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EU Competition Law: Function and Enforcement

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1 INTRODUCTION

When the European Economic Community (EEC) Treaty was negotiated, there was considerable pressure by Americans, but also by segments of Europe's academic community, that competition

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law should be included in the Treaty.[1] However, at that time, the 'culture of competition' had yet to emerge in most Member States, who traditionally favoured cartel arrangements, State intervention and the promotion of national champions.[2] Indeed, some Member States only introduced national competition laws as late as the 1990s, and even today in some countries enforcement is emerging or unstable.[3] Thus, when provisions were first introduced to curb restrictive practices in the coal and steel sector (by Articles 65 and 66 of the European Coal and Steel Community Treaty), these were an innovation for the Member States.[4] Originally the purpose of introducing competition law into the EEC Treaty was to complement the internal market rules by preventing businesses from partitioning the internal market and by encouraging competition across borders.[5] Today, the need for EU competition law as a means of securing economic welfare is widely accepted and the rules are enforced robustly by the Commission.

The present chapter considers why competition law is important and how it is enforced. It is organised as follows.

Section 2 is a review of the debates about the objectives of EU competition law. It shows that there are divided opinions on two fronts: first, between those who consider that the application of competition law should focus on maximising economic welfare and those who take the view that competition law is about the pursuit of economic and non-economic considerations; and secondly that even among those who think that economics offers a superior paradigm for applying competition law, there are differences of opinion about how to best deploy economic thinking. This section of the chapter is essential reading for an understanding of the subject, because, as will be seen in Chapter 23, these differences can have a significant impact on how competition law is applied and enforced.

Section 3 examines the enforcement powers of the European Commission. It explains how the Commission investigates cases, the procedures for reaching a decision, and the penalties that may be imposed if an infringement is found. Attention is given to the effectiveness of the enforcement scheme as well as to its legitimacy, measured by how well it safeguards the fundamental rights of those under investigation.

Section 4 considers the significance of Regulation 1/2003. This Regulation 'entrusted the national competition authorities with a key role in ensuring that the EU competition rules are applied effectively and consistently, in conjunction with the Commission'.[6] It was a significant and controversial measure. It gave greater prominence to national competition authorities, and changed the role of the Commission.

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[1] D. J. Gerber, *Law and Competition in Twentieth Century Europe* (Oxford University Press, 1998) ch. 9.

[2] H. G. Schröter, 'Cartelization and Decartelization in Europe, 1870–1995: Rise and Decline of an Economic Institution' (1996) 25 *Journal of European Economic History* 129. An exception was West Germany's competition law drafted in 1957.

[3] Examples of latecomers include: Ireland and Italy in 1990, the Netherlands in 1997, Luxembourg in 2004. The enforcement of competition law in Italy is advanced in part but certain markets remain closed to competition. See L. Berti and A. Pezzoli, *Le Stagioni dell'Antitrust* (Milan, EGEA, 2010). Furthermore, in exchange for receiving financial aid from the Union, a number of Member States have been required to strengthen their competition laws. For an overview see G. Monti, 'Independence, Interdependence and Legitimacy: The EU Commission, National Competition Authorities and the European Competition Network', EUI Department of Law Research Paper 2014/01.

[4] Jean Monnet, *Mémoires* (Paris, Fayard, 1976) 356–7, 411–13 (also noting US pressure to implement anti-cartel laws).

[5] G. Marenco, 'The Birth of Modern Competition Law in Europe' in A. von Bogdandy, P. Mavroidis and Y. Mény (eds.), *European Integration and International Coordination: Studies in Transnational Economic Law in Honour of C.-D. Ehlermann* (The Hague, Kluwer, 2002) esp. 297–8.

[6] European Commission, 'Report on the Functioning of Regulation 1/2003', COM(2009)206 final, para. 28.

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Section 5 reviews the rules relating to the private enforcement of EU competition law. It considers the contribution of the Court of Justice, the Damages Directive and the value and role of private enforcement.

Section 6 discusses the possible impact of Brexit on competition law enforcement in the United Kingdom.

2 AIMS OF EU COMPETITION LAW

There is considerable debate regarding the functions of competition law. Today, the majority view is that competition law should be enforced against firms whose behaviour harms consumers. Against this, there are two alternative views. One is that competition law should not be concerned with an outcome (consumer welfare) but with maintaining the competitive process. Another view is that competition law can be enforced to attain a wider set of economic and non-economic ambitions; for example, it may be enforced to promote national industries, to safeguard employment or to protect the environment. In section (i) below, we sketch a justification of the role of competition law derived from the discipline of economics, which supports the majority view. In some jurisdictions (most notably the United States), scholars argue that competition law should be interpreted solely according to what economic theory dictates.[7] This mainstream view is contingent upon advances in economics, so that lawyers are called upon to reflect new learning in the application of the law. In section (ii), we consider the alternative points of view. In section (iii), we turn to explore how far these competing approaches have influenced EU competition law enforcement, and in section (iv) we discuss recent debates that stem from the great recession.

(i) Economics of Competition

From an economic perspective, competition law should prohibit commercial practices that damage the operation of markets. Accordingly, the principal measuring stick of a good competition law is how well it sustains an efficient economic order by prohibiting conduct that reduces efficiency.

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M. de la Mano, 'For the Customer's Sake: The Competitive Effects of Efficiencies in European Merger Control', Enterprise Papers No. 11 (Brussels, Enterprise Directorate General, 2002) 8–14

Economists generally distinguish between three broad classes of efficiencies all of which are relevant for the analysis of competition: allocative, productive (or technical) and dynamic (or innovation) efficiency.

Allocative efficiency: Allocative efficiency is achieved when the existing stock of (final and intermediate) goods are allocated through the price system to those buyers who value them most, in terms of willingness

[7] R. H. Bork, *The Antitrust Paradox* (New York, The Free Press, 1978, repr. 1993); R. A. Posner, *Antitrust Law*, 2nd edn (University of Chicago Press, 2000). The major debate here is whether this is best achieved with a consumer welfare standard or a total welfare standard. See e.g. R. D. Blair and D. D. Sokol, 'Welfare Standards in US and EU Antitrust Enforcement' (2003) 81 *Fordham L Rev* 2497.

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to pay or willingness to forego other consumption possibilities. At an allocatively efficient outcome, market prices are equal to the real resource costs of producing and supplying the products.

Productive (or technical) efficiency: Productive efficiency is a narrower concept than allocative efficiency, and focuses on a particular firm or industry. It addresses the question of whether any given level of output is being produced by that firm/industry at least cost or, alternatively, whether any given combination of inputs is producing the maximum possible output. Productive efficiency depends on the existing technology and resource prices. The state of technology determines what alternative combinations of resources can produce a given amount of output. Resource prices determine which combination of resources is the most efficient one in that it gives rise to the lowest production cost. Productive efficiency is achieved when output is produced in plants of optimal scale (or minimum efficient scale) given the relative prices of production inputs.

Dynamic (or innovation) efficiency: Allocative and productive efficiency are static notions concerned with the performance of an economy, industry or firm at a given point in time, for a given technology and level of existing knowledge. Dynamic efficiency in antitrust economics is connected to whether appropriate incentives and ability exist to increase productivity and engage in innovative activity over time, which may yield cheaper or better goods or new products that afford consumers more satisfaction than previous consumption choices.

The distinction between static (allocative or productive) efficiency and dynamic efficiency is based on the idea that the latter leads to improvements in the available technology or the discovery of new production processes or products. In other words, dynamic efficiency is related to the ability of a firm, industry or economy to exploit its potential to innovate, develop new technologies and thus expand its production possibility frontier.

These definitions provide us with the main tools to evaluate the performance of industry. Suppose that manufacturers of escalators agree among each other to raise prices. The implementation of this agreement serves to raise prices well above cost (allocative inefficiency), it reduces demand so that the manufacturers are not using their resources optimally (productive inefficiency) and, since the firms cooperate in a way that is mutually beneficial, the incentive to innovate is reduced (dynamic inefficiency). This example typifies the kinds of considerations an economist makes to test if behaviour by firms is to be challenged as anti-competitive. It has also been suggested that there is a further economic harm: cartels are well-organised political players who can lobby successfully for legislative measures to exclude rivals.[8] This particular concern is also found in monopolies.

M. de la Mano, 'For the Customer's Sake: The Competitive Effects of Efficiencies in European Merger Control', Enterprise Papers No. 11 (Brussels, Enterprise Directorate General, 2002) 8–14

Further, monopoly rents will tend to be dissipated as firms, in order to establish or defend a dominant position, are willing to spend anything up to the value of their monopoly profits. Such expenditures may take various forms: excess advertising, research and development (R&D), investment in excess capacity or

[8] G. Amato, *Antitrust and the Bounds of Power* (Oxford, Hart, 1997).

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brand proliferation in order to deter entry from rival firms, lobbying to secure government quotas or licences, etc. Often this expenditure is in itself entirely unproductive (e.g. lobbying) although other expenditures may partly lead to consumer benefits (as in the case of R&D that results in innovations). These examples imply that the costs of market power through weakened productive efficiency may be at least as important as its adverse impact on allocative efficiency.

The upshot is that competition law should be mostly concerned with manifestations of market power, where the likelihood of inefficient outcomes is higher. However, diagnosing market power and identifying harmful practices has evolved, and we trace this history briefly here.

In the 1960s, some economists believed that there was a direct causal relation between market structure and economic performance, whereby the fewer the firms (and thus the more concentrated the market), the less competitive the industry. This view (often labelled the 'Harvard School' view, as the main proponents were Harvard economists) influenced the development of US antitrust law (called antitrust rather than competition law, as its earliest actions were against cartels established in the form of trusts) until the 1970s, when the economic mood swung away from this exclusively structural understanding of markets.[9] One of the major policy consequences of this approach was that mergers were viewed with suspicion and conduct likely to exclude rivals was also of concern as both strategies would serve to exclude rivals, increasing concentration and thereby worsening economic performance. This led to aggressive antitrust enforcement.

In the 1970s, the 'Chicago School' championed a different set of opinions about how markets worked and advocated a more lax degree of scrutiny.[10] Their arguments can be summarised in the following manner. First, while it is true that a firm with a large market share may be tempted to behave anti-competitively by reducing output and increasing prices, this kind of behaviour will send a signal to other market players that there is unmet demand in the market, and invite the entry of new firms. This new entry will bring prices down and reintroduce the degree of competition necessary to satisfy consumer desires. In other words, while acknowledging that market structure may affect economic performance, the Chicago School added the rider that if economic performance led to unmet consumer demand, this would cause the entry of other firms. This economic dynamic meant that competition law was largely unnecessary unless new entry was hampered, and the greatest reason why entry was hampered was national legislation limiting business freedom, not the anti-competitive behaviour of business. Absent barriers for new competitors, the market would heal itself. Secondly, while the Harvard School lamented the increasing concentration of firms, the Chicago School argued that concentrated markets were more efficient because firms would be able to exploit economies of scale (that is, it is relatively cheaper for one firm to manufacture millions of cars than for several firms to manufacture a

[9] See F. M. Scherer and G. Ross, *Industrial Market Structure and Economic Performance*, 3rd edn (Boston, MA, Houghton Mifflin, 1990) ch. 1 for a review of this approach. See the policy prescriptions in C. Kaysen and D. F. Turner, *Antitrust Policy: An Economic and Legal Analysis* (Cambridge, MA, Harvard University Press, 1959).

[10] H. Hovenkamp, 'Antitrust Policy after Chicago' (1986) 84 *Mich L Rev* 213; F. H. Easterbrook, 'Workable Antitrust Policy' (1986) 84 *Mich L Rev* 1696; B. Hawk, 'The American Antitrust Revolution: Lessons for the EEC?' (1988) *ECLR* 53. For a more critical perspective see E. M. Fox and L. A. Sullivan, 'Antitrust – Retrospective and Prospective: Where Are We Coming From? Where Are We Going?' (1987) 62 *NYUL Rev* 936.

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thousand cars each). Thirdly, the Chicagoans believed that law enforcers were more likely to damage the competitive process by their intervention because of their ignorance about how markets worked.

The Chicago and Harvard views can diverge significantly in their prescriptions for competition law enforcement. For example, a Harvard School approach would suggest that high prices by a monopoly are illegal but a Chicago School approach would indicate that high prices invite new entry, which would render the market competitive in the long run. The Chicago School is probably the most influential school of thought in competition law. It set out a coherent view of competition law enforcement, embedded in confidence that markets work best without excessive regulation by States or courts. It was contested by 'post-Chicago' economic theories.[11]

M. S. Jacobs, 'An Essay on the Normative Foundations of Antitrust Economics' (1995–6) *74 North Carolina Law Review* 219, 222–5

A post-Chicago School of economics has arisen, working within the efficiency model, but starting from assumptions and ending with an enforcement methodology markedly different from Chicago's . . . Both agree that economics is 'the essence of antitrust' and that protecting consumer welfare, conceived in allocative efficiency terms, should be the exclusive goal of competition law. Both eschew the subjective inquiries that they ascribe to the overtly political approaches of the past, and both assert that unless business conduct raises prices or reduces output it should be left alone, regardless of the political or distributive consequences.

The new debate involves contending visions of the workings of the market mechanism and of the proper model for antitrust enforcement. Chicagoans believe that markets tend toward efficiency, that market imperfections are normally transitory, and that judicial enforcement should proceed cautiously, lest it mistakenly proscribe behavior that promotes consumer welfare. Post-Chicagoans, by contrast, believe that market failures are not necessarily self-correcting, and that firms can therefore take advantage of imperfections, such as information gaps or competitors' sunk costs, to produce inefficient results even in ostensibly competitive markets. They argue that the distortions to competition made possible by market imperfections should prompt enforcement authorities to scrutinize a wider variety of conduct than Chicagoans would examine. On the doctrinal level, this debate has produced conflicting answers to some of antitrust's most pressing questions: the relevant measures of market power, the competitive effects of tying arrangements and other vertical restraints, the economic plausibility of predatory pricing schemes, and the durability of cartels and oligopolies.

On its surface, the nature of this debate confirms the view that antitrust analysis has taken a decidedly technological turn . . . What apparently divide the parties are not their political ideologies or interpretations of history, but differing evaluations of the efficiency implications of their respective theories and methodologies. Indeed, some post-Chicagoans characterize their work not as an alternative to Chicago thinking but as a refinement of it, an effort to provide decisionmakers with a more accurate picture of the marketplace and more sensitive tools for detecting inefficient behavior.

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[11] See H. Hovenkamp, 'Post-Chicago Antitrust: A Review and Critique' (2001) *Colum. Bus. L. Rev* 257; L. A. Sullivan and W. S. Grimes, *The Law of Antitrust: An Integrated Handbook*, 2nd edn (St Paul, MN, West Publishing, 2006), a textbook written taking into account many post-Chicago insights; R. Pitofsky (ed.), *How the Chicago School Overshot the Mark* (Oxford University Press, 2008).

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These appearances, however, are deceptive. The parties' shared commitment to efficiency and the debate's specialized vocabulary mask deep divisions regarding the normative assumptions most appropriate to competition policy. The contending economic models reflect very different views of human nature, firm behavior, and judicial competence. While Chicagoans assume that the desire to maximize profits drives firms to compete away market imperfections and destabilizes collusive activity, post-Chicagoans believe that strategizing firms can create or perpetuate market imperfections that can seriously hamper competitive balance. Similarly, while Chicagoans presuppose that markets promote efficient business behavior and that judges untrained in economics are ill-equipped to identify and measure market imperfections, post-Chicagoans have less trust in markets and more confidence in the judiciary's ability to distinguish between competitive and anticompetitive conduct. Post-Chicagoans have shown that the neoclassical price model [based on assumptions that individuals have rational preferences and act based on all relevant information to maximise income (firms) or utility (consumers)] is not the only method for analyzing the efficiency questions central to antitrust. They have demonstrated that economists equally loyal to the goal of consumer welfare can disagree markedly with price theorists about the means most conducive to allocative efficiency. In doing so, however, they have revealed, albeit unintentionally, the inability of economics to furnish empirical or theoretical criteria for resolving the differences between their model and Chicago's. Their work has produced a stalemate in economic theory that effectively requires antitrust decisionmakers, most of whom accept the legitimacy of the economic model, to probe the technocratic surface of the current debate and evaluate the conflicting beliefs about firms, markets, and governments embedded in its foundation. Ironically, far from having marginalized the role of value choice in antitrust discourse, the ascendancy of economic models underscores its enduring importance.

The post-Chicago approach leads to suggestions for competition law enforcement that are different from the Chicago model. For example, under a Chicago approach, predatory pricing (that is, prices set at a level below the cost of production) is only unlawful when the predator is able to cause all rivals to exit and monopolise the market. In contrast, under post-Chicago theories, predatory pricing can be held to be unlawful even if the predator does not monopolise the market. Instead, predatory pricing may be a way of hurting competitors to 'discipline' them (e.g. if a firm is well-established in the United Kingdom and its competitor mainly sells in Germany, predatory pricing might be used by the UK firm should the German firm try to penetrate the UK market, the aim being not the destruction of the German competitor, but the maintenance of separate markets) or to establish a reputation as a tough competitor (e.g. in a market where entry is relatively easy, one bout of predatory pricing against a new entrant may discourage other firms from entering, even when it might be economically rational to enter).[12] Jacobs suggests that these differences of opinion about what is economically rational belie a series of value assumptions about how markets work. Therefore, competition law cannot be founded upon economics; rather it is premised upon the assumptions we make about how market players operate. On this argument, a competition authority chooses an economic theory that supports those assumptions.

