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The "Modernisation" of European Community Competition Law: Achieving Consistency in Enforcement-Part II (with P. Cassinis)

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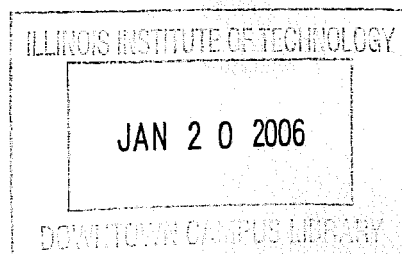
Since coming into force in 2002, the new EC Leniency Notice has been an undoubted success in uncovering and de-stabilising cartels. However, a number of issues concerning its operation have yet to be addressed. This article considers procedural issues such as the use of marker systems, paperless applications and plea bargaining, as well as certain important discrepancies between EU and national leniency programmes, and assesses the impact of these issues on the effectiveness of the Leniency Notice going forward.

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News Section



The "Modernisation" of European Community Competition Law: Achieving Consistency in Enforcement—Part II[†]

David J. Gerber** and Paolo Cassinis*

 Competition law; EC law; Enforcement; European Commission; National competition authorities; National courts

III. "Single-case" consistency

Consistency in the treatment of a single fact situation is a different kind of problem, which is both more specific, and, in some ways, more complex. Again, it involves an obligation on the part of Member State institutions to act in a way that is consistent with the Commission's decisions. In this respect, a special role is assigned to Art.16, a provision that, as indicated in the preamble of the Regulation, has the aim to "ensure compliance with

principles of legal certainty and the uniform application of Community competition rules" and to avoid in this way "conflicting decisions".¹

This recognises the pre-eminence of Commission decisions over national institutions' decisions on the same case based on Arts 81 to 82 EC.² Article 16 also expressly provides that both national courts (para.1) and NCAs (para.2) must refrain from taking decisions in a case that would "run counter to" a decision either taken by the Commission in such a case or "contemplated by the Commission in proceedings it has initiated".³

III.A.

The most prominent part of Art.16 is the provision related to national courts. In fact, the first paragraph of Art.16 "codifies" the principle set forth by the ECJ in the famous *Delimitis*⁴ and *Masterfoods*⁵ cases, by providing a ban for national judges to adopt decisions *in conflict* with those taken or envisaged by the Commission on the same case. The ECJ further underscored this position in its *IMS Health* judgment,⁶ which was issued only a few days before the effective date of the new Regulation.

Here the main issues are how to assure that national courts know when the Commission is treating a case and increasing the likelihood that national courts will make

[†] Part I of this article appeared in [2006] 1 E.C.L.R.

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In preparing this article the authors have used the following article by Paolo Cassinis as their starting point: "La riforma della modernizzazione ed i meccanismi a garanzia della coerenza applicativa della disciplina comunitaria della concorrenza", presented at the VI UAE-LIDC Conference "Antitrust between EC and national law" held in Treviso on May 13–14, 2004, A. Raffaelli, ed. 2005. The authors thank Paolo Saba and Céline Gauer for their valuable comments. The views expressed are solely those of the authors. They do not necessarily represent the views of any institution with which the authors may be associated.

1 See Recital 22.

2 Under Regulation 17/62, the exclusive competence of the Commission to grant exemptions ex Art.81(3), represented for NCA and judges a limitation that does not exist in the new system.

3 This does not apply to so-called "commitment decisions" under Art.9 of the Regulation (Recitals 13 and 22, Regulation). This is because they do not actually ascertain infringement, but rather make compulsory—for the undertaking under investigation—commitments that remove the Commission's competition concerns and, by doing so, close the proceeding. If however, the Commission already closed a procedure accepting commitments, a new decision by an NCA regarding future conduct of the companies should either be avoided or be compatible with that decision. See the Commission Press Release on commitment decisions under Art.9 Regulation 1/2003 (Memo 04/217, September 17, 2004). The first commitment decisions have been the following: *Bundesliga* [2004] O.J. C229; [2005] O.J. L134; *Coca-Cola* [2004] O.J. C289; Press Release IP/05/775). Additional envisaged commitment decisions involve the cases *Alrosa* and *De Beers* (Press Release IP/04/1513), the case *Football Association Premier League* (and the case *Repsol CPP* [2004] O.J. C258); *BUMA-SABAM* [2005] O.J. C200; *Austrian Airlines-SAS* [2005] O.J. C233.

