

**A LAW AND ECONOMICS APPROACH
TO THE NEW EUROPEAN ANTITRUST ENFORCING RULES**

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Abstract

The adoption of Regulation No. 1/2003 raises some questions as to the effectiveness of the EC antitrust enforcement rules. Different criteria may be used to ascertain whether the new regulation actually improves the current application of Articles 81 and 82 of the Treaty. To this end an assessment was carried out on the basis of two main parameters. The first concerns whether and when it is more satisfactory for the competent public authority to intervene (before or after the anticompetitive behavior has occurred). The second, regards who is in the best position to provide the public authorities with the relevant information regarding illegitimate conduct (private parties or public agents). The results of the analysis conducted seem to indicate that the reform will prove to be more efficient than the system set up by Regulation No. 17/62, although the passage from an ex ante to an ex post regime might entail some additional costs both for the undertakings under investigation and for the public authorities responsible for the correct and uniform implementation of EC antitrust law.

Keywords: Regulation 17/62, Regulation 1/2003, Reform of EU competition law, EC antitrust enforcement rules

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1. Introduction

This article attempts a legal and economic analysis of the new enforcement rules of European antitrust law laid down by Regulation No. 1/2003¹ (hereinafter reg.1/03 which has profoundly modified the regime set out in the previous regulation No. 17 of 1962 (hereinafter reg.17). In the following paragraph we will review the principal dimensions of law enforcement. In paragraphs 3, 4 and 5, we will analyse some of the main features of the recently adopted regulation in the light of those dimensions. In paragraph 6 we conclude with the attempt to verify whether there have been some improvements in the structure of enforcement.

It is beyond the scope of this article to deal with the specific problems related to the efficient functioning of the European network of authorities competent to apply Articles 81 and 82 of the EC Treaty. The issue has already been addressed by the Commission in its recently published ‘modernization package’². For the time being, suffice it to say that the Council and the Commission have, along with the adoption of reg.1/03, agreed on a joint statement by which, at least between the Commission and the national authorities, the allocation of cases should be guided by factors such as the place where the main anticompetitive effects are felt, the ability of the authority to gather evidence, to bring the infringement to an end and to apply sanctions effectively³. The objective of this article is different. We shall try to assess the effectiveness of the new antitrust enforcement rules on the basis of the new regulation, utilising analytical tools developed in some already classical works in the field of L&E⁴.

According to the systematic approach adopted by Shavell⁵, the effectiveness of

¹ Council Regulation 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, 04.01.2003, p.1.

² See web site www.europa.eu.int/comm/competition/antitrust/legislation/. In particular, amongst the texts of acts which are deemed necessary to complete the reform process, a notice on co-operation within the network of competition authorities and a notice on co-operation between the Commission and the national courts. See also *Press Release - IP/04/411 - 30.03.2004*

³ See the Draft joint Statement of the Council and the Commission on the functioning of the network of Competition Authorities, adopted on 25 November 2002. For a comment on the Network, see W.P.J. Wils, *Constructing the EU Network of Competition Authorities*, European Competition Law Annual 2002, Oxford/Portland Oregon, Hart Publishing.

⁴ See A.M. Polinsky & S. Shavell, *Enforcement Costs and The Optimal Magnitude and Probability of Fines*, 35 Journal L. & Econ. (1992), p. 133; W. Landes & R. Posner, *The Economics of Anticipatory Adjudication*, 23 J. Legal Stud. (1994), pp. 683, 690; S. Shavell, *The Fundamental Divergence between the Private and the Social Motive to Use the Legal System*, 26 J. Legal Stud. 575 (1997), pp. 608-611

⁵ S. Shavell, *The Optimal Structure of Law Enforcement*, 36 J.L. & Econ. (1993), p. 255.

law enforcement may be ascertained on the basis of three main parameters. The first one is the stage of legal intervention. It concerns the timing of law implementation; this may take place at an early stage by means of prevention of the harmful act. Alternatively, legal intervention may come about either after the unlawful act has been committed but before harm results, or after damage has occurred. In the first case we can talk about “*ex ante intervention*”, in the second and third case we can talk about “*ex post intervention*” respectively harm-based and act-based. The second parameter is the form of sanctions. These can assume two forms: monetary or non-monetary. In the former case the sanction will consist in the payment of a fine; in the latter case it will be imprisonment. In this field the general assumption is that the imposition of monetary sanctions is cheaper than imprisonment. The third parameter concerns the role played by private and/or public parties in recovering and providing the State with information as to unlawful conducts. A so-called “private-oriented enforcement system” will occur when the most relevant data is provided by private parties. Conversely, a so-called “public-oriented enforcement system” is present when such information is retrieved by public agents.

Taking into consideration the peculiarities of European antitrust law, we will use a slightly modified approach. Within the first parameter, which we will refer to as the *ex ante* / *ex post* issue, we will merge some of Shavell's categories that do not appear to have a separate meaning in this specific sector of law. We will not discuss the second parameter separately, since the only form of sanction in this field is monetary. In particular, we will deal with the relevant aspects of fines analysing the first variable of the aforesaid *ex ante/ex post* issue. Finally, the third parameter, which we will refer to as the *public* / *private* issue, seems almost fully to apply to European Antitrust matters⁶.

