Commission may exempt the agreement from the prohibition. Put differently, Community antitrust law procedures first assessed the effects on competition. Where the effects are considered to be negative an additional assessment follows which allows for other policy considerations.In Community antitrust law procedures, the partitioning between these two analytically different decisions could not be identified. The published version of the Commission's antitrust decisions do not always provide an adequate distinction between the separate types of judgment. Published "versions of European Commission decisions with regard of cases including Article 81 distinguished between the two steps, by which was first established whether or not a restriction of competition occurred and second whether an exemption may be granted, but the wording of the reasoning in the decisions together with the wide margins of discretion which are implicit in the application of the antitrust law p0rovisions can conceal the "real" motives underlying certain judgments.(Wesseling,2000,p.167) For example, there is clear doubt that the exemption granted by the Commission to a joint venture between Volkswagen and Ford for development of a multipurpose vehicle was based on employment and cohesion policy considerations. In its decision, the Commission ruled out those motives and argued along pure competition lines. Yet, from a Commission's point of view it was very doubtful whether the joint venture between two of the big car manufacturers can really contribute to improving the production or distribution of goods or promotes technical or economic progress, while allowing consumers a fair share of the resulting benefit, while at the same time does not impose any restrictions on the concerned companies (Volkswagen and Ford) which are not indispensable to the attainment of these objectives.

Different choices for restructuring of the procedural and institutional system, thus enhancing the fairness and transparency of Community antitrust law enforcement, have been proposed. The proposals vary from restrained amendments within the existing the legal context to radical institutional reform that required new legislation. The first group of proposals include the idea of separating functions within Directorate for Competition by appointing distinct officials for the investigative phase and the draft decision phase.(Ehlermann,1997) However, while these measures could be relatively

easily taken, they would not appear to solve the fundamental objections to the system because of the simple fact that prosecution and judgment powers would remain in the same hands, just as the legal and political judgments would continue to be made by one institution. More radical proposals included alternatives where Commission would either retain its prosecuting function and discard the adjudicative role or it would remain responsible for judgments but would rid itself of its role as prosecutor.(Waelbroeck, Fosselard, 1994)

Another option of the more radical reform is particularly interesting and requires more extensive discussion in the context of the modernization of Community antitrust policy. This is the proposal to relocate the enforcement of Community antitrust law from the Commission to an independent Community agency.

This original proposal for an independent European Cartel Office was discussed in the negotiations which resulted with signing of the EEC Treaty in 1957. The debate for an independent Community agency was somewhat confusing because the proponents of an independent agency tended to vary in their preference for the degree of independence and for the phase in which this independent body is to enter the procedure. On the one hand, there were those who wanted to improve the procedural and institutional transparency. Their focal intention was to reveal the reason for the final decision in the assessment of the compatibility of a potentially anti-competitive agreement, considering that antitrust law enforcement practice did not disclose what the assessment of the effects on competition would be with respect to individual agreements or mergers. On the other hand, there were those who were looking for an adjustment of substantive antitrust law. The supporters of independent antitrust agency were inspired by the German system of antitrust law enforcement. In their view, the establishment of a "single purpose" antitrust agency would rule out political intervention with antitrust law enforcement.(Bartodziej, 1996) Therefore, the debate on the separation of the two types of assessments in the decision-making process has become equated with the question of the desirability of an independent competition agency. However, the debate generally focused on the second model, particularly since the German government proposed the establishment of a European antitrust agency following the model of the German agency for competition matters, the Bundeskartellamt model.(Bartodziej, 1996) Bundeskartellamt is formally and administratively part of the Ministry of Economic Affairs but it operates independently of it both in specific cases and in its case selection. The primary task of the Bundeskartellamt is to maintain and promote competition on the basis of the main competition statute. All decisions taken by the Bundeskartellamt are subject to assessment by the German courts on the application of the parties concerned.

Supporters of this solution saw the Bundeskartellamtas as the appropriate model for a European Cartel Office and deemed that this

institution would be responsible only for assessing whether agreements, behavior or mergers would lead to a restriction of competition. The transfer would be limited to enforcement action in relation to the application of Articles 81(1) and 82 and the Merger Regulation and all regulatory competences would continue to be exercised by the European Commission. Moreover, the Commission would also maintain its responsibility for enforcing the Treaty's competition rules towards Member States and public undertakings.