[12] A. Kate and G. Neils, 'On the Rationality of Predatory Pricing: The Debate Between Chicago and Post-Chicago' (2002) *Antitrust Bulletin* 1. However, these new approaches have not been very successful. For a discussion of why this may be so, see N. Giocoli, 'Games Judges Don't Play: Predatory Pricing and Strategic Reasoning in US Antitrust' (2013) 21 *Supreme Court Economic Review* 271.

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A further, similar, challenge to the Chicago School approach comes from behavioural economics. This approach to economics rejects the assumption of mainstream economic theory that actors behave rationally, and this has an effect on how one regulates markets. In the specific context of antitrust, irrationality may manifest itself on the side of consumers (who mishandle information, or make decisions based on factors like loyalty or an over-inflated perception of risk) and producers (who may similarly read market signals poorly). For instance, it has been suggested that firms entering new markets assume they will be successful, when in reality few manage to make any lasting inroads: this suggests that the Chicagoan view that low entry barriers reduce the risk of anti-competitive behaviour might be too limited if new entrants fail to bring discipline to the market. This means more sophisticated evidence is required to test if there is market power.[13]

A final economic issue to consider is the role of dynamic efficiency. We might object to the pharmaceutical sector being monopolised by one firm, but what if this is the only way to concentrate enough resources to obtain life-saving drugs in the future? How much can we suffocate competition today in favour of greater consumer benefits tomorrow? Some have taken the view that innovation requires large firms so that monopolies are more likely to innovate, while others have taken the view that innovation can only take place if new entrants are protected by competition law regulating the firms that monopolise the market.[14] There is no consensus on the best competition policy to facilitate innovation, although 'antitrust economists recognise that dynamic net efficiency gains from continuing innovation may far outweigh the static gains from marginal-cost pricing'.[15] However, competition authorities have tended to focus on allocative and productive efficiency.[16]

It is worth closing with the following consideration: the post-Chicago and behavioural antitrust approaches, and the concerns over dynamic efficiency pose sound qualifications to a Chicago-based perspective but they have not led to major changes in enforcement policy. The reason for this has largely to do with considerations of institutional design.

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W. E. Kovacic, 'The Intellectual DNA of Modern Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix' (2007) 1(1) *Columbia Business Law Review* 1, 36–7, 72

Antitrust rules should not outrun the capabilities of implementing institutions. Among other points, Areeda and Turner [founding authors of the leading multi-volume treatise on US antitrust law] argued

[13] A. Tor, 'The Fable of Entry: Bounded Rationality, Market Discipline, and Legal Policy' (2002) 101 *Mich L Rev* 482.

[14] See D. S. Evans and R. Schmalensee, 'Some Economic Aspects of Antitrust Analysis in Dynamically Competitive Industries' in A. B. Jae, J. Lerner and S. Stern (eds.), *Innovation Policy and the Economy* (Cambridge, MA, NBER and MIT Press, 2002) vol. II; G. Monti, 'Article 82 EC and New Economy Markets' in C. Graham and F. Smith (eds.), *Competition, Regulation and the New Economy* (Oxford, Hart, 2004); J. D. Balto and R. Pitofsky, 'Challenges of the New Economy: Issues at the Intersection of Antitrust and the New Economy' (2001) 68 *Antitrust Bulletin* 913.

[15] M. de la Mano, 'For the Customer's Sake: The Competitive Effects of Efficiencies in European Merger Control', Enterprise Papers No. 11 (Brussels, Enterprise Directorate General, 2002) 14.

[16] Although dynamic efficiency considerations played a role in the *Microsoft* decision, where the firm indicated the risk that the European Commission's action would undermine dynamic efficiency (summary at: [2007] OJ L 32/23); and in *GlaxoSmithKline Services Unlimited* v. *Commission*, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, ECLI:EU:C:2009:610, where the ECJ confirmed that dynamic efficiencies may be pleaded under Article 101(3) TFEU.

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that antitrust rules and decision-making tasks must be administrable for the central participants in the antitrust system (courts, enforcement agencies, the private bar, and business managers); that special substantive and procedural screens should be used to ensure that suits initiated by private antitrust plaintiffs were consistent with larger social aims; and that remedies should be carefully linked to the harm caused by the specific practices found to have constituted improper behaviour . . .

Post-Chicago scholars often falter because they make unduly hopeful assumptions about the capacity of the key implementing institutions of the antitrust system to apply the insights of Post-Chicago analysis skillfully. By this view, non-interventionist presumptions are endorsed not because they inevitably make sound assumptions about the harms of specific forms of business behavior, but instead because they make more accurate assumptions about the limitations of courts and enforcement agencies.

In other words, the conservative economic approach of the Chicago School is supported in large part because it is legally workable given the institutional setting for law enforcement in the United States. In particular, jury trials caution against the use of complex economic theories which may be misunderstood, punitive damages awards for antitrust offences often invite spurious claims that courts must ward off,[17] and the level of expertise and capacity of an antitrust authority limits the degree to which it can regulate certain complex markets where specific regulators have a comparative advantage.[18]

(ii) Politics of Competition Law

The debates about the economics of competition law often seem technical and non-political. However, as Jacobs argued above, there is an inherent political dimension to competition law, even when analysed through an economic perspective.

E. M. Fox and L. A. Sullivan, 'Antitrust – Retrospective and Prospective: Where are We Coming From? Where are We Going?' (1987) 62 *New York University Law Review* 936, 942, 956–9

Many economists, especially those with Chicago leanings, think that because antitrust is about markets, as is microeconomics, antitrust law should be economics. They react as though the law is out of kilter whenever it diverges from their particular economic insight; and they so react regardless of whether the law diverges because empirical processes have not validated factual assumptions, or because the law has identified social goals other than or in addition to allocative efficiency.

Law is not economics. Nor were the antitrust laws adopted to squeeze the greatest possible efficiency out of business.

Finally, the producer-plus-consumer-welfare paradigm presses the analyst to think only in terms of aggregate outcomes or wealth of the nation. But this concept is static and outcome-oriented, while the

[17] *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.* 429 US 477 (1977), denying damages when the conduct in question was pro-competitive.

[18] E.g. *Verizon* v. *Trinko*, 540 US 398 (2004), refusing to extend the scope of antitrust law on the facts because there is a dedicated telecommunications regulator tasked with promoting competition.

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antitrust laws are dynamic and process-oriented. They protect not an outcome, but a process – competition. Antitrust laws set fair rules of the game. They give rights of access and opportunity. The antitrust laws preserve and foster dynamic interactions among those in the market. They deal not with aggregate national wealth, but with the expectations and behavior of the people who participate in the markets.

The American debate is particularly instructive in setting out the values that animate competition policy. As Fox has suggested more recently, the real point of debate presently is between those who consider that antitrust law should only be enforced when one proves a harmful economic outcome (or at most the strong likelihood of a harmful economic outcome) and those who believe that it should also be enforced when certain actions weaken the competitive process, by weakening rivals.[19]

Moreover, Fox and Sullivan locate competition law within the perspective of a liberal economic order, which has a particular affinity to the origins of EU competition law. In its early years, EU competition law was influenced by German scholarship and German officials played a key role in the development of competition law. Underpinning the German approach to competition was a unique economic philosophy: ordoliberalism.[20]

W. Möschel, 'Competition Policy from an Ordo Point of View' in A. Peacock and H. Willgerodt (eds.), *German Neo-liberals and the Social Market Economy* (London, Macmillan, 1989) 146

The actual goal of the competition policy of Ordo-liberalism lies in the protection of individual economic freedom of action as a value in itself, or vice versa, in the restraint of undue economic power. Franz Böhm once illuminated this idea by the aphoristic formula, 'the one who has power has no right to be free and the one who wants to be free should have no power'. Economic efficiency as a generic term for growth, for the encouragement and development of technical progress and for allocative efficiency, is but an indirect and derived goal. It results generally from the realisation of individual freedom of action in a market system . . .

This is contrary to the various concepts of utilitarianism. In this respect the Ordo-liberal competition policy is obviously related to the intellectual traditions of idealist German philosophy, particularly that of Immanuel Kant . . . Modern currents in the American anti-trust law which lean directly upon wealth maximisation, [like] Richard Posner's constrained utilitarianism . . . are obviously incompatible with the Ordo-liberal system of values. Ordo-liberalism treats individuals as ends in themselves and not as means of another's welfare.

Here, the dislike of market power is not based primarily on fears of inefficiency, rather on concerns that firms with market power can stifle the freedom of other economic operators, and this leads to inefficiency. Like Fox and Sullivan, the process of competition, favouring access

[19] E. M. Fox, 'Against Goals' (2013) 81 *Fordham L Rev* 2157.

[20] See also D. J. Gerber, *Law and Competition in Twentieth Century Europe* (Oxford University Press, 1998) ch. 7; W. Möschel, 'The Proper Scope of Government Viewed from an Ordoliberal Perspective: The Example of Competition Policy' (2001) 157(1) *Journal of Institution and Theoretical Economics* 3.

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and opportunities for new businesses, is valued. This vision has had a strong influence on the development of EU competition law.[21] Protecting the competitive process or competitive outcomes does not make a significant practical difference in most cases (e.g. both condemn cartels and mergers that create a dominant player). The major difference (as we will examine more closely in the following chapter) is over exclusionary conduct. Taking predatory pricing again, an economic approach would condemn it only if it is likely that the conduct harms welfare, while an approach protecting the competitive process would condemn it a step before: once it is likely that the conduct excludes market players. One criticism that may be made of the latter approach is that it is not always clear how to translate the notion of competitive process when faced with a set of facts: to a certain extent every contract reduces competition (if I agree to sell all my books to you, nobody else can buy them), but it is hard to find a test by which one decides what degree of reduction is sufficiently meaningful to merit prohibition, and there is a risk that one slides into taking a very formalistic approach which applies the prohibition too aggressively.[22]

Originally the Commission enforced competition law informed by this approach, but it is currently recalibrating its rules to focus more on examining the effects of suspicious conduct. Those that support the old policy have three major concerns: first, the absence of any debate at EU level about the choice to abandon the model of competition based on safeguarding the competitive process and favouring an economic approach; secondly, that an economic approach may lead to reduced enforcement, especially against the most powerful firms, while harming smaller players; and thirdly, that the mainstream economic approach focuses on allocative efficiency (i.e. measuring the direct impact on consumers today) at the expense of promoting dynamic efficiency.[23]

(iii) Aims of EU Competition Policy

It was only in the late 1980s that EU competition policy took shape. This happened as a result of five factors. First, the neoliberal economic policies championed by Reagan in the United States and Thatcher in the United Kingdom began to affect governments and industries across Europe, and the economic liberalisation called for by the Single European Act necessitated a stronger role for competition law to ensure that the transformation from a mixed economy to a free market occurred smoothly. Secondly, the Court of Justice, since the 1960s, had ruled on a number of competition law cases and established strong precedents that consolidated the Commission's powers. Thirdly, the staff morale at the Directorate General (DG) for Competition (charged with enforcing competition law in the Union) was considerably strengthened by the economic and legal backing that emerged in the 1980s. Fourthly, the personalities of the competition Commissioners were instrumental in strengthening this DG. Two competition commissioners, Peter

[21] D. Gerber, 'Constitutionalising the Economy: German Neo-Liberalism, Competition Law and the "New" Europe' (1994) 42 *AJCL* 25, 69–74.

[22] C. Ahlborn and C. Grave, 'Walter Eucken and Ordoliberalism: An Introduction from a Consumer Welfare Perspective' (2006) 2(2) *Competition Policy International* 197.

[23] I. L. O. Schmidt, 'The Suitability of the More Economic Approach for Competition Policy: Dynamic vs. Static Efficiency' (2007) *ECLR* 408; Bundeskartellamt/Competition Law Forum, 'A Bundeskartellamt/Competition Law Forum Debate on Reform of Article 82: A Dialectic on Competing Approaches' (2006) 2 *ECJ* 211; R. Zäch and A. Künzler, 'Freedom to Compete or Consumer Welfare: The Goal of Competition Law according to Constitutional Law' in R. Zäch, A. Heinemann and A. Kellerhals (eds.), *The Development of Competition Law* (Cheltenham, Edward Elgar, 2009).

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Sutherland (1985–9) and Sir Leon Brittan (1989–93), were instrumental in pursuing and extending the free market logic, often leading to clashes between the views espoused by DG Competition and those of the Commission President, Jacques Delors. Finally, in 1990, the Commission obtained powers to regulate mergers in the Union. With the economic restructuring that was taking place as a result of economic liberalisation, this placed EU competition law at the heart of the Union's transformation to a neoliberal market economy.[24]

Two aspects of this evolution are worthy of note. First, the increased emphasis on the benefits of efficient markets undermined concerns about economic power and economic freedom that were seminal in the early development of EU competition law. Secondly, the Commissioner for competition policy can have a direct role in influencing the general direction of competition policy. For instance, Sir Leon Brittan's advocacy of free markets was instrumental in the early success of the implementation of the merger rules. His successor, Karel van Miert (1993–9), however, was less convinced than his predecessor about grounding competition law in free market terms, favouring an approach that considers the impact of competition law 'in other areas of Commission policy, such as industrial policy, regional policy, social policy and the environment'.[25] His replacement, Mario Monti (1999–2004), an economics professor, steered competition policy back along the lines taken by Sutherland and Brittan, and the Commissioners who have followed him have more or less continued to follow this policy line. In particular, the speeches of these Commissioners make regular reference to the benefits consumers obtain as a result of competition law enforcement, whether this is lower prices as a result of dismantling a cartel, or more choice as a result of removing certain contract terms.[26] However, it should be recalled that competition law (and indeed, the economic provisions in the Treaty) are there also for the development of a strong European industry.[27] And a closer study of the development of the Community shows that an even broader range of objectives have influenced EU competition law.

R. Wesseling, *The Modernisation of EC Antitrust Law* (Oxford-Portland, Hart, 2000) 48–9

Initially, the antitrust law provisions were inserted into the Treaty in view of their role in the process of market integration. The antitrust rules were no more than the private counterpart to the rules, enshrined in Arts 28–30 EC which guaranteed freedom to trade across borders without hindrance from the Community's Member States. The framers of the Treaty wanted to preclude private undertakings replacing the prohibited public obstacles to inter-State trade. The first period of Community antitrust policy [1958–1973][[28]] saw

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[24] L. McGowan, 'Safeguarding the Economic Constitution: The Commission and Competition Policy' in N. Nugent (ed.), *At the Heart of the Union: Studies of the European Commission*, 2nd edn (Basingstoke, Macmillan Press, 2000) 151–3; R. Buch-Hansen and A. Wigger, *The Politics of European Competition Regulation: A Critical Political Economy Perspective* (Abingdon, Routledge, 2011).

[25] Karel van Miert, 'The Competition Policy of the New Commission', EGKartellrechtsforum der Studienvereinigung Kartellrecht Brussels 11/5/1995, http://europa.eu.int/comm/competition/index_en.html.

[26] See e.g. M. Monti, 'European Competition for the 21st Century' (2001) *Fordham Corporate Law Institute* 257, 257–8; M. Vestager, 'Introductory Statement to the European Parliament' 2 October 2014, https://ec.europa.eu/commission/commissioners/2014–2019/vestager_en.

[27] European Commission, 'A Pro-Active Competition Policy for a Competitive Europe', COM(2004)293 final, esp. ch. 2.

[28] The author uses the same time periods as J. Weiler, 'The Transformation of Europe' (1991) 100 *Yale LJ* 2403.

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the Commission enforcing the rules with constant reference to ensuring the free flow of goods, thus promoting market integration.

Subsequently, in the second period [1973–1985], antitrust policy was employed to establish a broader Community industrial policy. Exemptions for the antitrust rules were granted to forms of (trans-national) co-operation between undertakings which the Commission considered desirable, to promote either integration (*Eurocheque*) or broader Community policy aims (e.g. employment in crisis sectors). Thus, a Community industrial policy was gradually developed on the basis of the Treaty's antitrust rules.

The momentum generated by the Commission's '1992 programme' then provided the occasion for expanding the scope of Community antitrust policy even further [in the third period commencing in 1985]. With continued reference to the needs of market integration, the Commission acquired powers under the Merger Regulation to regulate the structure of markets. Furthermore it extended the enforcement of the antitrust rules to the public sectors of the various Member States. While reference was still made to the underpinning of Community antitrust law in economic integration, the socio-political implications of integration by competition (law) became ever more apparent. In this respect the control of corporate mergers and the gradual liberalisation of public economic sectors, both highly political exercises, which commenced by the end of the 1980s, symbolise the altered character of Community antitrust law enforcement.