2. The two theoretical instruments of the analysis: the *ex ante*/ *ex post* issue and the *public*/ *private* issue

The *ex ante* / *ex post* parameter aims at determining whether the optimal stage of legal intervention is before the harmful act has been committed or after, and, in the latter case, whether it should be an act-based intervention (i.e. after the unlawful behaviour has taken place) or harm based intervention (i.e. after the detrimental effect has been produced). The different timing of legal intervention mainly depends on the

⁶ For an interesting yet quite different economic approach in analyzing these issues see W.P.J. Wils, *Notification, Clearance and Exemption in EC Competition Law: An Economic Analysis*, 24 *Eur L. Rev.* (1999), p. 139; W. P.J. Wils, *The Modernization of the Enforcement of Articles 81 and 82 EC: A legal and economic Analysis of the Commission's proposal for a new Council Regulation Replacing Regulation n.17*, 5 *Fordham Int'l L.J.*, (2001), pp. 1655, 1717.

combination of three variables. Firstly, the relation between the magnitude of the sanction and the probability of its application. Secondly, the State's ability to spot unlawful conducts taking into consideration the costs of legal enforcement⁷. Thirdly, the amount of data possessed by the State on the actual harmful effects of a certain conduct.

As far as the first variable is concerned we will start from the assumption that to be effective (i.e. able to deter unlawful action), the number obtained by multiplying the magnitude of the sanction by the probability of its application must be higher than the benefits obtained by violating the law. On the basis of this assumption, we can formulate the two following rules. For any given sanction an *ex ante* legal intervention should be favoured when the probabilities of its application are low. On the contrary, an *ex post* legal intervention should be privileged when those probabilities are high. If instead we keep as given the probabilities of implementation of a sanction, we will prefer an *ex ante* legal intervention when the applicable sanction is low and, *vice versa*, an *ex post* intervention when that sanction is high.

As far as the second variable is concerned (i.e. the State's ability to recognise unlawful conducts keeping in consideration the costs of legal enforcement), again our remarks will be based on a general assumption: the best stage of legal intervention will be the one that, while allowing the State to deter individuals from committing unlawful acts, entails the lowest costs of enforcement. Therefore, if, for instance, the prohibited act is dumping chemical products in a lake, the most appropriate way to prevent people from infringing the law is to fence in the lake instead of trying to individuate and fine the violators. In such a case an *ex ante* intervention would therefore be more efficient. On the other hand, if the goal is to ensure the respect of road signals, the best solution is to foresee sanctions for the violators rather than employing thousands of agents in order to guarantee their respect. An *ex post* intervention would be undoubtedly preferable in this case.

The last variable capable of determining the optimal stage of legal intervention is, as indicated, the amount of data possessed by the State on the actual harmful effects of a conduct. The less information the public authority has about the character of an act, the more an *ex ante* intervention appears to be appropriate. Conversely, if the public authority already knows the possible effects of a certain conduct, an *ex post* intervention is more desirable and, according to the amount of data possessed, it may decide to intervene after or before the harm resulting from an unlawful conduct has occurred. If, for instance, the public authority has no knowledge as to the possible repercussions on the health of consumers of a new way of processing a chemical

⁷ See S. Shavell, (1997), *supra* note 5.

product, it probably will want to obtain the relevant information by requesting an authorisation before permitting its implementation (*ex ante* intervention). If instead the State foresees that that processing may produce harmful effects if improperly used, but does not know the specific causes capable of determining negative consequences on the health of consumers, it may intervene only when such effects actually occur (*ex post* harm-based intervention). But, if it is able to determine the specific misuses which determine those negative consequences it will want to sanction them directly before the harm occurs (*ex post* act-based intervention).

Turning now to the public / private issue, it should be stressed how the effectiveness of an enforcement procedure also depends on the quality of the information possessed and on the time it takes the public authority to discover the existence of an unlawful conduct. In order to gather as quickly as possible all the relevant data concerning a certain behaviour, the State may rely on public agents and/or on private parties. Although the two ways of detecting and prosecuting unlawful conduct can go very well together, and usually do, the role played by private parties and by public agents within the procedure itself may vary substantially according to a series of factors. A private-oriented system ought to be favoured when the following factors are present: a) the violation has occurred in a situation where, more than the public agents, individuals can easily come into possession of information concerning the nature of the infringement and the parties involved; b) individuals can obtain a financial gain or avoid a monetary loss by soliciting legal intervention; c) individuals are protected from reprisal by the accused parties. Instead, a public-oriented system should be preferred when private parties do not accede to the information, which can help the identification of a liable party, or they do not have sufficient economic incentives to start the legal procedure.

3. EC antitrust legislation relevant for the *ex ante* / *ex post* issue

Reg. 1/03 will modify the antitrust implementation system by acting on both of the above mentioned parameters. It will move from an *ex ante* to an *ex post* control system and from a public to a private-oriented enforcement regime. These changes will be discussed separately in the following paragraphs.

It is well known that under reg.17 the enforcement of antitrust law relies on an *ex ante* control system. If parties are uncertain about the lawfulness of their practice they may ask the Commission, by means of a notification, for a prior declaration stating its compatibility with Articles 81 and 82 of the Treaty. For this purpose, the latter can send the undertakings concerned a comfort letter or adopt a negative clearance decision in which it assesses that the practice is not anticompetitive since it does not fall within the scope of Articles 81 (1) and/or 82. If instead the undertakings

are well aware of the anticompetitive effects of their practice, but are also convinced that it falls within the scope of Article 81 (3), they may ask the Commission for an exemption. With the latter decision, the European institution ascertains that although the practice is anticompetitive, it still can be enacted on the basis of its redeeming virtues (e.g. because it favours allocative and distributive efficiency). It should be noted that such a system cannot be described as a pure ex ante regime since it presents certain peculiarities. It is coherent with a pure ex ante system in the way in which it sanctions the individuals simply for not having notified their practice, independently of the anticompetitive effects of that practice. Notwithstanding, it deviates from the pure ex ante system since it does not impose a general obligation to notify, but lays this burden only on undertakings that, being conscious of the fact that their practice is anticompetitive, want to enjoy the benefits of the exemption decision. This is confirmed by the fact that reg.17 expressly prevents the Commission from adopting any decision in application of Article 81 (3) even when the agreement meets the conditions set out in the latter provision but has not been notified. In fact, the European Authority may grant an exemption only for the period following notification⁸. It must also be stressed that the Commission has the monopoly to adopt the above mentioned measures. The Commission alone has the power to declare Article 81 (1) applicable or inapplicable pursuant to Article 81 (3) (infringement or individual exemption decision).