On the other hand, there were commentators who pointed out that the Bundeskartellamt model is not an adequate model for EC antitrust law enforcement in the context of the Treaty on European Union.(Sturm, 1996) They point out that there are fundamental differences in the economic and political context between Germany and the European Community. Namely, the Bundeskartellamt administers the observance of antitrust law on the basis of a nationally shared respect for economic freedom and competition. On the other hand, it must be stressed that it is evident that the EC Treaty does not constitute an economic constitution which guarantees the prominence of free competition. Within the Community, conflicts between competition policy and other Community policies are solved on the basis of political deliberation rather than on a hierarchy of norms. Therefore, this desirability for an independent agency should be seen understood from this perspective.

In addition to these principal reasons for rejecting the Bundeskartellamt model for the European Community, a number of practical and legal objections to the establishment of an independent European cartel agency should be mentioned. First, in the context of the European Community, the process of establishing a new institution is very complicated.[12] The second "practical problem which the establishment of a separate cartel agency might create is the co-ordination of the separate strands of the competition policy. Enforcement of the Treaty's antitrust rules is by its very nature closely related to competition policy with regards to state aids, public monopolies and anti-dumping. Creation of a separate enforcement body for the antitrust rules would isolate the assessment of those cases from broader competition policy concerns".(Schaub, 1997)

Notwithstanding the fact that the Bundeskartellamt model does not fit well with the Community antitrust law system does not imply that the existing institutional structure should remained untouched. Conversely, the

[12] Experience with the establishment of new bodies and institutions suggest that the establishment of an independent cartel agency would be a complicated, protracted and, most importantly, a highly politicised process. Once established the European cartel office could still suffer from the political interference to which the Commission is currently subject.

institutional framework in which Community antitrust law is applied needs to be revised in order to alleviate the objections to the system that existed from the 1960's to the turn of the 21st century.

As was pointed out, the prohibition in Article 81(1) was interpreted so explicitly with respect to the needs of integration towards the common market, that it was evident that the European Commission, as the supranational body, was most involved with the administration of the common market and consequently was best capable of judging whether an exemption should be provided.

"However, three subsequent developments altered the character of Community antitrust law. The changes, which they generated, affected the institutions framework. The first is the direct effect, which the Court of Justice ascribed to the Treaty's antitrust law provisions. The second is the altered function of Community antitrust law. The third was the gradual and ongoing adoption of national antitrust law systems in the Community's Member States".(Wesseling, 1997, p 41)

As to the first development, one should recall that, when the Court ruled that the Treaty's antitrust rules have direct effect, it added a third category of Community antitrust law enforcers (national courts) to the European Commission and national antitrust authorities. Therefore, naturally, national courts were acting as Community courts of general jurisdiction, applying the Treaty's directly effective antitrust law provisions.[13] In the interpretation of Community antitrust law, the national courts may make preliminary references to the European Court of Justice. As a result, Court of Justice's interpretation of the extent of the rights and prohibitions laid down in Articles 81(1) and 82 replaced the Commission's administrative practice as constituents of Community antitrust law jurisprudence and the case law. Although the Commission remained responsible for the implementation and general orientation of Community antitrust policy, the nature of antitrust law was no longer exclusively administrative. In other words, the European Court of Justice and the national courts gained new significant roles.

The second factor, which changed the nature of Community antitrust law, was its transformation, as the Internal Market was gradually established. In other words, the shift within Community antitrust law from negative to positive integration changed the nature of the anti-trust law itself. The traditional function of Community antitrust law, i.e., to promote economic integration evolved into a more political one which is to be understood as change from policy that encompasses measures which promote market integration by eliminating only potential obstacles to trade between the Member States towards

[13] Case T-51/89 *Tetra Pak* v. *Commission* [1990] ECR II-309, at para. 42

policy that comprises of regulation of processes of the newly emerged common market. For that reason, it can be said that the European Commission conducted a real policy that did not limit itself as plain enforcer of legal rules as a prosecution authority would do, with decisions whether to prosecute or not given violations. This "competition policy" can then be influenced by the general economic policy (including industrial policy) which the European Commission is carrying out within the framework of the EEC Treaty".(Verstrynge, 1986)

The third development, which affected the institutional structure in which Community antitrust law is applied, is the growing number of national antitrust authorities. Within the institutional framework the Member States, authorities do not have a vital role in the decision-making process. Their role was limited to providing the Commission with their common opinion in the Advisory Committees on restrictive practices and mergers respectively. However, these new institutions looked for ways to increase their influence on the process of the European antitrust law decision-making, especially since the scope of Community antitrust law was so extensive as to include many cases which were mainly of national relevance.

