

The Second Devolution of European Competition Law: Empowering National Courts, National Authorities, and Private Litigants in the Expanding European Union

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Introduction: The Centrality of Competition Policy in the EC

Competition (antitrust) policy is one of the most fundamental policies underlying the European Community because of its relationship to the original overarching goals of the Community to create a European common market in which distinct national markets give way to the “Single Market.” While this may come as a surprise to those familiar with the large role played by cartels in the industrialization of Europe,¹ the emphasis on competition rules followed from the decartelization of Germany during the Allied occupation following the Second World War. The now-expired European Coal and Steel Community Treaty (1952-2002) was of limited scope but nonetheless laid the single market groundwork for the more expansive European Community Treaty. Competition policy was seen by the then-High Authority (now the Commission of the European Community) as integral to this objective, as was noted in an early policy memorandum:

A genuine single market cannot be brought about except through free competition. If the market were to remain subject to the arbitrary decisions of the cartels, or to the restrictive practices of monopolies, then the benefits of the single market would soon be offset by the effects of price-fixing and production quotas. This of course was understood by the framers of the [ECSC] Treaty, who provided in Articles 65 and 66 a set of standards and guiding procedural principles which together constitute the first effective anti-trust law in Europe. (There is a resemblance to American models here. Article 65, which relates to combinations in restraint of trade, and Article 66, which relates to illegal concentrations of economic power,

¹ See, generally, C. Trebilcock, *The Industrialization of the continental powers 1780-1914* (Oxford, 1981).

respectively correspond somewhat to Articles 1 and 2 of the Sherman Anti-Trust Act.)²

In the EC, it has often been said that the “first principle” of competition law is single market integration and the elimination of private practices which interfere with integration.³ As Deringer has commented, “the basic sin in Europe is not so much restricting competition but creating an obstacle to integration.”⁴ Competition law serves the purpose of integration by preventing private concerns from erecting or maintaining private barriers to free trade after or as governmental barriers are dismantled under the Treaty of Rome.⁵ As Faull has put it, “the EC's overriding objective of prising open national markets ... is not the invisible hand; it is competition policy as can opener.”⁶

While more recent documents have placed more emphasis on maintenance of competitive markets as the first objective of EC competition policy⁷ and seemingly demoted the single market objective to second place, there is no doubt that both are important. Because the Community anticipates as many as ten new members in the next few years, the single market objective may well take on renewed importance. Many of the new candidates for EU membership are former Communist states to whom “free

² High Authority, European Coal and Steel Community, *Memorandum On The Anti-Trust Policy of The High Authority 1* (1954). (Translation by the High Authority) The original antitrust rules of Articles 65 and 66 of the ECSC Treaty migrated into what are now Articles 81 and 82 of the EC Treaty.

³ B. Hawk, *United States, Common Market and international antitrust*, II, 6, (2d edn.), (Englewood Cliffs, N.J. Supp. 1990).

⁴ A. Deringer, in conference discussions, *Enterprise law of the 80's: European and American perspectives on competition and industrial organization* [F. Rowe, F. Jacobs & M. Joelson, Eds.] (Chicago, 1980), 65.

⁵ N. Green, T. Hartley, & J. Usher, *The legal foundations of the Single European Market* [T. Hartley, Ed.] (Oxford, 1991), 201; V. Korah, *EC competition law and practice*, 5th edn. (London, 1994), 1.

⁶ J. Faull, ‘The enforcement of competition policy in the European Community: a mature system’, 18 (1992) *Fordham Corp. Law Inst.* 139, 141 (B. Hawk, ed.).

⁷ Commission, XXIXth Report on Competition Policy, ¶ 2-3 (1999).

market”⁸ has been a pejorative term for most of the decades since the close of World War II. The new Member States frequently are also new market economies in which those former state-owned industries which have survived the collapse of the Soviet Union are often dominant in the national markets. The challenges of creation of a single market free of distortions and restrictions of competition in the context of ten new members are arguably comparable to if not greater than those which faced the Six in 1952 and 1958.

The Commission’s Competition Directorate was already overwhelmed by the task of policing the existing common market of 15 Member States containing over 350 million people and considered that the challenges of the impending leap to 25 Members and 450 million-plus people gave urgency to the long-felt need to revamp the venerable Regulation 17, which had governed the making and enforcement of competition policy since 1962 without substantial amendment. Consideration of the needed changes had been discussed for many years, but the first concrete move toward new legislation appeared in the form of the 1999 White Paper,⁹ followed by the Draft Regulation in 2000.¹⁰ After much commentary, debate, and some amendments, the final version of the Draft Regulation received approval in December 2002 and appeared as Regulation 1 of

⁸ The original Treaty of Rome commands “the institution of a system ensuring that competition in the common market is not distorted . . .” Art. 3(g) EC. As amended at Maastricht, in addition the Treaty now explicitly requires the Member States to adopt an economic policy which is “conducted in accordance with the principle of an open market economy with free competition.” Art. (4)(1) EC. It has also been said that following the entry into force of the Single European Act, the Community already has the “most strongly free-market oriented constitution in the world.” C.-D. Ehlermann, “The contribution of EC competition policy to the Single Market” [1992] 29 *C.M.L.Rev.* 257, 273.

⁹ Commission, “White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty,” Commission Programme No 99/027 (Brussels, 28.04. 1999).

¹⁰ Commission, *Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87*, COM(2000) 582 final.

2003,¹¹ entering into force January 24, 2003, and applying from May 1, 2004. However, a brief historical review is needed to prepare to assess the new “Reg. 1.”

I. Origins and Transitions: In the Beginning, 1958-1962

The main competition provisions of the Treaty of Rome, Articles 81¹² and 82¹³ EC, took effect in 1958, but it was not until 1962 that the Council enacted Regulation

¹¹ “Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty,” OJ L 1, 4.1.2003.

¹² *Article 81 EC, ex 85.* 1. The following shall be prohibited as incompatible with the common market; all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings;
- any decision or category of decisions by associations of undertakings;
- any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

¹³ *Article 82 EC, ex 86.* Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in :

- (a) directly or indirectly imposing unfair purchase or selling prices or unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to

17¹⁴ and laid down the specific implementation measures provided for in the Treaty.¹⁵ Nonetheless, the Treaty provided for immediate enforcement¹⁶ of these rules by prescribing a combination of action by the Commission and national competition authorities acting under the Treaty and national law. Under Article 84 EC (ex 88), the “authorities” in the Member States were directed to enforce Articles 81 and 82 (ex 85 and 86) until implementing regulations were adopted. Under Article 85 EC (ex 89), the Commission was entitled to find infringements and “authorise” the Member States to take steps to enforce such a finding. National authorities were expressly authorized by Art. 84 EC (ex 88) to apply the “exemption” provisions of Art. 81(3), ex 85(3). The German *Bundeskartellamt* (Federal Cartel Office) made use of this power in declaring Article 81 (ex 85) inapplicable in several instances.¹⁷

In the beginning, the situation was that national competition authorities and the Commission could enforce what are now Articles 81 and 82 EC, and in particular the national authorities could declare exemptions under Article 81(3) EC and non-infringement under Article 82 EC. This was in contrast to the beginning of the now expired ECSC Treaty, which initially did not have a High Authority and made no provisions for enforcement by Member State authorities in the transition period between creation and implementation of institutions and rules. The European Court of Justice had

commercial usage, have no connection with the subject of such contracts.

