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

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Contents

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Editorial

EDWARD PITT — **Markets are Instruments Not Values** 1
A non-economist comments on the implications of a more heavily economics based approach to competition law enforcement, both in Brussels and in London.

Case Comments

MAGNUS GUSTAFSSON AND FOAD HOSEINIAN — **Private Enforcement of EC Competition Law: Swedish Supreme Court Judgment on the Validity of "Follow-on" Contracts** 5
In a much-awaited decision the Swedish Supreme Court rules that follow-on contracts, i.e. vertical agreements concluded by individual cartel members with third parties, can "as a general rule" not be deemed void under Art.81(2). The authors conclude that long-settled ECJ case law, left uncommented by the Supreme Court, provides the methodological framework for reaching a much firmer answer.

Articles

DAVID GERBER AND PAOLO CASSINIS — **The "Modernisation" of European Community Competition Law: Achieving Consistency in Enforcement—Part I** 10
Critical to the success of the Modernisation project is the capacity of the new system to achieve an acceptable degree of consistency in the application of Community competition law throughout the European Union. This article analyses the mechanisms that the new system employs for promoting and maintaining enforcement consistency in the interpretation and application of Community competition law and makes some preliminary evaluations on their functioning.

MITJA KOCMUT — **Efficiency Considerations and Merger Control—Quo Vadis, Commission?** 19
Various efficiencies, which are planned to result from the transaction, are without doubt the main aim of most of the concentrations between undertakings. Nevertheless, the EU merger control failed to properly address this important issue until the reform in 2004. This article critically evaluates the impact of the reform and attempts to provide some answers for the future.

GUIDO KORDEL — **Behavioural Economic Analysis of Collective Bargaining Agreements Under EC Antitrust Law** 28
Behavioural economics is a relatively recent field of research in economics. This article shows which implications a behavioural approach can have for economic and antitrust analysis under EC Antitrust Law. It illustrates this by reviewing two cases that have been decided by the ECJ in the last few years and that deal with the impact of collective bargaining agreements on competition.

Book Reviews

CARSTEN GRAVE — **Merger Control in the European Union** 40
MARK FURSE — **The Future Development of Competition Framework** 40

News Section

N-1

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

*David J. Gerber** and Paolo Cassinis**

LT Competition law; EC law; Enforcement; National competition authorities

EC Council Regulation 1/2003 (hereinafter, the Regulation) establishes a fundamentally new system for enforcing competition law in Europe.[1] Applicable since May 1, 2004, it represents a "modernisation" of the enforcement system for Arts 81 and 82 of the Treaty of Rome and is part of a major reform of the Community competition rules that relates not only to anti-competitive agreements and abuses of dominance (Arts 81 to 82 EC), but also to merger control and state aids.[2]

Under the Regulation the European Commission relinquishes its role as primary enforcement mechanism for competition law, with respect to Arts 81 to 82 EC. The Regulation places Member State institutions—administrative agencies and courts—at the centre of the enforcement process together with the Commission, and it promotes a wider and more active participation of antitrust institutions and civil courts of Member States (the so-called "decentralisation"). "Decentralised enforcement" is the *normal* way in which Community rules have always been implemented in the Member States in fields other than competition. Thus, Regulation 1/2003 "extends" this implementing feature of the Community legal system to the provisions of Arts 81 to 82 EC.

Critical to the success of this project is the capacity of the new system to achieve an acceptable degree of consistency in the application of Community competition law throughout the European Union. This Article analyses the mechanisms that the new system employs[3] for promoting and maintaining enforcement consistency in the interpretation and application of Community competition law and makes some preliminary evaluations on their functioning.

The new system represents an ambitious reform. It creates a complex and innovative[4] set of relationships among numerous Community and Member States' institutions that must follow new and often untried procedures. Moreover, the national decision makers are also subject to domestic procedures

† Part II of this article will appear in [2006] 2 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. 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 Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty: [2003] O.J. L1, amended by Regulation 411/2004, Art.3: [2004] O.J. L68, in order to include air transportation services between Community airports and third countries. Unless otherwise noted, numerical references are to this Regulation.

2 See, e.g. Council Regulation 139/2004: [2004] O.J. L24.

3 The main instruments analysed in this article are those set out in Arts 3, 11, 13, 15 and 16 of the Regulation. This article does not address, for instance, either informal guidance letters or the Advisory Committee, that can be convened at the request of an NCA (Regulation, Art.14(7)) for the discussion of cases dealt with at national level, even if also these instruments can contribute to a coherent application of Arts 81–82 EC.