Although the system was originally devised for promoting market integration, antitrust policy is now also – and mainly – directed at promoting the various objectives of the Community enshrined in Article 2 EC. Absent a clear hierarchy between those objectives, priorities are selected on a case by case basis. Agreements between undertakings have been exempted from the prohibition in Article 81(1) EC when their negative effect on the intensity of competition on the relevant market was outweighed by positive consequences for European industry's competitiveness, or for social and economic cohesion. Likewise, mergers are sometimes held compatible with the common market, in spite of the significant reduction in the degree of competition they engender, when the Commission considers that they may contribute to one or more of the objectives laid down in Article 2 EC. While it is not submitted that the majority of antitrust issues is settled on the basis of extra-competition elements, it is evident from the Commission decisions, endorsed by the European Courts, that the Commission is able to pursue 'flanking' policies on the basis of its enforcement of the antitrust rules.

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This review suggests that a wide range of policy issues affect competition law decisions, and that competition law objectives might at times take second place to other EU values. On the one hand, we might be sympathetic to the use of competition law to sustain other policies, but this would be to forget that there are other, direct means to achieve them. For example, if we wish to reduce pollution, we might prefer banning pollutants than tolerating an agreement among firms to phase out certain polluting equipment which might yield higher prices.[29] Secondly, legal certainty for market participants is undermined if competition law is modified to achieve other objectives. Lastly, there is a risk that by securing other policies, markets may not develop efficiently and thereby harm consumers. These concerns, among others, led the Commission to try and concentrate on regulating markets only when there was harm to consumer welfare.

[29] L. Kaplow, 'On the Choice of Welfare Standards in Competition Law' in D. Zimmer (ed.), *The Goals of Competition Law* (Cheltenham, Edward Elgar, 2012).

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However, as we illustrate in this and the following chapters, there remain episodes where competition is enforced for the pursuit of other goals.

(iv) Impact of the Economic Crisis

The great recession which commenced in 2008 has led to two rounds of rethinking the objectives of competition law. During the crisis, the question arose whether competition law should be applied less strictly. The Commission refused maintaining that competition law enforcement is part of the solution to the economic crisis. Firms cannot be allowed to form cartels as a means of surviving the crisis: some firms should exit the market if they are not competitive, to allow the more efficient firms to serve consumers best. Nor can merger control be made more lenient to support politically important industries. The former Competition Commissioner, Neelie Kroes, described this approach as ‘tough love’.[30] The one concession was reducing some cartel fines if this would lead to an ‘increase in unemployment or deterioration in the economic sectors upstream and downstream of the undertaking concerned’.[31] The second was the application of the State aid rules to facilitate the rescue of banks.[32]

The justification of this stance is the following: first, in the aftermath of the recession of 1929 the US Government had supported a relaxation of antitrust laws but an influential study came to the conclusion that this made matters worse, not better.[33] Secondly, the Commission reflected back on its own management of the oil crisis in the 1970s and concluded that its lax approach to competition law, which included allowing the formation of so-called crisis cartels (i.e. agreements between manufacturers to reduce output collectively so as to ensure that all firms survived) was a failure because it did not force industries to adjust.[34] Furthermore, Wigger and Buch-Hansen have suggested that while crises normally lead to policy changes, the present crisis has not made an impression for five reasons. First, the policy approach has been to fix the current economic system rather than rethink it; secondly, this approach has the backing of major industrial and financial interest groups as well as politicians; thirdly, no concrete alternative to the current economic system has been identified. The fourth and fifth reasons are given in the extract below.

A. Wigger and H. Buch-Hansen, ‘Explaining (Missing) Regulatory Paradigm Shifts: EU Competition Regulation in Times of Economic Crisis’ (2013) *New Political Economy* 1, 18

Fourth, the Commission, enjoying significant powers and a considerable degree of operational autonomy from Member State governments, has been able to take a proactive approach in acting as a neoliberal crisis manager, interfering with national-level crisis management and prescribing ever more vigorous neoliberal

[30] Neelie Kroes, ‘Competition, the Crisis and the Road to Recovery’, address at Economic Club of Toronto, Speech/09/152, 30 March 2009.

[31] *Novácke chemické závody a.s.* v. *Commission*, T-352/09, ECLI:EU:T:2012:673, para. 192. P. Kienapfel and G. Wils, ‘Inability to Pay: First Cases and Practical Experiences’ (2010) 3 *Competition Policy Newsletter* 3.

[32] See Ch. 23.

[33] H. L. Cole and L. E. Ohanian, ‘New Deal Policies and the Persistence of the Great Depression: A General Equilibrium Analysis’ (2004) 112 *Journal of Political Economy* 779.

[34] OECD Global Forum on Competition, *Crisis Cartels* (DAF/COMP/GF(2011)11) 109–20.

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policies. By being strategically selective, it has privileged the interests of organised financial capital and national crisis strategies compatible with neoliberal ideas. The relative strength of the DG, namely its institutional independence, discretionary powers and resources as well as ensuing business support, allowed it to oppose fundamental institutional change, thereby marginalising more radical solutions from the outset and thus the possibility for a regulatory paradigm shift.

The fifth and final factor relates to the absence of a wider shift in the regulation of economic activities . . . Recent studies in the fields of EU financial services regulation, EU trade policies and international tax policies as well as the budget austerity programmes orchestrated by the EU-IMF tandem more generally suggest that neoliberalism is currently being reworked and extended in various regulatory fields rather than being abandoned. Against the backdrop of the prevalence of a neoliberal crisis management filling merely regulatory gaps in the financial sector, a paradigm shift in the field of EU competition regulation is also unlikely at this stage.

After the crisis, however, with growing evidence of inequality and seeing that many industries are composed of a small number of large players, pressure is being exerted to invest in more rigorous competition law enforcement.[35] This challenge to antitrust is largely US-based at present, and has two major strands: the first is to use antitrust to fight against inequalities, however it is not easy to see how policy could be directed at this social problem other than by making a priority cases in markets that affect the more vulnerable members of society (e.g. prioritising a case that harms disabled consumers).[36] Others instead plead for a much more robust antitrust enforcement against large corporations.[37] This challenges the foundations of modern competition law, however it is not clear whether this debate is of relevance to the European Union for it appears to be largely directed at the very low levels of enforcement in the United States against firms that the European Union has instead pursued with vigour: e.g. Google, Facebook, Qualcomm.[38]

3 ENFORCEMENT BY THE COMMISSION

The Commission's powers are set in Regulation 1/2003, which is in force from 1 May 2004.[39] In the beginning, there was little expectation that competition policy would form a key part of EU law; today it has 'a kind of rock-star status' because of the active way these powers are exercised.[40]

The cases the Commission takes up have two sources. First, the Commission may start an investigation on its own initiative, triggered by press reports, or its investigation of an economic

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[35] C. Shapiro, 'Antitrust in a Time of Populism' (2018) *International Journal of Industrial Organization*, https://faculty.haas.berkeley.edu/shapiro/antitrustpopulism.pdf.

[36] J. B. Baker and S. C. Salop, 'Antitrust, Competition Policy, and Inequality' (2015) 104 *Georgetown LJ* 1.

[37] L. Kahn and S. Vaheesan, 'Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents' (2017) 11 *Harvard Law & Policy Review* 235.

[38] Thus, the present Commissioner does not believe that applying Article 102 to Google requires any fundamental reconsideration to guarantee fair markets. See speech by M. Vestager, 'Fair Markets in a Digital World', 9 March 2018.

[39] Regulation 17/62 First Regulation implementing Articles 81 and 82 [1959] OJ Special Edn, 062, 57; Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 [2003] OJ L 1/1.

[40] R. D. Kelemen, *Eurolegalism: The Transformation of Law and Regulation in the European Union* (Cambridge, MA, Harvard University Press, 2011) 143.

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sector under the powers provided in Regulation 1/2003, Article 17. Secondly, some cases arise from complaints made by private parties or applications for leniency brought by undertakings that have infringed the rules. However, the Commission has no obligation to reach a decision on every complaint or leniency application it receives: it may prioritise cases on the basis of whether there is a Union-wide interest.[41] This is so where the parties commit violations that have an impact in the EU market as a whole or, where the case gives rise to novel points of law, or where the practices in question have a significant effect on market integration.[42] Given that as a result of Regulation 1/2003 national competition authorities (NCAs) are required to apply EU competition law, this provides a further basis for declining to take up a case when this is best addressed at national level.[43]

The enforcement procedure, which is administrative in character, is divided into two stages.[44] In the first stage, the Commission gathers evidence to determine whether there has been an infringement. In the second stage, it makes its concerns known to the parties being investigated and after a hearing issues a decision.[45] The main challenge is balancing the effectiveness of competition law enforcement with the protection of fundamental rights found in the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights (EUCFR).

(i) First Stage: Investigation

In order to obtain information to determine whether an undertaking has infringed competition law, the Commission has two powers. First, it may require undertakings to hand over information and carry out interviews; secondly, it has power to inspect business premises and private homes to seize relevant documents.

(a) Requests for Information and Interviews

Regulation 1/2003, Article 18(1) empowers the Commission to require undertakings to hand over information related to the suspected infringement.[46] The Commission may make a simple request (to which reply is not compulsory, but a fine is payable if incorrect information is supplied intentionally or negligently),[47] or issue a decision requiring information to be provided. The Commission also relies on statements made to it by the parties.[48]

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[41] *Automec Srl* v. *Commission (Automec II)*, T-24/90, ECLI:EU:T:1992:97; but reasons must be given, see *CEAHR* v. *Commission*, T-427/08, ECLI:EU:T:2010:517.

[42] Commission Notice on cooperation within the Network of Competition Authorities [2004] OJ C 101/42, paras. 14, 15 and 54.

[43] *easyJet Airline* v. *Commission*, T-355/13, ECLI:EU:T:2015:36. E. Rousseva, 'Article 13 of Regulation 1/2003 Animated' (2018) 2 *Concurrences* 1.

[44] For a detailed exposition, see C. S. Kerse and N. Kahn, *EU Antitrust Procedure*, 6th edn (London, Sweet & Maxwell, 2012). See also Commission Regulation 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81–82 of the EC Treaty [2004] OJ L 123/18, setting out in more detail the practicalities of the proceedings; and a helpful guide is also DG Competition's *Manual of Procedure for the Application of Articles 101 and 102 TFEU* (March 2012).

[45] *Limburgse Vinyl Maatschappij NV and Others* v. *Commission*, C-238/99 P, C-244–5/99 P, C-247/99 P, C-250–2/99 P and C-254/99 P, ECLI:EU:C:2002:582, paras. 181–3.

[46] *SEP* v. *Commission*, C-36/92, ECLI:EU:C:1994:205, para. 21.

[47] Regulation 1/2003, Article 23(1).

[48] E.g. *Pre-insulated Pipes* [1999] OJ L 24/1, para. 24; *Zinc Phosphate* [2003] OJ L 153/1, paras. 57 and 59. Now see Regulation 1/2003, Article 19(1).

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In supplying information, there is a risk that the undertaking is providing proof that it has infringed competition law. This would run counter to the undertaking's privilege against self-incrimination and in a challenge to a request for information by the Commission, the Court of Justice recognised this in part. First, the right not to incriminate oneself only applies to requests where the addressee is required to reply, under pain of a fine; in cases of a simple request, this protection is not available, because the undertaking has no duty to reply.[49] Secondly, even in cases of requests made under pain of a fine, the right to remain silent is limited.

Orkem v. *Commission*, 374/87, ECLI:EU:C:1989:387

28 In the absence of any right to remain silent expressly embodied in Regulation No. 17 [now Regulation 1/2003], it is appropriate to consider whether and to what extent the general principles of Community law, of which fundamental rights form an integral part and in the light of which all Community legislation must be interpreted, require, as the applicant claims, recognition of the right not to supply information capable of being used in order to establish, against the person supplying it, the existence of an infringement of the competition rules . . .

33 In that connection, the Court observed recently that whilst it is true that the rights of the defence must be observed in administrative procedures which may lead to the imposition of penalties, it is necessary to prevent those rights from being irremediably impaired during preliminary inquiry procedures which may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings and for which they may be liable. Consequently, although certain rights of the defence relate only to contentious proceedings which follow the delivery of the statement of objections, other rights must be respected even during the preliminary inquiry.

34 Accordingly, whilst the Commission is entitled, in order to preserve the useful effect of Article [18 of Regulation 1/2003], to compel an undertaking to provide all necessary information concerning such facts as may be known to it and to disclose to it, if necessary, such documents relating thereto as are in its possession, even if the latter may be used to establish, against it or another undertaking, the existence of anti-competitive conduct, it may not, by means of a decision calling for information, undermine the rights of defence of the undertaking concerned.

35 Thus, the Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove.

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On the facts of the case, the Court of Justice held that some of the information sought by the Commission infringed the applicant's rights. For example at paragraph 39, the Court held:

> [b]y requiring disclosure of the 'details of any system or method which made it possible to attribute sales targets or quotas to the participants' and details of 'any method facilitating annual monitoring of compliance with any system of targets in terms of volume or quotas', the Commission endeavoured to obtain from the applicant an acknowledgment of its participation in an agreement intended to limit or control production or outlets or to share markets.

Likewise, the Commission cannot ask parties how many meetings they had with their competitors that infringed Article 101 TFEU. However, it is possible to obtain documentary information

[49] *Damline SpA* v. *Commission*, C-407/04 P, ECLI:EU:C:2007:53, paras. 33–6.

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concerning agreements entered into, or factual information – for example, about which undertakings were present in certain meetings.[50] Following *Orkem*, parties have challenged the Commission's requests for information as infringing the privilege against self-incrimination, with occasional success.[51] The Court of Justice has not changed the position taken in *Orkem*, and a helpful explanation is found in Advocate General Geelhoed's opinion.

Commission v. *SGL Carbon*, C-301/04 P, ECLI:EU:C:2006:53, Opinion of Advocate General Geelhoed

67 . . . the interplay between the fundamental rights of legal persons and competition enforcement remains a balancing exercise: at stake are the protection of fundamental rights versus effective enforcement of Community competition law. Article [101 TFEU] is a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market. Article [101 TFEU] forms part of public policy. If the Commission is no longer empowered to request the production of documents its enforcement of competition law in the Community legal order will become heavily dependent on either voluntary cooperation or on the use of other means of coercion as for example dawn raids. It is self-evident that the effective enforcement with reasonable means of the basic tenets of the Community public legal order should remain possible, just as it is evident that the rights of the defence should be respected too. In my view, the latter is the case. As case-law now stands, a defendant is still able, either during the administrative procedure or in the proceedings before the Community courts, to contend that the documents produced have a different meaning from that ascribed to them by the Commission.[52]

While the General Court considers that the approach reflects the jurisprudence of the European Court of Human Rights (ECtHR) on the right against self-incrimination, commentators have been less convinced.[53] There are two points of debate. The first is whether the judgments of the Court of Justice are in conformity with those of the ECtHR. Here the Court of Justice appears to take the view that they are, on the ground that when asking for documents one is seeking information which is available independently of the person. The second issue is whether the right against self-incrimination developed in the context of human rights law should apply with equal vigour to the enforcement of economic laws. According to Advocate General Geelhoed, 'it is not possible simply to transpose the findings of the European Court of Human Rights without more to legal persons or undertakings'.[54] This suggests that corporations may enjoy less protection from the fundamental rights.

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[50] *Austrian Banks* [2002] OJ L 56/1, para. 488.
[51] E.g. *Mannesmannröhren-Werke AG* v. *Commission*, T-112/98, ECLI:EU:T:2001:61, para. 71.
[52] The ECJ took the same view; see paras. 39–49 of the judgment.
[53] *Mannesmannröhren-Werke AG* v. *Commission*, T-112/98, ECLI:EU:T:2001:61, para. 77. The leading cases are *Funke* v. *France* [1993] 16 EHRR 297; *Saunders* v. *United Kingdom* (1997) 23 EHRR 313. For comment see I. van Bael and J.-F. Bellis, *Competition Law of the European Community*, 4th edn (The Hague, Kluwer Law International, 2005) 107, opining that national courts which are signatories to the ECHR might interpret the ECHR more strictly than the ECJ; A. McCulloch, 'The Privilege against Self-incrimination in Competition Investigations' (2006) 26(2) *Legal Studies* 211, criticising the distinction between factual questions and admissions of infringement.
[54] *Commission* v. *SGL Carbon*, C-301/04 P, ECLI:EU:C:2006:53, Opinion of Advocate General Geelhoed, para. 63. See further S. Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing Human Rights Acquis' (2006) 43 *CMLRev* 629.

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The Court of Justice also protects the privacy of communications between an undertaking and its lawyers, and information passing between lawyer and client need not be disclosed. This rule is justified by the view that the lawyer collaborates in the administration of justice and is required to provide, independently and confidentially, any legal assistance the client needs.[55] However, the Court curtails lawyer–client privilege in one way: it only protects communication by independent lawyers, not in-house lawyers. The rationale for this is that in many Member States in-house lawyers are not subject to professional codes of discipline.[56] Furthermore, the information that is privileged only extends to matters linked with the subject matter of the investigation, which will normally be material written after the investigation.[57] It may include working documents prepared by the undertaking to aid the lawyers in preparing the defence.[58]

(b) Inspections

The Commission's most draconian means to secure information about a possible competition law infringement are its powers to enter business premises of the parties under investigation and seize the relevant information. These procedures are colloquially referred to as 'dawn raids'.[59]

Regulation 1/2003

Article 20

(1) In order to carry out the duties assigned to it by this Regulation, the Commission may conduct all necessary inspections of undertakings and associations of undertakings.

