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Petros C. Mavroidis

Columbia Law School, petros.mavroidis@unine.ch

Damien J. Neven

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From the White Paper to the Proposal for a Council Regulation: How to Treat the New Kids on the Block?

*Petros C. Mavroidis and Damien J. Neven**

Abstract. This Paper analyses how the network of enforcers envisaged in the Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty (September 2000) would operate. We identify four issues. First, we observe that the Proposal (unlike the White Paper) includes safeguards to avoid a shift of competence in favour of national competition laws, which may be questionable in terms of subsidiarity. Second, we recognise that the accountability of antitrust authorities might vary across the members of the network, so that, for instance, some authorities may be more prone than others to accept industrial policy considerations. The preservation of the Commission's monopoly (among administrative units) with respect to decisions granting a *positive* application of Article 81(3) (a matter which was not fully clear in the White Paper) can be seen in this light. We suggest that the imposition of institutional constraints on Member States like accountability and independence standards could have been a more effective way of addressing the issue. Third, we observe that in the proposed framework, sequential enforcement by several authorities is likely to occur and that each Member States will have little incentive to take into account in its decision the interests of other Member States. We show that such a system of enforcement can have a '*disintegrating effect*', to the extent that it does not allow for a balance between positive and negative net benefits across Member States. The Proposal contains a number of measures which may reduce the scope of multiple enforcement, without however addressing the underlying incentive issue. We suggest that additional co-ordination between the members of the network may prove necessary. In particular, we advocate the re-emergence in the intra-EC context of a 'positive comity' obligation and we suggest that a formal procedure for co-ordination between different institutions might turn out to be necessary. Finally, we observe that if the Proposal formalises the (vertical) relationship between the Commission and the national competition authorities (beyond what was considered in the White Paper), it fails to bind the Commission discretion. We argue, in light of the US experience with multiple enforcement that such commitment would be useful.

* University of Neuchâtel and CEPR and University Of Lausanne and CEPR respectively.

Some of the material discussed in this Paper borrows heavily from on a presentation at the 5th Annual Competition Workshop at the European University Institute in Florence in June 2000. This presentation focused on the White Paper on the Modernisation of EU competition policy, whereas the current Paper considers the next iteration of this policy proposal, namely the Proposal for a Council Regulation put forward in September 2000. The authors would like to express their gratitude to Richard Baldwin, Pedro Barros, Céline Gauer, Henrik Horn af Rantzien, Emile Paulis and Michel Waelbroeck for discussions on the issues considered in this Paper and particularly to Eleanor Fox and Diane P. Wood for guiding them through some of the intricacies of US antitrust procedures. We are particularly indebted to Claus-Dieter Ehlermann for numerous insightful discussions in the course of the last year on the issue of institutional reform in EU competition policy.

1. Introduction

This Paper focuses on the de-centralisation of enforcement of European Community (EC) competition law as spelled out in the Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 (hereinafter, the Proposal).¹ This Proposal follows the EC White Paper of April 1999 on Modernisation of EC competition law (hereinafter 'the White Paper').² We will focus on the Proposal but occasionally refer to the important changes that it brought about relative to the White Paper. This will highlight some of the Commission's underlying concern with respect to decentralisation, which may have arisen out of the comments that the Commission received on its original proposal.

We identify four issues. First, we observe that the Proposal (unlike the White Paper) includes safeguards to avoid a shift of competence in favour of national competition laws, which may be questionable in terms of subsidiarity. Second, we recognise that the accountability of antitrust authorities might vary across the members of the network, so that, for instance, some authorities may be more prone than others to accept industrial policy considerations. The preservation of the Commission's monopoly (among administrative units) with respect to decisions granting a *positive* application of Article 81(3) (a matter which was not fully clear in the White Paper) can be seen in this light. We suggest that the imposition of institutional constraints on Member States like accountability and independence standards could have been a more effective way of addressing the issue. Third, we observe that in the proposed framework, sequential enforcement by several authorities is likely to occur and that each Member State will have little incentive to take into account in its decision the interests of other Member States. We show that such a system of enforcement can have a '*disintegrating effect*', to the extent that it does not allow for a balancing between positive and negative net benefits across Member States. The Proposal contains a number of measures which may reduce the scope of multiple enforcement, without however addressing the underlying incentive issue. We suggest that additional co-ordination between the members of the network may prove necessary. In particular, we advocate the re-emergence in the intra-EC context of a 'positive comity' obligation and we suggest that a formal procedure for co-ordination between different institutions (as in the US) might turn out to be necessary. Finally, we observe that if the Proposal formalises the (vertical) relationship between the Commission and the national competition authorities (beyond what was considered in the White Paper), it fails to bind the

1. See Commission of the European Communities, COM(2000) 582 final, 2000/0243 (CNS), Brussels, 27 September 2000.
2. See, European Commission, The White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, Commission Programme No. 99/027, 28 April 1999.

Commission discretion. We argue, in light of the US experience with multiple enforcement, that such commitment would be useful.

2. National versus Community Law

At the outset, it would appear that a reform to decentralise enforcement could proceed without modifying the allocation of competence between Member States and the Community. Decentralisation does not *per se* involve an issue of subsidiarity and indeed the White Paper did not refer to subsidiarity. The White Paper did not put into question the allocation of competence as laid down in Article 81 of the EC Treaty (ECT) but merely reorganised enforcement, so that some of the implementation of Article 81 would be entrusted to at least³ 16 players, rather than one.

In the Proposal, the matter is different. In our view, Article 3 of the Proposal does affect the allocation of competence between Member States and the Community, in two significant ways.