4 See ECJ, Case C-234/89, [1991] E.C.R. I-935 at [47].

5 See ECJ, Case C-344/98, [2000] E.C.R. I-11369 at [52].

6 See ECJ, Case C-418/01, [2004] E.C.R. I-5039 at [19].

decisions that are consistent with the Commission's decisions. These courts have fewer opportunities to be adequately informed of Commission decisions, whether adopted or envisaged, than competition authorities have. Moreover, the national judges will normally have far less experience with competition law than do NCAs. In addition, they do not interact with the Commission on a regular basis, because they are not members of the ECN. Finally, they may in some cases be less inclined to feel bound by a Commission decision. As a result, even where they know about a case, they may nevertheless decide in ways that are not completely consistent with the relevant Commission decisions. Where a national court suspects that the Commission may be contemplating action, it may request information from the Commission about the opening of proceedings on potentially relevant cases as well as about their progress and likely outcome.

Where a national court recognises the existence of a possible conflict between its own decision and a Commission decision it has two main options. It may suspend its proceeding until the Commission has reached its decision. Alternatively, where it is not satisfied with the Commission's position, it may also make a referral for a preliminary ruling to the Court of Justice,⁷ which is the final arbiter of Community law legality.⁸ Therefore, the mechanism provided for by Art.16(1) allows the highest Community jurisdictional body to clarify an issue for the entire Union. Even if a preliminary ruling would not bind other national courts, it would become an important precedent for similar cases.

Article 16 provides an incisive and important mechanism,⁹ but it is to be understood as part of a complex system based on loyal co-operation among institutions, national judges and the Commission. Their roles are complementary in the enforcement of Community competition law. Each seeks the correct functioning of a system in which legal certainty in

the enlarged Union represents a common value and objective. Thus, Art.16(1) of the Regulation respects the different roles of national courts, but gives sufficient unity to a complex enforcement system that otherwise might give rise to interpretative "drift", as feared by the undertakings, especially in the start-up phase of the new system.

Direct application of Art.16 in relation to national courts is likely to be rare in practice. First, the provision refers only to cases of disputes submitted to a national judge in which the same conduct (e.g. the same agreement, among the same parties, in the same market) has been already examined by the Commission in a decision or is being examined by the Commission and is the subject of a contemplated decision. Secondly, it generally only comes into play where the Commission identifies an infringement of Arts 81 or 82, but the national judge does not find an infringement. The reverse case—i.e. where the Commission determines that conduct does not represent a violation of these provisions—is subject to a specific *positive* decision under Art.10, and such decisions will be adopted only "in exceptional cases where the public interest of the Community so requires".¹⁰

On the other hand, whenever the Commission becomes aware that national courts are evaluating similar behaviours in an openly divergent way under Arts 81 or 82 EC, it might consider to start an investigation and conclude it, if appropriate, with a *positive* decision under Art.10 Regulation, clarifying the Community competition policy on a specific issue.

III.B.

The second paragraph of Art.16 provides an explicit obligation of uniform application of Community competition law also for NCAs.¹¹ However, as far as they are concerned, it seems unlikely that there will often be a need for a formal application of this rule for at least two reasons: (i) the application of other provisions of Regulation 1/2003¹² may in practice "deprive" an NCA of a sufficient interest to deal with

⁷ Ex Art.234 EC.

⁸ Art.220 EC. Along this line, see the Opinion of the Advocate General Ruiz-Jarabo Colomer, Case C-17/00, *de Coster*, at [72]–[76]. In particular, at [76], it stressed the role of the preliminary referral ex Art.234 EC as an instrument of judicial co-operation between judges. The essential feature of the preliminary ruling of the ECJ is to give a uniform interpretation and implementation of Community rules in all the Member States; G. Tesauro, *Diritto Comunitario*, 2005, p.295.

⁹ The New German law (s.33(4)) also makes infringement decisions of NCAs binding for German courts.

¹⁰ See Recital 14, Regulation 1/2003.

¹¹ On this point see also Commission Network Notice, point 43.