4 The ECN—through the mechanisms of consultation and cooperation provided for by the Regulation—also has the function of "creation" of an antitrust common law within the EU: M. D'Alberti, "La rete europea di concorrenza e la costruzione del diritto antitrust" proceedings of the VI UAE-LIDC Conference, Antitrust Between EC and National Law, Treviso May 13–14, 2004; A. Raffaelli, ed., The Italian Council of State—in its capacity as second instance review court of the Italian NCA decisions, recently pointed out that Regulation 1/2003 brings about "a process of integration, a kind of circular harmonization, in which the confrontation between different models in place in the Member states contributes to create the community rule, which—in turn—influences the interpretation of domestic rules" (VI Chamber, judgment no.1113, March 21, 2005, *SFIR v Authority*, pt. 4.7.3).

that—unfortunately[5]—have not been harmonised. In this system, national institutions assume direct responsibility for applying Community competition law, but the European Commission plays a critically important role in co-ordinating the system and in maintaining its integrity and coherence. Central to this mechanism is a newly created "network" of competition authorities (the European Competition Network, ECN) in which national competition authorities ("NCAs") and the Commission work together, exchanging information and interweaving decisions and responsibilities. The effective functioning of the system requires close co-operation among members of this network.[6]

The modernisation project has two main objectives. One is to increase the effectiveness of Community competition rules. Promoting wider and more active participation of Member State competition authorities and civil courts in the application of competition law is seen as necessary for effective enforcement under the new circumstances created by the enlargement of the EU's membership that took place in May 2004. The (very preliminary) results of the new enforcement regime indicate "an increased enforcement compared to the past record".[7]

A second major goal is to enhance the role of Community competition law in European integration.[8] The enlargement underscored the importance of a single substantive competition law within the EU capable also of promoting effective economic integration of the new Member States. This concern is highlighted in the European Constitution, signed on October 29, 2004 (now subject to a troubled ratification process), which confirms the importance of antitrust among the primary economic values of the Union (see, in particular, Art.I (3), paras 2 and 3).[9]

Competition law has played a central role in the integration of Europe,[10] and the need to adapt it to new circumstances is recognised as imperative. The system chosen to achieve these goals faces, however, a major risk that could undermine the effectiveness of competition law throughout Europe. The devolution of authority to Member State institutions creates the potential for divergent application and interpretation of Community law. National authorities and courts may have divergent interpretations within a single system; there may be differing interpretations among Member States; and individual Member States may diverge from the interpretations of the Commission. Such divergences can result from intentional efforts to protect national or institutional interests, but—more often—they could also result unintentionally from differing understandings of applicable law or divergent interpretations of economics. In either case, the result would be the same: a "re-nationalisation" of competition law that would severely hamper efforts to create a unified market.

The modernisation reform includes a number of mechanisms intended to prevent such divergences.[11] This article describes and briefly analyses the main instruments provided in the Regulation for that purpose (e.g. those in Arts 3, 10, 11, 13, 15 and 16) and clarified in several Commission Notices, the so-called "modernisation package". It also examines how these mechanisms relate to existing structures and principles within Community law.

The article looks first at the duties imposed on national decision makers regarding the application of

5 In its comment on the reform of Regulation 17/62, the European Parliament advocated the harmonisation of fines for undertakings for violations of Arts 81–82 EC (see the amendments proposed on September 6, 2001, [2002] O.J. C72/305). The need also to harmonise procedural rules and fines for implementing Arts 81–82 EC was stressed by some authors soon after the White paper on modernisation reform (see, e.g. A. Pera, P. Cassinis, "The decentralised application of Community competition law: Italy's recent experience and the modernisation perspective", Decentralised application of EC competition law: national experience and reform, Academy of European Law, Trier, Vol.32, 2001).
Some speakers at the IBA/European Commission Conference held in Brussels on March 9–11, 2005 advocated the need of a new Regulation on procedures and sanctions. Proceedings available on the European Commission web site.

6 Recital 15 of the Regulation and Commission Notice on co-operation within the Network of Competition Authorities: [2004] O.J. C101 (Network Notice), Pts 1–4.