As to the application of Article 81 (1), though the Commission shares its competence with the national authorities and the national judges, the true powers of these national instances are, in practice, extremely limited. National authorities must stay proceedings when the Commission takes action under reg.17. National judges, although not bound by the initiative of the Commission, are very seldom asked to apply such provision, being considered by private parties not sufficiently equipped from the legal and economic point of view. Both national authorities and national judges have, in practice, always preferred to apply their national antitrust law, even those with transnational dimension and effects⁹.

The new regime has reversed the standard and has adopted an ex post enforcement approach. Pursuant to Article 1 of reg.1/03, practices covered by Article 81 (1) which do not satisfy the conditions of Article 81 (3) are prohibited, no prior decision to that effect being required. Conversely, practices covered by Article 81 (1) which satisfy the conditions laid down in Article 81 (3) are not prohibited, again without a prior decision. Further, it appears from a textual and systematic

⁸ See Article 4, 1 of reg.17, *supra* note 2.

⁹ This for mainly two reasons. Firstly they could operate free from the necessary co-operation with Brussels. Secondly they felt more at ease when applying their own national law.

interpretation of the new regulation that parties cannot ask the Commission to take a prior position declaring that their practice does not even fall under Article 81 (1) in as much as it is not anticompetitive. To be sure, according to Article 10 of the new regulation the Commission may still declare that Article 81 is not applicable to a certain practice either because the conditions of paragraph 1 are not fulfilled or because the conditions of paragraph 3 are satisfied. But it may do so only if it is required by the Community's public interest and only acting on its own initiative. Together with this new approach the regulation has also abolished the Commission's monopoly in the implementation of Article 81 (3). In this regard the European institution, national authorities and national judges all have the power to apply Article 81 as a whole¹⁰. The new regime envisages a number of provisions aiming to coordinate the jurisdictional activities of the various actors involved. In particular, the regulation sets out rules concerning the exchange of relevant information, rules governing the rejection or suspension of potentially conflicting proceedings and rules to avoid contradictory decisions¹¹.

4. The analysis based on the ex ante / ex post issue of EC antitrust law

4.1 The First Variable: the relation between the magnitude of the sanctions and the probability of their application

As we have seen, two rules can be inferred from the first variable. Assuming that the probabilities of implementation of a given sanction do not vary, we would prefer an ex ante legal intervention when that sanction is low and, conversely, an ex post intervention when the sanction in question is high. If instead we assume that the sanction remains the same, an ex ante legal intervention should be favoured if the probabilities of its application are low, while an ex post legal intervention should be implemented if those probabilities are high.

When reg.17 was conceived, the European Community was lacking sufficient information concerning the competitive dynamics in the new common market. Hence, the probabilities of discovering an anticompetitive conduct were considerably scarce. An ex ante legal intervention represented at the time a reasonable solution. Having opted for such a control system, reg.17, quite appropriately, provided for a system of relatively mild sanctions. First of all, it did not contemplate imprisonment but only monetary sanctions¹². Furthermore, the level of these sanctions was relatively low. In

¹⁰ See Articles 5 and 6 of reg. 1/03, *supra* note 1.

¹¹ See Article 11, 12, 13, 15 and 16 of reg. 1/03, *supra* note 1.

¹² In 1957, when the ECC was founded, it was inconceivable to introduce sanctions of a

fact, the Commission could not impose fines, calculated¹³ on the basis of gravity¹⁴ and duration¹⁵ of the infringement, in excess of 10 % of the turnover in the preceding business year of each of the undertakings participating in the unlawful conduct¹⁶.

Over the years the ex ante intervention which is applicable through reg. 17 has not proven to be capable of guaranteeing a sufficient rate of probabilities in discovering anticompetitive behaviours. In fact, this rate is very close to 0. In this regard it is sufficient to observe that, notwithstanding the thousands of notifications

criminal nature. Just recently, since the Maastricht Treaty of 1993, the European Union has started dealing with criminal related issues and only within the third pillar. *See* Articles 29 to 42 of the EU Treaty (O.J.C. C 325 of 24 December 2002). Formally, the EC does not cover criminal law matters, so much so that Article 23 (5) of reg.1/03, repeats the expression already contained in Article 15 (3) of reg.17 according to which the decision imposing a fine “shall not be of a criminal law nature”. On the delicate and still debated issue concerning the legal nature (administrative or penal) of such sanctions, *see* C. Harding, *European Community Investigations and Sanctions, the Supranational Control of Business Delinquency*, Leicester University Press, 1993, pp. 79, 95 and, more recently, S. Mail-Fouilleul, *Les Sanctions de la Violation du Droit Communautaire de la Concurrence*, Bibliothèque de Droit International et Communautaire, 2002, Tome 118, pp. 369, 378.

¹³ *See* Commission Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of reg.17/62, O.J.C. 9/3 (1998).

