

Obviously, such additional analysis consumes additional resources.<sup>58</sup>

Taking together the figures for the European Commission and the national competition authorities, however, there can be no doubt that Regulation 1/2003 has led to a spectacular increase in the enforcement of Articles 101 and 102 TFEU,<sup>59</sup> and that Regulation 1/2003 has thus been a great success. ■

58 See also Voigt, "More Economic" Does Not Necessarily Mean "Better" – Perils and Pitfalls of the "More Economic Approach" as Recommended by the European Commission, in Schmidtchen/Albert/Voigt (eds), *The More Economic Approach to European Competition Law – Conferences on New Political Economy 24* (Mohr Siebeck 2007), 97 at 99; *Idot*, Modern industrial economics revisited – comments on Daniel Rubinfeld, Michele Polo and Oliver Budzinski, in Drexler/Kerber/Podszun

(eds), *Competition Policy and the Economic Approach – Foundations and Limitations* (Edward Elgar 2011), 139 at 141-142; Drexler, On the (a)political character of the economic approach to competition law, in Drexler/Kerber/Podszun (eds), as just above, 312 at 322; Zimmer, Law and Economics im Recht der Wettbewerbsbeschränkungen, in Studienvereinigung Kartellrecht, *Kartellrecht in Theorie und Praxis – Festschrift für Cornelis Canenbley zum 70. Geburtstag* (Beck 2012), 525 at 533; Ortiz Blanco/Lamadrid de Pablo, Expert Economic Evidence and Effects-Based Assessments in Competition Law Cases, in Merola/Derenne (eds), *The Role of the Court of Justice of the European Union in Competition Law Cases* (Bruylant 2012), 305; Steenbergen, Has Competition Analysis Become Too Sophisticated for Its Own Good?, 19th St. Gallen International Competition Law Forum (7-8 June 2012), accessible at <http://papers.ssrn.com/abstract=2179905>; and Bishop, Snake-Oil with Mathematics is Still Snake-Oil: Why Recent Trends in the Application of So-Called "Sophisticated" Economics is Hindering Good Competition Policy Enforcement (2013), 9 *European Competition Journal*, 67.

59 See (text accompanying) note 22 above.

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## How does Regulation 1/2003 give effect to the principles set out in Art. 101, 102 TFEU?

### I. Landmarks?

The Commission in a stock taking report after five years of Regulation 1/2003 sees a landmark change in the way competition rules are enforced and a keystone in the modernization of competition policy. Landmark and keystone are both related to the more economic approach that is to govern interpretation and administration of competition rules.<sup>1</sup> Economists, familiar with American Antitrust policy, see the true beginning of a rational policy and a late recognition of the Chicago teachings. Rationality means that purpose and effect, efficiency and the allocation of resources are to be determined by a general or consumer welfare test. The influential report by the EAGCP on "An Economic Approach to Article 82"<sup>2</sup> summarizes some of the more engrained economic assumptions: That economics focuses on consumer interests, protect competition and not competitors, and on the effects and not on the legal form of business practices. The legal implication is as radical as it is revealing: "In terms of procedure there is no need to establish a preliminary and separate assessment of dominance." You notice that Art. 102 TFEU is criticized as dealing with procedure, that we do not need market structures to find anticompetitive conduct and effects of dominance. We miss, however, the legal functions of competition rules if we do not realise that they deal with procedure and the economic substance of competition. The substance of competition law evaporates if it is looked upon as an organisation of procedure or "straight jacket" for business. The task is to understand the economics of competition, in order to identify the legal substance and purpose of competition rules.

Legal rules in general, and competition rules in particular aim at a resolution of conflicts that is compatible with, and contributes to, effects which justify their interference with individual liberty. The interpretation of competition rules is informed by the interference with and limitation of individual rights exercised in competition. Purpose and limitations follow from the means prohibited and the sanctions imposed. Competition rules specify anticompetitive conduct as well as remedies and sanctions to bring an infringement to an end, and to prevent its recurrence. Outside the specific offence,

former members of a cartel or a dominant undertaking found guilty of abuse are not prevented from simultaneous or future participation in competition; it is this interaction of freedom to compete with the prohibition of anti-competitive practices that make competition rules compatible with a system of undistorted competition and, last but not least, with fundamental rights applicable to their administration.