7 E. Paulis, E. De Smijter, "European Commission, Enhanced enforcement of the EC competition rules since May 1, 2004 by the Commission and the NCAs, the Commission's view" paper presented at the IBA-European Commission Conference, Antitrust Reform in Europe: A Year in Practice, Brussels, March 9–11, 2005. See also n.39 below

8 For discussion of the historical context of this system, see D. J. Gerber, "Modernising European Competition Law: A Developmental Perspective (2001) 4 E.C.L.R. 122; and D.J. Gerber, "The Evolution of a European Competition Law Network" (2002) *European Competition Law Annual* (Claus-Dieter Ehlermann and Isabela Atanasiu, eds, 2005).

9 M. Monti, "A reformed competition policy: achievements and challenges for the future" speech at Center for European Reform, Brussels, October 28, 2004. (available on the European Union website)

10 This development is described in detail in David J. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (1998; soft cover, 2001).

11 See Commission Network Notice, pts 3 and 43. On this issue, see P. Lowe, "The role of the Commission in the modernisation of EC competition law" paper presented at the United Kingdom Association on European Law ("UKAEL") Conference, January 23, 2004, available on the EC Commission web site.

Community rules. It then looks at the Commission's role in the system and the procedural devices that the Commission can use to improve consistency, particularly in cases where the normal procedural mechanism within the network may prove to be inadequate to protect Community interests. These obligations and procedural devices are the "hard" mechanisms for achieving consistency. The final section then reviews briefly the "soft" mechanisms that focus on voluntary co-operation and on developing the common evaluative and decisional tools that are likely to be necessary for achieving consistency.

I. The duty of national competition authorities and courts to apply Community competition law

The central mechanism for achieving consistency in the application of competition law in this system is the duty that the Regulation imposes on national authorities to apply Community competition law (Art.81 and Art.82 EC) to conduct that "may affect trade between Member States"[12] (Art.3(1)).[13] This duty creates for most purposes a single competition law standard for the entire European Union. With it, the same basic rules apply wherever anti-competitive conduct may have an impact on trade between Member states.

This device also promotes consistency at another level by increasing the effectiveness of network operations. For example, it means that the Commission and the NCAs exchange information for the enforcement of the same set of rules rather than about potentially diverse and inconsistent national rules. This is necessary for effective and correct allocation of cases within the new network and for the "information" procedures that precede the adoption of prohibition decisions (e.g. Art.11(2) to (4)).[14] In addition, it allows the NCAs to co-operate more effectively within the ECN Network. It is a precondition, for example, both for the exchange of information to be used as evidence (Art.12) and for the mutual assistance among NCAs in searching for evidence of infringements within their respective territories (Art.22). These co-operative mechanisms can be used only in the context of investigations based on Arts 81 and 82 of the Treaty. They are not authorised for use in applying exclusively national competition laws or other provisions of Community law.

The duty to apply Community law does not prohibit or exclude the parallel application of national laws. Although this point was hotly contested in the negotiations over the modernisation project, the final version of the Regulation does not preclude an NCA from applying also its own national competition rules to a case in which Community law is applied, provided that the national law allows such a parallel application.[15] An important justification for this arrangement is that it should preclude a party to a proceeding from claiming that the relevant competition authority has used the wrong legal basis for its action—i.e. that the authority has used national rather than Community law or vice versa.

The possibility of parallel application of national and Community competition rules may create the potential for conflict between the two substantive systems. To reduce this potential the Regulation (Art.3(2)) provides a "convergence rule" which requires that NCAs[16]—and national judges[17]—may not issue a prohibition decision on the basis of national competition law that is more restrictive than would be required in applying Art.81 of the Treaty. This means that an agreement, a decision of an association of undertakings or a concerted practice that has an impact on trade between Member States may not be prohibited where it either: (i) does not violate Art.81(1); or (ii) if it does violate Art.81, it also meets the criteria of Art.81(3) or falls within the scope of a block exemption regulation. This may also prevent national

12 Recital 8, Regulation 1/2003. See Guidelines on the effect on trade concept contained in Arts 81 and 82 of the Treaty, Pt 9, and Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Arts 81 and 82 of the EC Treaty, Pt 5 (both in [2004] O.J. C101).

13 Note that Art.3 introduces for the first time a specific provision governing the relationship between Community and national competition rules.

14 For discussion of the scope of this provision, see W. P. J. Wils, "Community Report; the reform of competition law enforcement brought about by Regulation 1/2003" in *The modernisation of EU Competition Law enforcement in the EU* 2004 FIDE pp.712, 718, 723.