According to constant case law (see Elhermann, 2001), EC competition law is applicable to agreements (or concerted practice) which *both* 'restrict competition' and 'may affect trade between the member states'.

Article 3 of the Proposal reads as follows:

where an agreement, a decision by an association of undertakings or a concerted practice within the meaning of Article 81 of the Treaty or the abuse of a dominant position within the meaning of Article 82 may affect trade between Member States, Community competition law shall apply to the exclusion of national competition laws.

This new provision clearly affects the joint exercise of competence by EC and national laws and affirms the primacy of EU law. Arguably, it also prevents the application of national laws in situations where there may be a restriction of competition under national law but not under EU law (i.e. in situations where EU law does not apply!). We take each argument in turn.

2.1. *The exclusion of national competition laws*

The principle that EU law applies to agreements that restrict competition and affect trade between member states does not exclude the simultaneous application of EU and national laws. The Court of Justice has also ruled (see for instance the *Walt Wilhelm*⁴ decision and subsequent jurisprudence) that in case of simultaneous application, national laws should not prevent

3. In each Member State, both the antitrust agency and courts could implement Article 81 ECT.

4. See Case 14/68 *Walt Wilhelm* [1969] ECR 1.

EU law from fully deploying its effects. As made clear by the Court, the effects associated with EU law include the *negative* consequences of not preventing what is deemed an unlawful restriction of competition at the EU level (a restriction of competition which does not meet the conditions laid down in Article 81(3)⁵), but also the *foregone positive* consequences of preventing an agreement which is not unlawful according to the EU law. The Court did not clarify any further how foregone positive effects should be understood and it has been interpreted by most observers as referring to the foregone positive consequences associated with agreements which meet the conditions of Article 81(3). According to this interpretation, the principle established by the Court ensures that EU law always prevails over national law (and hence is sometimes referred to as the principle of primacy). A more narrow interpretation which excludes the foregone positive effects of agreements exempted under Article 81(3)⁶ would only imply that the most restrictive law prevails.

Article 3 clearly affirms the primacy of EU law. At the very least, this Article thus crystallises jurisprudence into law. As it has happened in other areas of EU law,⁷ a jurisprudential principle becomes a regulatory principle. Arguably, if a narrow interpretation of the Court ruling in *Walt Wilhelm* (and subsequent decisions) is adopted, this Article does also extend the primacy of EU law by preventing Member States from applying their law when it is more restrictive than EU law.

2.2. Preventing the extension of national laws

It is striking that the body of Article 3 omits any explicit reference to the term 'restriction of competition'. Hence, it would appear that the exclusion of national law applies not only to agreements which restrict competition and affect trade between Member States but also to agreements which *do not* restrict competition (according to EU law) *but still affect trade* between Member States. All agreements, which are *potentially* covered by Article 81, seem to be considered for the sake of applying the exclusion of national laws as long as they affect trade between Member States. Hence, it would appear that Article 3 prevents the application of national laws to situations where community law does *not apply* (i.e. where according to EU law there is no restriction of competition).

One can wonder about the motivation behind this new provision. One line of argument (offered by Elhermann, 2001) stems from the observation that

5. An agreement which does not restrict competition would not fall under Article 81 – and hence would not formally lead to the simultaneous implementation of Article 81 and national laws.
6. It is not clear however what the Court could have been referring to if not to the benefits of agreements exempted under Article 81(3).
7. See, for example, the impact that the *Cassis de Dijon* jurisprudence has had on what is termed the 'new approach' in the field of free movement of goods.

the notion of what is deemed a restriction of competition in the EU has become narrower over time. Hence, the scope of application of EU law has shrunk and the Commission may be concerned that the space left by the retreat of EU law could be covered by a subsequent deployment of national laws. Article 3 does radically meet such a concern.

The new approach towards vertical agreements may be a case in point. Under the new regulation, some vertical agreements⁸ are no longer deemed to restrict competition. Member States could indeed pursue and prohibit such agreements and Article 3 will prevent them from doing so.

2.3. A subsidiarity test

Hence, it appears that the Proposal (unlike the White Paper) affects the allocation of competencies between the EU and the member states in a substantial way.

One consequence of Article 3 is that national law can no longer ever trump EC law. Another consequence of Article 3 is that the condition of whether trade between the Member States is affected becomes the sole criterion for the exclusive application of Article 81 ECT. The ECJ has traditionally interpreted this term *lato sensu*. Indeed, it could not be otherwise. Article 81 ECT refers to 'trade' and not to free movement of goods or services. Hence, investment and free movement of capital as well come within the ambit of the term 'trade'. It is a quixotic test to try to imagine which cases do not affect trade among Member States. It would thus appear that the ambit of EC law with respect to national law will increase as a consequence of the Proposal and as such the proposal should be considered from the perspective of subsidiarity.

It is perhaps also revealing in this respect that the Explanatory Memorandum to the Proposal – unlike that attached to the White Paper – contains a section entitled 'Subsidiarity And Proportionality' (p. 11ff. of the proposal, *op. cit.*).

This section does not however contain a real subsidiarity test. It merely states that 'The Commission's proposal is thus fully in line with the principle enshrined in Article 5 of the Treaty, according to which action should be taken at the most efficient level'. Hence, the reference to the principle of subsidiarity is somewhat cosmetic.

So, without embarking on a full fledged discussion of the optimal level of intervention with respect to the term 'restriction of competition' – that is, without altering the existing distribution of competence between domestic and EC antitrust laws – Article 3 still prevents national laws from extending to the territory left uncharted from the retreat of EC law, as a result of the new interpretation of the term 'restriction of competition' at the EU level.