There are important endorsements of such an approach in the jurisprudence of the Court of Justice. I refer to the application of competition rules, of Art. 101 TFEU as well as Art. 102 TFEU, to conduct that is, as a matter of law and economics, incompatible with "competition as such", and the "competitive structure of markets."<sup>3</sup> Contrary to a facile criticism, competition as such is not circular reasoning. The elimination of the uncertainties of plans, initiatives or strategies of competitors is the essence of a restriction of competition within the meaning of Art. 101 (1) TFEU. The relevance of this insight is not limited to market information systems. The recognition that conditions of competition depend upon and reflect the interdependence of competitors explains why

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1 Report on the functioning of regulation 1/2003, Brussels 29.04.2009 COM (2009, 206 final).

2 July 2005.

3 I quote from the leading case ECJ 6 October 2009, C-501/06 P et al., ECR 2009 I 9291 rec. 63 – *GlaxoSmithKline, Services v. Commission*: "First of all, there is nothing in that provision to indicate that only those agreements which deprive consumers of certain advantages may have an anti-competitive object. Secondly, it must be borne in mind that the Court has held that, like other competition rules laid down in the Treaty, Article 101 TFEU aims to protect not only the interests of competitors or of consumers but also the structure of the market and, in so doing, competition as such. Consequently for finding that an agreement has an anti-competitive object, it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price." There is a long line of cases confirming this approach: ECJ 12 February 2011, C-52/09 ECR 2011 I 527 rec. 24 – *TeliaSonera Sverige*; ECJ 27 March 2012, C-209/10, ECR 2012 I rec. 19 – *Post Danmark*.

it is legitimate to look at and interpret agreements, decisions and concerted practices as the same kind of offence. The single complex and continuous infringement is a representative, if controversial, application of this interpretation.<sup>4</sup> The comprehensive plan of a cartel using different instruments for its implementation justifies their qualification as one offence. There is no fundamental right to be protected against a finding that different means of restricting competition constitute one offence, where these means are used for the same purpose and with unitary effect. The law expects of competitors the ability and willingness to accept the lessons of markets, and to observe the rules of the game. The subjective elements, so irritating to theories that want to measure economic effects only, are essential to the law and economics of competition. The disturbing element in a tradition of rational enlightenment is, of course, to deal with and even enforce conditions of limited knowledge. We have, however, to distinguish different uses of knowledge in competition. One is to overcome our ignorance of welfare effects attributable to and caused by individual undertakings or consumers. Undertakings use the procedure of competition to acquire the knowledge generated through competition. It is this knowledge that informs undertakings whether they have been efficient or failed to learn the right economic lessons. The disappointment of plans and expectations is a necessary and inevitable element of competition.

This brings us to the other part of competition law: The abuse of dominant positions under Art. 102 TFEU. The difficult task before courts and competition authorities is to deal with the interdependence of market structure and individual conduct. How to distinguish normal and efficient behaviour of an individual enterprise from the exploitation of market power? A guide-post is the special responsibility of dominant undertakings for the preservation of that kind of actual or potential competition that in spite of market imperfections is possible on the relevant market. The standard criticism of our American friends is the protection of competitors, and not of competition. The special responsibility refers, however, to the economic characteristics of market dominance, which include the knowledge dominant undertakings have of their own market and of the effects of their conduct on customers and competitors.

## II. Decentralisation

One of the purposes of Regulation 1/03 was the decentralisation of the administration of competition rules through strengthening the role of national authorities and courts.

The Regulation makes use of the following enabling provisions of Art. 103 TFEU: For the first time the Regulation determines in accordance with Art. 103 (2) lit.e TFEU “the relationship between national law and the policies contained in this section or adopted pursuant to this article.” Recognizing that the Treaty does not empower the Union to eliminate member state legislation, Art. 3 (1) Regulation 1/2003 provides for the parallel application of Art. 101 and Art. 102 TFEU with national competition law, where the effect may affect trade among member states. The other major change is, of course, the direct applicability of Art. 101 (3) TFEU. An agreement that does not satisfy the requirements of Art. 101 (3) TFEU “shall be prohibited no prior decision to this effect being required” (Art. 1 Regulation 1/2003). The same rule applies to the prohibition under Art. 101 (1) TFEU. The burden of proof that an agreement satisfies the requirements of par. 3 is on the party invoking the benefit of this defence (Art. 2 Regulation 1/2003). These changes are to

contribute to a decentralisation of the application of competition rules and a more active role of national competition authorities and courts. Art. 5 Regulation 1/2003 enumerates the decisions that are within the competence of national competition authorities. New is the power of national competition authorities to withdraw a group exemption where the effects are contrary to Art. 101 (3) TFEU.