15 Not all national systems currently permit parallel application of national and Community rules to the same case. Among those that do not is, for example, the Italian system. Research recently carried out within the ECN indicates, however, that most Member States either currently allow parallel application (22 Member States) or are considering allowing it (one Member State).

16 See Commission Network Notice, Pt 43.

17 See Commission Notice on cooperation between the Commission and the courts of the EU Member States in the application of Arts 81 and 82 EC, Pt 6.

authorities and courts from discriminating against non-domestic firms in applying competition law rules against cartels and similar agreements.

However, this "convergence rule" applies only to *agreements* not to *unilateral* conduct. It does not prevent the applicability of more restrictive national rules to *unilateral* conduct, including abuses of dominant position not realised through agreements.[18] Consequently, not all conduct that may involve an abuse of a market-dominating position subject to such a specific convergence requirement.[19] Moreover, Art.3 and the "convergence rule" do not apply either to the national rules on merger control, or to national rules having objectives other than protecting competition on the market, such as, for instance, the prohibition of unfair trading practices.[20]

Article3(2) of the Regulation implies—and in some way integrates—the application of the more general principle of *primacy* of Community law. Accordingly, in cases of parallel application of Community and national competition rules, agreements infringing Art.81 EC or abusive practices (also unilateral conduct) against Art.82 EC shall not in any event be considered lawful because they are acceptable under national antitrust rules.[21]

The effect of this "convergence rule" is reinforced by Art.12(2), which provides that in cases where Community competition law and national competition law are both applied, information that is exchanged pursuant to the new procedures cannot be used as evidence in adopting decisions under national law that are not consistent with the decision based on Community law. By thus limiting the ways in which information exchanged within the network can be used, this provision indirectly produces an effect similar to the convergence rule. In one sense, its scope is even broader than the convergence rule, because it also applies to *unilateral* conduct, since Art.12(2) of Regulation 1/2003—unlike Art.3(2)—does not make any distinction between agreements and unilateral conduct.

National authorities still also have some flexibility in applying Community law even in cases under Art.81. For example, under certain circumstances (see Art.29(2)) NCAs are permitted to withdraw the benefit of a Community block exemption in cases examined by them.[22] In such cases, however, the NCA must inform the ECN (Art.11(4)) and, upon request from other NCAs or the Commission, an Advisory Committee can be convened to discuss the decision.

Some countries also provide a kind of a "domestic EU convergence rule". For example, Italian law specifically requires that Italian competition law be interpreted according to "the principles of European Community competition law".[23] This provision has played an important role in guiding interpretation of Italian competition law by the national institutions (the Italian Competition Authority, Italian civil courts an Italian administrative courts that review decisions of the Competition Authority), as recently confirmed by the Italian Supreme Court.[24] Moreover, the Italian Council of State—acting as appellative review court of the Italian competition authority—in a recent judgment made clear that Art.1(4) of Law No.287/90 contains a "general principle of conforming domestic antitrust law to Community law, as provided for in the recent EC Regulation 1/2003".[25] To give other examples, the British competition law has a specific and complete convergence rule in its domestic competition law[26]

18 This exception to the convergence rule contained in Art.3(2), Regulation 1/2003—with reference to unilateral conducts—reflected the concerns of some Member States (in particular, Germany) not to limit the applicability of more restrictive national rules to unilateral conducts of dominant undertakings. Some authors argued that with respect to unilateral conduct, a "double barrier" system is—to some extent—still in place; see V. Korah, *An Introductory guide to EC Competition Law and Practice* (7th ed., 2004), para.7.3.

19 Among the abusive practices realised through agreements (in the sense indicated by Recital 8), and falling within the scope of the convergence rule are—for instance—exclusive dealing agreements, agreements about resale terms and conditions, and tying clauses applied to third parties.

20 See Art.3(3) Regulation 1/2003 and Recitals 8–9.

21 This principle is pointed out in the Notices creating the so-called "modernisation package". See, in particular, the Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Arts 81 and 82 EC, Pt 6; see also Commission Notice—Guidelines on the application of Article 81(3) of the Treaty, para.14: [2004] O.J. C101.

22 This authority has been previously granted to NCAs by EC Regulation 1215/99, Art.1 as well as EC Regulation 2790/99, Art.7. Similar authority is provided in Commission Block Exemption Regulation 772/2004 on technology transfer agreements: [2004] O.J. L123.