(2) The officials and other accompanying persons authorised by the Commission to conduct an inspection are empowered:

(a) to enter any premises, land and means of transport of undertakings and associations of undertakings;

(b) to examine the books and other records related to the business, irrespective of the medium on which they are stored;

(c) to take or obtain in any form copies of or extracts from such books or records;

(d) to seal any business premises and books or records for the period and to the extent necessary for the inspection;

(e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers . . .

(4) Undertakings and associations of undertakings are required to submit to inspections ordered by decision of the Commission.

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[55] *AM&S Europe Ltd* v. *Commission*, 155/79, ECLI:EU:C:1982:157, para. 24. See generally J. Faull, 'Legal Professional Privilege: The Commission Proposes International Negotiations' (1985) 10 *ELRev* 119.

[56] The General Court has followed the approach of the ECJ in *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd* v. *Commission*, T-125 and 253/03, ECLI:EU:T:2007:287.

[57] *AM&S Europe Ltd* v. *Commission*, 155/79, ECLI:EU:C:1982:157.

[58] *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd* v. *Commission*, T-125 and 253/03, ECLI:EU:T:2007:287, paras. 123–4.

[59] J. Joshua, 'The Element of Surprise' (1983) 8 *ELRev* 3.

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Article 21

(1) If a reasonable suspicion exists that books or other records related to the business and to the subject-matter of the inspection, which may be relevant to prove a serious violation of Article [101 TFEU] or Article [102 TFEU] . . . are being kept in any other premises, land and means of transport, including the homes of directors, managers and other members of staff of the undertakings and associations of undertakings concerned, the Commission can by decision order an inspection to be conducted in such other premises, land and means of transport.

The Commission must specify the subject matter and purpose of its investigation 'not merely to show that the proposed entry onto the premises of the undertakings concerned is justified but also to enable those undertakings to assess the scope of their duty to cooperate whilst at the same time safeguarding their rights of defence'.[60] Article 21 is an innovation and provides for searches into private homes, but these require prior authorisation from a national court where the premises are located.

The Commission's power to search premises is controversial when judged against fundamental rights standards. Article 8 of the European Convention of Human Rights (ECHR) incorporates a right to private and family life. A derogation from this right is specified in Article 8(2) ECHR, which states that infringements of privacy are justified only when necessary, *inter alia*, for the economic wellbeing of the country or the prevention of crime. To benefit from the derogation in Article 8(2), the interference with the right to privacy must be based on accessible legal rules, the interference must have a legitimate aim, and there must be effective protection against abuse by the investigators.[61]

It might be argued that any inspection must be approved by a judge if one looks at the case law of the ECtHR. First, in *Niemetz* v. *Germany*, the ECtHR held that the right to private life does not merely encompass private homes but also business premises, when this is necessary to protect the individual against arbitrary interference by public authorities.[62] Secondly, in *Société Colas Est and Others* v. *France*, the ECtHR held that in competition cases, prior judicial authorisation is required when conducting inspections so as to afford adequate and effective safeguards against abuse.[63] However, the European Court of Justice (ECJ) has confirmed that judicial approval is not always necessary.

***Deutsche Bahn* v. *Commission*, C-583/13 P, CELI:EU:C:2015:404**

20 Furthermore, although it is apparent from the case-law of the ECtHR that the protection provided for in Article 8 of the ECHR may extend to certain commercial premises, the fact remains that that court did hold

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[60] *Hoechst AG* v. *Commission*, 46/87 and 227/88, ECLI:EU:C:1989:337, para. 19.
[61] Kerse and Kahn, n. 44 above, 166; *Société Colas Est and Others* v. *France* (2004) 39 EHRR 17.
[62] *Niemetz* v. *Germany* [1993] 16 EHRR 97, para. 31; *Veeber* v. *Estonia (No. 1)* [2004] 39 EHRR 6. See also *Janssen Cilag SAS* v. *France*, No. 33931/12 judgment of 13 April 2017 emphasising the need for proportionality between the inspection and the information obtained.
[63] *Société Colas Est and Others* v. *France* [2002] ECHR 418, para. 49.

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that interference by a public authority could go further for professional or commercial premises or activities than in other cases.

22 . . . the lack of prior judicial authorisation is only one of the factors borne in mind in the determination of whether Article 8 of the ECHR has been infringed. [In its case law] the ECtHR took into account the extent of the powers held by the national competition authority, the circumstances of the interference and the fact that the system in place at the material time provided for only a limited number of safeguards, all of which differs from the situation under EU law.

23 It must be pointed out in that regard that the Commission's investigative powers under Article 20(2) of Regulation No 1/2003 are restricted to the Commission's agents having the power, *inter alia*, to enter premises of their choosing, to have access to documents they request and make copies thereof, and to have shown to them the contents of pieces of furniture they indicate.

24 It must also be remembered that, under Article 20(6) and (7) of Regulation No 1/2003, authorisation must be sought from a judicial authority where, when the undertaking concerned opposes an inspection, the Member State concerned provides the necessary assistance, requesting where appropriate the assistance of the police or of an equivalent enforcement authority, so as to enable the inspection to be conducted and where such authorisation is required under national law. Authorisation may also be applied for as a precautionary measure. Article 20(8) further provides that although the national judicial authority is to control, *inter alia*, that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject-matter of the inspection, it may not call into question the necessity for the inspection, and that the decision is subject to review only by the Court of Justice.

The Court continues by stating that the main justification for not requiring prior judicial authorisation is that it is possible to seek judicial review after the event, on the grounds that, in the circumstances, a dawn raid was arbitrary, disproportionate or excessive.[64] It notes that the possibility of *ex post* judicial review is recognised as a criterion to justify intrusions into privacy by the ECtHR. Moreover the powers of inspection are delimited by the inspection decision, the Commission may not seize non-business documents, and the firm may seek legal assistance.[65] If the Court of Justice agrees with the applicant that the Commission abused its powers, then the Commission would be prevented from using, for the purposes of proceeding in respect of an infringement of the competition rules, any documents or evidence which it might have obtained in the course of that investigation.[66] At the same time the legislature acknowledges that in some Member States prior judicial authorisation is required thus Article 20(7) requires the Commission to obtain such authorisation.

However, it has been argued that this falls short of the requirements for derogation stipulated by the ECtHR's case law because a judicial warrant need not be obtained in all cases, and the scope for judicial scrutiny by the national judge in Article 20(8) is limited.[67] Accordingly, dawn raids may be challenged, either at national level, questioning national courts' authorisations of

[64] *Dow Chemical Ibérica and Others* v. *Commission*, 97–9/87, ECLI:EU:C:1989:380, para. 16.
[65] *Deutsche Bahn* v. *Commission*, C-583/13 P, EU:C:2015:404, paras. 30–6.
[66] *Roquette Frères* v. *Directeur général de la concurrence, de la consommation et de la répression des frauds*, C-94/00, ECLI:EU:C:2002:603, para. 49.
[67] A. Riley, 'The ECHR Implications of the Investigation Provisions of the Draft Competition Regulation' (2002) 51 *ICLQ* 55, 76–7.

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Commission inspections,[68] or at EU level, for compatibility with the protection of the undertaking's fundamental rights in the absence of judicial authorisation.

(ii) Second Stage: Adjudication

Once the information is gathered, the Commission issues a statement of objections and the parties have access to the Commission's file to see the evidence upon which the allegations are based. Secondly, the parties have the right to a hearing. The rationale for these procedures is to guarantee the parties' right to defend themselves.

(a) Statement of Objections and Access to the File

After proceedings have begun, the Commission must notify the parties of the infringements that it believes have been committed. This document is known as the statement of objections.

Regulation 1/2003, Article 27

(1) Before taking decisions . . . the Commission shall give the undertakings or associations of undertakings which are the subject of the proceedings conducted by the Commission the opportunity of being heard on the matters to which the Commission has taken objection. The Commission shall base its decisions only on objections on which the parties concerned have been able to comment. Complainants shall be associated closely with the proceedings.

As the final sentence of Article 27(1) makes clear, the Commission can only issue a decision on grounds set out in the statement of objections. The right to access the file is enshrined in Regulation 1/2003.[69]

Regulation 1/2003, Article 27

(2) The rights of defence of the parties concerned shall be fully respected in the proceedings. They shall be entitled to have access to the Commission's file, subject to the legitimate interest of undertakings in the protection of their business secrets. The right of access to the file shall not extend to confidential information and internal documents of the Commission or the competition authorities of the Member States. In particular, the right of access shall not extend to correspondence between the Commission and the competition authorities of the Member States, or between the latter. Nothing in this paragraph shall prevent the Commission from disclosing and using information necessary to prove an infringement.

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[68] As in *Roquette Frères* v. *Directeur général de la concurrence, de la consommation et de la répression des frauds*, C-94/00, ECLI:EU:C:2002:603, appeal against an order of a local judge to empower the Commission to conduct an investigation on the appellant's premises.

[69] And recognised by the ECJ, see e.g. *Aalborg Portland A/S and Others* v. *Commission*, C-204–5/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, ECLI:EU:C:2004:6, paras. 68–77.

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A key principle of EU law is 'equality of arms': the party accused of an infringement has access to the Commission's entire file (save for the documents protected by Article 27(2)) and it is not for the Commission to decide which documents to pass on.[70]

(b) Oral Hearing

Hearings are normally attended by the following: the parties accused, complainants, Commission representatives and representatives of the national competition authorities. They are moderated by a hearing officer. This Commission official is independent of DG Competition and reports directly to the Commissioner for competition. He or she has the task of ensuring 'that the hearing is properly conducted and contributes to the objectivity of the hearing itself and of any decision taken subsequently'.[71] This serves to 'safeguard the effective exercise of procedural rights throughout proceedings before the Commission'.[72]

The hearing is composed of arguments by the Commission and the accused, and is followed by questions from those present.[73] Before the hearing the defendant will have had several exchanges of view with DG Competition. However, it has been said that the hearing is useful because it is the only time for the defendant to set out its case to the national authorities, to the Commission's legal service, and to representatives of other DGs.[74]

After the hearings, the Commission prepares a decision acting as a collegiate body. Draft decisions are reviewed by the Advisory Committee which is composed of representatives of Member States' competition authorities.[75] The Commission must take the 'utmost account' of the Committee's views but is not bound to follow them.[76] For most competition cases, the Commission operates with a 'written procedure' whereby the draft decision is circulated to all Commissioners and is adopted if there are no objections.[77] For controversial cases however, there are debates among the Commissioners, and lobbying is not uncommon.[78] The decisions must be fully reasoned to allow the parties to see which findings of fact and of law led the Commission to its conclusion.[79] This is necessary to afford the parties the opportunity of challenging the Commission's decision in the courts.

(iii) Penalties for Infringement

Once an infringement is established, the Commission has a wide range of powers, which may be divided into two categories. First, the Commission has powers to bring the infringement to a close and to remedy the anti-competitive effects.

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[70] *Solvay SA* v. *Commission*, T-30/91, ECLI:EU:T:1995:115, paras. 81–3. For a critique see C. D. Ehlermann and B. J. Drijber, 'Legal Protection of Enterprises: Administrative Procedure, in Particular Access to the File and Confidentiality' [1996] *ECLR* 375.

[71] Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings [2011] OJ L 275/29.

[72] *Evonik Degussa GmbH* v. *European Commission*, C-162/15 P, ECLI:EU:C:2017:205, para. 40.

[73] For detail see Regulation 773/2004 [2004] OJ L 123/18.

[74] Van Bael and Bellis, n. 53 above, 1096.

[75] Regulation 1/2003, Article 14.

[76] *Ibid.* Article 14(5).

[77] Van Bael and Bellis, n. 53 above, 1103.

[78] 'Brussels Braces for a Lobbying Invasion', *Financial Times*, 3 October 2005.

[79] *ACF Chemiefarmia* v. *Commission*, 41/69, ECLI:EU:C:1970:71, paras. 76–81.

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Regulation 1/2003, Article 7

(1) Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article [101 TFEU] or of Article [102 TFEU] . . . it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. If the Commission has a legitimate interest in doing so, it may also find that an infringement has been committed in the past.

In a cartel case, for example, the Commission will normally demand that the undertakings bring the agreement to an end so that the damage to competition does not continue. It may also order parties to change their behaviour vis-à-vis competitors, a sanction which has been imposed upon dominant undertakings to oblige them to supply competitors.[80] However, the Commission cannot impose obligations that are not necessary to bring the infringement to an end. In one case the General Court held that requiring members of a cartel to stop fixing prices was legitimate, but asking them to inform customers that they may renegotiate the contracts that had been signed when the cartel inflated prices was unnecessary, because the contracts in question were only of a year's duration and because, if parties to a cartel suffer losses, this is a matter to be addressed in a damages action.[81]

Article 7 adds a novel remedy: empowering the Commission to impose 'structural remedies'. This can entail a demand that a company be broken up into two or more smaller units. This is a draconian remedy for it makes a fundamental change in the way the business is run. It has been imposed once, to require a dominant firm to divest essential infrastructure to allow other firms to compete. However, this is an unusual case where the dominant firm had offered the divestiture and agreed this was a proportional remedy.[82] The final sentence of Article 7 allows the Commission to make decisions against infringements that have occurred in the past but only if there is a legitimate interest: for example, clarifying a point of law or issuing a decision to facilitate follow-on damages claims.[83]

The second category of powers the Commission has is penalising the undertaking for breaching competition law. Fines not exceeding 1 per cent of the undertaking's turnover may be imposed for procedural infringements (e.g. supplying incorrect or misleading information),[84] and fines not exceeding 10 per cent of the undertaking's turnover may be imposed for intentional or negligent infringements of Articles 101 and 102 TFEU.[85] The Commission's approach to fines should be read together with its policy on leniency applications and settlements. In this way, we can gain a sense of the Commission's enforcement strategy as a whole.

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80 See e.g. *Microsoft* v. *Commission*, T-201/04, ECLI:EU:T:2007:289.
81 *Atlantic Container Line* v. *Commission*, T-395/94, ECLI:EU:T:2002:49, paras. 410–16.
82 CASE AT.39759 – *ARA foreclosure* 20 September 2016.
83 *GVL* v. *Commission*, 7/82, ECLI:EU:C:1983:52, para. 24.
84 Regulation 1/2003, Article 23(1).
85 *Ibid.* Article 23(2).

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(a) Fining Policy

In 1980 the Commission declared that fines would be increased as a means of deterring undertakings,[86] and in 1991, it announced that in appropriate cases it would apply the highest penalty possible: 10 per cent of the undertaking's turnover.[87] The gradual increase can be seen as a sensible policy in that in the early years undertakings were unfamiliar with their obligations under the competition rules, but as the culture of competition spread, and as the deadline for achieving a single market neared, higher fines were justified. The current policy targeting cartels has led to ever-greater fines. Between 2014 and 2017, the Commission imposed fines of nearly €8 billion Euros for twenty-eight cartel infringements.[88] Google has also received very high fines for abusing its dominant position (€6.7 billion for two infringements).[89]

However, the Commission is often criticised for imposing fines arbitrarily, in particular due to the vagueness of Article 23(3) of Regulation 1/2003, which merely provides: 'in fixing the amount of the fine, regard shall be had both to the gravity and duration of the infringement'. In response to calls for greater transparency, the Commission issued Guidelines on the method of setting fines.[90] These reflect the Commission's practice and take into account the rulings of the Court of Justice.[91] They also aim to provide for tougher fines to deter the undertaking in question as well as all undertakings in the market. The Guidelines indicate that the Commission will first determine a 'basic amount' for the fine, which is then adjusted by considering aggravating or mitigating circumstances. We consider these two steps in turn.