¹⁴ *Ibidem*, Section 1.A. Within the framework of the Guidelines, infringers are to be put into one of three categories: “minor infringements”, usually of a vertical nature with a limited market impact, for which the likely fines are between ECU 1 000 and ECU 1 000 000; “serious infringements”, normally vertical or horizontal practices characterized by a certain market impact, for which the likely fines are between ECU 1 million and ECU 20 million; and “very serious infringements”, which generally comprise horizontal restrictions such as price cartels and market sharing quotas, for which the likely fines are above ECU 20 million.

¹⁵ *Ibidem*, Section 1.B. The Guidelines draw a distinction between infringements of short duration (in general, less than one year), for which the amount determined for gravity should not be increased, infringements of medium duration (in general, one to five years), for which the amount determined for gravity may be increased by up to 50%, and infringements of long duration (in general, more than five years), for which the amount determined for gravity may be increased by 10% per year.

¹⁶ *See* Article 15, 2 of reg.17, *supra* note 2. Once it has been determined, the basic amount of the fine may also be increased or reduced in consideration of the aggravating or attenuating circumstances which arise. *See* Sections 2 and 3 of the Notice. The underlying idea is to offer the undertakings operating in the common market legal certainty. By consulting the above mentioned Notice, the economic operators will in fact be able to determine in advance the possible sanction they face when taking part in an anticompetitive agreement or concerted practice. Obviously, the Notice does not allow the undertakings involved to determine with certainty the amount of the fine which ultimately will be imposed by the Commission. In calculating the sanction, in fact, the Commission will take into consideration different factors such as the nature of the infringement, the actual impact of the agreement or concerted practice on the relevant market, the effective economic capacity

received by the Commission since 1962¹⁷, in the last 35 years, only 9 cases originating from a notification were found contrary to Article 81¹⁸.

These figures clearly indicate the inefficiency of the regime laid down by reg.17 and therefore the passage to an ex post system may be held appropriate. On the basis of the assumptions we have made, an ex post enforcement system requires the possibility to apply higher sanctions, but this is not the case since under reg.1/03 the maximum amount of the fines has remained substantially unchanged. This inconsistency is partially tempered by the case-law and by the practice of the Commission. The European Court of Justice has clarified that in order to calculate the fine, the Commission can take into consideration the total turnover of the enterprises involved in the anticompetitive practice and not only the turnover realized on the relevant market¹⁹. In this way the magnitude of the fine can, *de facto*, be substantially higher. On its part, the Commission has considerably increased the amount of the

of the offenders to cause significant damage to other operators, in particular consumers, the legal and economic expertise of the undertakings involved, the economic and financial benefit derived by the offenders, the specific characteristics of the undertaking in question and their real ability to pay in a specific social context, etc. The fines should be adjusted accordingly to the circumstances that occur in the specific case examined by the Commission. See Sections 1.A. and 5 of the Notice cited above. It should be noted that according to the latest case-law the Guidelines are binding on the Commission. See Court of First Instance, judgment of 9 July 2003, *Daesang Corp. and Sewon Europe GmbH v Commission of the European Communities*, case T-230/00, ECR 2003, at para. 38. Nevertheless, the Commission has a margin of discretion when fixing the amount of each fine and cannot be considered bound to apply a precise mathematical formula for that purpose. See Judgment of the Court of First Instance of 19 March 2003, *CMA CGM and Others v Commission of the European Communities*, case T-213/00, ECR 2003, at para. 252.

¹⁷ In 1967 the Commission had already received 37450 notifications. See White Paper on Modernization of the Rules Implementing Articles 85 and 86 of the EC Treaty, O.J.C. 132/1 (1999) - hereinafter White Paper - at para 25. Between 1988 and 1998, the average number of notifications per year was around 200 and in 2000 101 new cases were notified to the Commission (source: 32nd Report on Competition Policy, p.63).

¹⁸ See White Paper, *supra* note 17, at para 77. To be sure, the Commission has tried to accomplish its task through less formal instruments (i.e. administrative letters, comfort or discomfort letters) stating the competitive or anticompetitive nature of the notified agreements.

¹⁹ See Court of Justice, judgement of June 7, 1983, *Musique Diffusion Francaise v. Commission of the European Communities*, C-100-103/80, ECR 1983, p. 1825, para 16.

fines imposed on infringers²⁰, especially in cartel cases²¹.

However, consistently with the above mentioned assumptions, the new regime has increased the probabilities of discovering anticompetitive conduct. As already mentioned, pursuant to reg. 1/03, the Commission will be assisted in the application of Article 81 by the national authorities and national judges. For this reason it will be able to focus on the most severe anticompetitive practices such as cartels. In doing so it will rely on the personnel at present overwhelmed by the enormous workload created by the mass notification phenomenon²². In this regard it must be stressed that

²⁰ It should also be stressed that during the last 10 years the number of decisions by the Commission finding an infringement to Articles 81 (1) and 82 has increased sensibly notwithstanding the fact that the majority of the cases are now settled on an informal basis (between 1996 and 2002 more than 91% of all cases relating to Articles 81 and 82 pending before the Commission have been settled by means of an informal decision). This increase is the natural consequence of the economic integration phenomenon and of the improved ability by the Commission to single out anticompetitive agreements or concerted practices. It is also worth noting that between 1993-1998 the number of decisions with fines represent around 60% of all infringement decisions (between 1993 and 1998 the Commission adopted 33 infringement decisions imposing a fine on the undertakings involved in 19 occasions), whereas in the past five years this percentage has gone up to more than 80% (between 1999 and May 2003 the Commission adopted 74 infringement decisions imposing a fine on the undertakings involved in 64 cases). In particular, the Commission has focused on detecting horizontal restraints. In this regard suffice it to recall what Commissioner Mario Monti stated on September 11, 2002 in his speech to EMAC EMAC, Brussels: “the fight against cartels was given increased priority around the end of 1998. The Commission has increased the resources devoted to the work: a unit specializing in the fight against cartels has been established, and over the last three years the number of officials engaged solely on the investigation of cartel cases has doubled...the Commission will seek to maintain the level of activity in future. Our objective is to...intensify the fight against cartels. I am happy to be able to tell you that a second unit devoted to the fight against cartels has been set up in the Directorate-General for Competition: this represents a substantial increase in the resources devoted to the work”.