23 Italian Competition Law (Art.1(4), Law No.287/90).

24 See, Corte di Cassazione, United Chambers, judgment no.2207, February 4, 2005, *Unipol v Ricciardelli*; see also, *inter alia*, Corte di Cassazione, I Chamber, judgment no.827/99, *Ferro v Mafin*; Council of State, VI Chamber, judgment no.2199/2002, *Axa Assicurazioni v Italian Competition Authority*.

25 See Council of State, VI Chamber, judgment no.5368/2004, *Italgas v Italian Competition Authority*.

26 The 1998 Competition Act under s.60 guarantees, as much as possible, an implementation coherent with the EU rules, also with reference to procedures (see, Competition Appeal Tribunal, *Pernod v OFT*, judgment June 10, 2004). See also R. Whish, *Competition Law* (2003), p.351.

while others (such as the Netherlands) have a partial domestic convergence rule.[27] In other Member States such as France that do not have a similar provision, the NCAs often make reference to Community competition principles and case law when applying their domestic rules.[28]

Another factor that facilitates cohesive interpretation and application of competition law in Europe is a trend toward convergence of national laws. Since the late 1980s, and increasingly during the 1990s, Member States have sought to bring their national competition laws closer to Community law.[29] The adoption of Regulation 1/2003 has accelerated this development, leading most Member States to have their national laws amended in order to move toward the "benchmark" represented by the Regulation itself. In most Member States such convergence includes, for example, the abolition of notification systems also for non-Art.81 agreements, parallel application of national rules, authority to adopt commitment decisions, authority to seal business premises, books and records, authority to inspect non-business premises, similar to those provided for by Regulation 1/2003. Despite this convergence, however, there remain significant differences among systems, primarily relating to procedures and sanctions (including leniency programmes), and these call for some kind of harmonisation, as recently pointed out by many.[30]

II. The Commission's role in promoting consistency: procedural tools

The European Commission has a pivotal role in this system. The modernisation project, although based on full parallel competences of all the ECN members as well as, mutual assistance and close co-operation between them, gives the Commission a special role and responsibility for ensuring consistency in the application of Community competition law.

27 See Chapter 1, section 1, of Dutch Competition Act, of May 22, 1997.

28 The new German law amending national competition rules (that entered into force on July 1) does not contain a provision concerning the interpretation of national competition law in the light of European community rules, although such provision was envisaged in an advanced draft of the new law.

29 For details of this development, see Gerber, *Law and Competition*, cited above at n.10, Ch.10.

30 See Philip Lowe, closing remarks at IBA/European Commission Conference, Brussels on March 9–11, 2005, available on the European Commission web site.

In this section, we first examine this role of the Commission as well as the "pre-eminence" that, under certain circumstances, Commission's decisions may have within the system *vis-á-vis* Member State institutions. We then look at the different procedural tools the Commission can use to maintain consistency. In the following section III we will examine the special instrument the Commission can use to ensure uniform application of competition law in a specific case.

For these purposes, we might distinguish between "systemic consistency", by which we mean consistency in outcomes among different cases within the system and "single-case consistency", which relates to the treatment of a single set of facts by multiple institutions. The latter, to some extent, brings about *ne bis in idem* issues, especially with reference to the relationship between Commission and NCAs decisions.

II.A. The Commission's policy-making role and the expectation of systemic consistency

In the effort to achieve a systemic coherence in the enforcement of competition rules the new system recognises a special role of the Commission and its decisions. These decisions anchor the system by providing a basic source of stability in interpreting the Community competition rules. They are, of course, subject to the review of the Court of Justice and the Tribunal of First Instance. This role is established in the Treaty itself, which entrusts the Commission with the task of supervising the implementation of the Treaty (Art.211). As presented by the European Court of Justice in the specific field of competition, Art.85(1) EC gives the Commission "the task of ensuring application of the principles laid down in Articles 85 and 86 [now Arts 81 to 82 EC] of the Treaty"; it makes the Commission "responsible for defining and implementing the orientation of Community competition policy".[31] This underscores a general "pre-eminence" of the decisions of the Commission as well as its policy guidelines.[32]

The modernisation package, while decentralising the enforcement of competition rules, emphasises this role for the Commission as the guardian of the Treaty. It has a special role to play in setting competition policy and in ensuring that Arts 81 and 82 are applied consistently throughout the single market. All decision makers

31 See Case C-344/98, *Masterfoods* [2000] E.C.R. I-11369, at [46].

32 See in this respect Recital 34 of the Regulation.

within the system are generally expected, therefore, to consider the Commission's position and responsibility in this regard.