The basic amount is set by reference to the value of the sales of the goods to which the infringement relates, having regard to the gravity of the infringement. For 'very serious' infringements (e.g. price-fixing and market-sharing) the basic amount will be up to 30 per cent of the value of the sales. Under the 2006 Guidelines, this figure is then multiplied by the number of years that the undertaking has infringed competition law.[92] Under the 1998 Guidelines, in contrast, an addition was made depending on the duration of the agreement. The change is significant in two respects. First, it places greater emphasis on the duration of the cartel and, secondly, it serves to raise the fine considerably. For example, under the old Guidelines, in a cartel lasting three years where the basic amount was €20 million, the Commission would add 50 per cent for duration, making the total fine €30 million. Under the new Guidelines the same infringement would lead to a fine of €60 million (€20 million x 3). In addition, an 'entry fee' is added to the basic amount (of between 15 and 25 per cent of the value of sales) to cartels that involve price-fixing, market-sharing or output limitation, irrespective of duration.[93]

The basic amount is adjusted both (a) upwards if there are aggravating circumstances (e.g. repeated infringements, for which the fine will be increased by 100 per cent for each previous infringement;[94] refusal to cooperate with the investigation; instigating the

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[86] *Pioneer* [1980] OJ L 60/21; affirmed in *Musique diffusion française and Others* v. *Commission*, 100–3/80, ECLI:EU:C:1983:158, paras. 105–9.
[87] European Commission, *Twenty-first Report on Competition Policy* (1991), para. 139.
[88] Source: http://ec.europa.eu/competition/cartels/statistics/statistics.pdf.
[89] Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine (Press Release 18 July 2017); CASE AT.39740 *Google Search (Shopping)* 18 December 2017.
[90] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003 [2006] OJ C 210/2.
[91] See further P. Manzini, 'European Antitrust in Search of the Perfect Fine' (2008) 31(1) *World Competition* 3; C. Veljanovski, 'Cartel Fines in Europe: Law, Practice and Deterrence' (2007) 30(1) *World Competition* 65.
[92] 2006 Guidelines, n. 90 above, para. 19.
[93] *Ibid.* para. 25.
[94] *Ibid.* para. 28. See *Groupe Danone* v. *Commission*, C-3/06 P, EU:C:2007:88.

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infringement);[95] and (b) downwards in the presence of attenuating circumstances (e.g. a passive role in the infringement; termination as soon as the investigation begins; the existence of reasonable doubt as to the legality of the practice).[96]

Two themes can be detected in the Commission's fining Guidelines. Deterrence features most prominently. The second theme focuses on sales as a proxy for how much each member stood to gain from the cartel, thereby imposing a more accurate fine on each member of the cartel. It can thus be said to lead to fairer fines as between cartel members. This is in response to one frequent ground on which fines are appealed: discrimination between cartel offenders.[97]

The European Courts have upheld the legality of the Commission's general approach to fines in a number of judgments.[98]

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Dornbracht v. *Commission*, T-386/10, ECLI:EU:T:2013:450

68 [I]n the first place, it should be noted that in essence, according to the case-law, adoption by the Commission of Guidelines contributes to ensuring observance of the principle that penalties must have a proper legal basis. In that regard, it should be observed that the Guidelines determine, generally and abstractly, the method which the Commission has bound itself to use in setting the amount of fines and, consequently, ensure legal certainty on the part of undertakings.

69 In the second place, as can be seen from point 2 of the 2006 Guidelines, the latter fall within the statutory limits laid down by Article 23(2) and (3) of Regulation No 1/2003 . . . [T]hat article meets the requirements deriving from the principle that penalties must have a proper legal basis and the principle of legal certainty.

70 In the third place, it must be held that, in adopting the 2006 Guidelines, the Commission did not exceed the limits of the discretion afforded it by Article 23(2) and (3) of Regulation No 1/2003.

. . .

76 Lastly, in point 35 of the 2006 Guidelines, the Commission provides that, in exceptional cases, the Commission may, for purposes of setting the amount of the fine, take account of an undertaking's inability to pay. Contrary to what is maintained by the applicant, that provision does not give the Commission limitless discretion, since the conditions for reducing the amount of the fine on account of inability to pay are very clearly set out in that point. Thus, it is clearly stated there that no reduction in a fine will be granted on the mere finding of an adverse or loss-making financial situation and also that a reduction can be granted solely on the basis of objective evidence that imposition of a fine would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value.

77 Also, in point 37 of the 2006 Guidelines, the Commission states that the particularities of a case or the need to achieve deterrence in a particular case may justify departing from the methodology described in the 2006 Guidelines. Since the provisions of that point do not allow the Commission to depart from the principles laid down by Article 23(2) and (3) of Regulation No 1/2003, it must be held that, contrary to what the applicant contends, they do not give the Commission almost limitless discretion and that, hence, point 37 does not derogate from the principle that penalties must have a proper legal basis.

[95] *Shell Petroleum NV* v. *Commission*, T-343/06, EU:T:2012:479, paras. 152–8.

[96] For an example of the application of the previous Guidelines, see *Commission* v. *SGL Carbon AG*, C-301/04 P, ECLI:EU:C:2006:432.

[97] E.g. *CD Contact Data GmbH* v. *Commission*, T-18/03, ECLI:EU:T:2009:132. The fine imposed was reduced to ensure compliance with the principle of equal treatment.

[98] *Dansk Rørindustri and Others* v. *Commission*, C-189/02 P, C-202/02 P, C-205–8/02 P and C-213/02 P, ECLI:EU:C:2005:408.

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> **78** It follows that the adoption by the Commission of the 2006 Guidelines, inasmuch as it fell within the statutory limits laid down by Article 23(2) and (3) of Regulation No 1/2003, contributed to defining the limits within which the Commission exercises its discretion under that provision and did not infringe the principle that penalties must have a proper legal basis but was conducive to observance of it.

The confirmation of the Commission's powers is a boost in its fight against cartels, allowing it to design a fining policy to deter undertakings to create cartels. However, the Commission's wide discretion has led to criticism that the Notice on the method of setting fines does little to increase transparency and consistency.[99] Furthermore, critics have said that the courts do not exercise a sufficiently robust standard of review when fines are appealed.[100] Between 2005 and February 2017 the court has heard 355 appeals: in one-third of these cases the fines were reduced, but often the reduction is less than the cost of the appeal. The most successful pleadings involve the miscalculation of the fine, errors on the duration of the cartel, misapplication of the leniency notice and a failure to state reasons.[101] However it would be unfair to use these statistics as a sign of weak judicial review: often the judgments of the General Court review the Commission decision in quite some detail, and the low rate of success may also be attributed to diligent decision-making by the Commission.

On the other hand, economists consider that the current policy may not do enough to deter. The number of investigations is still too low, so while the fine is high, the probability of being subject to the fine remains low. One study of US antitrust, where discovery and penalties are stronger than those in the Union, estimated that only one in six cartels is detected.[102] A more recent study concluded that fines are at least five times too small to deter.[103] In these circumstances it still pays to engage in restrictive practices because the expected gains are greater than the expected penalties.[104]

(b) Leniency Policy

Pursuant to the Commission's leniency policy, the first undertaking that informs the Commission of the existence of an anti-competitive practice of which it is a member, and whose information allows the Commission to carry out an inspection or find an infringement under Article 101 TFEU, obtains immunity from any fine. If an undertaking collaborates with the Commission

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[99] L. Solek, 'Administrative and Judicial Discretion in Setting Fines' (2015) 38 *World Competition* 547. E. Barbier de la Serre and E. Lagathu, 'The Law on Fines Imposed in EU Competition Proceedings: Converging Towards Hazier Lines' (2018) 9(7) *Journal of European Competition Law and Practice* 459.

[100] I. Forrester, 'A Challenge for Europe's Judges: The Review of Fines in Competition Cases' (2011) 36 *ELRev* 185; E. Barbier de la Serre and E. Lagathu, 'The Law on Fines Imposed in EU Competition Proceedings: Faster, Higher, Harsher' (2013) 4(4) *Journal of European Competition Law and Practice* 325.

[101] D. Paemen and J. Blondeel, 'Appealing EU Cartel Decisions before European Courts: Winning (and Losing) Arguments' (2017) 18(2) *Business Law International* 155.

[102] P. G. Bryant and E. W. Eckard, 'Price Fixing: The Probability of Getting Caught' (1991) 73 *Review of Economics and Statistics* 531 is the seminal work. Recent research has obtained similar results. E. Combe *et al.*, 'Cartels: The Probability of Getting Caught in the European Union', Bruges European Economic Research Papers, Working Paper No. 12 (2008), http://ssrn.com/abstract=1015061. But see N. H. Miller, 'Strategic Leniency and Cartel Enforcement' (2009) 99 *American Economic Review* 750, suggesting that the probability is now 20–27%, which is reassuring because it means that the leniency policies and the increases in penalties since the early 1990s have had some impact.

[103] J. M. Connor and R. H. Lande, 'Cartels as Rational Business Strategy: Crime Pays' (2012) 34 *Cardozo L Rev* 427.

[104] M. P. Schinkel, 'Effective Cartel Enforcement in Europe' (2007) 30 *World Competition* 539.

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during the investigation by providing important evidence that strengthens the Commission's case, this may result in a reduction in the fine of between 20 and 50 per cent, the reduction being more significant for those who collaborate first.[105] The aim of this policy is to give members of a cartel the incentive to bring the existence of cartels to the attention of the Commission.[106] The prize for being the first to do so is designed to encourage cartel members to blow the whistle, which can save Commission resources, as it may be able to rely solely on the evidence supplied by the 'whistleblower' to reach a decision that competition law has been infringed. The policy began in 1996 and has been effective in increasing the number of successful cartel infringement decisions brought by the Commission.[107] A significant proportion of cartel cases have been initiated by a leniency application: over half of the cartel cases decided between 2005 and 2008,[108] and more recently the Commission reports that most cartels come to their attention through this policy,[109] although the Commission stresses that it does not depend solely on leniency applications to uncover cartels.[110] These results match those of a comparable US programme, which has been described as 'the single greatest investigative tool available to anti-cartel enforcers'.[111]

Two factors that may undermine the success of the Commission's leniency policy.[112] First, NCAs can enforce EU competition law, and Member States have different (or no) leniency policies.[113] If an undertaking provides evidence of a cartel to one competition authority, but the cartel is then prosecuted by a competition authority without a leniency programme or one with less generous reductions in fines, the benefits of confessing are reduced.[114] This may deter parties from stepping forward.[115] This has been tackled by the European Competition Network designing a Model Leniency Programme for NCAs to adopt.[116] In 2012 the programme was enhanced in that all leniency applicants who apply for leniency to the Commission may also send a summary leniency application to all Member State competition authorities and the summary form is standardised.[117] Presently a Directive to empower NCAs seeks to harmonise leniency policies.[118]

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[105] Notice on immunity from fines and reduction of fines in cartel cases [2006] OJ C 298/17. For comment on earlier drafts of this document, see N. Levy and R. O'Donoghue, 'The EU Leniency Programme Comes of Age' (2004) 27 *World Competition* 75.

[106] And some have gone even further, suggesting that the Commission should pay whistleblowers. See A. Riley, 'Beyond Leniency: Enhancing Enforcement in EC Antitrust Law' (2005) 28 *World Competition* 377.

[107] Kerse and Kahn, n. 44 above, 417, report that since 1998 the leniency notice was applied in eighteen out of twenty cartel decisions.

[108] 'Report on Competition Policy 2005', SEC(2006)761 final, para. 174; 'Report on Competition Policy 2006', COM(2007) 358 final, para. 8; 'Report on Competition Policy 2007', COM(2008)368 final, para. 6.

[109] 'Report on Competition Policy 2017', COM(2018)482 final, 3.

[110] 'Report on Competition Policy 2007', COM(2008)368 final, para. 6.

[111] S. D. Hammond, 'When Calculating the Cost and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on an Individual's Freedom?', 8 March 2001, www.usdoj.gov/atr.

[112] For a critical account, see P. Billiet, 'How Lenient is the EC Leniency Policy? A Matter of Certainty and Predictability' (2009) *ECLR* 14.

[113] See L. Brokx, 'A Patchwork of Leniency Programmes' (2001) 2 *ECLR* 35.

[114] *DHL Express (Italy) srl* v. *AGCM*, C-428/14, EU:C:2016:274. The applicant was pursued both by the Commission and the Italian NCA for different infringements. However, his leniency application to the Italian NCA was incomplete.

[115] The Commission suggests this is not a significant problem. S. Blake and D. Schnichels, 'Leniency Following Modernisation: Safeguarding Europe's Leniency Programmes' (2004) 2 *Competition Policy Newsletter* 7.

[116] Commission Staff Working Document, Annex to 'Commission Report on Competition Policy 2007', SEC(2008)2038, para. 449.

[117] Commission Staff Working Document accompanying *Report on Competition Policy* (2012) 8.

[118] This is discussed below at p. 909.

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Secondly, leniency policies do not affect the undertaking's liability if the victims of a cartel seek damages. A successful leniency applicant may pay less damages because the Damages Directive provides that a defendant who has benefited from leniency will not be jointly and severally liable for the infringement unless the claimants are unable to secure full compensation from the other cartel members.[119] However, this is a small reduction. As a result, the money saved by confessing to the existence of a cartel (which might otherwise not have come to light) and avoiding the antitrust fine can be lost when the undertaking is sued for damages.[120] This might deter leniency applications. Recently, the Commission has initiated a whistleblower tool whereby employees may contact the Commission with information about restrictive practices. No reward is offered, and it may be that this is a response to the reduced incentives that corporations have to apply for leniency as a result of the damages exposure.[121]

A related policy remains to be mentioned: cartel settlements.[122] Parties secure a discount on the fine up to 10 per cent if they agree not to contest the Commission's proposed infringement findings. The aim is to save resources that go into preparing the case for oral hearing and subsequent appeals. Practitioners report that the Commission gives fairly clear ideas about the estimated fines it proposes to apply so that parties can decide if it is worth settling; however, the discount is not as generous as that found in other legal systems, which may reduce its attractiveness.[123] At the same time 50 per cent of cartel cases are settled.[124] It is of course possible to benefit from both leniency and settlement policies.

(iv) Commitment Decisions

The Commission has frequently used informal means to close certain cases.[125] For undertakings, informality has the obvious advantage that fines and the publicity of an investigation (which may give rise to damages claims) are avoided. The disadvantages, however, are over-enforcement on the one hand (e.g. without a full hearing the Commission may abuse its powers by accusing parties of a non-existent infringement); or under-enforcement on the other (informal closures avoid the imposition of fines and are privately negotiated between parties and Commission).[126] Furthermore, from an enforcer's point of view, if the parties did not comply, the Commission's only solution would be to restart an investigation afresh. In an attempt to increase transparency of its settlements practice, and to strengthen its enforceability, the Council formalised this practice, creating a new category of decisions: commitment decisions.[127]

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[119] Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L 349/1, Article 11(4).

[120] P. C. Zane, 'The Price Fixer's Dilemma: Applying Game Theory to the Decision of Whether to Plead Guilty to Antitrust Crimes' (2003) *Antitrust Bulletin* 1.

[121] This scheme is explained here: http://ec.europa.eu/competition/cartels/whistleblower/index.html.

[122] Commission Regulation 622/2008 of 30 June 2008 amending Regulation 773/2004, as regards the conduct of settlement procedures in cartel cases [2008] OJ L 171/3.

[123] S.-P. Brankin, 'The First Cases Under the Commission's Cartel Settlement Procedure: Problems Solved?' (2011) 32(4) *ECLR* 5 for an informative insider's perspective. M. P. Schinkel, 'Bargaining in the Shadow of the European Settlement for Cartels' (2011) 56(2) *Antitrust Bulletin* 462.

[124] R. Whish and D. Bailey, *Competition Law*, 9th edn (Oxford University Press, 2018) 273.

[125] I. van Bael, 'The Antitrust Settlement Practice of the EC Commission' (1986) 23 *CMLRev* 61.

[126] For a discussion of these concerns, see G. Bruzzone and G. Boccaccio, 'Taking Care of Modernisation after the Startup: A View from a Member State' (2008) 31 *World Competition* 89.

[127] N. Dunne, 'Commitment Decisions in EU Competition Law' (2014) 10 *Journal of Competition Law and Economics* 399.

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Regulation 1/2003, Article 9

(1) Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission.

Proposed decisions to accept commitments must be published, inviting comments from third parties as a way of gaining information about the competitive impact of the commitment[128] and consulting the Advisory Committee.[129] Increased transparency and consultation may lead to more predictable use of commitment procedures; however, a number of concerns have arisen with this new procedure, not least because the Commission uses it in non-cartel cases far more frequently than expected. The first concern is that judicial review appears limited. In *Alrosa*, the Commission was reviewing an agreement by which Alrosa agreed to sell all its diamonds for export to De Beers. After a series of proceedings De Beers offered a commitment to phase out the agreement, which the Commission accepted. Alrosa was dissatisfied with the outcome and argued that the commitment was disproportionate, for less aggressive commitments would have sufficed to resolve the competition concerns.[130]

Commission v. *Alrosa*, C-441/07 P, ECLI:EU:C:2010:377

35 . . . Article 9 of the Regulation is based on considerations of procedural economy, and enables undertakings to participate fully in the procedure, by putting forward the solutions which appear to them to be the most appropriate and capable of addressing the Commission's concerns.

36 As observed by the parties and by the Advocate General . . . the principle of proportionality, as a general principle of European Union law, is . . . a criterion for the lawfulness of any act of the institutions of the Union, including decisions taken by the Commission in its capacity of competition authority . . .

48 Undertakings which offer commitments on the basis of Article 9 of Regulation No. 1/2003 consciously accept that the concessions they make may go beyond what the Commission could itself impose on them in a decision adopted under Article 7 of the Regulation after a thorough examination. On the other hand, the closure of the infringement proceedings brought against those undertakings allows them to avoid a finding of an infringement of competition law and a possible fine.

49 Moreover, the fact that the individual commitments offered by an undertaking have been made binding by the Commission does not mean that other undertakings are deprived of the possibility of protecting the rights they may have in connection with their relations with that undertaking.