²¹ In 2001, the Commission imposed sanctions in excess of € 1.8 billion on 61 companies that were involved in cartel cases. In particular, on 21 November 2001, the Commission adopted a decision under Article 81 of the EC Treaty and Article 53 of the EEA Agreement finding that 13 manufacturers of vitamins A, E, B1, B2, B5, B6, C, D3, H, folic acid, beta carotene and carotinoids had participated in cartels for each of these products resulting in a total of 12 separate infringements. The Commission fined eight companies a total of 855.23 million for fixing the prices of eight different products and allocating sales quotas in respect thereof. In particular, Hoffman La Roche was condemned to pay € 462 million, the highest fine ever imposed on a single undertaking. *See Vitamins case*, COMP./37.512, press release IP/01/1625, 21.11.2001. Moreover, on November 27, 2002 the Commission imposed the highest fine ever inflicted on a single undertaking for a single infringement. *See Plasterboard cartel*, COMP.37.152, IP/02/1744 where the Commission fined Lafarge for € 249.6 million.

²² *See* Wouter P.J. Wils, *The Modernization of the Enforcement of Articles 81 and 82 EC*, *supra* note 7. In this regard the author points out that “notification related work does consume about half of the resources of the parts of the Commission’s Directorate General

under the regime of reg. 17 the number of cases opened by the Commission of its own motion or by complaint has been rather low if we compare it to the number of cases filed on the basis of a notification. In the decade 1988-1998 the cases registered ex officio and by complaint were respectively 13% and 29% of the total number of cases brought before the Commission, whereas the cases notified add up to 58%²³. Also, the effectiveness of an ex post enforcement will be amplified by the fact that, as we have seen, the Commission will no longer be the only body to implement Article 81 as a whole. National authorities and national judges will share this power with it.

4.2. The Second Variable: the State's ability to spot unlawful conduct taking into consideration the costs of legal enforcement

As far as the second variable is concerned, we have suggested that the most efficient ratio between results and costs of enforcement will determine the best stage of legal intervention. In this regard, in the frame of the new regulation, private and public burdens need to be analysed separately.

In the context of private expenses, the adoption of an ex post regime will obviously eliminate the costs of notification. In this respect it should be recalled how providing the Commission with all the relevant information entails rather significant costs for the undertakings²⁴. However, the reform too will produce some costly consequences. In the first place, it will create uncertainty amongst the enterprises operating on the European market. These will be deprived of the opportunity to receive from the Commission information as to the compatibility of their practice with the Treaty before they execute it²⁵. This lack of information will only partially be compensated by the stock of knowledge deriving from the practice of the

for Competition not dealing with mergers or State Aid". It should also be noted that the DG Commission's staff is formed by approximately 700 agents.

²³ See White Paper, supra note 17, at para 44.

²⁴ In order to simplify the bureaucratic burden for the undertakings the Commission has adopted regulation 3385/84 of 21 December 1994 on the form, content and other details of applications and notifications provided for in Council regulation No 17, O.J. L 377, 31.12.1994, 28. Annexed to the regulation are three separate forms: Form A to obtain a negative clearance, Form B to request an individual exemption and Form C for complaints. These documents should help the undertakings provide the Commission with all the relevant information. The practice generally followed by undertakings is to fill out and send the Commission both forms. For a comment, see Kerse C.S., *E.C. Antitrust Procedure*, Sweet & Maxwell, 1998, pp. 70-82 and *Dealing with the Commission*.

²⁵ On the problems related to legal uncertainty under the new regime see L. Idot, B. Van De Walle De Ghalcke, *Le besoin de Sécurité Juridique: Notifications et Exemptions*, 1 C.D.E. (2001), pp. 186-192; R. Wesseling, *The Modernization of EC Antitrust Law*, Oxford-Portland Oregon (2000), pp. 207-221.

Commission and the case-law of the European Courts²⁶. Therefore undertakings will be forced to buy that information from private legal services²⁷. Secondly, an ex post control will most probably entail an increase in the costs of litigation. In fact, calling upon a larger number of public institutions (national and supranational) to apply European antitrust law, the new system multiplies the possibilities for legal claims which, it is well known, are quite costly.

Turning to public expenses, we can observe that the transition from an ex ante to an ex post enforcement system will improve the allocation of resources devolved to DG Competition without reducing them. As we have already mentioned, the staff dealing with notifications will be freed from this unproductive burden and will be used, in a more efficient way, to detect and work on the most dangerous practices²⁸.

This means a more satisfying ratio between results and costs of enforcement. However it must be noted that the new regulation might also bring about some additional costs. National instances will be called upon to apply Article 81 in its entirety. Consequently, their workload concerning the application of European antitrust law will significantly increase. Hence, reg. 1/03 requires the State to devolve new resources or redistribute the already existing ones in order to comply with its extended competence in the field of competition law²⁹. Thus, if at a supranational level we acknowledge a greater efficiency without additional costs, at a national level the achievement of the same result necessarily implies certain investments by the Member States³⁰.