8. And too few, to our taste ...

3. A partial delegation

There are two significant limits to the sharing of enforcement with National Competition Authorities (NCAs) envisaged by the Proposal. First, it appears that, unlike the Commission and the Courts, the NCAs cannot take decisions which clear an agreement because the conditions of Article 81(3) are fulfilled. They can only take decisions where the conditions of Article 81(3) are not fulfilled. Second, it appears that unlike those adopted by the Commission, decisions adopted by an NCA only bind the authority adopting the decision.

3.1. *Half of 81(3)*

... *for the NCAs*. Article 5 of the Proposal reads:

‘The competition authorities of the Member States shall have the power in individual cases to apply the prohibition in Article 81(1) of the Treaty *where the conditions of Article 81(3) are not fulfilled*, and the prohibition in Article 82’ (emphasis added).

On the other hand, Article 10 of the Proposal reads:

‘For reasons of the Community public interest, the Commission, acting on its own initiative, may by *decision* find that ... Article 81 of the Treaty is not applicable ... *because the conditions of Article 81(3) are satisfied*’ (emphasis added).

The combination of the two Articles leads to the inescapable conclusion that NCAs can only take decisions on the whole of Article 81 (that is paras. 1 and 3) in cases where the conditions laid down in Article 81.3 are not fulfilled. Conversely, they cannot take a decision which does not prohibit an agreement because the conditions laid down in Article 81.3 are fulfilled in a particular case.⁹ The Commission retains monopoly (among administrative units) over such decisions.

... *but not for the Courts*. Article 6 of the Proposal states that: ‘National courts before which the prohibition in Article 81(1) of the Treaty is invoked shall also have jurisdiction to apply Article 81(3)’.

There is an obvious discrepancy between the wording of Article 6 and that of Article 5 of the Proposal: the former does not limit the review-power of national courts to ‘negative’ review only, in the way Article 5 does with respect to NCAs. Consequently, national courts should have jurisdiction

9. All what the NCAs can do if they conclude that the conditions of Article 81(3) are fulfilled is to close proceedings.

to apply Article 81.3 in a positive manner as well, that is, they should be empowered to take decisions which exempt an agreement from antitrust persecution any time the requirements laid down in Article 81.3 are fulfilled.

This understanding of Article 6 of the Proposal is further supported by the Explanatory Memorandum of the Commission. There (p. 17 of the Proposal) the Commission explains that 'if a national court finds that the conditions of Article 81(3) are satisfied it must – in the absence of other objections – hold that the agreement is valid with effect *ab initio*. It must then enforce the agreement and reject any claims for damages based on an alleged violation of Article 81'.

3.2. Effects of the decisions taken by the NCAs

Although the text of Article 5 is silent on the effects of the decisions taken by the NCAs, in its explanation of the Proposal (p. 17), the Commission unambiguously states that: 'such decisions bind only the authority adopting the decision'.

Hence, the approach of the White Paper has been confirmed and decisions by NCAs are deprived of any legal effects beyond national boundaries. This approach is somewhat paradoxical: a transaction which by definition affects trade among Member States (since otherwise, EC law does not come into play at all) will be submitted to one NCA knowing *ex ante*, that no matter what the decision is, it is binding only within a part of the common market.

The limited legal standing of the decisions taken by the NCA will also affect the scope for conflict and the consequences of multiple enforcement. As pointed out by Nehl (1999), it can lead to a series of perverse incentives: not to submit to NCAs if EC-wide protection is sought; outlaw an otherwise valid transaction only within the four corners of a particular sovereignty. It can also add to confusion and raise transaction costs to the extent that fifteen different outcomes are conceivable in a particular case.¹⁰ These issues will be discussed in section 4.

3.3. Political economy of enforcement

The significant limitation of the responsibilities entrusted to the NCAs and the curtailment of their legal effects are intriguing. Everything happens as if the Commission did not want to trust the NCAs in the evaluation of efficiency benefits that might justify a restrictive agreement. One possible interpretation of this attitude is that the Commission is concerned that NCAs (but not the Courts) might be unduly influenced by outside parties

10. Ehlermann (2000), Nehl (1999) and Siragusa (1999) have identified some of the consequences mentioned here.

and in particular might be led to include industrial policy considerations in the evaluation of Article 81(3).

Indeed, it has long been recognised that institutions should not be seen as benevolent and omniscient agents following the mandate that has been assigned to them. Civil servants will take decisions in terms of their own objectives (which may include the objective assigned by the law but also others like career motives) and third parties will naturally seek to exert influence on the decision. The extent to which civil servants will actually deviate from pursuing the objectives that have been assigned to them, which is usually referred to as capture, will also depend on the institutional framework. For instance, greater accountability should in general reduce the extent of capture. Other features like independence will involve more delicate trade-offs (see for instance Neven *et al.*, 1992 for a discussion).

In turn, greater accountability will be easier to achieve if the mandate given to the civil servants is precisely codified. The implementation of rules can indeed be verified *ex post* relatively easily. By contrast, the implementation of general principles which allow for wide discretion is harder to monitor.

Competition statutes in general, and Article 81 ECT in particular, are formulated in very general terms and leave a lot of discretion to the agency in charge of implementing it. As a result, accountability is difficult to achieve in the area of competition and it will be difficult to monitor effectively the operation of several agencies.