[128] Regulation 1/2003, Article 27(4).

[129] *Ibid.* Article 14(1) (the composition of the committee is described above at p. 887).

[130] There is an added complexity: the Commission had moved against this agreement in two ways: against De Beers for breach of Article 102 TFEU and against both undertakings for breach of Article 101 TFEU. There were ongoing negotiations on the Article 101 commitments when De Beers then proposed to settle under Article 102. The attentive reader will also have noticed that the agreement here looks like a cartel, and Article 9 procedures should not normally apply to such cases, see Regulation 1/2003, recital 13.

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50 It must therefore be concluded that the Commission is right to submit that in the judgment under appeal the General Court wrongly considered that the application of the principle of proportionality must be assessed, in the case of decisions taken under Article 9 of Regulation No. 1/2003, by reference to the way in which it is assessed in connection with decisions taken under Article 7 of that Regulation despite the different concepts underlying those two provisions.

Accordingly, in commitment decisions the parties forfeit the accuracy of the Article 7 remedy in favour of a more convenient procedure. The problems with this line of argumentation are many.[131] Principal among these is that the Commission has superior bargaining power and thus can extract significant concessions that go beyond what is strictly necessary, and there is no doubt that the Commission proposes commitments to the parties, contrary to what the Court of Justice intimates.[132] Not only can the Commission threaten a formal procedure with fines, but parties may fear that non-cooperation today damages their future dealings with the Commission. However, a commitment decision does not bind national courts which may still find the conduct infringing competition law.[133] To remedy this critique the Commission has developed a practice of assessing the proportionality of the remedy in detail. Some commitments have been challenged by third parties (who might consider that the commitment is not adequate) with some success at national level.[134] However, further concerns remain. The fact that commitment decisions are not appealed frequently may stimulate the enforcer to use this procedure even for cases where the law is not clear, meaning that rather than exploring in detail the soundness of the competition problem (and risking judicial assessment of that) the Commission can expand the reach of the competition rules. Moreover, many decisions include structural remedies, which are considered exceptional in formal procedures. We show the concrete effects of these risks in Chapter 22.

(v) Commission's Procedures: An Assessment

One theme that emerges from the discussion above is how the significant powers that may be exercised need to be kept in check by reference to the fundamental rights of the parties under investigation. The source of these fundamental rights has evolved: at first these were general principles of EU law, often interpreted by reference to the jurisprudence of the ECtHR, and more recently the source of rights has been the EUCFR. In evaluating the compatibility of EU competition procedures with fundamental rights, one should distinguish two lines of analysis: one is whether the exercise of the various powers noted above is carried out in such a way that fundamental rights are complied with. As discussed above, there is some doubt as to whether this is the case, but it is telling that the European Courts and Commission make genuine attempts to ensure the law evolves to safeguard these rights.[135] The second point is whether the institutional

[131] F. Wagner von Papp, 'Best and Even Better Practices in Commitment Procedures After Alrosa' (2012) 49 *CMLRev* 929, offering the most comprehensive critique.
[132] DG Competition, *Antitrust Manual of Procedures* (2012) ch. 16, 7.
[133] *Gasorba SL* v. *Repsol*, C-547/16, EU:C:2017:891.
[134] *Skyscanner Ltd* v. *Competition and Markets Authority* [2014] CAT 16, but so far no success against Commission decisions, see *Morningstar* v. *Commission*, T-76/14, EU:T:2016:481. But see *Groupe Canal +* v. *European Commission*, T-873/16, ECLI:EU:T:2018:904.
[135] See generally I. van Bael, *Due Process in EU Competition Proceedings* (The Hague, Kluwer, 2011).

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set-up by which the Commission investigates, prosecutes and reaches a decision is compatible with fundamental rights.[136] We examine this debate here.

Article 6(1) ECHR provides that when persons face criminal charges they are entitled to 'a fair and public hearing by an independent and impartial tribunal established by law'. One might object that Article 23(5) of Regulation 1/2003 provides that fines are administrative in nature, but this is to overlook the case law of the ECtHR which provides that formal classifications are irrelevant and that a wide range of penalties may be described as criminal, by reference to the penalty imposed and whether it aims to sanction and deter the infringer. Accordingly, most assume that Commission procedures are criminal in nature.[137] However, the ECtHR has also held that there are different degrees of criminal charges, and for non-hardcore criminal charges the imposition of penalties by agencies may be appropriate provided that the agency's decisions are subjected to judicial review. In *Menarini Diagnostics* v. *Italy*, the ECtHR ruled that Italy's antitrust procedures, which are similar to those of the Commission, comply with Article 6(1) ECHR in that the decision of the competition authority was susceptible to judicial review by a court that had full jurisdiction.[138] One might thus legitimately assume that the same applies to the Commission, so that undertakings in competition cases do not require the full set of procedural guarantees that are afforded to, say, those accused of theft.[139] If so, the question then is how far the General Court has full jurisdiction. This is where the debate is most heated at the moment, and the Court of Justice has attempted to respond to the *Menarini* judgment in an appeal against a Commission decision imposing fines on members of a cartel.[140]

KME v. *Commission*, C-272/09 P, ECLI:EU:C:2011:810

93 The judicial review of the decisions of the institutions was arranged by the founding Treaties. In addition to the review of legality, now provided for under Article 263 TFEU, a review with unlimited jurisdiction was envisaged in regard to the penalties laid down by regulations.

94 As regards the review of legality, the Court of Justice has held that whilst, in areas giving rise to complex economic assessments, the Commission has a margin of discretion with regard to economic matters, that does not mean that the Courts of the European Union must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must those Courts establish, among other things, whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.

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[136] This is a long-standing debate, see F. Montag, 'The Case for Radical Reform of the Infringement Procedure under Regulation 17' (1998) *ECLR* 428; C. D. Ehlermann and M. Marquis (eds.), *European Competition Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases* (Oxford, Hart, 2011).

[137] *KME* v. *Commission*, C-272/09 P, ECLI:EU:C:2011:63, Opinion of Advocate General Sharpston, para. 64; Editorial Comments, 'Towards a More Judicial Approach? EU Antitrust Fines under the Scrutiny of Fundamental Rights' (2011) 48(5) *CMLRev* 1405, 1408.

[138] *Menarini Diagnostics* v. *Italy* (Application no. 43509/08), Judgment of 27 September 2011.

[139] W. P. J. Wils, 'Antitrust Enforcement Powers and Procedural Rights and Guarantees: The Interplay between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights' (2011) 34 *World Competition* 189.

[140] *Schindler Holding and Others* v. *Commission*, C-501/11 P, EU:C:2013:522, paras. 33–8, citing *Menarini* and stating that judicial review by the ECJ complies with the requirements of the ECtHR.

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95 With regard to the penalties for infringements of competition law, the second subparagraph of Article 15(2) of Regulation No. 17 provides that in fixing the amount of the fine, regard is to be had both to the gravity and to the duration of the infringement.

96 The Court of Justice has held that, in order to determine the amount of a fine, it is necessary to take account of the duration of the infringements and of all the factors capable of affecting the assessment of their gravity, such as the conduct of each of the undertakings, the role played by each of them in the establishment of the concerted practices, the profit which they were able to derive from those practices, their size, the value of the goods concerned and the threat that infringements of that type pose to the European Community.

97 The Court has also stated that objective factors such as the content and duration of the anticompetitive conduct, the number of incidents and their intensity, the extent of the market affected and the damage to the economic public order must be taken into account. The analysis must also take into consideration the relative importance and market share of the undertakings responsible and also any repeated infringements.

98 This large number of factors requires that the Commission carry out a thorough examination of the circumstances of the infringement.

99 In the interests of transparency the Commission adopted the Guidelines, in which it indicates the basis on which it will take account of one or other aspect of the infringement and what this will imply as regards the amount of the fine.

100 The Guidelines, which, the Court has held, form rules of practice from which the administration may not depart in an individual case without giving reasons compatible with the principle of equal treatment, merely describe the method used by the Commission to examine infringements and the criteria that the Commission requires to be taken into account in setting the amount of a fine.

101 It is important to bear in mind the obligation to state reasons for Community acts. That is a particularly important obligation in the present case. It is for the Commission to state the reasons for its decision and, in particular, to explain the weighting and assessment of the factors taken into account. The Courts must establish of their own motion that there is a statement of reasons.

102 Furthermore, the Courts must carry out the review of legality incumbent upon them on the basis of the evidence adduced by the applicant in support of the pleas in law put forward. In carrying out such a review, the Courts cannot use the Commission's margin of discretion – either as regards the choice of factors taken into account in the application of the criteria mentioned in the Guidelines or as regards the assessment of those factors – as a basis for dispensing with the conduct of an in-depth review of the law and of the facts.

103 The review of legality is supplemented by the unlimited jurisdiction which the Courts of the European Union were afforded by Article 17 of Regulation No. 17 and which is now recognised by Article 31 of Regulation No. 1/2003, in accordance with Article 261 TFEU. That jurisdiction empowers the Courts, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute their own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed . . .

106 The review provided for by the Treaties thus involves review by the Courts of the European Union of both the law and the facts, and means that they have the power to assess the evidence, to annul the contested decision and to alter the amount of a fine. The review of legality provided for under Article 263 TFEU, supplemented by the unlimited jurisdiction in respect of the amount of the fine, provided for under Article 31 of Regulation No. 1/2003, is not therefore contrary to the requirements of the principle of effective judicial protection in Article 47 of the Charter.

This judgment leaves something to be desired on two fronts. First, the General Court's power with respect to fines is much more significant than its power when it comes to a review of the facts,

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which raises questions about whether the Court really has full jurisdiction across the board. Secondly, the Court restates a long-held view that while for factual findings the Court can examine the correctness in detail, in certain complex economic matters it defers to the Commission's judgment (para. 94). Commentators have viewed this approach as unsatisfactory on two grounds: first, it is not always clear which kinds of issue merit more in-depth review and which ones do not; secondly, this passage seems to be evidence that the court lacks full jurisdiction.[141] On the other hand, the judgment has been welcomed because it appears to require the General Court to consider much more closely the grounds of appeal raised by the parties.

The debate on the nature of judicial review has developed in an unsatisfactory manner because no court has yet arrived at a clear conception of what an appropriate level of judicial scrutiny means. This has not been helped by one judge explaining that when faced with the review of complex economic assessments the court applies an 'intense – though marginal – review'.[142]

As a reaction to this it has been argued that a more fruitful approach would be to allow the Court of Justice to retain the present marginal review of delicate economic policy issues (for which the Commission is constitutionally better placed) and instead consider reforming the decision-making organism so that there is a functional separation between prosecution and decision-making. Rendering the decision-maker independent in this way would serve to legitimise the exercise of the Commission's discretionary powers for there would be no confirmation bias.[143] On the other hand, the current dialectic between the Commission and the General Court appears satisfactory in most cases.

C. Harding and J. Joshua, *Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency*, 2nd edn (Oxford University Press, 2010) 219–20

[The General Court] has fashioned for itself a distinctive role as a court of review . . . Moreover, its review of virtually every aspect of the Commission's procedure has been painstaking. In effect, this has encouraged appeals by undertakings to such an extent that the Court has an almost automatic role in dealing with the Commission's cartel decisions. It would not be an exaggeration to say that it has for practical purposes almost turned itself into a trial court in this context . . . In effect, therefore, the separation of powers complaint . . . has been addressed. In the majority of cartel cases, the Commission's formal decision has evolved into a summative statement of the case for the prosecution, which is then judicially tested before the [General Court]. Since the dust has settled on this development, from the middle of the 1990s both the Commission and the Court appear to have settled into a comfortable relationship, within which the former prepares its cases carefully, and the latter confirms most of the prosecution case . . . the cartels still have their day in court, with the prospect of appeal to the Court of Justice if they wish to continue the legal battle.

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[141] I. van Bael, *Due Process in Competition Proceedings* (The Hague, Kluwer, 2011) 357–63.

[142] M. Jaeger, 'The Standard of Review in Competition Cases Involving Complex Economic Assessments' (2011) 2(4) *Journal of European Competition Law and Practice* 295, 300. The judge was simply referring to para. 94 in *KME*, noting how this has been the basis for several detailed reviews of the economic evidence brought by the Commission. Yet, the choice of language is rather unfortunate. Likewise, later the learned judge's suggestion that marginal review be limited to matters of 'economic policy' (313) appears too narrow, for what he appears to mean is the application of economic theory by the Commission, its discretion in selecting a theory of harm.

[143] R. Nazzini, 'Administrative Enforcement, Judicial Review and Fundamental Rights in EU Competition Law: A Comparative Contextual-Functionalist Perspective' (2012) 49(3) *CMLRev* 971.

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However, Harding and Joshua are concerned with the fact that this legal development has occurred as a result of powerful corporate actors, who have explored the judicial process in the light of clear infringements of EU competition law, and who often make repetitive legal arguments. And while the appeals by these large firms have led to the creation of considerable procedural safeguards for their interests, the Court of Justice has had little opportunity to explain what rights those injured by anti-competitive behaviour have. One possible reaction to this assessment is that the Court's review of the Commission's decisions appears to vary from case to case. In some merger cases the Court appears to be very willing to probe in depth the soundness of the economic theories used,[144] while in cartel and abuse-of-dominance cases the Court appears to be less exacting in its review, although this may be changing.[145]

(vi) Commission's Performance

A further long-standing criticism of the Commission's procedures is the potentially political nature of the decision-making process.

L. Laudati, 'The European Commission as Regulator: The Uncertain Pursuit of the Competitive Market' in G. Majone (ed.), *Regulating Europe* (London, Routledge, 1996) 231, 235–6

The degree of independence of an antitrust enforcement institution is determined by two elements: the structural independence from political authority, and separation of investigatory, prosecutorial and decision-making functions. The Community antitrust enforcement has a low level of independence in both respects . . .

When the Community system was established, it was believed that placing the powers to execute the competition laws in the hands of the Commission would minimize political interference with enforcement by the Member States. The Commission has, however, become a highly political body, and political considerations play a significant role in its competition enforcement decisions. National antitrust officials acknowledge that pressure from national governments may influence the Commission's decisions because the Commission must have the cooperation of national governments in order to fulfil its mission. Thus, the Commission exerts considerable effort to reconcile national policies with Community policy.

Moreover, DG IV [now, DG Competition] cannot act independently of the other DGs since final decisions are made by the full Commission. Political pressure from other DGs is felt constantly, owing to the broad economic implications of competition decisions. Such pressure, in general, runs against the negative decisions by DG IV, particularly with regard to mergers. Moreover, it forces DG IV to take account of policy considerations other than competition policy . . . This type of pressure has grown in recent years owing to the increasingly important role of competition law, and the economic recession and high levels of unemployment throughout the Community.

For instance, DG III (industrial policy) and DG IV (social policy) frequently take positions at odds with those of DG IV. Other DGs likely to intervene regulate specific sectors of the economy – for example DG XIII

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[144] See e.g. *Commission* v. *Tetra Laval*, C-12/03 P, ECLI:EU:C:2005:87.

[145] See e.g. *Microsoft* v. *Commission*, T-201/04, ECLI:EU:T:2007:289. For discussion see I. Forrester, 'A Challenge for Europe's Judges: The Review of Fines in Competition Cases' (2011) 36 *ELRev* 185; D. Bailey, 'Scope of Review under Article 81 EC' (2004) 41 *CMLRev* 1327; A. Fritzsche, 'Discretion, Scope of Judicial Review and Institutional Balance in European Law' (2010) 47 *CMLRev* 361.

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(telecommunications) and DG XVII (energy). This does not mean that all communication among the DGs is contentious. Rather, collaboration and consultation regularly occur between rapporteurs of DG IV and those of other DGs, especially DG III, because of their familiarity with the various sectors. But if DG III staff believe that a merger should be cleared and their counterparts believe the opposite, the staff members of each DG must convince their Commissioner of the merits of their position. Commissioners themselves then resolve the dispute.

Another fault of the system is that it requires Commissioners with no expertise in competition law and severe time constraints to apply complex laws and economic analysis to facts in all cases, then make the final decision. It is doubtful whether all Commissioners are professionally qualified to perform this function. Critics point out that, in practice, most competition decisions are adopted with little or no debate, as written proposed decisions are circulated to each cabinet of each Commissioner and considered to be adopted if no objections are made within a limited period.

An additional problem results from a lack of clarity as to the standards being applied in deciding antitrust cases. As stated above, policy areas other than competition are considered, especially industrial and social policy. However, parties with competition matters before the Commission have no substantive or procedural rules to follow regarding the presentation of evidence on such policy issues, even though these matters could have significant impact on the outcome of their cases. This raises due process concerns.