¹² In particular Art.11(6). See Commission Network Notice, points 51–53.

a case already decided by the Commission,¹³ although, in theory, when Art.11(6) is used, the acting NCA is relieved of its competence only until the Commission adopts its decision¹⁴; (ii) the *ne bis in idem* principle, to some extent, may also prevent the situation of possible conflicting decisions.¹⁵

An innovative perspective would have been created if the ECJ had confirmed the possibility also for NCAs (at least for those having investigative and decision-making functions, and a sufficient degree of independence) to make directly a preliminary referral under Art.234 EC for the interpretation of Arts 81 and 82 EC.¹⁶ This issue was raised by the Greek competition authority (*Epitropi Antagonismou*)¹⁷ and endorsed by the Commission as well as by Advocate General Jacobs.¹⁸ The ECJ determined the referral was not admissible, finding that the Greek NCA—in light of its features—"is not a court or tribunal within the meaning of Article 234 EC". In doing so, the Court pointed out that, under the new Regulation, NCAs are "required to work in close co-operation with the Commission of the European Communities".¹⁹

IV. The Commission, National Competition Authorities and National Courts: co-operation and consistency

In general, the duties and rules within the modernisation package that seek to ensure a consistent enforcement of Community competition law do not eliminate opportunities for national authorities to exercise their own discretion. Competition cases usually involve complex factual situations (the ascertainment of which is under the responsibility of the acting decision-maker) and, often, the assessment of economic effects. This creates some room for variations in the ways in which facts and legal provisions are interpreted. As a consequence,²⁰ competition law authorities often have a degree of latitude in making their assessments and decisions.

Developing consistency within the system thus will ultimately depend on the degree to which these decision-makers use a common set of analytical and assessment tools, without sacrificing discretion or the responsibility of assessing the relevant factual circumstances. Put another way, the degree of consistency in Community competition law decisions is likely to correlate positively with the degree to which decision-makers see cases from the same basic analytical perspective and principles. The specific procedures and duties that are intended to increase consistency in the application of Community competition law are likely to have limited impact if they are not accompanied by the development of shared knowledge and understandings among the decision-makers in the system, and thus the ECN Network has a knowledge-diffusion and development function to which many of the procedural and institutional devices relate and on which their success will ultimately depend.

The drafters of the modernisation package have sought, therefore, to create a system that encourages the development of shared evaluation techniques and modes of analysis. Interactions within the Network—exchanges of information and views within the ECN working groups, both horizontal and sectorial that, as seen above, represent permanent *fora* of confrontation also on policy issues—are intended not only to improve

13 However, there may be cases where the NCA maintains a specific interest in adopting a subsequent decision. One example could be when the Commission has adopted a decision finding an anti-competitive cartel among certain parties in a geographic area which doesn't include the territory of a certain member state. The NCA of that country could then have an interest to open a new investigation to evaluate and fine that behaviour only in its territory (and Art.16(2) would be applicable). Another example could be a Commission decision finding an anti-competitive cartel among certain parties; the NCA might have an interest to open a new investigation on the same cartel to evaluate and fine the participation in that cartel of another company.

14 Therefore, a subsequent decision of an NCA would be subject to Art.16(2).

15 The issue is incidentally addressed by A.G. Tizzano in his opinion of June 7, 2005, in the case C-397/03 P, *Archer Daniels Midland Company and others v Commission of the European Communities*, at [86]–[107].

16 The ECJ already admitted such possibility with reference to the Spanish Tribunal de la Competencia, in the Case C-67/91, *Banche Spagnole* [1992] E.C.R. I-4785.

17 Case C-53/03, *Synetairismos Farmakopoion Aitolias (Syfait)* [2003] O.J. C101/18. In favor of this solution, see A. P. Komninos, "Article 234 EC and National Competition Authorities in the era of decentralization" (2004) E.L.Rev. 106.

18 See the Opinion of October 28, 2004, Case C-53/03, at [22]–[46]. In particular, Jacobs pointed out the possibility of the referral as a means to "provide some additional safeguard of the uniformity of Community law" during the administrative proceeding "allowing a reference to be made at the earliest possible stage, thereby avoiding the need for subsequent proceedings before a reviewing court in order to enable a preliminary reference to be made", at [45].