¹⁴ Council Regulation 17, 1959-62 O.J. SPEC. ED. 87.

¹⁵ Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 3, Article 83 EC, ex 87.

¹⁶ Case 13/61, *DeGeus v. Bosch*, [1962] ECR 45.

¹⁷A. Deringer, “The Distribution of Powers in the Enforcement of the Rules of Competition Under the Rome Treaty,” (1963) 1 *Common Mkt. L. Rev.* 30, 33n.2.

attempted to bring legal certainty to the ECSC Treaty by pronouncing¹⁸ a doctrine of “provisional validity” under which no enforcement of possibly infringing arrangements could occur until the High Authority was in place and capable of pronouncing on possible exemptions.

In the case of the EC Treaty, the Court erroneously (it is submitted) established in *Bosch* another, unnecessary “provisional validity” doctrine, whereby national courts were required to give effect to any agreement in force prior to passage of Regulation 17 (*e.g.*, not declare it a nullity under Article 85(2), now 81) which had not yet been the subject of an unfavorable Commission or Member State authority action. The *Bosch* judgment states that it would be contrary to the principle of legal certainty to apply Article 85(2), now 81(2) before decisions had been taken under both Article 85(1) and Article 85(3), now Article 81(2) and 81(3)—the Court was concerned by the:

.... [I]nadmissible result that some agreements would already have been automatically void for several years without having been so declared by any authority, and even though they might ultimately be validated subsequently with retroactive effect. In general it would be contrary to the general principle of legal certainty - a rule of law to be upheld in the application of the Treaty - to render agreements automatically void before it is even possible to tell which are the agreements to which Article 85 [now 81] as a whole applies.¹⁹

The Court’s solution to a perceived lack of legal certainty was its doctrine of provisional validity, but this was unnecessary. The ECJ could have ruled that national courts were competent to apply both the prohibition of Art. 81(1) EC and the exemption of Art. 81(3), but it did not do so for reasons which remain unclear. The ECJ later

¹⁸ Case 1/58, *Friedrich Stork & Co. v. High Authority*, [1959] ECR 17, 29.

¹⁹ *Bosch, supra*, [1962] ECR 45, at ¶¶ 51-2.

clarified the doctrine of provisional validity under the EC Treaty and limited its application to those agreements or decisions already extant at the time Regulation 17 entered into force.²⁰ Despite the existence of the provisional validity doctrine and its impact on national courts, the period prior to the coming into force of Regulation 17 represents at least in principle the high-water mark of decentralized enforcement of competition law in the Community.²¹

II. The Commission Takes Control, 1962-1993

In 1962, Community competition law enforcement was rendered nearly the exclusive preserve of the Commission when implementing legislation was adopted. Key elements of the Commission-centric system included: (1.) A notification system for agreements (Reg. 17, Art. 4); (2.) The Commission's exclusive powers to declare exemptions to Article 81(1) EC through application of Article 81(3) EC (Reg. 17, Art. 9(1)); (3) The Commission's power to divest the Member States of their authority to apply Articles 81(1) EC and 82 EC by initiating its own enforcement procedure (Reg. 17, Art. 9(3)). These elements represented a conscious policy choice which resulted in Ian Forrester's characterization of the staff of (now) DG-Competition as a "priestly class" who were "keepers of the cult, fully acquainted with its higher economic mysteries."²²

²⁰ Case 48/72, *Brasserie de Haecht v. Wilkin (No. 2)*, [1973] ECR 77.

²¹ This is in principle only, because in 1962 few of the Member States (Germany being the principal exception) even had national competition laws or authorities empowered to enforce the Treaty provisions on competition law. Any sort of "competition culture" was notable by its absence. See, e.g., C.A. Jones, *Private Enforcement of Competition Law in the EU, UK, and USA* (Oxford: Oxford Press 1999), p. 27-9.

²² I. Forrester, "Modernisation of EC Competition Law," (2000) 26 *Fordham Corp. L. Inst.* 181, 186 (B. Hawk, ed.). See also, I. Forrester & C. Norall, "The Laicization of Community Law--Self-help and the Rule of Reason: How Competition Law Is and Could Be Applied" (1983) 10 *Fordham Corp. L. Inst.* 305, 306-7 (B. Hawk, ed.). For a more comprehensive theological structure, see B. Hawk, "EU 'Modernisation': a latter-day Reformation," *Global Competition L. Rev.*, August/September 1999, p. 12.

(1) *Notification system.* The first implementing legislation, Regulation 17 established a “notification” system in which undertakings (firms) could ask the Commission for a decision that their existing or proposed conduct or agreements did not infringe the competition rules (“negative clearance”), or in the case of Article 81 (formerly 85), were generally obliged to ask the Commission to determine that their agreement/conduct was exempt (Article 81(1) “declared inapplicable”) if they wished to claim the benefit of Article 81(3) EC.²³ The failure of an undertaking to notify its agreements when required to do so meant that the firm was not immune from fines from the date of notification until the Commission’s ruling, as it was if a timely notification were made. The coming into force of Regulation 17 prompted nearly 40,000 notifications²⁴ in a Community of six Member States and immediately overwhelmed the skeletal Competition Directorate of the Commission. This state of affairs lasted for many years.

The original concept of the notification system was in part to provide guidance to firms, an objective which fell by the wayside from the beginning. In practice, notifications largely fell into a sort of bureaucratic black hole (or, if you prefer theological analogies, purgatory). In the first 37 years of Reg. 17, a total of 226 exemption decisions were issued, or approximately 6 per year. However, 136 of those were issued before 1979, so only 86 were issued in about the last 20 years: approximately 4 per year.²⁵ The rest remained in a file and most were (very gradually) cleared. In at

²³ Article 82 EC, ex 86, contains no provision for exemption.

²⁴ Commission, *First Report on Competition Policy*, ¶ 48 (1972); Commission, *Ninth Report on Competition Policy*, ¶ 2 (1980).

²⁵ Norall, 2000, *supra*, at p. 184.

least one case, *Ford Agricultural*, the duration from notification to decision lasted 28 years (1964 to 1992).²⁶ As a practical matter, exemptions were essentially unavailable.

The more negative side of notifications was that it consumed scarce Commission resources to deal with what were mostly innocuous distribution agreements (few price-fixing cartels filed notifications) at the expense of being able to take enforcement action against more obviously harmful infringements.²⁷ Of the nearly 40,000 notifications filed in 1962-63, some 30,000 of them dealt with exclusive distribution agreements. In addition, there was little contribution to enforcement because in the entire 37 year history of Reg. 17 through 1999, only 9 formal prohibition decisions resulted from notifications in which there was not also a complaint investigated by the Commission—about one every four years.²⁸

(2.) *Monopoly on Exemptions.* Article 9(1) of Regulation 17 gave the Commission the “sole power” to declare Article 81(1) EC “inapplicable” pursuant to Article 81(3), a nearly complete reversal of the previous situation in which the authorities of the Member States were expressly directed (“shall rule”) by Article 84 EC (ex 88) to apply both national law and “the provisions of Article 81, particular paragraph 3.” The combination of this exclusive power of exemption and the notification system funneled virtually all decisions under Article 81 to the Commission with the view that the

²⁶ Norall, 2000, *supra*, at p. 187. The champion appears to be the Dutch retail book price agreement, which enjoyed provisional validity for 36 years, from 1962 until decision in 1998. See Case C-39/96 *KVBBB v. Free Record Shop* [1997] ECR I-2303.