Laudati's comments strengthen the views of Wesseling (discussed in section 2 of this chapter) by noting how the interference of other EU objectives is inevitable, given the institutional make-up of the Commission and the Commission's own political energies and understanding of how the Community project impacts upon the development of competition law. Of course, not every competition decision is keenly debated by the College of Commissioners – much competition law enforcement is the routine supervision of business practices where wider Community interests are affected marginally, but in significant cases that establish a new precedent or apply to novel markets, other Commissioners' views (whether based upon their portfolio or their national interests) become more prominent. It is fair to say, however, that as a whole, the Commission's enforcement of competition law is like that of any other independent agency: while it must be sensitive to the political context, by and large it exercises its powers autonomously. Indeed, competition enforcement by the Commission is highly regarded worldwide.[146]

4 RESETTLEMENT OF COMPETITION REGULATORY AUTHORITY

(i) Modernisation

Concentrating the task of enforcement in the Commission brought certain advantages: a single regulator, a uniform approach to competition law (although stricter national competition laws could still apply provided the Commission had not acted),[147] and DG Competition gained

[146] See generally Monti, n. 3 above.

[147] *Walt Wilhelm* v. *Bundeskartellamt*, 14/68, ECLI:EU:C:1969:4. On the difficulties of this see R. Wesseling, 'Subsidiarity in Community Competition Law over National Law' (1997) 22 *ELRev* 19.

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experience in handling disputes. However, there were two drawbacks in concentrating enforcement in the hands of the Commission. The first, as we saw above, is that the Commission could act in a politically motivated manner. In the mid-1990s it was argued that competition enforcement should be delegated to a separate 'European Cartel Office' to enhance the independence of the decision-making process, but this suggestion is now unlikely to be implemented.[148] The second problem is that the Commission considered that its limited resources had become insufficient to deal with all competition problems coming to its attention. This was because parties were able to notify the Commission of their plans and evaluating these proposals was time-consuming and diverted efforts away from a proactive enforcement strategy.[149] This enforcement pattern was neither in the interests of business nor in the interests of the proper enforcement of competition law.

Since the 1970s, the Commission has attempted to ameliorate this, first by developing certain administrative practices that were less time-consuming. It issued comfort letters (informal indications that on the basis of information available there was no competition concern). However, their non-binding character gave parties little legal security where the agreement was challenged in national courts. The second solution was to draft Block Exemption Regulations. These provide that if an agreement meets certain specified criteria, it benefits from automatic exemption, without notification. The weakness of this approach is that it creates a straitjacket effect: the parties use the relevant Block Exemption as the basis for their contractual relations and structure the agreement according to its terms, which might skew their commercial desires. Requiring parties to sacrifice commercial practicality in order to gain legal security seemed to some too high a price to pay.[150]

In the early 1990s the Commission attempted a third solution, often referred to as a programme of decentralisation. It encouraged national competition authorities to enforce EU competition law and invited private parties to use national courts to enforce competition law. The Commission argued that national competition authorities had a common task of protecting competition and the national authorities should use EU competition law to regulate markets, allowing the Commission to take action in cases of particular significance to the Community.[151] However, encouraging decentralised enforcement though soft law failed to galvanise national authorities and courts and the Commission still had a worryingly heavy caseload, and this was due to the 2004 enlargement of the EU, which would prevent it from setting its enforcement priorities. More drastic reforms were needed.[152] This background explains the emergence of Regulation 1/2003.[153]

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[148] S. Wilks and L. McGowan, 'Disarming the Commission: The Debate Over a European Cartel Office' (1995) 32 *JCMS* 259.

[149] Some 40,000 notifications were received. *Ninth Report on Competition Policy* (1979) 15–16.

[150] The first Block Exemption was implemented in 1967: Regulation 67/67 on exclusive purchase agreements [1967] OJ L 84/67.

[151] Commission Notice on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Articles [101 TFEU] and [102 TFEU] [1997] OJ C 313/1; Commission Notice on cooperation between national courts and the Commission in applying Articles [101 TFEU] and [102 TFEU] [1993] OJ C 39/6.

[152] *White Paper on Modernisation of the Rules Implementing Articles [101 TFEU] and [102 TFEU]* [1999] OJ C 132/1.

[153] Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1.

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Regulation 1/2003, Article 1

(1) Agreements, decisions and concerted practices caught by Article [101(1)] of the Treaty which do not satisfy the conditions of Article [101(3)] of the Treaty shall be prohibited, no prior decision to that effect being required.

(2) Agreements, decisions and concerted practices caught by Article [101(1)] of the Treaty which satisfy the conditions of Article [101(3)] of the Treaty shall not be prohibited, no prior decision to that effect being required.

The implication of Article 1 is profound: parties who before would have submitted a request for exemption and had to wait endlessly for a response must now decide for themselves whether their agreement infringes the competition rules. This represents a switch from an *ex ante* notification-based system of competition enforcement to an *ex post* deterrence-based system. Abolishing the right of parties to notify an agreement means that the Commission is now free to focus on the more serious infringements.

The other plank of the reform is to require national competition authorities to enforce EU competition law, thereby decentralising enforcement of EU competition law.

Regulation 1/2003, Article 3

(1) Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article [101(1)] which may affect trade between Member States within the meaning of that provision, they shall also apply Article [101] to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article [102], they shall also apply Article [102].

(2) The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article [101(1)], or which fulfil the conditions of Article [101(3)] or which are covered by a Regulation for the application of Article [101(3)]. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.

(3) Without prejudice to general principles and other provisions of Community law, paragraphs 1 and 2 do not apply when the competition authorities and the courts of the Member States apply national merger control laws nor do they preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles [101] and [102].

This provision obliges NCAs to apply Articles 101 and 102 TFEU and to give EU competition law priority over national competition law. 'Enforcement of Articles [101 and 102] is now a shared responsibility, not just in theory but in practice. At both the political and practical level, the modernisation regime requires Member States to adopt a commitment to the enforcement of Community law in this area far in excess of anything to date.'[154] In effect, Regulation 1/2003

[154] Kerse and Khan, n. 44 above, 47.

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turns the NCA into a Union competition authority. There are three exceptions to the obligation of the NCA to give priority to EU competition law. The first is in the final sentence of Regulation 1/2003, Article 3(2), which allows the authority to apply stricter national competition law that regulates unilateral behaviour. As we will see in the following two chapters, EU competition law only regulates unilateral behaviour when the firm has a dominant position. In contrast, some Member States have competition laws that are wider in scope. The second exception is that national merger law is unaffected. The final exception is that national laws, which pursue non-competition objectives, may be enforced to prohibit a practice which is unobjectionable from a competition perspective, for example consumer protection legislation.

From the perspective of undertakings, Regulation 1/2003 reduces compliance costs because very similar competition rules apply across the Union. Therefore, their practices will be scrutinised uniformly regardless of which competition authority handles the investigation. From the perspective of the Commission, this creates a battalion of competition authorities with ample resources, thereby improving the enforcement of competition law.

(ii) Commission's New Role

The Commission no longer has to review every agreement notified to it. It can now set its own agenda in a legal environment where the majority of competition enforcement will be carried out by national authorities. The Commission has carried out three main tasks.

First, the Commission has increased enforcement against cartels which operate internationally, as well as focusing on industries where a few firms hold market power. This is significant because in the past the Commission was criticised for focusing on harmless business conduct that was notified to it.[155] However, this is somewhat misleading because a closer look at the statistics reveals that the Commission had already begun to focus on cartels around the year 2000, largely because of improved internal working practices, and because Block Exemptions led to fewer notifications. The absence of a significant increase in the Commission's output in the period since 2004 is not easy to explain.[156]

The second task for the Commission is to provide guidance in novel cases to facilitate the work of national competition authorities. The Commission will continue the process of drafting Notices and Guidelines (begun in the late 1990s), which are not binding but are an expression of how the Commission would handle a case and are bound to influence the national authorities. These instruments will be of increasing importance for undertakings because they are now unable to notify agreements to gain exemption and require as much information as possible to determine for themselves whether their planned business practices are lawful. In exceptional circumstances, however, parties may be able to obtain individual guidance from the Commission either informally through guidance letters,[157] or formally.

[155] D. Neven, P. Papandropoulos and P. Seabright, *Trawling for Minnows: European Competition Policy and Agreements Between Firms* (London, CEPR, 1998), M. Monti, 'European Competition Policy: Quo Vadis?', 10 April 2003, http://ec.europa.eu/competition/index_en.html.

[156] Monti, n. 3 above, and W. P. J. Wils, 'Ten Years of Regulation 1/2003: A Retrospective' (2013) 4(4) *Journal of European Competition Law and Practice* 1.

[157] Regulation 1/2003, recital 38 and Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases [2004] OJ C 101/78.

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Regulation 1/2003, Article 10

Where the Community public interest relating to the application of Articles [101 TFEU] and [102 TFEU] . . . so requires, the Commission, acting on its own initiative, may by decision find that Article [101 TFEU] . . . is not applicable to an agreement, a decision by an association of undertakings or a concerted practice, either because the conditions of Article [101(1) TFEU] . . . are not fulfilled, or because the conditions of Article [101(3) TFEU] . . . are satisfied.

The Commission may likewise make such a finding with reference to Article 82 of the Treaty.

There is a risk that Article 10 could be used for reasons other than merely clarifying the law. The provision is triggered by the need to serve the *Community's public interest*. This is sufficiently wide to allow the Commission to decide that a particular practice does not infringe Article 101 TFEU because of some public policy reason unrelated to competition law. Given the institutional make-up of the Commission, the risk is present, even though the recitals to the Regulation suggest that the purpose of Article 10 is to shed light on areas where the law is unclear.[158] To date, no decision has been issued under Article 10. Instead of using these methods the Commission has used its powers as *amicus curiae* to intervene in cases in national courts to secure harmonised interpretation.[159]

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(iii) European Competition Network

To ensure the successful functioning of national enforcement, each Member State must designate the competition authority responsible for the application of Articles 101 and 102 TFEU,[160] and the NCA must be able to impose meaningful remedies, including interim measures, prohibition orders, imposing penalties and accepting commitments.[161] This harmonises the sanctions of all NCAs to guarantee the effective enforcement of EU competition law. However, in addition to empowering each NCA, successful enforcement requires considerable coordination among the NCAs and the Commission. Therefore, as early as 2002 the European Competition Network (ECN) was created, comprising all NCAs and the Commission. The ECN is not a competition authority, but a forum for cooperation for the NCAs. Its principal tasks when it was originally designed were the following: first, to coordinate enforcement so that there is an efficient allocation of cases among the Network; and secondly, to develop mechanisms for cooperation during investigations and means of ensuring consistency in the application of competition rules. In reality the performance of the Network has been even more impressive, if problematic. We chart the performance of the original tasks first.

[158] Regulation 1/2003, recital 14.
[159] *Ibid.* Article 15(3) provides for this power (the interventions are available at http://ec.europa.eu/competition/court/antitrust_amicus_curiae.html).
[160] *Ibid.* Article 35(1). [161] *Ibid.* Article 5.

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(a) Case Allocation and Cooperation

Regulation 1/2003 envisaged that each case should be handled by a single authority,[162] but the detailed implementation was left to soft law instruments, setting out in detail how cases may be allocated. Three alternatives are envisaged: enforcement by one NCA, enforcement by several NCAs or enforcement by the Commission.[163] The Network serves as a platform for case reallocation. One agency will initiate a procedure and will inform the others of it. Normally the agency that initiates the case keeps it but other agencies may claim to be better placed. An authority is well placed when the practice in question affects its territory, where it is able to impose effective remedies and when it has access to the information necessary to prove the infringement.[164] Parallel action is envisaged when this might be better for bringing the infringement to an end, or where this might allow for more effective remedies.[165] Finally, the Notice provides that the Commission may be better placed in three scenarios: when the activity affects three or more Member States; when the competition complaint is closely linked to other EU law prohibitions so that it is more efficient for the Commission to intervene; or when the case 'requires the adoption of a Commission decision to develop [EU] competition policy when a new competition issue arises or to ensure effective enforcement'.[166]

Thus far there have been very few reallocations. However, a legal concern arises in instances of parallel proceedings: suppose there is a price-fixing agreement among manufacturers of widgets and prices are fixed in Bulgaria and Hungary. May the two NCAs decide to divide up the case so that each prosecutes it? Arguably this is advantageous because then the two authorities may impose a fine each for the effects of the cartel in their jurisdiction. However, it is arguable that this prosecution infringes the undertakings' right not to be prosecuted twice for the same offence. The Court of Justice has addressed this concern in *Toshiba*: the Commission and the Czech NCA had prosecuted and fined a cartel, but the Czech NCA had done so for activities that had taken place in the Czech Republic before that country's accession to the European Union. In these circumstances, the right not to be prosecuted twice did not arise.[167] Other cartel cases have been divided up among the enforcers.[168] While this may be expedient, it undermines the rights of the firms under investigation: the justifications for prohibiting a second prosecution are in order to discipline the prosecutor so that it has all the evidence before proceeding; a single prosecution also spares the defendant the burdens of defending the issue twice. Furthermore, allowing multiple prosecutions of the same price-fixing cartel misses the key enforcement gap: many NCAs appear to have no power to impose fines for effects that occur outside their Member State.[169] This is particularly problematic because the reason they must apply EU competition law in the first place is that the practice has an effect on trade among Member States.[170]

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[162] *Ibid.* recital 18.
[163] Commission Notice on cooperation within the Network of Competition Authorities [2004] OJ C 101/43.
[164] *Ibid.* paras. 6–11. [165] *Ibid.* para. 12. [166] *Ibid.* para. 15.
[167] *Toshiba Corporation and Others* v. *Úřad pro ochranu hospodářské soutěže*, C-17/10, ECLI:EU:C:2012:72.
[168] G. Monti, 'Galvanising National Competition Authorities in the European Union' in D. Gerard and I. Lianos (eds.), *Reconciling Efficiency and Equity* (forthcoming 2019).
[169] K. Lenaerts, D. Gerard, 'Decentralisation of EC Competition Law Enforcement: Judges in the Frontline' (2004) 27(3) *World Competition* 313
[170] For further discussion, see G. Monti, 'Managing Decentralised Antitrust Enforcement' (2014) 51(1) *CMLRev* 261; G. di Federico, 'EU Competition Law and the Principle of *Ne Bis in Idem*' (2011) 17(2) *EPL* 241.

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Once a case is allocated, there are also provisions to assist the NCA: the Commission or any other NCA may transmit information to the NCA in charge, and it is even possible that one NCA carries out investigations in its Member State on behalf of the NCA in charge of prosecuting the case.[171] Some concerns have been expressed that this transmission of information may not contain sufficient safeguards, but so far there have been very few instances where these powers have been exercised.[172]

Finally, before a decision is rendered by an NCA, the Commission may check it.

Regulation 1/2003, Article 11

(6) The initiation by the Commission of proceedings for the adoption of a decision shall relieve the competition authorities of the Member States of their competence to apply Articles [101 TFEU] and [102 TFEU] . . . If a competition authority of a Member State is already acting on a case, the Commission shall only initiate proceedings after consulting with that national competition authority.

The article is designed to allow other NCAs to express their views on the decision and, more significantly, it is a way for the Commission to check that the NCA does not use the law in a political manner to favour national industry. As an additional safeguard against national bias in a planned decision, Article 11(6) allows the Commission to remove the case from the NCA and decide it itself. The latter provision is a drastic measure, and the Commission has so far used less drastic (but also less transparent) means of advising NCAs on the approach they should take.[173]

(b) Modernisation in Practice

What has been observed is that the two main tasks for the ECN have not taxed it, but the ECN has been active on other fronts: it appears to be a site where members seek practical advice about how to analyse markets, and where collaborative projects are entered into to improve enforcement. For example, the ECN has surveyed NCAs and issued recommendations on procedural matters like commitment decisions and gathering digital evidence.[174] There has also been one instance where several NCAs coordinated their enforcement efforts when faced with the same concern.[175] In brief, NCAs were alerted to the risks posed by the agreements between booking.com and hotels. The agreements required that the hotel prices on the booking.com website had to be no higher than those that the hotel charged on its own website or on the website of any other platform (a so-called wide price parity clause). NCAs were concerned that this would soften competition for hotel rooms and may also make entry of competitors to booking.com more difficult. The French, Italian and Swedish NCAs took the lead in assessing the competition concerns. This led to three commitment decisions in the three jurisdictions by which booking.com agreed to narrow price parity clauses (that is to say, booking.com could prevent the hotel from charging lower rates on its website but could not prevent the hotel from agreeing to lower rates with other online platforms like Expedia). Nearly all other NCAs then followed this

[171] See Regulation 1/2003, Articles 11(3), 12 and 22(4).
[172] D. Reichelt, 'To What Extent Does the Co-operation within the European Competition Network Protect the Rights of Undertakings?' (2005) 42 *CMLRev* 745.
[173] Monti, n. 3 above. [174] For an overview, see http://ec.europa.eu/competition/ecn/index_en.html.
[175] For an overview, see Monti, n. 168 above.

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approach and issued similar commitment decisions. The German NCA however disagreed and issued a decision prohibiting all price parity clauses. In the aftermath of this the Commission facilitated an *ex post* study on the extent to which these actions impacted on the market. Its main conclusions were that more time was needed to test the effects and that many hotels remained unaware of the change in policy.[176] To some, these developments suggest that there is the potential for experimentalist governance.