However, as far as the NCAs are concerned, this effort of ensuring consistency is primarily pursued—as shown by the first year of experience—*through* and *within* the ECN network, which is actually "a forum for discussion and cooperation in the application and enforcement of EC competition policy".[33] Here all the NCAs bring the experience gained at national level (also by the courts) in addressing competition issues and, by doing so, contribute to the evolution and setting of Community competition policy, especially with reference to substantive matters, economic issues, and common enforcement strategies.[34] This is what actually happens through the ECN working groups on horizontal matters and in the ECN sectorial subgroups[35] (on this issue see also para.IV.C below).

In sum, the new system emphasises a general expectation of systemic consistency with the decisional practice of the Commission[36] as well as with its competition policy guidelines. The Member State authorities play an important role in establishing these guidelines.

II.B. The Commission's enforcement authority: procedural tools for promoting enforcement consistency

The new system not only postulates a general "pre-eminence" of the Commission's decisions and guidelines, but it also gives the Commission procedural tools for assuring that its views are given the weight necessary to maintain enforcement consistency. In essence, these tools allow the Commission to monitor the network's procedures and intervene in it for certain purposes, including the purpose of improving consistency in the application of Community competition law. The basic idea behind these provisions is that—as indicated above—the Commission is ultimately responsible for assuring the operability of the system and the consistency of enforcement, and thus it must have the appropriate authority to carry out its mission.

The precise relationships among these tools will have to be worked out in practice, but there are, in essence, three types of tools. The first one aims at communicating to the ECN network and the Commission the launching as well as the closure of an investigation for the enforcement of Arts 81 to 82 EC. The second allows the Commission to "pre-empt" the network procedures in specific types of cases and to take specific forms of action in such cases; the third tool can be used more generally to transfer authority for a case from the network to the Commission.

II.B.1. Mechanism of formal information of Articles 81 to 82 EC proceedings

The Regulation introduces a mechanism of compulsory communication to the Commission (and the other NCAs) of new proceedings launched at national level (ex Art.11(3) Regulation). The Commission has a similar obligation for its proceedings under Art.11(2). These early information duties are aimed at detecting issues that might call for re-allocation of cases.[37]

Moreover, NCAs have to inform the Commission—at least 30 days in advance—about their envisaged decisions (namely, prohibition or commitment decisions as well as decisions about withdrawing the benefit of an exemption regulation)[38] (e.g. Art.11(4) Regulation), by transmitting a copy of a draft-decision or any other document setting out the envisaged course of action.[39] This information may be shared with the other member of the network. In practice this takes place by uploading a summary of the case in a ECN IT-system. Once it has received that information, the Commission has the possibility to send written and oral observations to the NCAs.[40] These observations are not binding; however,

33 See Commission Network Notice, Pt.1.

34 This occurred in the late 1990s with reference to the Community policy review—towards a more economic oriented analysis—concerning vertical restraints; this review led to the adoption of Regulation 2790/1999 and the relevant Commission Guidelines. At present, ECN members are working with the Commission in the policy review concerning exclusive practices pursuant to Art.82 EC.

35 See K. Dekeyser, D. Dalheimer, "Cooperation within the European Competition Network—taking stock after 10 months of case practice" paper presented at IBA/European Commission Conference, Brussels on March 9–11, 2005, available on the European Commission website.

36 The CFI in its judgment in Case T-65/98, *Van den Bergh Foods*, October 23, 2003, at [198], stressed the importance of this form of coherence in Community decision-making.

37 See Commission Network Notice, Pt 17.

38 Note that the joint declaration of the Council and the Commission that accompanied the approval of Regulation 1/2003 (doc no.15435/02 ADD 1, Pts 21–23, available on the Council's internet site) and the Commission Network Notice, Pt 48, indicate the possibility for NCAs to inform the network also on other types of envisaged decisions (such as those rejecting a complaint, closing a procedure, or ordering interim measures) that can also be important in terms of competition policy.

39 Through the end of September 2005, there had been 460 new cases handled by the network, and 88 envisaged decisions had been notified.

40 See Commission Network Notice, Pt 46.

in case of major divergence, the Commission might open a proceeding (under Art.11(6)) and relieve the NCA of its competence, as we will see below. The draft decisions of the Commission—as under Regulation 17/62—are discussed in Advisory Committee with the participation of NCAs (Art.14, Regulation 1/2003).