A critique of these three developments include the idea that the Commission's administrative procedures were inappropriate for the determination of civil rights and obligations. As seen, the European Commission, as a whole, lacks the guarantees of independence and impartiality that should be expected from a tribunal, which interprets the scope of private rights. The Court of First Instance judgment that Community antitrust law proceedings should guarantee "equality of arms", as well as the argument made in the legal writings that Community antitrust law procedures should, in accordance with Article 6 ECHR, provide for a fair and public hearing within a reasonable time by an independent and impartial tribunal, should be understood in that light.(Toth,2005,p.363)

The second line of criticism concerns the lack of transparency within the institutional design. As noted by a number of authors, the Commission is solely responsible for all phases of the application of EC antitrust law and the legal and political elements in antitrust law enforcement are blurred.(Wilks,Mcgowan,1995) The Directorate for Competition and Commission itself combines the responsibility to evaluate whether an agreement causes a reduction or distortion of competition with the competence to judge whether there are political reasons for deciding that the agreement is nevertheless compatible with the common market.

On the basis of these observations it was submitted that reform of the EC antitrust law's institutional structure should be based on a separation of responsibility for the two stages in procedures. The

institution responsible for the first stage examines whether the agreement, decision or concerted practice leads to a reduction or distortion of competition. Only if competition is considered to be reduced or distorted will the case proceed to the next stage in which considerations of competition policy are weighed against other policy concerns. A political body should be responsible for the deliberation and decision in this second stage.

The institution responsible for the assessment of whether a specific agreement, decision or concerted practice infringes Community antitrust law should be an independent institution, ideally a court.(Riley, 1994) Therefore the courts would have competence to apply the Treaty's antitrust law provisions which have direct effect, possibly complemented by the power to assert the effects of mergers on competition. The Commission's Directorate General for competition matters could act as public prosecutor which would take special care of those interests which are likely to be under-represented in private enforcement action.

Only where the tribunal concludes that competition is likely to be reduced or significantly impeded as a consequence of the agreement at issue will the procedure move into a second stage. The College of Commissioners might be an appropriate institution for this phase, as politically accountable body which determines whether there are political reasons for granting an exemption to the prohibition on reducing competition.

To put it differently, the structure here proposed contains a clear demarcation of the two stages, with the judiciary-being responsible for the first test and the Commission for the political discretion implicit in the exemption decision.

Modernization of antitrust law procedures and Regulation 1/2003

Regulation 1/2003 brought about a radical change in the manner in which Articles 81 and 82 are enforced. The previous enforcement regime, under Regulation 17, which dated from 1962, was characterised by a centralised notification and authorisation system for Article 81(3). Regulation 1/2003 abolished this system and replaced it by a system of decentralised *ex post* enforcement, in which the European Commission and the competition authorities of the EU Member States together form the European Competition Network to pursue infringements of Articles 81 and 82 of the Treaty.

Regulation 1/2003 was the final legislative result of the modernization debate and is considered, with the exception of the Merger Control Regulation, as the most important instrument for the powers of the Commission. The Regulation grants the Commission broad powers to

apply and enforce Articles 81 and 82 of the Treaty. The procedures set out in the regulation are similar to the procedures within the field of merger control. The Commission can start an investigation into an infringement of the EC competition rules upon its own initiative or upon a complaint. As a result of the modernization decentralization process of European competition law, the National Competition Authorities (NCA) and the national courts play an increasingly important role in the application and enforcement of the EC competition rules. Together with the NCAs, the Commission forms a network of competition authorities having the task to detect and punish violations of Articles 81 and 82. Nonetheless, the role of the Commission remains vital, particularly where it must provide the parties with the necessary legal certainty as to how the Community rules must be applied and a coherent competition policy must be developed in a decentralized system.

The modernization process has had the result that the NCAs and the national courts play a more significant role in the enforcement of the EC competition rules, in particular Articles 81 and 82 EC. Furthermore, in applying national competition law, the NCAs have to respect European Community competition law. After all, the dictum of European Court of Justice, as per the judgement of the Van Gend & Loos[14] and Costa/Enel[15] cases, that Community law has created its own legal order and provisions of Community law take precedence over provisions of national law. In accordance with Article 5 of Regulation 1/2003 the national competition authorities possess the power to apply Articles 81 and 82 in individual cases. Article 5 stipulates that they may upon their own initiative or after a private complaint make the following decisions: requiring that an infringement be brought to an end, ordering interim measures, accepting commitments, imposing fines, periodic penalty payments or any other penalty provided for in their own legislation.