²⁷ C. D. Ehlermann, “Deregulation and enforcement of competition laws,” *Proceedings of the Second Seminar on European Union/Japan Competition Policy* (Luxembourg, 1995), 25: “... [T]he examination of requests for individual exemption from the prohibition of restrictions of competition might be less productive than the discovery of hard-core cartels.”

²⁸ A. Schaub, “Modernisation of EC Competition Law: Reform of Regulation No. 17,” (2000) 26 *Fordham Corp. L. Inst.* 143, 144 (B. Hawk, ed.).

Commission would ensure the uniform development and application of Community competition law.

However, the result of what Barry Hawk²⁹ dubbed the “original sin” of EC competition law—bifurcation of the authority to condemn and reprieve—has been the discouragement of both enforcement by national competition authorities and national courts. It has been said that the inability to apply Article 81(3) deprives national courts and national authorities of “motivation” and willingness to cooperate in enforcement of EC competition law.³⁰ In the case of national authorities, they may prefer to act under national competition law where they can control the national exemption process. Indeed, barely over half (8) of the current fifteen Member States have national legislation empowering their national competition authorities to apply EC competition law, distinct from their national laws.³¹ In the case of national courts, parties may be unwilling to engage in expensive and protracted litigation with the knowledge that the Commission could end it at any time by granting an exemption.³²

This state of affairs has been one of the major reasons for the modernization of Reg. 17: The Commission now finds it “deplorable” and “untenable that the

²⁹ B. Hawk, “Enforcement of EC and National Competition Law by Member State Competition Authorities: Roundtable Four.” (1994) 20 *Fordham Corp. L. Inst.* 639, 661 (B. Hawk, ed.).

³⁰ K. Stockman, an official of the German Federal Cartel Office in “Enforcement of EC and National Competition Law by Member State Competition Authorities: Roundtable Four,” (1994) 20 *Fordham Corp. L. Inst.* 639, 646-8 (B. Hawk, ed.).

³¹ Schaub, *supra*, note 28, at 151.

³² G. Marengo, “The Uneasy Enforcement of Article 85 EEC as Between Community and National Levels,” (1994) 20 *Fordham Corp. L. Inst.* 605, 623 (B. Hawk, ed.)

Commission's exemption monopoly continues to block the appropriate participation of national authorities and courts in the enforcement of Article 81."³³

(3.) Divesting National Authorities of competence.

Reg. 17 also contains a further discouragement of national authorities in that it provides in Article 9(3) that national competition authorities remain competent to apply Article 81(1) EC and Article 82 only so long as the Commission has not "initiated any procedure" of enforcement. This does not directly affect the national courts because they do not lose their competence since it derives directly from the Treaty, not the regulation, but it does have a "chilling effect."³⁴ However, a national authority which already can not apply the Article 81(3) EC exemption procedures faces the additional possibility that the Commission might initiate a procedure which would halt the national proceedings in mid-course by divesting the national authority of jurisdiction. This occurred in the case of the *Ford/Volkswagen* joint venture, when the Commission initiated a procedure and issued an exemption in order to prevent the Bundeskartellamt from prohibiting the arrangement.³⁵ Other national authorities have also reported similar discouragement.³⁶

Finally, the notification system coupled with the Commission's monopoly on exemptions hampered and discouraged the application of Article 81 EC by national courts and national authorities because it meant that in the event of national proceedings in either place, parties who had not already notified their agreements could do so for

³³ Schaub, *supra*, note 28, at 144.

³⁴ Marengo, *supra*, note 32, at 623-4.

³⁵ H.-P. von Stoephasius, 'Enforcement of EC Competition Law By National Authorities', in *Procedure and Enforcement in EC and U.S. Competition Law* (P. J. Slot & A. McDonnell, eds., 1993), 33-34.

³⁶ J. Temple Lang, *General Report on the Application of Community Competition Law on Enterprises by National Courts and National Authorities*, (1998), 18. (Report to the FIDE Congress, Stockholm, June, 1998).

tactical reasons and then argue that no action should be taken until the Commission ruled on the notification. Since the notification system permitted notice to the Commission at any time, a party could be assured of many months if not years of Commission inaction, which often meant inaction in a national court or competition authority which waits for a Commission decision to avoid conflicts.³⁷

III. The First Devolution? 1993-2003

A. Delimitis and Masterfoods.

For the reasons described above and others, the Commission have long favored action to decentralize competition enforcement and bolster the role of national courts and national authorities. Despite the strong centralization provisions embodied in Reg. 17, the Commission from the beginning has considered that actions for damages were available to third parties in addition to the declarations of nullity mentioned in Article 85(2), now 81(2). In its proposal to the Council with respect to what ultimately became Regulation 17, the Commission followed its mention of the sanctions (fines for noncompliance) with a statement concerning the civil consequences of violations:

A ces sanctions s'ajoutent la publicité éventuelle de la décision et les risques inhérents à la nullité de l'entente et aux demandes de dommages et intérêts qui pourraient être formées par des tiers'.³⁸

³⁷ See C. Jones, *supra* n. 21, pp. 93-103.

³⁸ Commission, *Premier Reglement D'Application Des Articles 85 et 86 du Traite (Proposition de la Commission au Conseil)* (1960), 3. The Commission's unofficial translation of this memorandum of 28 October 1960 is "To these sanctions may be added the eventual publicity of the decision and the inherent risks of the nullity of the understanding, and of damages which could be raised by third parties."

In a series of decisions,³⁹ the European Court of Justice has applied its well-known doctrines of direct effects and supremacy to establish that individuals may enforce claims for damages for infringement of the competition rules in their national courts. In one of its most recent judgments on the point, the ECJ noted that “actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.”⁴⁰ The ECJ has accepted the direct effect of Articles (81)(1) and 82 EC at least since *BRT* in 1974.⁴¹ Since *BRT*, the Commission has in principle sought to encourage more decentralized enforcement by national courts and national authorities.

What I have called the “First Devolution” of European competition law may be traced to a combination of the direct effects jurisprudence of the ECJ with its judgment in *Delimitis*.⁴² This case involved a Frankfurt pub owner who challenged the validity of a beer supply agreement under Article 81(1) EC and sought to have it declared null and void in the German national court under Article 81(2) EC. In the course of giving its

³⁹ See Jones, *Private Enforcement*, *supra* note 21, pp. 45-78 for a detailed explanation of the road from general Community law principles of direct effect and supremacy to the recognition of private damages actions for breach of Community competition rules. The most recent authorities include Case C-282/95, *Guérin Automobiles v. Commission*, [1997] ECR I-1503; Opinion of Advocate General Van Gerven, Case C-128/92 *H.J. Banks & Co. Ltd v. British Coal Corp.* [1994] ECR I-1212, I-1250-52; and Opinion of Advocate General Mischo and the Judgment of the ECJ, Case C-453/99 *Courage Ltd v. Crehan* (22 March 2001, and 20 September 2001, respectively).

⁴⁰ *Courage*, *supra*, at ¶ 27.

⁴¹ Case 127/73, *Belgische Radio en Televisie [BRT] v. Société Belge des Auteurs Compositeurs et Editeurs [SABAM]*, [1974] ECR 51 and 313, ¶ 16.