The Commission seems to operate under two striking presumptions: first, the presumption that the accountability of NCAs is weaker than its own accountability and second that outside influence will operate in favour of industrial policy and not in favour of overzealous enforcement. Such presumptions are debatable. Consider the presumption that the accountability of NCAs is weaker than the accountability of the Commission. Indeed, the classic theory of federalism suggests the opposite; namely that accountability is greater at local levels of governments. Yet, there are some reasons to think that this wisdom may not apply in the case at hand. First, the accountability in front of the judicial system might be weaker at the local level. On the one hand, Commission decisions can be appealed at the ECJ, a court with experience in antitrust issues, the decisions of which have an EC wide effect. On the other hand, decisions by NCAs, which are binding to the authority adopting the decision, will be, if at all, scrutinised by national courts, which do not necessarily have much experience in antitrust.

Second, accountability might be subject to substantial increasing returns. For instance, the control which is undertaken by the press or by the academic community involves substantial fixed costs. Some countries may be too small to ensure the emergence of such mechanisms of accountability.

Finally, it is worth noting that curtailing the effects of the decisions taken by NCAs will if anything reduce their accountability. Indeed, decisions which

have EC wide effect are more likely to attract attention of the antitrust community throughout the EC. With the limitation of effects considered in the Proposal, national civil servants will be more sheltered from EC-wide scrutiny.

Overall, it is thus not clear whether the implicit presumption of the Proposal that the Commission is more accountable than NCAs and hence less likely to be led to take industrial policy into account, is warranted. Similarly, it is not clear why the risk of excessive industrial policy influence is always greater than the risk of overzealous enforcement. In our view, it is not clear that any form of presumption in this matter can be seriously supported.¹¹ In this context, it might have been more appropriate to take the problem at the source and impose institutional constraints on all institutions concerned (including the Commission).¹² These may take the form, for instance, of accountability standards (like common publication requirements). But harmonised accountability standards may not suffice because, as discussed above, only limited accountability (*ex post*) can be achieved in an area like competition. Hence, it would seem necessary to impose standards *ex ante* on particular features of the national institutions (for instance with respect to the status of civil servants or the nomination of competition commissioners).

4. Multiple enforcement among the National Competition Agencies

A central aspect in the organisation of the network of enforcers envisaged in the Proposal is the co-ordination between NCAs, the so-called horizontal dimension of the network. In what follows, we will argue that in the framework of the Proposal Member States are not seriously constrained in asserting their enforcement rights and that sequential multiple enforcement can be widely expected. We will further argue that such multiple enforcement can have a 'disintegrating effect'.

11. It is also intriguing from this perspective that the Commission would seem to have more confidence regarding the independence of the Courts. In our view, the Commission's approach could be supported by the observation that national Courts are more accountable towards EU jurisdictions than NCAs. This issue is further discussed below in the context of the vertical organisation of the network.
12. Institutional constraints on Member States are not unheard of. For instance, standards of independence are already considered in the new framework for the regulation of telecoms (*see Com (1999) 539*). Admittedly however, institutional constraints imposed on NCAs would also operate with respect to the enforcement of national laws (to the extent that NCAs implement both national and EU competition law). This does not arise in the case of telecoms.

4.1. Multiple sequential enforcement

As long as the Community is the sole enforcer, the evaluation of whether trade among Member States is affected is purely a Community-wide issue. For the purpose of exercising jurisdiction, the question of which EC countries are involved in the intra-community trade is simply irrelevant.

However, when national enforcers are involved, the issue is more intricate. Indeed, some countries may be unaffected (in terms of trade) and the question arises of whether they should still be allowed to exercise jurisdiction. For example, could the Belgian NCA assert competence over an agreement between an Italian and a Greek undertaking which only affects trade between those countries? In our view, the answer to this question must be positive.¹³

The Belgian NCA should not be asked to establish some 'minimum contacts' other than having satisfied the 'may affect trade between member states'-requirement. The reason is simply that the Proposal does not alter the mechanism that triggers jurisdiction (with respect to trade contacts).

Instances of multiple claims to jurisdiction are easy to illustrate. Imagine a case where country A and country B assert jurisdiction over the same practice or decide jointly not to intervene. Consider further the example of an alleged horizontal agreement between Greek and Italian carriers operating in the sea transport sector between Greece and Italy.¹⁴ Independently of whether the Greek and Italian authorities intervene or not, Belgium could claim jurisdiction, because Belgian tourists were charged monopoly prices by the Greek and Italian undertakings at hand. In such a scenario, one could *à la limite* imagine that the Belgian NCA at hand has implicitly established some minimum contacts since the 'effects' of the horizontal agreement between Italians and Greeks are felt within Belgium (when consumers pay higher prices).¹⁵

Hence, several countries could have claims to enforcement. Article 13 of the Proposal still puts constraints on the exercise of these claims. Although drafted along different lines, Article 13 could be viewed as distinguishing between simultaneous and sequential enforcement. By 'simultaneous', we understand cases where an NCA is requested to rule on a case that is pending before another NCA. By 'sequential', we understand cases where one NCA has already ruled on an issue and another NCA is subsequently requested to rule on the same issue.

Article 13.1 deals with simultaneous enforcement: in that case, the NCA requested to rule on a dispute pending before another NCA will have to either

13. Mestmäcker (2000, p. 443) concurring.

14. Any resemblance to actual cases is completely unintentional.

15. As discussed below, the Belgian NCA could be requested to intervene even in the absence of any effect within Belgium.

suspend proceedings awaiting the first NCA's decision or reject the complaint altogether. The Commentary to the Proposal makes it clear (p. 21) that national laws arguing for the opposite result are superseded.

If the NCA at hand decides to suspend proceedings, nothing in the Proposal however prevents it from re-opening the file once the first NCA has delivered its decision. Article 13.2 makes it plain that

‘where the competition authority of a Member State or the Commission has received a complaint against an agreement, decision of an association or practice which has already been dealt with by another competition authority, it *may* reject it’ (emphasis added).