19 See ECJ Case C-53/03, *Syfait*, May 31, 2005, at [34], not yet reported.

20 For discussion of divergences in interpretation of economic data among Community institutions, see D. Gerber, "Courts as Economic Experts in European Merger Law" 2003 *Fordham Corporate Law Institute* 475 (2004).

enforcement, but also to yield the shared understandings and policy that must be the basis for a consistent application of the law throughout the Union.

Co-operation and consistency are closely linked in this system. The ECN enforcers (Commission and national authorities) and national courts play roles that are inter-related and largely complementary. The Regulation thus provides—for the first time—a complete set of co-operation tools for developing a common knowledge and understanding of antitrust issues within the system.

IV.A. Co-operation in regulating case flow

One form of co-operation relates to the flow of cases within the Network, the so-called "case allocation". The objective of the system is to direct cases to authorities that are well placed for handling them. Given the economic importance of many competition law cases, however, NCAs may sometimes have incentives to handle cases that from a Community perspective would be handled more appropriately elsewhere. The Regulation does not contain any criteria for the allocation of cases; purely indicative criteria are set out in the Commission Notice.²¹ These do not create any legitimate expectations as to who in the Network will deal with a case.²²

This feature allows a high degree of flexibility and co-operation. It is, in fact, important for NCAs and the Commission to co-operate voluntarily in directing the flow of cases within the Network, as the experience of the first year of implementation of the Regulation clearly indicates.²³ Accordingly, the system²⁴ also provides the NCAs with authority to suspend a proceeding or reject (in whole or in part)²⁵ a complaint, where either the same practice (in the same product and geographic markets) is the object of examination—either on the

basis of a complaint or *ex officio*—by another authority or where it has already been evaluated under Art.81 or 82 EC. The Commission may also reject a complaint relating to conduct that is already being examined or decided by a national authority.²⁶ Where an authority decides to suspend or close a proceeding involving a case being dealt with by another authority, it may transmit to that other authority all information which it has acquired during its proceedings.²⁷ This mechanism is flexible and is designed primarily to avoid duplication of work within the Network and the consequent risk of divergent decisions, but it also encourages mutual understanding and trust among competition authorities, as the experience actually gained so far demonstrates.

IV.B. Mutual assistance and the courts

The Regulation not only provides tools for co-operation within the Network of competition authorities, but it also provides for mutual assistance among competition authorities and national courts.²⁸ Given that national judges are likely to have less contact with the application of Community competition law than do NCAs, there may be a risk of divergence in their decisions, particularly with respect to the issues involved in Art.81(3). In responding to this risk, the modernisation package provides specific tools²⁹ for bringing the courts into closer interaction and alignment with the European Commission and the national authorities. In effect, the various mutual assistance and information provisions involving the courts create a second, broader and more informal "expanded network" that includes all European institutions that apply competition law.

This co-operation is the object of a specific communication of the Commission,³⁰ and here we merely note some of the mechanisms provided there.

21 See Commission Network Notice, points 20–24.

22 The allocation of a case within the ECN has been challenged for the first time by the undertakings concerned (*Wanadoo and France Telecom*) in Cases T-339/04 & 340/04 [2004] O.J. C262/53.

23 A specific case of co-operation in the case allocation phase took place in the *BdKEP/Deutsche Post* case in which the Commission and the German Federal Cartel Office agreed to share and co-ordinate their actions, the Commission enforcing, first, Art.86 EC with respect to certain postal law provisions; then, the NCA enforcing Art.82 EC with reference to *Deutsche Post* behaviours (see *EC Competition Policy Newsletter*, spring 2005, p.31).

24 Art.13.

25 This may happen when only part of a procedure overlaps with another NCA case.

26 See Commission Notice on the handling of complaints by the Commission under Arts 81–82 EC, point 25 [2004] O.J. C101. In such a case, the Commission will inform the complainant without delay about the NCA that will examine the case (see Art.9, Regulation 773/2004 [2004] O.J. L123).

27 Art.12.

28 Art.15 Regulation. See R. Nazzini, *Concurrent Proceedings in Competition Law, Procedure, Evidence and Remedies* (Oxford 2004), p.32.