⁴² Case 234/89, *Delimitis v. Henninger Bräu*, [1991] ECR I-935.

judgment, the ECJ addressed the joint competence of national courts and the Commission to apply Articles 81(1) EC⁴³ and approaches to avoiding conflicting decisions:

Such conflicting decisions would be contrary to the general principle of legal certainty and must, therefore, be avoided when national courts give decisions on agreements or practices which may subsequently be the subject of a decision by the Commission....

Nevertheless, in order to reconcile the need to avoid conflicting decisions with the national court's duty to rule on the claims of a party to the proceedings that the agreement is automatically void, the national court may have regard to the following considerations in applying Article 85 [now 81].

50. If the conditions for the application of Article 85(1) [now 81(1)] are clearly not satisfied and there is, consequently, *scarcely any risk* of the Commission taking a different decision, the national court may continue the proceedings and rule on the agreement in issue. It may do the same if the agreement's incompatibility with Article 85(1) [now 81(1)] is beyond doubt and, regard being had to the exemption regulations and the Commission's previous decisions, the agreement may *on no account* be the subject of an exemption decision under Article 85(3) [now 81(3)]....

52. If the national court finds ... that the agreement *may be* the subject of an exemption decision, the national court *may decide* to stay the proceedings or to adopt interim measures pursuant to its national rules of procedure....

54. Finally, the national court may in any event, stay the proceedings and make a reference to the court for a preliminary ruling under Article 177 [now 234] of the Treaty.⁴⁴

The Court in *Delimitis* described the standard for the national court to employ in deciding not to stay its proceedings in seemingly strong terms such as whether the incompatibility of the practice with Article 81 EC is “*beyond doubt*,” if the practice “*may on no account*” be the subject of an exemption, or if there is “*scarcely any risk*” the

⁴³ “The Commission does not have exclusive competence to apply Articles 85(1) and 86 [now 81(1) and 82]. It shares that competence with the national courts.” *Delimitis*, supra, at ¶47.

⁴⁴ *Delimitis*, Case 234/89, at ¶¶ 47, 49-54 (Emphasis supplied).

Commission would decide to prohibit an agreement which the national court thought non-infringing. At the same time, the Court spoke of the national court's "*duty to rule* on the claims of a party" and the conditions under which it "*may decide to stay*" proceedings.

While *Delimitis* built upon foundations laid down earlier in *BRT*⁴⁵ and *de Haecht (No. 2)*⁴⁶, the language and tenor of the judgment was seen to emphasize what the national courts could do even in the face of the Commission's monopoly on exemptions rather than stressing what they could not do. It was clear following *Delimitis* that national courts could form considered judgments about the likelihood of Commission exemptions or conflicting decisions and act to resolve the issues before them. The national court could decide to ask the Commission for information, it could decide to refer the question to the ECJ under the preliminary reference procedure, Article 234 EC, or it could stay the national proceedings and await an impending Commission decision, as it thought appropriate keeping in mind its duty to avoid conflicting decisions.⁴⁷

The issue of conflicting decisions returned to the ECJ a decade later in the *Masterfoods*⁴⁸ judgment which well illustrated the panoply of procedures that make up the Community legal system. *Masterfoods* was a subsidiary of the US firm Mars which marketed ice cream bars/snacks in Ireland and elsewhere in the Community. HB was a subsidiary of Unilever, the largest seller of "impulse" ice cream in Ireland. HB provided complimentary freezers to retailers on condition that only HB's ice cream would be

⁴⁵ Case 127/73, *Belgische Radio en Televisie [BRT] v. Société Belge des Auteurs Compositeurs et Editeurs [SABAM]*, [1974] ECR 51 and 313.

⁴⁶ *Brasserie de Haecht v. Wilkin (No. 2)*, [1973] ECR 77.

⁴⁷ Jones, *supra*, note 21, at pp. 98-103.

⁴⁸ Case C-344/98, *Masterfoods Ltd v. HB Ice Cream Ltd*, [2000] ECR I-11369 (December 14, 2000).

stocked or displayed in them. When Masterfoods entered the market, retailers used the freezers to store Mars ice cream, prompting HB to demand that the retailers comply with the exclusivity clause. Since most retailers could accommodate only one freezer on the premises, limiting freezers to HB ice cream had the effect of excluding Mars ice cream.

Masterfoods brought an action in the Irish High Court (a trial court) seeking a declaration under Irish and EC law (Article 81 EC) that the exclusivity clause was null and void. HB countered by seeking an injunction in the Irish High Court prohibiting Masterfoods from inducing retailers to violate the exclusivity clause in the freezer agreements. Both cases also sought damages. The High Court granted (1992) HB an interlocutory and permanent injunction against Masterfoods' inducing retailers to breach the exclusivity clause and dismissed Masterfoods' claims and all damages claims. An appeal was taken to the Supreme Court of Ireland.

In parallel proceedings, Masterfoods lodged a complaint (1991) with the Commission claiming that HB's freezer exclusivity infringed Articles 81 and 82 EC. The Commission initially accepted the claim (1993) and issued a statement of objections (initiated an enforcement action) to HB, which then negotiated changes to the system (1995) resulting in the Commission's stated intent to grant an exemption under Article 81(3) EC. However, the Commission determined that the changes were insufficient to open up the market and issued a new statement of objections (in 1997) resulting in a formal decision of infringement and denial of an exemption in 1998.⁴⁹ An action to annul the decision was brought in the Court of First Instance and the Commission Decision was stayed pending the outcome of the appeal.

⁴⁹ Decision 98/531/EC of 11 March 1998 relating to a proceeding under Articles 85 and 86 of the Treaty (Case Nos IV/34.073, IV/34.395 and IV/35.436 - *Van den Bergh Foods Limited*) (OJ 1998 L 246, p. 1)

Meanwhile, the Supreme Court of Ireland stayed its review of the High Court judgment (apparently pending since 1992!) and referred questions to the ECJ under the preliminary reference procedure. The situation as it stood at the time of the ECJ's judgment in *Masterfoods* was that the national trial court had ruled that HB's exclusive freezer arrangement violated neither Article 81 or 82 EC; subsequently, the Commission ruled that the arrangement violated both Article 81 and 82 EC, and the Commission's decision was suspended pending review in the Court of First Instance. In this context, the Supreme Court of Ireland sought guidance from the Court of Justice on how it should proceed (or not) in reviewing the validity of the High Court's ruling and injunction. The ECJ replied as follows:

The answer to Question 1 must therefore be that, where a national court is ruling on an agreement or practice the compatibility of which with Articles 85(1) and 86 of the Treaty is already the subject of a Commission decision, it cannot take a decision running counter to that of the Commission, even if the latter's decision conflicts with a decision given by a national court of first instance. If the addressee of the Commission decision has, within the period prescribed in the fifth paragraph of Article 173 of the Treaty, brought an action for annulment of that decision, it is for the national court to decide whether to stay proceedings pending final judgment in that action for annulment or in order to refer a question to the Court for a preliminary ruling.⁵⁰

Masterfoods represents a straightforward application of the *Delimitis* principles to the situation where a national (trial) court has acted first but the Commission has subsequently condemned (after lengthy backing and filing) an arrangement approved by the trial court and then the national court's judgment is poised to be reviewed on appeal. A significant aspect of *Masterfoods* is that the ECJ does not attempt to instruct the Supreme Court of Ireland as to how it should decide so long as it avoids decisions "running counter" to the Commission decision. It remained open for the Supreme Court

⁵⁰ *Masterfoods*, at ¶ 60.

to reverse the trial court and follow the Commission's decision, to stay its proceedings and await judicial review of the Commission decision, or to refer the validity of the Commission's decision to the ECJ under the preliminary reference procedure. It has long been clear that the national court could not invalidate a Commission decision in light of the principle of the primacy of Community law, but the national court was otherwise able to act.