²⁶ R. Posner, *Economic Analysis of Law*, Boston and Toronto (1986). According to the author: "viewed economically, the body of precedents in the area of law is a stock of capital goods - specifically, a stock of knowledge that yields services over many years to potential disputants, in the form of information about legal obligation", p. 509.

²⁷ See also Hans Gilliams, *Modernisation: from policy to practice*, E.L.Rev. 28 (2003), pp. 470-472.

²⁸ In this regard it should be recalled that in 1998 a special anti-cartel unit was created within the Competition DG. See European Union Competition Policy, XXXII, http://europa.eu.int/comm/competition/annual_reports/2002/. Report on Competition Policy, 2002, European Commission, Directorate - General for Competition, para 28.

²⁹ According to the White Paper "in 1998, there were around 1,222 officials responsible for investigating cases involving mergers, restrictive practices and abuses of dominant positions in the Member States as opposed to 153 in the Commission". See White paper, *supra* note 17, at para 46. On the absence of cost free rights see in particular S. Holmes & C.R. Sunstein, *The Cost of Rights. Why Liberty Depends on Taxes*, N.Y. (1999).

³⁰ On the possible negative effects of the decentralization see L. Idot, B. Van De Walle De Ghalcke, *Le besoin de Sécurité Juridique: Notifications et Exemptions*, 1 C.D.E. (2001), pp. 191-201. See also J. Temple-Lang, *Decentralized Application of Community Competition Law*, Modernization and Decentralization of EC Competition Law, Kluwer Law (2000), pp. 13-30. Although generally in favour of the new enforcement system the author points out a variety of difficulties which could derive from the modernization and decentralization of EC

An overall evaluation of the new system must take into account two other specific factors which are capable of reducing the positive outcomes indicated above. The first one is intrinsic to a multiple enforcement system, the second one concerns its co-ordination and management of the system itself. With respect to the former, the network, constituted by the Commission, the national authorities and the national judges, may work inefficiently when two or more of these instances are asked to deal with the same case. In this regard it is worth noting that, even though reg. 1/03 contemplates some specific rules which aim to avoid duplication of proceedings and to coordinate the work of the instances involved in the application of Articles 81 and 82³¹, the Commission, national authorities and national judges are granted almost full parallel competence to apply those provisions³². In some cases this may lead to unnecessary financial and human effort on a specific case. Secondly, the positive results coming from the new system may be reduced by the necessity to assure the proper functioning of the network. In this regard, Article 11 of the Regulation establishes that the Commission and the competition authorities shall apply community competition rules “in close cooperation”. This entails costs which are mainly generated by the conspicuous exchange of information amongst the different actors, by the permanent consulting activity, by the need to analyse a great amount of documents coming from other members of the network, etc. It may be the rather paradoxical case that, having eliminated the administrative costs connected to the analysis of notifications, the ex-post system has actually imposed new and analogous costs in co-ordinating burdens.

4.3. The Third Variable: the amount of data possessed by the State on the actual harmful effects of a certain conduct

Let us now turn to the third variable. We have assumed that when the public authority has no information about the actual effect of an act, an ex ante intervention appears to be more appropriate since it permits the State to acquire relevant data concerning a certain conduct. Conversely, the public authority could surely intervene ex post if it were already in possession of a certain amount of information as to the effects of a given behaviour. In such a situation a harm-based intervention would be preferable to an act-based intervention for it allows the State, by postponing the time of intervention, to obtain a clearer picture of the practice in question. However, if the

Antitrust Rules.

³¹ See in particular Articles 11.6 and 13 of the new regulation. These provisions concern the coordination of the Commission's and national authorities' activities. But some cases may also be brought before a national judge.

³² See Wouter P.J. Wils, *The Principle of Ne Bis in Idem in EC Antitrust Enforcement: A Legal and Economic Analysis*, 26, *World Competition* (2003), pp.131-148

public authority had deep and complete information about the harmful effect of the conduct, the ex post intervention should be act-based instead of harm-based because, in this case, the State need not wait in order to apply the relevant sanction. To be sure, in the two latter cases an ex ante intervention would not provide any further information and therefore would only result in a waste of (administrative) resources.

As far as the application of antitrust rules is concerned, the general ex ante intervention provided by reg. 17 with the notification system appears to have almost only negative effects and very few redeeming virtues. The reason for this is that both for vertical and for horizontal restraints the public authority already possesses a certain amount of information regarding their possible negative effects. As far as vertical restraints are concerned, it is generally assumed that when the undertakings involved lack market power the possibility of anticompetitive effects is rare and, in any case, they can be assessed only on a case by case basis. Therefore, the anticipatory analysis following the notification cannot predict their effects with reasonable precision. Instead horizontal restraints normally have anticompetitive effects and they may be admitted only when they are ancillary to legitimate goals. Even for these practices therefore an ex ante analysis seems to be a costly and useless procedure, their harmful effects already being well known. To be sure, derogation or emendations to the general system laid down by reg. 17 have already coped with some of these problems: The Commission has recently adopted a block exemption regulation concerning vertical restraints. According to reg. 2790/99³³ the undertakings, parties to an agreement or those involved in a certain practice are not bound to notify if their market share does not exceed 30%³⁴. Moreover, the list of cases which can but need not be notified has been enlarged³⁵. As far as horizontal restraints are concerned, the Commission has also adopted block exemption regulations. In particular on R&D and on specialisation agreements³⁶.