29 In addition to Art.16(1), discussed above.

30 Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Arts 81 and 82 EC [2004] O.J. C101. Note that the even if the Recital 21, Regulation and the Notice on the co-operation between the Commission and the courts defines national courts also to include those courts acting as "public

Because they are now provided in a Community Regulation, these instruments are applicable in the Member States. National provisions should not interfere with their application, but divergences in national procedural and organisational systems can influence the effectiveness with which the system is implemented, and thus the harmonisation of these procedural and organisational principles can be expected to greatly enhance their effectiveness.

The modernisation project emphasises the need for national courts to become a more significant part of the competition law enforcement system.³¹ In order to do this, national courts should increasingly attract competition law cases among private entities. As shown in a study published by the Commission,³² the private enforcement of competition law in Europe has been largely "underdeveloped" in most Member States but it is considered vital for increasing the effective application of Community law,³³ also in terms of its potential deterrent effect.³⁴ The Commission has published at the end of December 2005, a Green Paper setting out options for improving the current system of damage actions related to the infringement of EC competition law.

In this respect, the extent to which national legal systems allow the victims of anti-competitive conduct to be compensated for the damages suffered is particularly important. It is therefore worth mentioning an important judgment recently issued by the Italian Supreme Court that clearly sets forth the principle according to which customers of companies involved in an anti-competitive horizontal agreement (in that case among insurance companies) are entitled to claim

damages that they may have suffered in terms of higher prices applied by each company in the downstream market.³⁵

However, at least in continental Europe legal systems, private enforcement of competition rules differs greatly from public enforcement (by the Commission and the NCAs) under many respects. One of the main issues concerns the powers available for finding evidence of infringements (much wider for public enforcers).³⁶

Also for this reason, public and private enforcement are clearly complementary, and must necessarily be effectively co-ordinated.

The new system thus requires that the Commission furnish assistance to national courts where they ask for it in cases involving Arts 81 to 82 EC. The Commission may provide such assistance in a variety of ways, and this may allow it to play an active role in such cases. It may, for example, transmit (although with some limitations)³⁷ information in its possession, on request, to national courts (and national authorities).³⁸ Secondly, where requested, it may provide its opinion on issues (of economics, of facts or of law) related to the application of Community competition law. Thirdly, "when the coherent application of Article 81 or Article 82 so requires", the Commission may *ex officio* present to the national courts written observations on a case. Where permitted by national law and authorised by the court, it may even present its observations orally in the judicial proceedings. In this context, it acts as a "friend of the court" or "*amicus curiae*". These opinions are not binding and may relate only to the application of Arts 81 and 82, and to "an economic and legal analysis of the facts underlying the case pending before the national court".³⁹ The NCAs are also directly enabled by the Regulation to perform a similar function in relation to their national courts, and the domestic legal systems of many Member States have been recently amended (or are about to be amended) to facilitate the exercise of this power in national civil proceedings. In a few Member States such as, for instance, Germany, there is quite a long tradition of the

enforcer and review court" (point 2), the instruments of co-operation set forth in Art.15, Regulation are primarily aimed at national courts dealing with "lawsuits between private parties".

31 M. Monti, "A reformed competition policy: achievements and challenges for the future" speech at Center for European Reform, Brussels, October 28, 2004. For discussion of private remedies in Europe in relation to the US experience, see D. J. Gerber, "Private enforcement of competition law: a comparative perspective" in *Private Enforcement of Competition Law in Europe* (Thomas Moellers and Andreas Heinemann, eds., forthcoming, 2005).

32 *Study on the conditions of claims for damages in case of infringement of EC competition rules*, August 31, 2004.

33 See M. Monti, "Private litigation as a key complement to public enforcement of competition rules and the first conclusions on the implementation of the new Merger Regulation" speech at IBA 8th Annual Competition Conference, Fiesole, September 17, 2004.

34 See Commissioner, N. Kroes, "Enhancing Actions for Damages for Breach of Competition Rules in Europe" speech at the Harvard Club, New York, September 22, 2005, available on the European Commission website.

35 See, Corte di Cassazione, United Chambers, judgment no.2207, February 4, 2005 (*Unipol v Ricciardelli*).

36 Thus, stand alone actions may be rare, for example, for non-contractual antitrust infringements, such as concerted practices.

37 See Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Arts 81 and 82 EC, points 23-26.

38 Art.15(1).

39 Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Arts 81 and 82 EC, point 32.