Technically, the national court's ruling does not conflict⁵¹ with the Commission's decision even though they are counter to each other because neither the national court judgment nor the Commission decision has constitutive effect. The ECJ's judgment rested on the lack of legal certainty, a general principle of Community law, which would be produced if the Irish Supreme Court were to decide the appeal contrary to the Commission's decision. Notably, the ECJ considered this could be resolved by a reference under Article 234 EC if the national court considered it warranted. Hence, the Irish Court could avoid a conflict by reversing the High Court if it thought the Commission ruling correct⁵² or refer it to the ECJ if it thought the Commission wrong. Either way, the Irish Supreme Court could act to resolve the case.

B. The Cooperation Notices.

Following *Delimitis*, the Commission sought to achieve devolution by an educative and advocacy approach in the form of Commission "notices," which are a form of policy press release, not binding except to the extent they otherwise correctly state the

⁵¹ Jones, *supra*, note 21, at p. 94

⁵² If the Supreme Court were to reverse the High Court on the basis of the Commission decision, there would be some risk that the Commission decision might be annulled in the CFI, with further review in the ECJ possible as well as further proceedings in the Commission. It may be that the Supreme Court under these circumstances would be better off to refer the question to the ECJ rather than stay the appeal for an additional lengthy period of time.

law. The first notice was addressed to national courts and lawyers,⁵³ and will be referred to as the “Co-operation Notice.” The apparent objective was to increase awareness on the part of national courts, lawyers, and prospective private litigants of their options for private enforcement actions and provide guidance on avoidance of inconsistent decisions by national courts and the Commission. The Cooperation Notice itself does not break any new ground, but it points out certain advantages of private enforcement over complaints to the Commission and cautions that the Commission's limited resources “cannot be used to deal with all the cases brought to its attention.”⁵⁴

The *Cooperation Notice* was intended to discourage firms from relying on (inexpensive) complaints to the Commission and encourage them to seek remedies in national courts. However, the *Cooperation Notice* sends mixed signals. A perusal of that document reveals that the Commission’s intended encouragement of resort to national courts is so encumbered with comments concerning the need for national courts to stay actions and wait on information or action from the Commission that it may well persuade prospective litigants that the most likely outcome of private litigation is inaction. From a workload standpoint, the most probable result anticipated was an increase in the Commission’s workload, rather than a decrease. If parties did resort to national courts, undertakings (defendants) who were formerly satisfied with an informal comfort letter but might be facing litigation in a national court may insist on a formal exemption decision. The Cooperation Notice, to the extent it had any substantial impact at all,

⁵³ *Notice on co-operation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty*, O.J. No. C-39/6, 13.02.1993.

⁵⁴ *Supra*, at ¶ 13.

would more likely be counterproductive. Five years after its appearance, Commission officials noted that its effects were limited.⁵⁵

The Commission followed the Cooperation Notice with another notice⁵⁶ (the “National Authorities Notice”), in which it sought to persuade parties to take their complaints to national competition authorities and persuade national competition authorities to take them up. These exhortatory measures had little effect and no impact on the Commission’s exemption monopoly or its ability to divest those national authorities who had competence to enforce the EC Treaty of that power. It is likely that the lack of success of these persuasive measures convinced the Commission that effective decentralization of competition enforcement required binding legislation, not mere advocacy.

IV. The Second Devolution: 2004--?

A. Reg. 1⁵⁷: Real Devolution or Real Revolution?

The decentralization provisions contained in Reg. 1 could be described as “so old they’re new again.” Reg. 1 does represent in some respects a radical reform of the measures governing application and enforcement of Community competition policy. However, in principle it does not really restore the level of decentralization reached in

⁵⁵ Temple Lang, *supra* note 36, at 38. (“Several reasons are given. Some national courts are not accustomed to the idea of asking any authority for information When a national court wants guidance on a question of law, rather than factual information, it naturally prefers to use Article 177 [now 234], so as to get an authoritative ruling.”)

⁵⁶ Commission, *Notice on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Articles 85 or 86 of the EC Treaty*, O.J. No. C-313/3, 15.10.1997.

⁵⁷ “Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty,” OJ L 1, 4.1.2003.

1958-1962 before the advent of Reg. 17. Had EC competition law remained decentralized from the outset, there might have been an accelerated dissemination of this innovation among the courts, national authorities, consumers, lawyers, and business segments of the Community such that compliance and enforcement activities might have reached higher levels with greater rapidity. We will never know. We do know that competition culture probably is now more widespread in the Community than before, and the legal and political climate for decentralized enforcement is much improved over 1962.⁵⁸ What we can say about Reg. 1 is that it goes far toward undoing the 40-year old regime of Reg. 17 without materially weakening the Commission, and it converts the merely hortatory provisions of the Cooperation Notices into directly applicable Regulations which are “binding in their entirety.”⁵⁹

1. Abandonment of the Notification System. The most obvious initial change is that the notification system originally contained in Articles 4 and 5 of Reg. 17 has vanished and lapses as of May 1, 2004 pursuant to Article 34 of Reg. 1.⁶⁰ There is no longer any provision for undertakings to request negative clearance or individual exemption decisions. As a result, undertakings will be responsible for making their own judgments about the compatibility of their agreements, decisions, and concerted practices with the common market.

⁵⁸ C.A. Jones, “A New Dawn for Private Competition Law Remedies in Europe? Reflections from the USA,” in Claus Dieter Ehlermann & Isabela Atanasiu, eds., *EUROPEAN COMPETITION LAW ANNUAL 2001: EFFECTIVE PRIVATE ENFORCEMENT OF EC ANTITRUST LAW* 95-108 (Oxford: Hart Publishing 2003).

⁵⁹ Article 249 EC.

⁶⁰ As a practical matter, this probably means that new notifications or exemption requests will cease almost instantly, since the system will lapse before the Commission would be likely to act on any new applications.

The effect on the Commission's administration is that in theory its staff will have more resources to address own-initiative investigations and complaints with an eye towards concentrating on more harmful infringements. However, the Commission retains the power (Art. 10, Reg. 1) to make "findings of inapplicability" on either negative clearance or exemption grounds when the "Community public interest requires" and "acting on its own initiative." Hence, the Commission can in what are expected to be rare circumstances still give individual clearances and exemptions. This enables the Commission to give formal positive decisions when it deems it necessary to give guidance to the legal and business communities. So long as this power is used on extraordinary occasions and not as a matter of routine, this should be beneficial. However, since the Commission only delivered an average of 4-6 formal exemption decisions per year, it remains to be seen how substantial a gain in resources will actually result. The principal gain will likely be from avoiding having to produce informal comfort letters.

Article 9 of Reg. 1 creates a new type of formal decision called commitment decisions. These are intended to address the situation where the Commission is poised to adopt an infringement decision and the undertakings concerned offer commitments to meet the concerns of the Commission. These decisions will be binding on the undertakings, be for a limited period, and "shall conclude that there are no longer grounds for action by the Commission." It is intended that these are equivalent to former negative clearance decisions in that they are declaratory, not constitutive, and therefore do not block action by national courts or authorities.⁶¹

⁶¹ Recital 13, Reg. 1. See, Marengo, *supra*, note 32, p. 616-7. "...[T]he operative part of a negative clearance (there are no grounds for the Commission to act in respect of a given agreement) conveys to the

The absence of a notification system also means that the ability of undertakings to play off the Commission versus national courts or national authorities is reduced because each agreement is no longer automatically before the Commission as a result of a notification. While the Commission has considered informal guidance something like business review letters in the U.S., this is not a part of Reg. 1.