This is a rather weak constraint but, indeed, it could hardly be otherwise: since the decisions by NCAs are not binding for others, other NCAs can reach (different) decisions enforceable in their own sovereignty.

Hence, it appears that multiple sequential enforcement is a feasible scenario. Private parties will also have an incentive to take full advantage of the opportunities offered by multiple enforcement. As a result, it can be expected to occur more than occasionally. In what follows, we analyse the consequences of such system of enforcement.

4.2. The consequences of multiple sequential enforcement

To the extent that national authorities are accountable to national constituencies, it is natural to assume that they will only consider the interest of those constituencies.¹⁶ In other words, national authorities cannot be expected to take into account, in the evaluation of the cases that they handle, the effects that are taking place outside their territory.¹⁷ Each country will thus consider both the competitive effects and the potential efficiency benefits that accrue within their own territory.

Since, as discussed above, a number of countries can be expected to assert their enforcement rights sequentially, a likely outcome is one where a number of countries will sequentially assess the competitive effects and the efficiency

16. The argument could be advanced that it is anyway (that is, even absent legal compulsion) in the interest of NCAs, since they are in some sort of repeated interaction with each other, to ‘internalise’ foreign interests in their decisions. Practice does offer however examples where co-operation breaks down. *Boeing/McDonnell Douglas* may be a case in point, where the EC moved in to assert jurisdiction without paying much attention to the stated wish of its partner to exclusively decide the case. When stakes are high, the incentive to deviate may be hard to resist.

17. The Proposal, following the White Paper in this respect, envisages the adoption of a wide information sharing scheme (Article 12). This would certainly help to reduce unintended inconsistencies in NCAs’ decisions but it certainly does not address the underlying issue of divergent incentives.

benefits that accrue within their own territory and adopt rulings which only bind themselves. One can then wonder whether such an outcome would significantly differ from that obtained if there was a single enforcer at the EU level.

For the sake of the argument, assume that each country can impose remedies which meet its own concern *without* affecting the agreement under review in other countries (in terms of competition or efficiency benefits). In such a hypothetical world, the deal under review is effectively 'separable' across countries and it is not clear that a single enforcer would achieve an outcome which is fundamentally different from that arising from simultaneous enforcement across countries.¹⁸ A single enforcer would indeed consider each country separately and would impose appropriate remedies in each country.

When remedies in one country affect other countries, the matter is altogether different. For instance, assume that a particular agreement only makes business sense if it can be implemented in all countries. In such a case, there is indeed a potential external effect across countries because a negative decision in one country will effectively prevent the deal from being implemented in other countries where the deal might possibly bring positive net benefits (i.e. where efficiency benefits dominate potential anti-competitive effects). The outcome of multiple enforcement might then differ significantly from that arising from a single EC wide enforcer. Consider for instance a deal which brings positive net benefits at the EC level but such that the balance between anti-competitive effects and efficiency is unfavourable in one country. An EC-wide enforcer would, in all likelihood (that is, observing the Community Interest Clause), allow (or fail to sanction) the deal. By contrast, under multiple enforcement, the deal will be banned (or sanctioned) by the country which suffers. Hence, whereas an EC-wide single enforcement allows for balancing between positive and negative net benefits across countries, multiple enforcement does not. In general, multiple enforcement also imposes more numerous constraints than single EC-wide enforcement (net benefits have to be positive in 15 subsets of the EC and not only at the level of the EC as a whole). As a consequence, multiple enforcement should be expected to lead to more prohibition (or sanctions) than EC-wide single enforcement. It will also be biased against deals which have an EC-wide scope but have uneven consequences across the EC. From that perspective, simultaneous multiple enforcement will thus have a '*disintegrating effect*' relative to the current situation.

So far, we have assumed that the choice of enforcers was dictated by the

18. In the absence of efficiency benefits, the scope for conflicts would also be reduced. Indeed, when the relevant antitrust market extends to a few countries, multiple enforcement by any subset of the countries concerned will yield the same outcome as single enforcement by a central authority (see Neven and Röller, 2000).

location of the parties concerned. It is worth noting however that in the presence of regulatory asymmetries the choice of enforcers might be strategic and the constraint of sequential enforcement introduces a strong incentive both for private parties and NCAs to be first in handling a case. The strategic element in the choice of enforcers is sometimes referred to as 'forum shopping', an issue which has been raised but not fully explored in the literature so far.¹⁹ As discussed above, regulatory asymmetries will remain in terms of institutional framework. They will also persist in terms of procedures. Differences in terms of institutions and procedures can then be exploited by the parties concerned and this should in principle lead to a very strict enforcement.

To illustrate, consider the example of ferry operators discussed above. We indicated that Belgium could claim jurisdiction if a Belgian tourist was involved. Arguably, Belgium however could still exercise jurisdiction even if no Belgian tourist ever travelled with one of the ferries participating in the agreement. The Belgian NCA could be requested to review the agreement by, for example, German tourists who know that the Belgian NCA is quite tough when it comes to confronting horizontal agreements and expect it to give Italians and Greeks maximum punishment. As the Proposal mentions on p. 12, 'the present proposal is based on the premise that national competition authorities will apply Articles 81 and 82 in accordance with their respective national procedural rules. It is not necessary for the implementation of the reform to embark on a full-scale harmonisation of national procedural laws'.