NCA acting on a regular basis as *amicus curiae* before national courts. Within the ECN, the Commission and the NCAs will inform each other about their *amicus curiae* interventions.

National courts are called to assist the Commission in the application of competition law. They must, for example, transmit documents necessary for the evaluation of a case in which the Commission intends to present its *amicus curiae* observations as provided in Art.15(3). In addition, national courts must regularly transmit their decisions applying Arts 81 and 82 CE to the Commission, so that the Commission will be informed of the merits of the cases in a timely fashion.

IV.C. Soft tools: developing "shared knowledge"

The new system also includes mechanisms that are specifically designed to disseminate information and to foster the development of shared understandings and common perspectives among decision-makers within the system. In this sense, they are "soft convergence tools". They may or may not relate to particular conduct, and they often operate on a voluntary and co-operative basis to provide the information and insights necessary for the development of consistency in the application of law.

The Commission's advisory role is an important example of this type of mechanism. Both national courts and NCAs are encouraged to seek the Commission's advice where they are uncertain about the application of the law. According to Art.11(5), an NCA may "consult the Commission on any case involving the application of Community law".⁴⁰ This informal mechanism enables the Commission to explain its practices and perspectives, inform the requesting institution about the way other national institutions are handling the relevant situation, and generally provide insights into the problem based on its own experience and the accumulated experience of other institutions. If used extensively, it can be particularly valuable in achieving consistency in viewing common problems.

Provisions for the use of Advisory Committees also serve this function,⁴¹ since they also allow for officials to discuss common problems in a group setting. This fosters dissemination of both information and analytical techniques among a large number of authorities and does so in a context of group norm-setting and personal

network relationships. As seen above, the ECN has developed working groups to deal with enforcement and co-operation problems, also with respect to particular sectors of the economy. These working groups allow officials to meet together to exchange information and views on legal and economic approaches. These groups are informal and do not publish their proceedings, but experience with them is generally considered to be very positive. Even the informal guidance letters that the Commission is authorised to issue in exceptional cases to undertakings can be of value in disseminating information and developing common views.⁴² Moreover, also the possibility for the Commission⁴³ and the NCAs to carry out general inquiries in particular economic sectors and share the outcomes may represent an important means of sharing knowledge.

Finally, the publication of non-confidential versions of decisions reported by national courts in a special section of the Commission's website adds a further element of openness and transparency that can facilitate common understanding of developments.⁴⁴ This mechanism was strongly encouraged by a working group of the ECN because it allows courts as well as national authorities and even business decision-makers to know what is happening in the application of Arts 81 and 82—what kinds of cases are being decided, what reasoning is being used and what the outcomes are. The value of this internet material is not yet optimal. It could be enhanced in several ways that could increase its accessibility. For example, it would be valuable to provide a summary of each national case in one or more languages in common use at the European level.

V. Concluding comments

This brief examination of the issue of promoting consistency in the application and enforcement of Community competition law in the enlarged European Union reveals a complex and highly sophisticated mechanism that is at the core of the modernisation process. Modernisation moves in what seem to be opposite directions. One involves the decentralisation of decision-making as the result of placing primary

40 See Art.15(1), for national courts.

41 Art.14(7) Regulation.

42 Informal guidance letters are regulated in a Commission Notice [2004] O.J. C101/6.

43 Art.17 Regulation.

44 Art.15(2).

enforcement responsibilities in the hands of the national competition authorities and national courts. The other recognises the paramount importance of maintaining coherence and consistency of Community competition law enforcement in such a decentralised system and provides tools and mechanisms for promoting such consistency. The system gives the European Commission, the National Competition Authorities and the European courts the responsibility for effectively using these tools.

The effectiveness of this system depends on the interactions of the many institutions now fully competent to apply Community competition rules. The new system creates a network of competition authorities

and provides numerous mechanisms for co-ordinating decision-making among NCAs, the Commission and national courts. The Commission is placed at the centre of this system, and it is given both the authority and the responsibility for ensuring consistency, but it cannot maintain consistency by itself. The success of the system depends on a delicate balancing of forces among the interacting institutions, but it also depends on the determination of those within those institutions to co-operate with each other and to earn each other's trust. The first year of experience has shown much promise and has featured strong commitment among all the ECN members to making the whole system work effectively and consistently.