(2). *Abolition of the Monopoly on Exemptions.* The most important change in Reg. 1 is that the Commission no longer has sole authority to grant exemptions in Article 81 cases, e.g., “declare inapplicable” the prohibition in Article 81(1) by application of the criteria laid down in Article 81(3) EC. In fact, under Reg. 1, no authority or court, whether Community or national will have the power to grant a constitutive exemption immunizing an agreement or decision from attack by others.⁶² This comes about because Article 1 of Reg. 1 rearranges the text of Article 81 EC to provide for a combined determination of whether conduct is caught by Article 81(1) EC and does or does not fulfill the conditions of Article 81(3) EC. If not, it is prohibited (Art. 1(1)); if it does, it is not prohibited (Art. 1(2)).

In theory, there is no longer any such thing as an individual exemption—conduct either infringes Article 81 or it does not.⁶³ One might say that Reg. 1 does not merely abolish the monopoly on individual exemptions; it abolishes individual exemptions.

National Authorities. National authorities are empowered by Reg. 1 to find

undertaking the message that the Commission does not *intend* to act. If a national court takes a different view as to the existence of an infringement, therefore, technically there is not even a conflict between the Commission's decision and the court's judgment. ... The result is that in the interpretation of Article 85(1) [now 81(1)] national courts are never legally bound by Commission decisions....”

⁶² W. P.J. Wils, *The Optimal Enforcement of EC Antitrust Law: Essays in Law and Economics* 139 (The Hague: Kluwer Int'l 2002).

⁶³ Reg. 1 does not address the effect of Article 81(2), the nullity provision, or its application. Of course, neither did Reg. 17.

infringements and require that they be ended, order interim measures, accept commitments, impose fines or other penalties, and where the conditions for prohibition are not met, decide “there are no grounds for action on their part.”⁶⁴ Although national authorities are now able to apply Article 81 EC as a whole, they are obligated by Article 11 of Reg. 1 to apply Community competition law in “close cooperation” with the Commission and other Member States. In particular, national competition authorities (NCA’s) are by Article 11(3) of Reg. 1 required to notify the Commission in writing before or immediately after initiation of any formal investigative measures applying Articles 81 or 82 EC. At least 30 days before adopting an infringement decision, accepting commitments, or withdrawing the benefits of a block exemption in the national territory, NCA’s are directed to inform the Commission and furnish substantial information regarding the case. Reg. 1 does not require that the Commission assent to the proposed decision, but it must be informed in advance. In turn, the Commission is required by Article 14 of Reg.1 to consult with the Advisory Committee on Restrictive Practices composed of Member State representatives before taking any of several specified decisions.

National Courts. National courts are similarly empowered, albeit more briefly. Article 6 of Reg. 1 states in full that “National courts shall have the power to apply Articles 81 and 82 of the Treaty.” Reg. 1 does not specify any particular remedies available in national courts, no doubt due to the general concept that all appropriate national remedies must be available to protect Community rights in national courts.⁶⁵

⁶⁴ Reg. 1, Article 5.

⁶⁵ See generally, Jones, *Private Enforcement*, *supra*, note 21, at pp. 62-78.

However, it is rumored that the Commission is drafting legislation laying down such remedies for adoption in the none-too-distant future.

Even in its present form, Reg. 1 breaks new ground by establishing certain substantive and procedural rules applicable in national courts which go beyond what has previously been required outside the ECJ's national remedies jurisprudence. Article 2 of Reg. 1 lays down a Community rule on burden of proof requiring the complaining party to show infringement of Article 81(1) or 82 EC and assigning the burden of establishing that the conditions of Article 81(3) are fulfilled to the party claiming its benefit. This was done to eliminate any doubt that the complaining undertaking or administrative authority, Community or national, would be required to prove a negative--that the conditions of Article 81(3) were not fulfilled--in order to establish an infringement. This burden of proof requirement in a directly applicable regulation ensures uniformity of a plainly desirable rule of enforcement.

Perhaps the most radical and amazing provision is found in Article 3 of Reg. 1, in which it is provided that national courts⁶⁶ applying national competition rules to conduct affecting trade between Member States *must also apply Article 81 and 82 EC*. In other words, national competition rules must be applied in tandem with Community rules if the conduct might infringe Articles 81 or 82 EC. Moreover, national competition law may not prohibit the conduct unless it would also infringe Community rules.⁶⁷ This rule does not apply when national merger laws are applied, when national laws are applied "which pursue an objective different from that pursued by Articles 81 and 82 of the Treaty," (e.g., unfair competition or deceptive practices laws) (Article 3 (2)), or when stricter

⁶⁶ This rule applies to NCAs also, but is discussed, *infra*, at text accompanying note 69.

⁶⁷ Reg. 1, Article 15(2)

national laws punishing unilateral conduct are applied to conduct on the national territory, Article 15(3).

The draft version of now Article 15 of Reg. 1 prohibited the application of national law in any case where trade between Member States was affected. After protests, the Commission achieved its objective by requiring the application of both national and Community law, with the stipulation that national law could not prohibit what Community law permitted. The purpose was to solve the problem of stricter national competition laws which might interfere with uniform Community competition law, the so-called double-barrier or “*Walt Wilhelm*” problem.⁶⁸ Most national competition rules now are modeled upon the Community rules, so at first this might not seem to be a substantial issue. This is actually a powerful centralizing measure since it prevents national authorities from applying only national law in a manner inconsistent with what the Commission would prefer.

Other new procedural rules are imposed on national courts in Article 15 of Reg.1. Courts are not required to notify the Commission in advance of taking infringement decisions, but member states are required to send the Commission “without delay after the full written judgment is notified to the parties” a copy of “any written judgment of national courts deciding on the application of Article 81 or 82.”

In addition, the Commission is empowered to inject its views and itself into national court proceedings in various ways that are not really novel, because similar provisions previously appeared in the *Cooperation Notice*, but are now directly applicable requirements, not exhortations. First, national courts are expressly empowered to ask the Commission for information and opinions on the application of Community

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

law (Article 15(1)). Previously, national evidence and procedural rules might have made this impossible. Second, Article 15(3) empowers NCAs on their own initiative to submit written observations on Community competition law to their own national courts, and with the permission of the court, oral observations (*e.g.*, appear and be heard by the court). Moreover, the same Article 15(3) empowers the Commission, acting on its own initiative, to submit written observations to national courts (whether the court wants to read them or not), and with permission, to submit oral observations. These “amicus curiae” provisions were suggestions in the *Cooperation Notice*, but are entitlements under Reg. 1 at least as to written observations. The net result is that the Commission may ensure that its views on the correct application of Community competition law are heard in national courts at all levels. Even if the Commission does not learn of a case in national court until judgment is given, it may be heard subsequently on appeal in the national court system, a marked change in the relationship between national courts and a Community institution.

(3.) Retaining the Power to Divest NCAs of competence.