The parallel application of Union law and national law has two effects: It contributes to a decentralised application of EU law and it contributes to a harmonisation of national competition laws. National competition authorities and courts applying their own law have to apply Art. 101 and 102 TFEU “also” where the conduct may affect trade among member states, and that conduct may come under Art. 101 TFEU or Art. 102 TFEU. The Commission’s original proposal of Regulation 1/03 provided for the exclusive applicability of Union law where the relevant conduct was capable of affecting trade among member states. In *Toshiba*<sup>5</sup>, the Court notices that this proposal did not become law (rec. 33) and endorsed the rule, first pronounced in *Walt Wilhelm*<sup>6</sup>: EU law and national law apply in parallel (*Toshiba* rec. 81); they view restrictions from different angles. Conflicts have to be resolved according to the pre-eminence of Union law over national law (*Walt Wilhelm* rec. 6). This rule has not been changed by Regulation 1/2003 (*Toshiba* rec. 82)<sup>7</sup>. It follows that Regulation 1/2003 permits both the rules of EU law and national law to be applied in one and the same case (*Toshiba* rec. 81, 82). Regulation 1/2003 is, however, also a conflict rule that limits the applicability of national law.

In light of this jurisprudence, the impact of Regulation 1/2003 on the applicability of national law is to be determined. To argue that national law is to give way to Union law as a matter of fact,<sup>8</sup> disregards the history of Art. 3 (1) Regulation 1/2003 and is incompatible with parallel application. The purpose of regulations under Art. 103 TFEU is to implement the principles set out in Art. 101 and 102 TFEU. That purpose must inform the interpretation of Art. 3 (1) Regulation 1/2003 and the meaning of parallel applications. As long as there are no national rules on how to take into account Union law, the applicability of national law is governed by the interpretation of the Commerce clause and the priority of Union law in cases of conflict. The commerce clause separates Union law and national competition law by looking at the different reach and standards of Union law and national law. One difference follows from the actual or potential territorial impact on trade between member states. The other difference follows from the “different aspects” in the application of the respective rules. These differences are a consequence of different traditions and methodologies of national systems. As long as these different approaches do not interfere with the equal and effective implementation of Union law, national courts are free to observe their own traditions. The parallel application and pre-eminence of Union law requires, however, that the final decision does not come into conflict with the principles set out in Art. 101, 102 TFEU. The different aspects of national law and Union law call for a margin of

4 ECJ 7 January 2004, C-204/00 P et al., ECR 2004 I 123 rec. 258 – *Aalborg Portland Commission*.

5 ECJ 14 February 2012, C-17/10, ECR 2012 I rec. 81, 82 – *Toshiba*.

6 ECJ 13 February 1969, 14-68, ECR 1969, 1 rec. 3 – *Walt Wilhelm/BKartA*.

7 ECJ 1 October 2009, C-505/07, ECR 2009 I 8963 rec. 52 – *Compania Espanola*; ECJ 13 July 2006, C-295/04 et al., ECR 2006 I 6619 rec. 38 – *Manfredi*; ECJ 9 September 2003, C-137/00, ECR 2003 I 7975 rec. 61 – *Milk Marque & National Farmers’ Union*.

8 *Rehbinder*, in Immenga/Mestmäcker, Art. 3 VO 1/2003 Rn. 19.

appreciation in assessing the compatibility of the final decision with competition rules. Parallel application is complied with as long as the national court's final decision is compatible with the major purpose and the policy of Art. 101, 102 TFEU. That policy requires the maintenance of the single market and no tolerance of hardcore restrictions. This interpretation takes into account that national courts are organs of the Union. And it is confirmed through those provisions of Regulation 1/2003 that are to prevent conflicting decisions in individual cases. In *Toshiba* (rec. 86), the Court is explicit that there is no loss of jurisdiction of member state courts or authorities beyond the specific conflict rule. There is, however, no rule that provides for a loss of jurisdiction of national courts where in the application of their own law they also apply Art. 101 or Art. 102 TFEU. In cases of doubt, a reference to the ECJ is, of course, possible; but it is not obligatory.