³³ Commission regulation 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices O.J. L 336, 29/12/1999, p.21

³⁴ *Ibidem*, Article 3 establishes that: "subject to paragraph 2 of this Article, the exemption provided for in Article 2 shall apply on condition that the market share held by the supplier does not exceed 30 % of the relevant market on which it sells the contract goods or services. In the case of vertical agreements containing exclusive supply obligations, the exemption provided for in Article 2 shall apply on condition that the market share held by the buyer does not exceed 30 % of the relevant market on which it purchases the contract goods or services".

³⁵ See Council regulation 1215/1999 of 10 June 1999 amending regulation No 19/65/EEC on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices, O.J. L 148, 15/06/1999, p.1.

³⁶ See Commission regulation 2659/2000 of 29 November 2000 on the application of Article

In this context, does the passage from an ex ante to an ex post system make sense from an economic point of view? We believe so. If the assumption that the harmful effects of a vertical restraint can, in general, be assessed only after their implementation, the complete suppression of the ex ante control of this conduct is to be approved of. The same can be said about the horizontal restraints. In fact, those characterised by redeeming virtues can still fall within the scope of block exemption regulations, which have not been repealed. The clearly anticompetitive ones, instead, are appropriately subject to an ex post regime, an ex ante control being, for the reasons set out above, largely useless. In both cases the institution of a network made out of national and European instances, all focused on the repression of truly anticompetitive conducts, should assure an efficient result even with an ex post legal intervention.

5. EC antitrust legislation relevant for the Private / Public issue

As we have seen, in order to start and promote a law enforcing procedure, the State may rely on the information provided by public agents and/or on private parties. Normally, all legal orders contain both methods, but as a starting point of this analysis we have accepted the two following main assumptions. A private-oriented system presumably ought to be favoured when: a) the violation has occurred in a situation where individuals, more than the public authority, can easily come into possession of information about the violation and the violators; b) individuals can obtain a financial gain or avoid a monetary loss by stimulating legal intervention; c) individuals are protected from reprisal by the accused parties. On the contrary, a public-oriented system can be justified when private parties do not easily accede to the information which can help the identification of a liable party or they do not have sufficient economic incentives to start the legal procedure.

We have already suggested that reg. 1/03 moved from a largely public-oriented system to a mainly private-oriented system³⁷. In fact, reg. 17 entrusted the Commission with a decisive role in discovering anticompetitive conducts, essentially through scrutiny of the agreements and practices which had to be notified for the purposes of Articles 2 (negative clearance) and 6 (individual exemption decision). Conversely, national authorities and national judges were relegated to play a marginal role in detecting infringements of Article 81 since they could not apply the third

81(3) of the Treaty to categories of research and development agreements O.J. L 304, 05/12/2000, p.7 and Commission regulation 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialization agreements O.J. L 304, 05/12/2000, p.3.

³⁷ See para. 3 above.

paragraph of that provision. Under the new regime, on the one hand the notification burden has been repealed, and on the other hand national authorities and national judges are entitled to apply Article 81 in its entirety. Consequently, the enforcement of antitrust law will now primarily depend on the information collected by a large number of enforcing authorities through independent actions brought by private parties (both at a national and at a supranational level) and will no longer depend almost exclusively on the Commission's power to act *ex officio*.

On the basis of the two aforesaid assumptions we consider that the adoption of the new regime will facilitate the repression especially of vertical restraints. In the cases promoted by private parties against such anticompetitive conducts at least two of the three above mentioned factors are present. As far as the first factor is concerned, we can easily observe that undertakings operating on a given market are in a much better position, with respect to public authorities, to perceive the harmful effects of a vertical restraint. For instance, distributors excluded from a selective distribution system or retailers to whom a resale price is imposed are obviously able to provide public instances with detailed information on such anticompetitive practices. With respect to the second factor it should be noted that only the victims of a vertical restraint can precisely assess the amount of damage suffered and ask for compensation. A private oriented system, where the role of national judges is strengthened, enables firms to carry out a judicial action, seek and obtain restoration. Coming to the third factor, it should be acknowledged that the private parties stimulating legal intervention against vertical restraints do not seem to be sufficiently protected from reprisal by the accused parties. Although losses might be recovered, it is unlikely that an excluded distributor will be readmitted to the distribution system.

The situation is somewhat different with regard to horizontal restraints. First of all, these conducts are more difficult to detect and normally have repercussions on consumers. The latter lack crucial information concerning the nature of the conduct, its actors and the magnitude of its harmful effects. Private parties are quite seldom in the position to appreciate that a price setting is the result of a cartel, the undertakings involved and the precise damage they have suffered.

Moreover it is also very important to underline that they often do not have the financial capacity to promote and sustain a legal action aiming at recovering the loss. For these reasons it could be stated that in the case of horizontal restraints a legal intervention mainly based on the action of public agents will have more effective outcomes. Still, it should not be forgotten that even in relation to these restraints, the Commission has acknowledged the importance of information coming from private parties and for this purpose it has adopted a Notice on the non-imposition or reduction of fines in cartel cases (so-called leniency Notice) which favours co-

operation by the undertakings involved³⁸.