This information mechanism represents an instrument both for "preventing" major inconsistencies and for "verifying" the coherent application of Community competition rules. The focus is on consideration of proposed NCA decisions, before the NCA concerned adopts a final decision (Arts 81 to 82 EC).[41]

II.B.2. Pre-empting the network: cases of predominant Community interest

The most specific of these tools is provided by Art.10 of the Regulation, which permits the Commission to decide on its own to commence proceedings and to adopt decisions on the basis of Community "public interest". Under this procedure, the Commission may only issue so-called "positive decisions"—i.e. decisions in which conduct is declared lawful. The main intent of the drafters here was to provide the Commission with a means for clarifying the application of Community competition rules in cases presenting novel questions and policy issues.[42] Article 10 also assures that the Commission can prevent NCAs from prohibiting particular types of conduct and thereby potentially harming Community interests. For example, this provision can be used in cases in which a certain interpretation could unreasonably reduce incentives to innovation or hamper market efficiency.[43] These decisions are specifically intended to have a "declaratory" role—i.e. they are to clarify the law in the area. They allow the Commission to provide guidance to other decision makers in the system in their evaluation of subsequent cases, but they also provide clarification of conduct standards for businesses and thus are intended to reduce conflicts and waste of resources by European businesses.[44]

The Community interest standard includes consistency in the application of competition law. One of the general objectives of the EC Treaty (Art.3(g))—and also of the European Constitution (Art.I (3)(2))—is to achieve undistorted competition in the internal market. For instance, where divergences in interpretation or application of Arts 81 to 82 EC are so significant that they may distort competition among different parts of the EU and thereby fragment markets, the Commission may use the Community interest standard to justify a decision under Art.10 that might threaten legal certainty and the process of integration.

This power is to be used only in *exceptional* cases. The Commission may use it, on its own initiative only, where issues are novel, particularly difficult or important or where they present special features that have not been tested in the case law of the ECJ or of the CFI or in Commission practice.[45]

In all these cases there might be the need of setting competition policy and ensuring a coherent application of competition rules within the Union. Thus, Art.10 decisions may also be used where particular practices are being evaluated in a different and contradictory way by NCAs or national civil courts and where new and important issues arise in the context of a proceeding by an NCA or a national civil court.

Given the policy-making function of this kind of decision, the Regulation not only provides for discussion of the draft decision of the Commission in an Advisory Committee (in which presumably the NCAs will bring and discuss together their views and experiences), but it also calls for a public consultation phase of not less than one month (Art.27(4) of Regulation 1/2003).

So far the Commission has not adopted any Art.10 decisions.

II.B.3. The Commission's general authority to remove cases from NCAs

The Commission may also use a more general authority to pre-empt the normal operations of the network and remove cases from the NCAs. Article 11(6) of the Regulation authorises the Commission to commence a proceeding itself and thereby preclude national

41 Note that the system of information/consultation of the Commission and the other NCAs (pursuant to Art.11(3) and (4), Regulation 1/2003) will also be applicable with reference to those national investigations in which a conflict is envisaged between domestic laws and regulations—imposing or allowing certain conduct—and Arts 3, 10, 81–82 EC. In such cases the NCAs have the obligation to disapply the conflicting domestic rules (see ECJ, Case C-198/01, *Consorzio Industrie Fiammiferi—CIF*, September 9, 2003).

42 The guidance letters provided for in Recital 38 of the Regulation and in the Notice on Informal Guidance, Pt 5, serve the same goal.

43 See Commission Notice—Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements: [2004] O.J. C101, Pt 7.

44 Note that Art.7 decisions may play the same role, especially when they ascertain an infringement without imposing sanctions.

45 According to Recital 14, they will be mainly cases regarding "new types of agreements or practices that have not been settled in the existing case law and administrative practice".

authorities from applying Arts 81 and 82,[46] provided that it takes certain procedural steps in relation to the network. The Commission can commence an action either at the time of the initial allocation of a case pursuant to Art.11(3), or after a NCA has commenced its own proceedings. The preclusive effect relates to the same agreements or practices regarding the same companies on the same relevant geographic and product markets. When the Commission takes such an action, NCAs lose their competence to investigate and decide on that specific case, at least on the basis of Arts 81 to 82 EC,[47] until the Commission adopts a decision. This effect takes place when the Commission commences a proceeding stating its intention to take a decision under Chapter 3 of the Regulation,[48] i.e. a decision specifically for the purpose of determining the existence of a violation, imposing interim measures or declaring the inapplicability of Arts 81 or 82 (Art.10). Where an NCA is handling a case and the Commission intends to take the case away from it, the Commission must consult with the NCA before doing so.