The precarious balance of the independence of courts and the Commission's administrative role is also at issue when the Commission interprets competition rules in guidelines. In the White Paper of 1999 announcing the modernization of competition policy, the Commission relied on its competence to develop and propose legal texts in order to guarantee the coherent and uniform application of competition rules.<sup>9</sup> Notices and guidelines are then identified as relevant legal texts. These instruments are held to be particularly adequate for the interpretation of economically relevant rules because they permit to take into account a whole set of criteria relevant for the application of competition rules (rec. 86). The temptation to proceed from administration to legislation is not limited to this passage of the Commission's White Paper. In the recent *Expedia* ruling, the Court and the Advocate General noted that the rule of *nulla poena sine lege* is satisfied by Art. 101 and has no relevance for the application of guidelines.<sup>10</sup> In this case, the French *Cour de Cassation* asked the Court of Justice whether Art. 101 TFEU and Art. 3 (2) Regulation 1/2003 precluded a national competition authority from applying Art. 101 TFEU to an agreement affecting trade between member states but that did not reach the thresholds specified by the Commission in its *de minimis* notice, namely an aggregate market share of 10%.<sup>11</sup> As to the effect of guidelines, the Court quoted settled case law: they bind the Commission itself in its administrative practice but they cannot bind the Union Courts. Remaining doubts of their effects for national authorities were cleared in *Expedia*. In order to determine whether or not a restriction of competition is appreciable, the competition authority of a member state may take into account the thresholds established in the *de minimis* notice. But it is not required to do so. Such thresholds are no more than factors among others that may enable that authority to determine whether or not a restriction is appreciable by reference to the actual circumstances of the agreement (rec. 31). Determinative for finding an appreciable restriction of competition is the case law of the Court only. Contrary to the conclusions of Advocate General Kokott in this case, the Court does not expect national authorities to give reasons why they do not follow the guidelines. With reference to divergent positions before the national court, the Court of Justice pointed out that an agreement having as its object a restriction of competition does always have an appreciable effect. That follows from its nature and applies independently of any concrete market effect (rec. 37). The Court distinguishes appreciable effects on trade from the effect on competition. If trade among member states is affected while the restriction is not appreciable, Art. 3 (2) Regulation 1/2003 excludes the application of national competition law.

### III. Article 101 (3) TFEU, Article 1 Regulation 1/2003

Before Regulation 1/2003 became law, its most controversial part was, of course, Art. 1 (1) transforming Art. 101 (3) TFEU into a legal exemption. This transformation was to relief the Commission of the administration of the notification system, to concentrate on the more serious infringements and to apply "strict economic criteria" in the administration of Art. 101 (White Paper rec. 75).

#### 1. Enforcement Priorities

A review of administrative practice leaves no doubt that the Commission verified its program to concentrate on the prosecution of the more serious infringements. I do not have to quote readily available statistics to show that the amounts of fines imposed upon cartels have reached unheard of amounts. I do not join the growing criticism of this practice. One of its side effects have been frequent cases based on fundamental rights testing procedure and assessment of fines, the limits of the Commission's discretion and the actual exercise of the Court's unlimited jurisdiction under Art. 31 Regulation 1/2003. The Court recognized that fines in effect are similar to criminal sanctions and are subject to analogues guarantees. The Commission's role is questioned under Art. 6 of the European Convention of Human Rights. In the Court's recent jurisprudence on the Charter of Fundamental Rights and on the principles derived from the European Convention on Human Rights, there are no indications that upsetting changes for competition policy are to be expected.<sup>12</sup>

On our agenda today is the question to what extent Regulation 1/2003 and the more economic approach contributed to these new enforcement priorities. The sobering answer is: Very little. The prosecution of cartels applies an interpretation of Art. 101 TFEU that has been adopted by the Court in *Grundig Consten* in 1966<sup>13</sup> and has been endorsed in recent cases: "The distinction of infringements by object and infringements by effects arise from the fact that certain forms of collusion of undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition."<sup>14</sup> The Commission's broad access to restrictive agreements by object is due to the leniency program. The Commission initiated the program by notices of 1996, 2002 and 2006.<sup>15</sup> This policy has been summarized as follows: "By their very nature, secret cartels are often difficult to detect and investigate without the cooperation of undertakings or individuals implicated in them. Therefore the Commission considered that it is in the Community interest to reward undertakings involved in this kind of illegal practices which are willing to put an end to their participation and

9 Official Journal (O.J.) 12 May 1999 C 132/1 rec. 84.

10 ECJ 13 December 2012, C-226/11, ECR 2012 I rec. 33 – *Expedia*.

11 Notice on agreements of minor importance which do not appreciably restrict competition under article 81 (1) – *De-minimis*, Official Journal (O.J.) 27. April 2004 C 101/81.