Overall, reg. 1/03 has established a more balanced enforcing system in comparison with the one contemplated by reg. 17, which was substantially public-oriented. This has occurred by means of two innovations. First, by eliminating the notification system it will reduce the costly and inefficient workload of the Commission. This institution, maintaining its power to conduct antitrust investigations on its own initiative, will therefore be able to concentrate on the most important and harmful practices. And it will not be alone in carrying out this delicate task. In the implementation of European antitrust law the role of national judges, whose action totally depends on the initiative of private parties, has been greatly reinforced. Not only are they now competent to apply Article 81 (3), but they have also been provided with some important juridical tools aimed at strengthening their antitrust expertise. For instance they can ask the Commission to send them the information concerning a specific case or give its opinion on general questions of law. At the same time, the national authorities and the Commission, acting *ex officio*, may submit written and oral observations to the national courts on issues relating to antitrust cases pending before them³⁹. Moreover, it should not go unnoticed that the reform has been preceded by an important judgement by the Court of Justice. In fact, it has been suggested that the *Courage* case⁴⁰ will determine a notable increase in private actions before national courts⁴¹. In this case the Court stated, *inter alia*, that a

³⁸ Precisely with the intention of obtaining co-operation by the undertakings directly involved in such practices, the Commission adopted in 1996 a first Notice (O.J.C. 207/1996, p.4). On the basis of the experience acquired applying it, a new version was prepared in 2002 (O.J.C. 45/2002, p.3). For a detailed commentary on the new notice see J. Carle, S. Pérvan Lindeborg and E. Segenmark, *The New Leniency Notice*, in E.C.L.R. (2002), Issue 6, pp. 265-272, M. Jephcott, *The European Commission's New Leniency Notice-Whistling the Right Tune?*, in E.C.L.R. (2002), Issue 8, pp. 378-385, D. Jarrett Arp and C.R.A. Swaak, *A tempting Offer: Immunity From Fines for Cartel Conduct under the European Commission's New Leniency Notice*, in E.C.L.R. (2003), Issue 1, pp. 9-18; J. Ysewyn and E. Jordan, *Cashing in on Cartels*, E.C.L.R. (2003), Issue 6, pp.235-237.

³⁹ See Article 15 of reg.1/03, *supra* note 1.

⁴⁰ See Court of Justice, Judgment of 20 September 2001, *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, case 453/99, ECR I-6297.

⁴¹ See A.P. Komminos, *New Prospects for Private Enforcement of EC Competition Law: Courage v. Crehan and the Community Right to Damages*, in C.M.L.R. (2003), pp. 442-460; Cumming G.A., *Courage Ltd v. Crehan*, in E.C.L.R. (2002), pp. 199; A. Jones and D. Beard, *Co-contractors, Damages and Article 81: The ECJ Finally Speaks*, in E.C.L.R. (2002), pp. 250-256; C. Fernandez and P. Gonzales Espejo, *Actions for Damages Based on Community Competition Law: New Case Law on Direct Applicability of Articles 81 and 82 by Spanish Civil Courts*, in E.C.L.R. (2002), pp. 168-171; J.S. Venit, *Brave New World: The Modernization and Decentralization of Enforcement under Articles 81 and 82 of the EC Treaty*, in C.M.L.R. (2003), p.570-572.

party to a contract liable to restrict or distort competition pursuant to Article 81 can claim damages before a national judge for loss caused by performance of that contract. In particular when its bargaining power is limited and therefore it cannot bear significant responsibility for the breach of the provision in question⁴². The principle by which Community law recognises that a party to an anticompetitive contract can rely on the infringement of Article 81 to obtain relief from the other contracting party is deemed to bring about major changes in national law, especially in those countries that do not now admit such legal remedy. The judgement, it is suggested, will act as a deterrent and favour both the full effectiveness of Article 81⁴³ and the uncovering of unlawful behaviours.

6. Does the new regime improve the enforcement of EC Antitrust rules?

Reg. 1/03 has modified the European enforcement system concerning antitrust rules in two ways. It has marked the passage from an *ex ante* to an *ex post* control and has moved from a mainly public system of implementation to a more balanced regime whereby private parties play a substantial role in detecting unlawful conducts. Generally speaking both these innovations must be favourable.

The first modification has been analysed, it will be recalled, on the basis of three variables: a) the relation between the magnitude and the probability of its application; b) the State's ability to spot unlawful conducts taking into consideration the costs of legal enforcement; c) the amount of data possessed by the State on the actual harmful effects of a certain conduct. The analysis of the first variable allowed us to ascertain that the new system will prove to be more efficient than the previous one, which turned out to be totally unsatisfactory. Even though the fines remain formally unchanged, under the new regime the probabilities that a given conduct will be detected are certainly higher. Concerning the State's ability to spot anticompetitive practices in relation to the costs of enforcement, it has been argued that the *ex post* system, eliminating the burdens connected to the duty to notify, will reduce certain costs both for the Commission and for the undertakings. However, it has also been hypothesised that new and different costs may arise, although, for the time being, they are difficult to quantify. These costs are related in the first place to the effort which will have to be put in the attempt to co-ordinate efficiently the network of European and national instances involved; in the second place to the litigation expenses. Turning to the third variable, related to the amount of information possessed by the State on the harmful effects of a given conduct, it is the very nature

⁴² See Court of Justice, *Courage*, *supra* note 41, at para 34.

⁴³ *Ibidem*, at para 26.

of the anticompetitive practice which determines the best stage of legal intervention. For vertical restraints the elimination of an ex ante control is justified by the fact that, in the majority of the cases, their real effect can be assessed only after they are actually implemented. But the same rule also fits horizontal restraints, even if for different reasons. Here, at least for the clearly anticompetitive ones, an ex ante control is not able to provide the competent authority with more information than it already possesses.

The second modification is represented by the greater amount of emphasis set on private enforcement with respect to public action. As in all mature legal orders, the European system also knows a combination of the two. In this regard we have come to the conclusion that generally speaking private parties are able to play a more relevant role in detecting vertical restraints over horizontal restraints.

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