"From the start of the application of Regulation 1/2003 on 1 May 2004 until 31 December 2018, the national competition authorities have informed the European Commission and their fellow national competition authorities of 2525 investigations under Articles 81 and 82 (101 and 102 TFEU), and of envisaged final decisions ordering termination of infringements, imposing fines or accepting commitments in 1097 cases".[16] The functioning of the European Competition Network, so far, is perceived a as clear success. The application of Regulation 1/2003 has also given rise to a significant degree of voluntary convergence of Member States' laws as to the procedures and

[14] Case 26/62 Van Gend en Loos [1963] ECR 1
[15] Case 6/64 Falminio Costa v ENEL [1964] ECR 585
[16] These statistics are available at, http://ec.europa.eu/competition/ecn/statistics.html

sanctioning powers of national competition authorities, supported by the policy work in the European Competition Network.(Wils, 2013)

However, a big test for the decentralization process is the avoidance of different and diverse interpretations of EC competition rules and as a consequence the uniform application of Articles 81 and 82 EC is being jeopardized. "It is therefore essential that the Commission and the NCAs work together with a view to the consistent application of Articles 81 and 82 EC. Along these lines, if we analyse the institutional framework and the domestic competition laws of Holland, Germany and UK it becomes apparent that these national systems are far from identical and concerning relationship between national competition authorities and the political sphere, it should be noted that none of the national legislators has opted for total independence from the executive authorities".(Gronden,Vries,2006) Although the application of competition law must be shielded from short-term political influences, long-term political considerations must be accommodated in how competition policy is implemented. In this regard, it must be pointed out that the national legislatures of these three countries shaped the difficult equilibrium between the competition authority and the executive powers differently. For instance, in Germany and Holland a distinction has been made between general and individual instructions in anti-trust cases. The respected Minister is allowed to issue general instructions towards the competent competition authority in German and Dutch law. Conversely, the Dutch competition law provides that individual instructions issued by the respected Ministry, are unlawful. In the UK the Cabinet Minister in charge of the government department may intervene in individual cases with a view to certain public interests. This intervention can be considered lawful only if a public interest is explicitly indicated in the laws at stake.

As far as the position of the European Commission and in particular, the Directorate for Competition in the modernized enforcement system, it is frequently stated that it still dominates the competition policy in the Union. In order to preclude the dysfunction of the internal market through national interventions, Article 11(6) of Regulation 1/2003 provides the Commission with necessary powers to intervene in cases dealt by the national authorities concerning cartels and abusive powers.

Conclusive remarks

In the article, we provided thorough account of the gradual development of the European Community antitrust policy and operation of the Community institutions from the initial period of the 1960' to the enactment of Regulation 1/2003. An assessment of the most important

criticism towards the institutional structure and operation of the European Community antitrust system formed the basis of the main discussion.
The enactment of Regulation 1/2003 is perceived as the result of the modernization of antitrust rules that decentralized the European Community antitrust system. However the modernization process represented a much more ambitious purpose than that of merely permitting National Competition Authorities and national courts to apply the EU competition provisions. The purposes of this choice are twofold. In the first place, it is to synchronize the activity of all these institutions in antitrust, a very delicate matter; and second, to increase the powers of NCAs while at the same time guaranteeing the uniform application of European competition rules.

Concerning the application of Article 81(3) within the previous enforcement system, the Commission enjoyed exclusivity and, consequently, national courts and NCAs were prevented from exempting cartels from the prohibition envisaged by Article 81(1). Still, due consideration was given to the so-called *rule of reason* crafted by the European Court of Justice within this provision,[17] A sufficient playing field already existed for a decentralized application of European competition law with respect to cartels, and no problems at all existed with regard to the prohibition of the abuse of a dominant position within Article 82 of the Treaty.

However, until the entry into force of Regulation 1/2003, speaking from a legal perspective, there was no trace of a decentralized application of European competition law. In this respect, the goal promoted by the European legislature was legitimate and opportune, and the results achieved from this point of view by this Regulation have been quite remarkable.

Nonetheless, decentralized application of EU antitrust rules is far from being a perfect mechanism. Certainly, from many perspectives it seems more as a work in progress. While undeniably the overall enforcement of Articles 81 and 82 (Articles 101 and 102 TFEU) has been improved by Regulation 1/2003, something more than a mere fine tuning still seems to be required. In this regard, the efforts by the Commission to improve the system are certainly to be appreciated. However, in order to avoid risks of hyper-activism and an unbalanced evolution of perhaps one of the most crucial aspects of EU substantial law, the European Commission should not be the only institution considered in this process. Having in mind that the EU agenda has other priorities, we need to welcome and underline a more conscious role by the national authorities for competition and national courts of their importance as enforcers of the EU competition law within a unique legal system, in which the rights and duties have to be administered uniformly and consistently with

[17]See, Judgment of 30 June 1966, Case 56/65, *Technique Miniére v. Maschinenbau Ulm*,[1966]ECR235;

equal standards and levels of protection throughout the whole internal market of the European Union.

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