12 Representative of the application of principles of effective judicial review and protection is ECJ 8 December 2011, C-389/10 P, ECR 2011 I – *KME Germany (Copper Installation Tubes)*.

13 ECJ 13 July 1966, 56 and 58/64, ECR 1966, 322, 391 – *Consten/Grundig v. Commission*.

14 ECJ 13 December 2012, C-226/11, ECR 2012 I rec. 36 – *Expedia*. ECJ 8 December 2011, C-389/10 P, ECR 2011 I rec. 86 – *KME Germany*: "This Court has held on numerous occasions that actual impact of cartel on the market must be regarded as sufficiently demonstrated if the commission is able to prove specific credible evidence indicating with reasonable probability that the cartel had an impact on the market." Among the facts that show an actual impact on the market are the implementation of an information exchange system in relation to sales, volume and prices, documents on meeting of the cartel members, price increases of the cartel and market shares (rec. 87).

15 Official Journal (O.J.) 8 December 2006 C 298/17.



cooperate in the Commission's investigation independently of the rest of the undertakings involved in the cartel. The interest of consumers and citizens in showing that secret cartels are detected and punished outweigh the interest in fining those undertakings that enable the Commission to detect and prohibit such practices" (rec. 3). There is a rich harvest of cases dealing with mitigating circumstances due to participation in the leniency program. The "intrinsic value" of collaboration lends itself to different degrees of mitigating circumstances. The Commission and courts are dealing with a new kind of competition of repenting sinners trying to prove their contribution to the discovery of the offence. In our present context the major finding is that the Commission shows courage and independence in the prosecution of cartels without, however, very much assistance from the more economic approach.

## 2. Guidelines on Article 101 TFEU

There can be no cases anymore that declare Art. 101 (1) TFEU inapplicable under par. 3. The conditions for exception – promotion of technical or economic progress and allowing consumers' a fair share of the resulting benefits – sound inviting for the more economic approach. The Commission appears, however, more inspired by applying Art. 101 (1) TFEU than in applying par 3. This impression is borne out by the Guidelines on Art. 101 (3) TFEU of 2004. I quote the summary of positive economic effects supposedly recognized by par. 3: "The aim of the Community competition rules is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources."<sup>16</sup> The proportionality test under par. 3 does, however, not justify the balancing of consumer welfare and efficient allocation of resources with the restriction of competition. The Commission argues that the fundamental objective of the assessment is to ascertain the overall impact of the agreement on the consumers within the relevant market.<sup>17</sup> For this position, the Commission quotes repeatedly *Grundig Consten*,<sup>18</sup> relying, however, not on the Court's opinion but on the conclusions of Advocate General Römer at page 469. The conclusion of Advocate General Römer and the position of the German Government in this case support the Commission's opinion in the Guideline indeed. But the Court's ruling went against its Advocate General with respect to both, the final outcome and his reasoning. The decision was upheld because it was – contrary to the Advocate General's opinion – not the overall economic effect of an agreement that justified an exception. The indispensability of the restriction had to be examined with respect to the individual parts of the agreement, taking into account the effects with respect to an objective improvement of the production or distribution of goods, and whether the improvements were sufficient to find the restriction of competition indispensable (p. 397).

The Commission's latest proposal to implement the more economic approach is in the guidelines on the application of Art. 101 TFEU to horizontal cooperation agreements<sup>19</sup>. This guideline confirms the guideline on Art. 101 (3) TFEU (rec. 19) just discussed and is consequently subject to the same objections. The new test of restrictive effect under Art. 101 (1) TFEU is an "adverse collusive outcome". A collusive outcome requires an appreciable impact of the agreement on at least one of the parameters of competition on the market, such as price, output, product quality, product variety or innovation (rec. 27). Adverse effects are to be expected where, due to the agreement, the parties would be able to profitably raise prices or reduce output, product quality, product

variety or innovation. This will depend on several factors, such as the nature and content of the agreement, the extent to which the parties individually or jointly have or obtain some degree of market power, and the extent to which the agreement contributes to the creation, maintenance or strengthening of the market power, or allows the parties to exploit such market power (rec. 28). The degree of market power is said to be less than the degree of the market power required for a finding of dominance under Art. 102 TFEU, where a substantial degree of market power is required (rec. 42).