The Regulation does not specify the conditions under which the Commission is authorised to use this power. Nevertheless, both the joint declaration of the Council and the Commission that accompanied their approval of the new Regulation[49] and the Network Notice provide guidance on this issue. They provide several criteria that should govern the exercise of the Commission's power of pre-emption where a case was already "allocated" to a national authority. Three cases are envisioned. First, where the procedure for allocating cases within the network has been completed, the power of pre-emption is to be exercised, in general, only where national authorities intend to adopt conflicting decisions in the same case or where a proposed decision is in clear "conflict with consistent Community interpretations". Such a conflict is to be determined by referring to principles enunciated by Community courts as well as to regulations and decisions of the Commission. Secondly, the removal power may be used where the proceedings in a particular case have been prolonged without justification. Last—but, certainly not least—it can be used where adoption of a decision by the Commission would be necessary either to provide guidance to the Community competition policy (in particular, where the relevant competition problem is being presented in various Member States) or to assure the effective application of Community competition law.

Where an NCA is already dealing with a case, this power of pre-emption can be exercised only where the Commission provides timely and sufficient information to the other members of the network regarding its intention to take the case. In particular, the Commission shall indicate in writing to the NCA concerned (and to the other NCAs) the reasons for taking the case. In practice, given the special nature of this kind of action, extensive consultation will take place with the NCA concerned before the Commission takes the case. Whenever the Commission seeks to exercise this power it will announce it to the network members, so to allow the latter to request a meeting of the appropriate Advisory Committee.[50]

The effective exercise of the Commission's authority in this area and thus its capacity to perform effectively its role as guarantor of uniform application of Community law depends on national competition authorities adhering to their obligation to inform the Commission (and the ECN) about their procedures under Art.11(3) and (4) of the Regulation (see above paragraph II.B.1). This has been the experience of the network so far. Where the Commission takes a case that has already been dealt with by an NCA (and communicated to the Commission under Art.11(4) of the Regulation), it not only overrides basic network procedures, but it can also entail potentially significant costs for the NCA involved. Accordingly, the Commission is to use this authority only in exceptional cases where some form of malfunction within the network take place or one of its participating institutions calls for the Commission to act. In fact, the principle governing the ECN network is dialogue and co-operation, as shown by the first year of practice, rather than unilateral impositions by the Commission. Noting the sensitive nature of this issue, the Council singled it out for special attention in the report on the functioning of the network that the

46 See Recital 17, Regulation 1/2003; see also Commission Network Notice, Pt 51.

47 Some commentators link the NCA's duty to apply Community competition rules (Art.3(1) Regulation) to the authority of the Commission (Art.11(6)) to withdraw cases from the network. They point out that the exercise of such a power on the part of the Commission would also prevent a national authority from proceeding to the end of its treatment of the case on the basis of national law (see, recently, C. Gauer, "Due process in the face of divergent national procedures and sanctions" IBA/European Commission Conference, Brussels on March 9–11, 2005, available on the European Commission web site).

48 Regulation 773/2004 on procedures, Art.2; see also Commission Network Notice, Pt 52.

49 See doc no.15435/02 ADD 1, Pts 21–23 (available on Council's internet site).

50 See Commission Network Notice, Pts 55–56.

Commission is required to file within five years of the inception of the system.[51]

The modernisation project envisions that the Commission will generally not interfere with decisions that NCAs have reached. In the absence of specific reasons of community public interest, the Commission has undertaken not to adopt decisions which conflict with those that have been reached by national authorities in cases where they have performed their information obligations under Art.11 of the Regulation, and the Commission has not exercised its power of preemption.[52]

51 See Art.44, Regulation 1/2003.

Finally, this power of preclusion can also be used—in a limited way—with regard to national courts, when they act as NCAs (Art.35(4) of the Regulation). It is not permitted, in contrast, in cases in which a court acts as review court of a decision of an antitrust authority (Art.35(3) of the Regulation). This "power of preemption" is also not available where courts are acting in the context of private enforcement (typically in the context of an action seeking to prohibit conduct or to recover compensation for damages suffered).

52 See Commission Network Notice, Pt 57. Also the *ne bis in idem* principle might, to some extent, limit the ability of the Commission to intervene again on the same case.