In such a context of regulatory asymmetry with respect to procedure, it is only to be expected that in case maximum punishment is sought, a case will be submitted to the NCA which operates within a national legal regime providing for the strictest remedies. Although the Proposal (p. 16) mentions that general principles of law would suggest that sanctions should ensure effective enforcement, practice reveals important asymmetries among national laws as to what constitutes the optimal response to antitrust violations. In short, the general principle of law reflected in the Proposal should not be understood as resembling to *de facto* harmonisation of domestic laws with respect to sanctions against antitrust violations.

4.3. A conclusion on horizontal co-operation

The White Paper was rather silent on the issue of horizontal co-operation. As discussed above, the Proposal has reduced the extent of multiple enforcement by preventing simultaneous multiple enforcement and only allowing sequential multiple enforcement. This constraint is certainly significant and

19. Compare Ehlermann (2000) and Siragusa (1999).

the Proposal is an improvement over the White Paper in this respect. Whether this constraint will suffice is unclear.

Of course, in case of horizontal conflict, the Commission (Article 11.6 of the Proposal) could still exercise its role as umpire and take over the case at hand. This is part of the vertical relationship between the Commission and the NCAs which is discussed in the next section.

One can briefly wonder whether other provisions of the EC legal order do not impose a form of co-ordination between NCAs. The obvious candidate is Article 10 ECT which imposes a double obligation on Member States: a positive obligation, that is to ensure fulfilment of the obligations arising out of the Treaty and a negative one, that is to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty. Lenaerts and Van Nuffel (1999, at p. 419) have appropriately dubbed the duty to co-operate as the 'federal good faith'.

It is well established that the duty to co-operate contains both a vertical (Member State to Community) as well as a horizontal (Member State to Member State) angle. Absent cases where a Member State fails to comply with specific EC obligations, the duty to co-operate has been interpreted as an obligation imposed on Member States 'to take all appropriate measures to guarantee the full scope of Community law' (Lenaerts and Van Nuffel, 1999 at p. 421).

This means that Member States (NCAs for the purposes of the present paper) must not only co-operate with EC institutions responsible for implementing EC law²⁰ (NCA to DG Competition), but also with institutions of other Member States²¹ (NCA to NCA). How far can we construe this obligation to extend?

We should keep in mind that normally Article 10 ECT is invoked as an auxiliary basis to any given claim. By itself, it is thus a rather weak basis to carry a claim. That is, Article 10 ECT offers a good argument when the violation of another specific obligation is alleged. But there is no such other alleged violation in the context of our discussion. More specifically, there is no obligation at all that calls for a Member State to desist when another Member State has decided to exercise jurisdiction. It seems fair to conclude that with respect to the horizontal angle of the duty to co-operate we should not expect too much when applied in the context of de-centralised antitrust enforcement.

20. See ECJ 217/88 *Commission v. Germany* [1990] ECR I-2879 at §33 p. I-2907.

21. See for example, ECJ 165/91 *Van Munster* [1994] ECR I-4661 at §32 p. I-4697.

5. Vertical Co-operation

Relative to the White Paper, Articles 11 and 12 of the Proposal establish an elaborate system of co-operation between the Commission and the NCAs. The essential features of this co-operation are as follows:

- (a) the Commission and NCAs can exchange any information even of confidential nature for pending before them cases where EC competition law is applied, and no national law can impede such exchange (Article 12 of the Proposal);
- (b) whenever the Commission initiates proceedings and moves on to apply Articles 81 and/or 82 ECT, NCAs are relieved with respect to the said case (Article 11.6 of the Proposal); this provision in fact reflects the provision of Article 9.3 of Reg. 17/62. According to Article 9.3 of Reg. 17/62

‘As long as the Commission has not initiated any procedure under Articles 2, 3 or 6, the authorities of the Member States shall remain competent to apply Article 85(1) and Article 86 in accordance with Article 88 of the Treaty’.

The White Paper suggested that, based on this provision, the Commission can, in case of a final decision by a national institution and subject to *res judicata*, prohibit an agreement allowed by national courts (or NCAs); moreover, in case of a non-final decision by a national authority, the Commission can intervene and propose its own preferred solution (the White Paper pp. 35–36). The Proposal does not replicate this comment, so that it is unclear whether the Commission will have the right to prohibit an agreement which has been allowed by a national institution.

- (c) NCAs will inform the Commission whenever they *motu proprio* or upon request move to apply Articles 81 and/or 82 ECT (Article 11.3 of the Proposal);
- (d) NCAs will inform the Commission of any decision they are about to adopt no later than one month before they adopt their decision (Article 11.4 of the Proposal); and, finally;
- (e) to avoid that the ‘vertical’ axis of co-operation looks like a one way street (but of course, also in an effort to inform NCAs), the Commission will transmit ‘the most important documents’ it has selected while adopting its decisions under Articles 81 and 82 ECT (Article 11.2 of the Proposal).
- (f) finally, Article 10 ECT (see above) has an impact on the vertical relation as well. It is by now settled case law that once the Commission has initiated procedures, and *a fortiori* when it has adopted a final decision,

national courts are bound to avoid conflicting decisions if necessary by suspending proceedings before them.²² As the White Paper notes (p. 35) the same principle could *mutatis mutandis* apply to NCAs as well. The duty to co-operate could serve as an argument for such an endeavour.

The Proposal thus formalises the relation between NCAs and the Commission and creates the conditions for the Commission to play an important role as first among equals. The formalisation of this relationship is clearly welcome, relative to what was considered in the White Paper. In particular, the requirement for NCAs to inform the Commission of all decisions they are about to take could prove useful.²³ Does this mean that based on such information the Commission will intervene in case, for example, it feels that an NCA is about to adopt a wrong decision?