Under Reg. 1, Article 11(6), the Commission retains the power to relieve NCAs of their competence to apply Articles 81 and 82 EC by initiating proceedings for adoption of a decision. If any NCA is already acting on a case, the Commission is required to “consult” with the NCA before commencing a proceeding. This power has been retained by the Commission to ensure that if NCAs do not apply Community competition law in sufficiently “close cooperation,” the Commission can take over the case and put an end to national proceedings. This divestiture does not apply to national courts acting to judicially review NCA decisions (Article 35 (3)), but requires NCAs proceeding before

judicial authorities to withdraw its claim and terminate the court proceeding (Article 35(4)).

While in the past, the Commission's power has apparently caused some resentment and made national authorities feel unmotivated to apply Community law, there is some reason to think that circumstances have changed. First, the Commission has only rarely used its power to deprive NCAs of authority, and never in the absence of a notification.⁶⁹ Second, because NCAs may now apply Article 81(3) as well as Article 81(1), they can take a case to termination. Third, since there are no longer any notifications at Community level, the Commission may not be automatically seized of the case at the outset.

Fourth, Article 3 now requires NCAs to apply EC law whenever national law is applied to conduct affecting trade between the Member States, so if NCAs wish to apply national law in such cases, they must apply both. The combination of Article 3 of Reg. 1 with Article 11(6) of Reg. 1 suggests that if the competence of NCAs to apply Community law is removed, NCAs will also be unable to apply national law if trade between Member States is affected. Moreover, all NCAs will now be empowered to apply Community law, and the designation by Member States of authorities to do so is required to occur before May 1, 2004.⁷⁰ The result is that the application of Community competition law is likely to greatly increase given that only 8 Member States now have the authority to apply it, and it has scarcely been used. Of course, the increased application of EC competition law by NCAs and national courts is a principal objective of the new regulation.

⁶⁹ Wils, *supra*, note 62, at 141.

⁷⁰ Reg. 1, Article 35.

Fifth, the close cooperation mandated by Article 11 of Reg. 1 means that NCAs will work more closely with the Commission, reducing the likelihood of disagreements since the Commission will be better placed to assure NCAs that their work will not be wasted. If there are disagreements, the consultation requirement before the Commission may divest an NCA of its competence should help to prevent misunderstandings, provided the Commission shows a reasonable degree of sensitivity to the concerns of NCAs.

4. *Uniformity of decisions and pluralism.* The increase in the number of entities applying Article 81(3) normally can be expected to produce divergent decisions. As previously discussed, guidelines for avoiding conflicting decisions were provided in *Delimitis*, the *Cooperation Notice*, and *Masterfoods*. The techniques for avoidance appear in Article 16 of Reg. 1, where they now are binding and directly applicable. Article 16(1) requires that when national courts rule on matters which “are already the subject of a Commission decision, they cannot take decisions counter to the decision adopted by the Commission.” This language is derived from *Masterfoods* ¶47 and seems to be based in the Community law doctrine of supremacy and the general duty to cooperate found in Article 10 EC. Earlier pronouncements by the ECJ had seemed to rest on the constitutive nature of Commission exemptions, which of course are no longer available under Reg. 1. The significance of this is that this leaves national courts in particular substantial freedom in deciding how to proceed.

Article 16 (1) of Reg. 1 provides that national courts “must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated.” Since prescience cannot be required even of courts, Article

16 further indicates the national courts “may assess whether it is necessary to stay its proceedings.” Note that national courts are not required to avoid conflicts with decisions of NCAs, whether existing or contemplated. Given the expectation that more enforcement will be devolved to NCAs, national courts therefore will have substantial freedom to decide cases without regard to the activities of NCAs.

I have developed at length elsewhere⁷¹ the reasons to believe that the Commission’s earlier monopoly on constitutive exemptions need not prevent private enforcement of EC competition law in national courts. However, there has never been any doubt that its existence served to depress the level of private enforcement.⁷² I submit that Reg. 1 will enable more private enforcement because the “Sword of Damocles” represented by the notification system and the exemption monopoly has been removed.

The obligation to avoid conflicting decisions between national courts and the Commission described in Article 16 of Reg. 1 is, comparatively speaking, much easier to fulfill. Article 16 clearly derives from the facts in *Masterfoods* where parallel proceedings resulted in first a decision of non-infringement in the Irish High Court, then an apparent Commission exemption which was withdrawn, followed by a decision of infringement by the Commission, which was then sought to be annulled in the CFI, finished off by the Irish Supreme Court’s preliminary reference addressing its review of the national court decision in the face of the Commission’s extant decision itself effectively on appeal. Neither the High Court’s finding of non-infringement nor the

⁷¹ C.A. Jones, *Private Enforcement of Competition Law in the EU, UK, and USA* (Oxford: Oxford Press 1999), pp. 93-112.

⁷² C.A. Jones, “A New Dawn for Private Competition Law Remedies in Europe? Reflections from the USA,” in Claus Dieter Ehlermann & Isabela Atanasiu, eds., *EUROPEAN COMPETITION LAW ANNUAL 2001: EFFECTIVE PRIVATE ENFORCEMENT OF EC ANTITRUST LAW* 95-108 (Oxford: Hart Publishing 2003).

Commission's decision of infringement were final since both were under review by superior courts. *Masterfoods* doubtless will generate a bonanza of appeals for lawyers as it convincingly demonstrates the advantages to keeping the ball in the air as long as possible.

However, *Masterfoods* did involve a decision rejecting an exemption for HB's exclusive freezers under Reg. 17, so it is difficult to conclude that the Commission's exclusive power of exemption was not a factor. Article 16(1) interestingly and expressly leaves it to the national court "to assess whether it is necessary to stay its proceedings," as well as referring to the availability of the Article 234 reference procedure. This implies that the duty of the national court is not unconditionally to wait for a Commission ruling if it concludes a stay is not necessary. It should be recalled that in *Masterfoods*, it was the Commission which was responsible for rendering a conflicting decision six years after the Irish High Court initially ruled on the matter.

On the *Masterfoods* facts, where precisely the same conduct was at issue in the national and Community systems and *Masterfoods* and HB were parties in both sets of proceedings (*Masterfoods* was a complainant in the Commission proceeding), it was plain that the duty of the national court was not to race to judgment ahead of the CFI or ECJ. However, under Reg. 1, where the Commission's decisions are declaratory only, it is not clear that Article 16 of Reg. 1 validly prevents a national court from rendering its own decision notwithstanding the Commission is also contemplating a decision. This is because the power of national courts to apply Articles 81 and 82 derives from their direct effect,⁷³ not from Reg. 1. I submit that only Article 10 EC is a possible barrier to national court decisions which might conflict with a Commission decision, and the national

⁷³See, *BRT v. SABAM*, *supra*, [1974] ECR 51, at ¶¶ 15-17.

court's duty of cooperation may be fulfilled by giving a remedy, including a preliminary reference, as well as by staying proceedings.

B. New Member States and Policy coherence after reform

Coherence. As the discussion above reveals, the Commission has attempted to address the problem of maintaining policy coherence in an environment of enforcement pluralism by several means. It should be clarified that the concerns of the Commission seem primarily to prevent national authorities from prohibiting agreements, decisions, or practices which the Commission wishes to allow across the Community and secondarily to prevent NCAs from allowing conduct which the Commission wishes to prohibit across the Community. The provisions of Article 3 serve both goals.