The Commission's proposal to identify restrictive effects of cooperative conduct as collusive outcome disregards settled case law on the legal and economic differences of Art. 101 and 102 TFEU.<sup>20</sup> The cases remind us that a dominant position is not illegal as such, that the prohibition of abuse is "absolute" without an exception similar to Art. 101 (3) TFEU and that abuses can be caught after the fact only. These differences are confirmed by a comparison of the text of the basic provisions, the specification of the illegal conduct in par. 1, lit. a and b of Art. 101 TFEU, and the examples of abuse in Art. 102, lit. a and b TFEU. The Commission is right in one respect: Both, Art. 101 and 102 TFEU, deal with restriction of competition and are part of the system of undistorted competition. Art. 101 TFEU deals with restrictions through agreements, Art. 102 TFEU with restrictions based on market structure. The fact that it is possible to find a common economic denominator in the restriction of competition does not, however, justify the disregard of relevant legal and economic differences and purposes. The concept of collusive outcome disregards in particular the difference of the prohibition of collusion and the prohibition of outcome. The prohibition of abuses of dominant positions relies necessarily on outcome, because it is impossible to prescribe in advance and in abstract terms what is, and what is not, an abuse. It is an earmark of individual market power that the prohibition of abuses can not be limited to certain kinds of conduct. A rule that prohibits specific abuses as such would have to subject dominant undertakings to regulation. For that regulation to be effective, it would have to cover all undertakings on that market. The task in applying Art. 102 TFEU is different; it is to prevent the strategic use of market power in individual cases; that conduct is, in the words of the Court of Justice, incompatible with normal competition. To administer that distinction is difficult enough. The risk to interfere with normal economic conduct and to prevent possible efficiencies is notorious. The risk is usually referred to as enforcing false positives.

The Commission's proposal to transfer these and the other conditions of Art. 102 TFEU to Art. 101 TFEU raises problems comparable to the relation of section 1 and section 2 Sherman Act. In comparing these provisions, the US Supreme Court found cooperative restraints more dangerous than individual conduct for competition, and its prohibition the more effective remedy. I quote: "Thus, in § 1 Sherman Act Congress "treated concerted behaviour more strictly than unilateral behaviour". This is so, because – unlike independent action – , "concerted activity inherently is fraught with

16 Official Journal (O. J.) 27 June 2004 C 101/102 rec 13.

17 Guideline rec. 103.

18 ECJ 13 July 1966, 56 and 58/64, ECR 1966, 322 – *Consten/Grundig v. Commission*.

19 Official Journal (O.J.) 14 January 2011 C 11/1.

20 ECJ 16 March 2000, C-395/96 P et al., ECR 2000 I 1365 – *Compagnie Maritime Belge Transports/Commission*; ECJ 11 April 1989, 66/86, ECR 1989, 803 rec. 32 – *Ahmed Saeed Flugreisen et al./Zentrale zur Bekämpfung unlauteren Wettbewerbs*.

anticompetitive risk”; it “deprives the marketplace of independent centres of decision-making that competition assumes and demands”: and concerted action is discrete and distinct. A limit on such activity leaves untouched a vast amount of business conduct. As a result, there is less risk of deterring a firm’s necessary conduct; courts need only to examine discrete agreements; and such conduct may be remedied simply through prohibition.<sup>21</sup>

Under our competition rules, part of the problem is taken care of by the prohibition of cartels as restriction by object. But there remains a vast amount of cooperative conduct “fraught with anti-competitive risk”. The emphasis on outcome of collusion is a tribute to an economic approach that considers economic effects and efficiencies as the only measure of competition and its restriction. Different legal rules are treated as imperfect attempts on the road to balancing economic effects in terms of welfare. If you accept this approach, there are no difficulties to interpret restriction of competition in Art. 102 TFEU as some kind of market power, collusion as conduct similar to abuses within the meaning of Art. 102 TFEU, efficiencies as excluding a collusive outcome, and a

collusive outcome excluding an exception under Art. 101 (3) TFEU.