One can only speculate in this context. The Proposal is silent here and if at all the Commentary gives the opposite impression: it talks of a 'consultation obligation' (p. 21 of the Proposal).

What is still striking about this vertical co-ordination is the absence of clear criteria for the intervention of the Commission. It is not clear when the Commission will consider a case before an NCA is involved, when it will take over a case from an NCA before it is decided and it will consider a case after it has been decided by an NCA (if at all). The Commission has thus not bound its discretion.

This stands in stark contrast with the US approach where the Supreme Court has indicated under what circumstances it is likely to intervene (see next section). The main drawback of unlimited discretion is that private parties are likely to prefer the security of a Commission decision. Ultimately, this could defeat the whole purpose of the Proposal in terms of decentralisation. For decentralisation to succeed, guidance on the role of the umpire seems necessary. In other words, the institutional credibility of the NCAs largely depends on the extent to which they follow the Commission's legacy and firms' anticipation of this will be greatly enhanced by guidelines on the circumstances where the Commission would intervene.

There is another dimension of the vertical relationship which differentiates NCAs from national courts. The mechanism laid down in Article 234 (ex-177) ECT indeed provides an avenue for questions relating to the interpretation of EC law which are before a national court to be transferred to the EC adjudicating instances. There is thus high probability that when national Courts are concerned, EU instance will be also involved (either because the case will reach the appeal stage where there is an obligation to

22. See C-234/89 *Sergios Delimitis v. Henninger Bräu AG* [1991] ECR I-935. See also the above cited *Masterfoods Ltd.* case law which reinforces *Delimitis*.

23. Even though the one month deadline considered by the Proposal appears to be rather short.

submit to the EC courts or because voluntarily the national court of first instance will submit such cases anyway to Luxembourg). There is no comparable mechanism to enlist the cooperation of EU instances or indeed to regulate the transfer of cases to the EU level with respect to NCAs.

In our view, the fact that national Courts, unlike the NCAs, can take decisions which conclude that the conditions of Article 81.3 are fulfilled should be seen in this light. The Commission is less concerned about such devolution when it comes to the Court because it has some guarantee that difficult cases involving Article 81(3) will in any event end up in EU courts.²⁴

6. Internal US Trade; The 50+1 Laboratory²⁵

Parallels with US experience are sometimes striking and sometimes less so. In what follows, we do not recommend an institutional transplant but still suggest that some US experience is quite relevant for the present discussion and should not be lightly overlooked. In the United States, multiple enforcement occurs notably across different circuits of the Federal Courts.²⁶

To illustrate the US approach, we will focus on a simulation whereby two federal courts are called to judge first on the same issue and then on a comparable issue.²⁷

Imagine that an undertaking sues another undertaking before two Federal Courts. Both suits can proceed simultaneously. One of the parties though can ask to transfer the case [using 28 USC 1404(a) or 1406(a)]. In such a case the two suits will be consolidated. If no such request is tabled, the possibility still exists for a party to request from the Court to stay proceedings until the other suit was resolved. In such case, it is up to the Court to decide whether it will act accordingly or not. If nothing from the above occurs, when judgement occurs in one of the two suits it will have force of *res judicata*

24. Of course, there is always a possibility that a national court of first instance takes a decision which is not appealed. In such a case, enforcement of the said decision in a country other than the country of origin of the national court at hand will take place following the procedures of the 1968 *Brussels Convention*. Apparently, this is not a serious risk in the eyes of the Commission (and probably, justifiably so because few cases remain un-appealed and most likely many national judges would like to avoid a 'hot' case like a 'positive' application of Article 81.3 where they are asked to play the role of national administration).

25. This term was first used by Justice Brandeis in *New State Ice Co. v. Liebermann*, 285 US 262,311 (1932).

26. Our discussion here does not focus on State law in the same way that the White Paper is not concerned about national competition law. As in the EC architecture, there are State Agencies and a Federal Agency. No formal links are established between the two and co-operation is on a voluntary basis. Notwithstanding this though, some rather spectacular outcomes are the result of such co-operation, the *Microsoft* litigation being probably the best illustration of the sort.

27. This part of the paper is largely based on discussions with Eleanor Fox and Diane P. Wood.

and the winning party on proper motion can dismiss the second suit. This is so essentially because judgements govern the actions of the parties in general not where they are acting. At least for Federal Courts there is nothing that limits the force of say a 7th Circuit judgement to the 7th Circuit. As mentioned above, the working hypothesis of the Proposal stands in contrast with this approach.

A similar result can stem from a case where multiple plaintiffs sue the same defendant before various circuits. The Judicial Panel of Multi-district Litigation (composed of federal judges, see 28 USC 1407) can order that the cases be all considered in one district for pre-trial proceedings. When litigation reaches the trial stage, it can be transferred back to various districts. There is a complicated doctrine, called *non-mutual offensive issue preclusion*, under which it is possible that particular facts found in one case against one party can be taken as established in a later case against the same party.

Now if comparable cases reach various districts, there is absolutely no guarantee that they will all end up with the same result. In fact, Federal Circuits often disagree on issues of law. Perhaps the most famous and long-standing conflict was between the 9th Circuit (alone) and everyone else on the question whether market power had to be shown in a Sherman Act Section 2 attempt to monopolise case. The Supreme Court finally granted *certiorari* and resolved it in *Spectrum Sports v. McQuillan*, 506 US 447 (answer – yes).

Rule 10 of the US Supreme Court addresses the subject of ‘considerations governing review of certiorari’ and provides a source of inspiration for the future EC Regulation in this respect. It reads as follows:

‘... Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following although neither controlling nor fully measuring the Court’s discretion, indicate the character of the reasons the Court considers:

- (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court’s supervisory power;
- (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
- (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should

not be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of *certiorari* is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.’