In addition, Reg. 1 establishes a network of NCAs to work in close cooperation with the Commission, thereby increasing the likelihood of consistent decisions. While stray decisions may occasionally occur, the effects are intended to be minimized by the fact that references to the ECJ are possible, the Commission is now empowered to participate as *amicus curiae*, and the effects of national decisions are limited to the national territory of the Member State involved. The Commission sees the combination of these factors as increasing the convergence effects on national competition law systems.

Finally, the risk of inconsistent decisions is sought to be minimized by Article 16 of Reg. 1, noted above. However, the ultimate means for reconciling conflicting decisions is through preliminary references to the ECJ and CFI from national courts, coupled with actions for annulment of Commission decisions.

Devolution in the New Member States. In some respects the candidate Member States⁷⁴ are not greatly different from the existing ones. All have previously signed or will sign agreements to conform their national systems and laws to the EC's requirements, including adoption of the *acquis communautaire*. Competition policy is a part of these requirements. However, about 7 of the first 10 are former Central and Eastern European Communist states for whom competition law is a voyage of discovery and the concept of competition itself is quite new. Of course, economy by cartels, then conceived of as respected economic institutions, was the rule in Western Europe as well, prior to 1945.⁷⁵

From the standpoint of the Commission, the impending enlargement of the Community was a substantial impetus for the adoption of Reg.1, considered essential in order to maintain a workable system and ensure effective protection of competition.⁷⁶ The prospect of many thousands of notifications pouring in from 10 countries may have seemed daunting, and that will not now happen. However, the dominance of former state monopolies in several of the candidate countries and ignorance of businessmen and government officials of basic precepts of competitive behavior and competition law must be equally a concern. It is clear that, experienced in competition law or not, the new Member States will be a very large drain on Commission resources even in the absence of notifications.

⁷⁴ Candidates considered in this analysis are the 10 countries expected to join in 2004 or soon after: Poland, Czech Republic, Malta, Cyprus, Latvia, Estonia, Lithuania, Slovak Republic, Slovenia, and Hungary. Longer term candidates are Bulgaria, Romania, and Turkey.

⁷⁵ H.G. Schröter, "Cartelization and Decartelization in Europe, 1870-1995," 25 *J. European Econ. Hist.* 129, 137 (1996). Ironically, cartels were only prohibited in the former Yugoslavia at the time. See also, Jones, *supra*, at note 71, pp. 23-28.

⁷⁶ Schaub, *supra*, note 28, at p.144.

However, because the competition culture in Europe seems more developed than it was in 1958 and 1962, more guidance is available. Numerous block exemptions are in place in the Community which will greatly reduce the amount of time expended on less serious matters. Many more national competition authorities now exist, even in the new Member States, than existed in the EC in 1958. Europe is full of competition lawyers who will gladly give legal advice to undertakings and governments alike. This was not the case in 1958. Community law is routinely taught in the new candidate countries, so a new generation of lawyers grounded in EC competition law is already more prepared than were the bar associations of the Six. It is likely there is already more experience and preparation in the candidate countries for competition law than at the inception of the EC.

The great questions which surround the Second Devolution are whether the Commission has the resources to do the job in an effective manner, and whether the national authorities and national courts will in fact take up a substantial part of the load. Even though the Commission is now relieved of the burden of notifications, it has many tasks under Reg. 1 which will likely more than offset the time saved.

While the Commission has approximately 153 officials responsible for investigating antitrust cases, the 15 Member States collectively have approximately 1,222.⁷⁷ Article 3 of Reg. 1 ensures that many of those national officials will now be enforcing EC competition law, even though this rarely occurred in the past. However, given the new role of the Commission in close monitoring and possible participation in the proceedings of national courts, national authorities, and network of competition officials, in soon-25 Member States, it seems unlikely that the Commission can spread its

⁷⁷ White Paper, *supra* note 9, ¶ 44. Figures given are for 1998.

present level of resources so far. As Judge David Edward of the ECJ stated, extra-judicially:

It should be recognized that the courts of all the Member States, as well as the ECJ and CFI, are already suffering from severe overload, and that this situation is unlikely to change in the near future, if at all. If [Reg. 1] ... is to depend on the Commission providing national and Community courts with advice and assistance, the Commission cannot be allowed to plead lack of time, resources, or manpower as a reason for not doing so. ... The principal reason for the writer's skepticism about the current proposal [now Reg. 1] is indeed that the Commission has, over the past forty years, found it impossible to provide more than comfort letters in response to the overwhelming majority of individual notifications. What then are the grounds for believing that it will be able not only to monitor the decisions of national courts from Tallinn to Lisbon and from Cork to Lanarka, but also to provide those courts *and* the ECJ or CFI with the assistance they need to apply Article 81(3) in concrete cases?⁷⁸

While the Commission considers that private enforcement in national courts is important, to be encouraged, and that Reg. 1 removes barriers to it, officials have conceded that other cultural and legal obstacles exist such that Reg. 1 alone is unlikely to have a major immediate impact on the level of private litigation by third parties. However, in contractual litigation, it is expected to have a substantial impact when defendants assert the nullity of contracts under Article 81(2), and the national court is now empowered to apply Article 81(3) itself.⁷⁹ At present, the latter is the vast majority of instances of private claims in national courts.

Conclusion: The Dual Character of the Second Devolution

Ironically, the Second Devolution embodied in Reg. 1 has both powerful decentralizing and powerful centralizing effects. The devolution effects come, first, from

⁷⁸ D.A.O. Edward, "The Modernisation of EC Antitrust Policy: Issues for Courts and Judges," in C.-D. Ehlermann & I. Atanasiu, eds. *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy*, (Oxford: Hart Publishing 2001), p. 567. (emphasis in original)

⁷⁹ Wils, *supra*, note 62, at pp. 150-51.

releasing Article 81(3) from the bondage of Reg. 17 and shattering the monopoly on exemptions of the Commission's priestly class, just as Gutenberg shattered the Bible-printing monopoly of the Catholic Church with his printing press over 500 years ago.

Second, the requirement of Article 3 of Reg. 1 that national courts and national authorities apply Community competition law in tandem with national competition law ensures the widespread application of Articles 81 and 82 by national authorities. Article 3 thus disseminates EC competition law widely, a form of devolution, and simultaneously makes it mandatory to do so, a type of centralization. This is particularly true for the new candidate Member States whose economies and governments are still in transition from Communism to market economies.

Third, the new network of competition authorities serves to devolve Commission advice and evidence among the NCAs. It also serves to centralize and unify the application of EC competition law because it mandates consultations and notices to the Commission by the NCAs. Coupled with the retained power of the Commission to deprive NCA's of their competence to apply EC competition law if the Commission is unhappy with the proposed actions of the NCA, this leaves the Commission rather firmly in control.

Fourth, Reg. 1 empowers national courts and NCAs to obtain information, advice, and evidence from the Commission to assist them in exercising their devolved power to apply EC competition law. However, it also requires that national courts accept written observations from the Commission when the Commission wishes to make them. While national courts will not take instructions from the Commission, it is conceivable that the Commission may inform a national court that it contemplates a decision running counter

to an actual or impending judgment of the national court, and refer to the obligation laid down in Article 16 to avoid conflicting decisions.

Hence, in many important respects, the duality of these elements mean that Reg. 1 is more about revolution than devolution. This is not necessarily bad. The problems under Reg. 17 literally had needed addressing for decades, and Reg. 1 resolves several of the most troublesome aspects of the first regulation implementing the competition rules. It is not a panacea for all of the substantive or procedural difficulties of Community competition law, but overall it seems fair to conclude that the system is substantially improved over what it was.