When our American friends criticize European approaches as legalistic and formalistic, a comparison ought to include how American courts are willing to take into account the limits of their own expertise and of the judicial process in general. In the EU, we are dealing with 27 different legal systems. Rules of procedure, competences, cooperation and networks are certainly important to achieve a competition law system that provides for level playing fields in all member states. But at least as important are the rules of substance that are to be interpreted by national competition authorities and courts. The transfer of Art. 102 TFEU criteria to Art. 101 TFEU is not a contribution to an efficient and decentralized application of competition rules in all member states. ■

21 American Needle Inc. v. National Football League 518 U.S. 231, 249. The Court quoted Copperweld Corp. v. Independence Tube Corp. 467 U.S. 752, 768, 769 (1984). For a comment on American Needle, see *Mestmäcker*, Kooperative Wettbewerbsbeschränkungen im US-Antitrustrecht und im europäischen Wettbewerbsrecht, in: *Festschrift Möschel*, 2011, S. 409-425.

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## How has Regulation 1/2003 affected the Role and Work of National Competition Authorities? – The French Example

### I. Introduction

To begin with the topic and without going back to the origins, it is useful to give a quick view on the history of French competition law. A major reform occurred in 1986 with the adoption of the ordinance of 1 December 1986 on freedom of prices and competition<sup>1</sup>. In the field of antitrust, the substantive rules, which were based on the prohibition of both anticompetitive agreements and abuses of a dominant position, were maintained. The main changes were of an institutional nature. A “dualist” system was established. A new independent administrative authority – le Conseil de la concurrence (hereinafter, the “Conseil”) – was created and empowered to adopt decisions and to fine undertakings for infringements. However, the Ministry of Economy (hereinafter, the “MECO”), through its specialised services – la DGCCRF – kept an important role and remained in charge of competition law inquiries. Both competition authorities were entitled to apply EC competition rules and, a few months after the entry into force of the new system, a major decision was adopted in the so-called *Cosmetics* case<sup>2</sup>.

In the 1990s, the power of the French competition authorities to apply articles 85 and 86 of the Treaty of Rome (later renumbered as articles 81 and 82 EC) was confirmed by a specific provision of a 1992 law<sup>3</sup>. An average of 4 to 6 parallel applications of French and EC law per year, out of an average of thirty prohibitions decisions and one hundred final decisions, could be observed<sup>4</sup>.

When the discussion on the modernisation of EC competition policy began at the end of the 1990s, France was on the whole in favour of the reform; the White Paper<sup>5</sup> was welcomed. This is easy to explain. The so-called “directly applicable exception” system had always been the rule in France

since the introduction of the first prohibition of anticompetitive agreements in 1953. Furthermore, no distinction in horizontal and vertical agreements was made in the French law, and following the case law of the Court of Justice, the French Supreme Court decided to apply the prohibition to vertical agreements at the beginning of the 1980s in the famous *Perfumes* cases<sup>6</sup>.

However, some concerns were expressed regarding the issue of the relations between EU and national rules, but for oppo-

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1 Ord. n° 86-243, 1 Dec. 1986, art. 7 & 8, now art. L 420-1 et L 420-2 Commercial code, FR OJ, 9 Dec. 1986, p. 14773. All French texts are available on the website [www.legifrance.gouv.fr/#](http://www.legifrance.gouv.fr/#); see also for texts in competition law, the website of the French Competition Authority, [www.autoritedelaconcurrence.fr](http://www.autoritedelaconcurrence.fr). Following the new codification of commercial rules, the text became, in 2000, book IV on freedom of prices and competition of the new Commercial Code (legislative part, Art. L. 410-1 to L. 470-8, completed by a regulatory part, art. R.420-1 to R. 470-7).

2 Cons. Conc., dec. 87-D-15, 9 June 1987.

3 Ord. 1 1986, art. 56 bis, modified by L. n° 12-1282, 11 Dec. 1992, FR OJ, 12 Dec. 1992, now art. L 470-6 Commercial Code.

4 For a review of these decisions, see, *Blaise/Idot*, chron. “Concurrence”, in *Rev. trim. dr. eur.*, 1995, n°4 p.859, 1996 n°4, p.747, 1997 n°3, p. 459, 1999, n°2, p.271, 2000, n° 4, p.741, 2002, n° 1, p.103, 2003, n°2, p. 287, 2004, n° 4, p.669.

5 White paper on modernisation of the rules implementing articles 85 and 86 of the EC Treaty, Commission programme no 99/027, 28 April 1999.

6 Case 253/78 and 1 to 3/79, ECJ, 10 Jul. 1980 – *Bruno Giry & alii*, ECR 2327; Cass. Crim., 3 Nov. 1982 – *La Semaine juridique – édition générale* 1983. I. 3108.