What are the lessons to be drawn from this parallel? First, multiple enforcement occurs in the US. Arguably, it encourages innovation in interpretation of US antitrust law and this feature is much valued in US practice.²⁸ Second, there are a number of procedural devices designed to encourage co-ordination between parallel enforcers. And third, there is a final umpire who plays the important role of providing future guidance on the basis of diverse and arguably enriched experience.

One should however be careful in drawing lessons for the European context. The main difference between the US and the EC lies with incentives. Whereas different circuits in the US do not have obvious incentives to concentrate on effects taking place within the territory of their jurisdiction, the same is not true for European NCAs which respond to domestic constituencies. The US institutional framework also differs from that found in the EC to the extent that the Commission is not the ultimate umpire as Commission’s decisions can be appealed before the ECJ.

7. Conclusion

The Proposal as it now stands, is definitely one step forward relative to the White Paper when it comes to providing a framework within which co-operation will occur. There is now a series of concrete legal obligations that define the form of co-operation as well as the overall applicability of EC competition law. The Proposal also grants important prerogatives to the Commission.

In our view, there are still three areas of concern. First, the absence of clear criteria for intervention by the Commission towards NCAs might reduce the extent to which decentralisation effectively takes place. In our view, the US experience also certainly suggests that the role of a central authority is as much to distil diversity as to co-ordinate enforcement. Hence, the focus of the Proposal must shift: instead of focusing solely on co-ordination of enforcement and *ex ante* instruments like information sharing, the Commission should pay more attention to *ex post* instruments designed to ensure that gains from innovation are properly realised.

28. As Burns (2000) notes, gains from innovation are particularly beneficial in an area like antitrust where economic analysis is not always beyond doubt.

The Commission's decisions are of course subject to judicial review by the ECJ. Hence, one could wonder whether the co-ordination *ex post* should not be left directly to the ECJ. Rapid action however will most likely be needed for the umpire to assume the entrusted responsibility. For this reason (along with the undisputed competence that the Commission now commands on antitrust issues) the Commission should probably play this role. And this solution does not at all set aside the ECJ since eventually some of the Commission's decisions will be submitted to its review by dissatisfied parties.

The Commission could thus provide a procedural vehicle which will function as the counterpart to Article 177 ECT: based on *ex ante* agreed criteria (inspired by the experience of the US Supreme Court), the Commission will move in to consider cases where incentives of NCAs are grossly inadequate or will provide 'corrective' action when deemed necessary.

Second, the concerns that the Commission might have had about independent enforcement could be better addressed. Preventing the NCAs from taking decisions which establish that the conditions of Article 81(3) are fulfilled, is a drastic measure which might also jeopardise effective decentralisation. It will also lead to a bias in enforcement in favour of false negative (overzealous enforcement) and against false negative (agreements allowed for industrial policy reasons). It is not clear that such a bias is welcome and it certainly runs against the usual wisdom that false negative may matter more than false positives for the development of competition. In our view, it would have been much more effective to address the concern at source and impose institutional constraints on all the authorities involved in the enforcement.

Third, the extent of multiple enforcement by NCAs that will occur might remain significant. The Proposal imposes a constraint on multiple enforcement and one might regret that it does not attack the problem at its root, namely the divergent incentives across NCAs. Positive comity obligations on NCAs are a natural instrument to align incentives and we would certainly advocate their consideration. Positive comity obligations might however prove insufficient to avoid the negative consequences of multiple enforcement. With some experience, the need for either a central co-ordination or a formal rule to allocate jurisdiction might become apparent.

Bibliographical References

- Burns, Jean Wegman. 2000. *Embracing Both Faces of Antitrust Federalism: Parker and Arc America Corp.*, Antitrust Law Journal, 68: 29–44.
- Ehlermann, Claus-Dieter. 2000. *The Modernisation of EC Antitrust Policy – A Legal and Cultural Revolution*. mimeo.
- Ehlermann, Claus-Dieter. 2001. *Kommentar für Wirtschaft und Wettbewerb.*, mimeo.
- Forrester, Ian. 1999. *Modernization of EC Competition Law*. Fordham Corporate Law Institute.

From the White Paper to the Proposal for a Council Regulation

- Kon, Stephen. 1999. *The Commission's White Paper on Modernization: The Need for Procedural Harmonization*. Fordham Corporate Law Institute.
- Lenaerts, Koen and Piet van Nuffel. 1999. *Constitutional Law of the European Union*. Sweet and Maxwell: London.
- Mestmäcker, Ernst-Joachim. 2000. The EC Commission's Modernization Of Competition Policy: A challenge To The Community's Constitutional Order, *European Business Organization Law Review*, 1: 401-444.
- Mohr Mersing, Erik. 1999. *The Modernization of EC Competition Law – The Need for a Common Competition Culture*. Fordham Corporate Law Institute.
- Nehl, H.P. 1999. *Change in Legislation: Constitutional Reform and the Role of the Administrator*. Mimeo.
- Neven, D., Nuttal, R. and Seabright, P. 1992. *Merger in Daylight; the Economics and Politics of EC Merger Control*, CEPR, London.
- Siragusa, Mario. 1999. *A Critical Review of the White Paper on the Reform of the EC Competition Law Enforcement Rules*. Fordham Corporate Law Institute.
- Wesslering, R. 1997. 'The Commission Notices on Decentralization of EC Antitrust Law: In for a Penny, not for a Pound.' *E.C.L.R.*, 18: 94-97.