Y. Svetiev, 'Networked Competition Governance in the EU: Delegation, Decentralization or Experimentalist Governance?' in C. F. Sabel and J. Zeitlin (eds.), *Experimentalist Governance in the European Union: Towards a New Architecture* (Oxford University Press, 2010) 84, 103

[T]he new network has features that can make it an important mechanism for disseminating learning about regulatory interventions by national authorities and the Commission, reviewing such interventions, and using the information gathered so as to advance the identified objectives of competition law and the metrics used to gauge their attainment. Finally, the residual powers of intervention vested in the Commission need not be viewed as instruments of command and control, both because, if exercised, they are checked by requirements for justification and peer review, and because they may play a different role in building up implementation capacity among the network members . . .

Alternatively, the obligation to report initiatives and decisions from specific interventions can provide a key learning tool for members of the network. For example, interventions by authorities considered to have greater implementation capacity and credibility (such as the United Kingdom, France, Germany and Italy) can be used by the smaller and less credible authorities to inform their own decision-making.

This optimistic approach may be challenged by the fact that the booking.com episode remains an isolated example: the vast majority of cases taken by NCAs address national markets, and indeed at times we find cross-border cartels investigated by multiple NCAs which appears inefficient.[177] Moreover, there are those who fear that the system is too informal to work in a legitimate manner. The club-like qualities of the ECN may well ensure better decision-making but at the expense of a transparent forum for deliberation. And opacity brings the risk of domination, whether by the Commission or another NCA, dictating enforcement priorities, thus NCAs work for the European Union's competition policy.[178] Here we have a tension: on the one hand, insiders report that the Network members cooperate amicably and productively.[179] But this raises concerns about absence of legitimacy: who actually decides the case, the NCA or the ECN? When does peer review become peer pressure? And who is accountable for the Network's deliberations?

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[176] European Commission, Report on the monitoring exercise carried out in the online hotel booking sector by EU competition authorities in 2016, http://ec.europa.eu/competition/ecn/hotel_monitoring_report_en.pdf.

[177] *DHL Express (Italy) Srl and Others* v. *Autorità Garante della Concorrenza e del mercato*, C-428/14, ECLI:EU:C:2016:27, where part of the cartel was punished by the Commission and part by the Italian NCA.

[178] S. Wilks, 'Agency Escape: Decentralization or Dominance of the European Commission in the Modernization of Competition Policy?' (2005) 18 *Governance* 431; see Bruzzone and Boccaccio, n. 126 above.

[179] K. Dekeyser and M. Jaspers, 'A New Era of ECN Cooperation' (2007) 30 *World Competition* 3. For a more theoretical analysis, see G. Majone, 'The Credibility Crisis of Community Regulation' (2000) 38(2) *JCMS* 273; I. Maher, 'Regulation and Modes of Governance in EC Competition Law: What is New in Enforcement?' (2007–8) 31 *Fordham Int'l LJ* 1713.

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(c) Negative and Positive Harmonisation

It was inevitable, given the incomplete nature of Regulation 1/2003 that the Court of Justice would become involved. What is striking is the vigour with which the Court has tested national arrangements and limited NCAs. This case law is in tension with the flexibility some would like to see develop. The most striking judgment, with far-reaching impact, is *VEBIC*. This was a simple cartel case but the Court was asked to investigate if the Belgian competition procedures were adequate. The legislation designated the Belgian NCA to function like an administrative court, and within it were two bodies: a prosecutor and a decision-maker. This was to ensure compliance with fundamental rights. Parties could appeal, but on such appeals the NCA (which was the lower court) was understandably not allowed to act as respondent. Instead, a Minister responsible for the economy could make written observations in support of the NCA's decision.

VEBIC, C-439/08, ECLI:EU:C:2010:739

57 Although Article 35(1) of the Regulation leaves it to the domestic legal order of each Member State to determine the detailed procedural rules for legal proceedings brought against decisions of the competition authorities designated thereunder, such rules must not jeopardise the attainment of the objective of the Regulation, which is to ensure that Articles 101 TFEU and 102 TFEU are applied effectively by those authorities.

58 In that regard, as the Advocate General has remarked in point 74 of his Opinion, if the national competition authority is not afforded rights as a party to proceedings and is thus prevented from defending a decision that it has adopted in the general interest, there is a risk that the court before which the proceedings have been brought might be wholly 'captive' to the pleas in law and arguments put forward by the undertaking(s) bringing the proceedings. In a field such as that of establishing infringements of the competition rules and imposing fines, which involves complex legal and economic assessments, the very existence of such a risk is likely to compromise the exercise of the specific obligation on national competition authorities under the Regulation to ensure the effective application of Articles 101 TFEU and 102 TFEU.

59 A national competition authority's obligation to ensure that Articles 101 TFEU and 102 TFEU are applied effectively therefore requires that the authority should be entitled to participate, as a defendant or respondent, in proceedings before a national court which challenge a decision that the authority itself has taken . . .

62 Under Article 35(1) of the Regulation, the competition authorities designated by the Member States may include courts. Under Article 35(2), when enforcement of EU competition law is entrusted to national administrative and judicial authorities, the Member States may allocate different powers and functions to those different national authorities, whether administrative or judicial.

63 In that regard, in the absence of EU rules, the Member States remain competent, in accordance with the principle of procedural autonomy, to designate the bodies of the national competition authority which may participate, as a defendant or respondent, in proceedings brought before a national court against a decision that the authority itself has taken, while at the same time ensuring that fundamental rights are observed and that EU competition law is fully effective.

On the facts, this meant that Belgium had to redesign its NCA. The more general point is the Court of Justice's repeated insistence on effectiveness. This may pose significant limits on the possibilities of NCAs to explore alternative means of designing. For example, the Court may

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challenge the design of leniency policies: in *Schenker* it reminded a national authority that immunity from a fine should be an exceptional reward only when cooperation is 'decisive in detecting and actually suppressing the cartel';[180] in *Donau Chemie*, it found that the criteria to determine whether a plaintiff should be able to have access to the leniency documents must be set at national level having regard to the effectiveness of leniency programmes.[181] It is not clear how far-reaching the judgment in *VEBIC* might be: can one challenge an NCA because its fining policies are not sufficiently high when the NCA imposes fines for the effects of an anti-competitive practice only in its territory?[182] Can it be used to challenge the funding of an NCA, if it is found that insufficient resources are afforded to ensure effective enforcement? Furthermore, the Court of Justice has also eroded some of the powers NCAs may be afforded; for example, an NCA cannot make a decision stating that a given practice does not infringe competition law.[183]

The 'negative' integration that the Court of Justice stimulates (negative because the Court merely prohibits certain procedures of NCAs) is set to be complemented by a Directive to 'empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market'.[184] The background to this initiative was the review of ten years of Regulation 1/2003. It reports that decentralised enforcement has worked well with NCAs applying EU competition law to nearly 1,000 cases. At the same time it takes the view that the quality of enforcement would be improved if all NCAs had similar powers. The Directive will therefore align the powers of NCAs with those of the Commission when it comes to powers of inspection, the imposition of fines and limitation periods. Furthermore, it requires States to have a leniency policy which is aligned with that of the Commission. Moreover, it creates a legal requirement that NCAs must be independent and sufficiently well-resourced to carry out their tasks. These added powers have been welcomed by NCAs many of whom had been unsuccessful in lobbying their governments to secure these added powers. However, it is not particularly clear why it is the Commission's powers that serve as the exclusive model for NCAs. (Had no NCA developed some useful procedure for the others to imitate?) Nor does the Directive try and facilitate joint enforcement, save for affording the NCA that has imposed a fine the ability to request that another NCA collect the fine in case this is impossible in the former NCA's territory.[185]

5 PRIVATE ENFORCEMENT

It has been argued that private litigation in competition law should be welcomed for two reasons: first, victims of competition law infringements are compensated (public law enforcement merely prevents further harm); secondly, private litigants increase the number of enforcement actions,

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[180] *Bundeswettbewerbsbehörde and Bundeskartellanwalt* v. *Schenker & Co. AG and Others*, C-681/11, ECLI:EU:C:2013:404, para. 47.

[181] *Bundeswettbewerbsbehörde* v. *Donau Chemie AG and Others*, C-536/11, ECLI:EU:C:2013:366.

[182] This is a live issue because the practice in many NCAs is to limit fines to local effects, even if the practice is caught by EU competition law. See Monti, n. 168 above.

[183] *Prezes Urzędu Ochrony Konkurencji i Konsumentów* v. *Tele2 Polska sp. z o.o., devenue Netia SA*, C-375/09, ECLI:EU:C:2011:270; see discussion in Ch. 22, p. 944, and the note by S. Brammer (2012) 49(3) *CMLRev* 1163.

[184] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] OJ L11/3.

[185] Directive 2019/1, Article 26. G. Monti, 'The Proposed Directive to Empower National Competition Authorities: Too Little, Too Much, or Just Right?' (2017) 3(3) *Competition Law and Policy Debate* 40.

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widening the application of competition law.[186] The Commission has long campaigned for private parties to bring competition cases in national courts.[187] Recently, private enforcement (especially damages claims against undertakings who infringe EU competition law) has been promoted in an effort to complement the Commission's deterrence-based enforcement strategy.

(i) An EU Law Right to Damages

It has long been clear that Articles 101(1) and 102 TFEU have direct effect,[188] opening the way for parties to seek damages. However, there was very little litigation because of uncertainties about the nature of a claim for damages and because a national court could not decide on the application of Article 101(3) (which left it with little room for applying Article 101). The second problem, as we saw above, was resolved by Regulation 1/2003, which establishes the direct effect of Article 101(3), and the first was resolved in 2001 by the Court of Justice in a landmark judgment. Mr Crehan made a contract with Inntrepreneur for the lease of two pubs. The lease contract included a beer tie, providing that Crehan would buy his beer exclusively from Courage. The business was unsuccessful and Crehan abandoned the leases. He sought damages for the loss of a business from Inntrepreneur on the basis that the beer tie prevented him from buying cheaper beer which would have allowed him to make a profit. In the English courts, doubts arose as to whether a party privy to an anti-competitive agreement could claim damages. The Court of Justice enthusiastically affirmed that Crehan could claim damages. When the case returned to the English courts, the Court of Appeal awarded Crehan £131,336 in damages for the losses he suffered, but on appeal to the House of Lords the claim failed.[189]

Courage v. *Crehan*, C-453/99, ECLI:EU:C:2001:465

24 . . . any individual can rely on a breach of Article [101(1) TFEU] before a national court even where he is a party to a contract that is liable to restrict or distort competition within the meaning of that provision.

25 As regards the possibility of seeking compensation for loss caused by a contract or by conduct liable to restrict or distort competition, it should be remembered from the outset that . . . the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals.

26 The full effectiveness of Article [101 TFEU] and, in particular, the practical effect of the prohibition laid down in Article [101(1) TFEU] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.

27 Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.

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[186] *White Paper on Productivity and Enterprise: A World Class Competition Regime*, Cm. 5233 (2001) ch. 8.

[187] European Commission, *Thirteenth Report on Competition Policy* (1983) paras. 217–18; Commission Notice of 23 December 1992 on cooperation between national courts and the Commission in applying Articles 85 and 86 of EEC Treaty [1993] OJ C 39/6.

[188] *BRT* v. *SABAM*, 127/73, ECLI:EU:C:1974:25.

[189] *Crehan* v. *Inntrepreneur* [2004] EWCA Civ 637; *Inntrepreneur Pub Company (CPC) and Others* v. *Crehan* [2006] UKHL 38.

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This judgment should be studied from two perspectives. From a narrow perspective focusing on the facts of the case, it should be noted that the English courts had never doubted that a right to damages for breach of competition law was available.[190] Rather, the question that had been referred to the Court of Justice was whether a party privy to an anti-competitive agreement should be able to seek compensation, because the principle of illegality in English law meant that those implicated in an illegal venture lost the right to damages for loss suffered. The Court of Justice paid little attention to this question.[191]

From a wider perspective, the judgment is a general statement establishing an EU law right to damages. This is significant because it gives the European and national courts a shared role in shaping the law. Since then the Court and commentators have helped give shape to the legal implications that Courage has for national tort laws, in particular how the principles of equivalence and effectiveness could be interpreted.[192] For example, in *Manfredi*, the Court of Justice took further steps to explain the right to damages and the role of national courts. This was a damages claim by Italian consumers who had purchased liability insurance for motor vehicles at inflated prices after insurers had colluded. It was a follow-on claim after the Italian competition authority had found a cartel in the sector and the Court explained the damages that may be awarded.

Vincenzo Manfredi and Others v. *Lloyd Adriatico Assicurazioni SpA and Others*, C-295–298/04, ECLI:EU:C:2006:461

93 . . . in accordance with the principle of equivalence, it must be possible to award particular damages, such as exemplary or punitive damages, pursuant to actions founded on the Community competition rules, if such damages may be awarded pursuant to similar actions founded on domestic law.

95 Secondly, it follows from the principle of effectiveness and the right of any individual to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest.

96 Total exclusion of loss of profit as a head of damage for which compensation may be awarded cannot be accepted in the case of a breach of Community law since, especially in the context of economic or commercial litigation, such a total exclusion of loss of profit would be such as to make reparation of damage practically impossible.

The relevant Italian court rendered a judgment that, among other matters, awards the claimant ‘double damages’ as a means of giving effect to the Court of Justice’s judgment, but it has been suggested that this is not what the Court intended.[193] While the Court of Justice will continue to establish principles to shape private enforcement, these now should be read alongside the Damages Directive.[194]

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[190] E.g. in the United Kingdom the House of Lords in *Garden Cottage Foods* v. *Milk Marketing Board* [1984] AC 130 assumed damages to be available.
[191] G. Monti, ‘Anticompetitive Agreements: The Innocent Party’s Right to Damages’ (2002) 27 *ELRev* 282.
[192] The key work is A. P. Komninos, *EC Private Antitrust Enforcement* (Oxford, Hart, 2008). See pp. 170–6 therein for a helpful framework.
[193] See P. Nebbia, ‘So What Happened to Manfredi?’ (2007) *ECLR* 591, for a strong critique of the Italian court’s decision.
[194] E.g. *Skanska Industrial Solutions and Others*, C-724/17 P, ECLI:EU:C:2019:204, raises issues about the liability of parent companies.

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(ii) The Damages Directive

The journey to this Directive began with the 2005 *Green Paper on Damages Actions*, which was criticised for being too aggressive and creating the risk of US-style over-litigation. The 2008 *White Paper on Damages Actions* addressed this by stating that proposals would be 'balanced measures that are rooted in European legal culture and traditions',[195] but was criticised as not bold enough.[196] This explains the Directive's timid title: Directive on 'certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union'.[197]

The vast majority of damages claims are the result of follow-on actions. This means that plaintiffs rely on a cartel decision of the Commission or an NCA to bring a damages claim. This is because, as we saw above, the competition authorities have awesome powers to obtain evidence which no individual can equal. In briefest outline the Directive has two main goals: stimulating damages actions by making proof easier for the plaintiff and ensuring consistency among national courts. It begins by stating that plaintiffs have a right to full compensation and then makes provisions to harmonise the following: rules on the evidence that a plaintiff may seek disclosure from the defendant and the NCA (especially important in follow-on claims), rules on passing-on, the quantification of damages, limitation periods and alternative dispute resolution. It also provides for the binding effect of NCA decisions.

Damages Directive, Article 9

(1) Member States shall ensure that an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under Article 101 or 102 TFEU or under national competition law.

(2) Member States shall ensure that where a final decision referred to in paragraph 1 is taken in another Member State, that final decision may, in accordance with national law, be presented before their national courts as at least prima facie evidence that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties.

It was already clear that decisions of the Commission bind national courts, and many follow-on actions are based on Commission decisions.[198] Notably in *Otis* the plaintiff was the Commission itself: having punished a cartel in the market of escalators and elevators it sought damages for the losses it suffered as a result of purchasing such goods for its offices.[199] This article was controversial for some Member States. Note how in paragraph 1 NCA decisions are not 'binding' – this language would prove too much for States where, from a constitutional perspective, decisions of the administrations cannot bind courts and where judges must remain independent.

[195] 'White Paper on Damages Actions for Breach of the EC Antitrust Rules', COM(2008)165, 2.
[196] Editorial Comments, 'A Little More Action Please! The White Paper on Damages Actions for Breach of the EC Antitrust Rules' (2008) 45 *CMLRev* 609.
[197] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L 349/1.
[198] Regulation 1/2003, Article 16.
[199] The court allowed the claim, see *Commission* v. *Otis NV and Others*, C-199/11, ECLI:EU:C:2012:684.

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And while the Commission would have preferred that the decisions of foreign NCAs should have a stronger effect, States objected given the different review standards at national level.[200] However, Article 9(2) probably has little value: as matters stand, most NCAs appear to penalise cartels only for the effects they have in their Member State, so it is unlikely that claimants will find much value in decisions rendered in other Member States.

The right to access documents held by defendants and the NCA is vital in obtaining data on the details of the infringements and on the damage that was caused. A particularly controversial matter is the right to access the leniency application. According to the Court, a plaintiff may access a leniency application when this is necessary to obtain evidence to bring a damages action.[201] However the Commission and the NCAs were concerned that this would create a disincentive for leniency applicants and lobbied hard for a limitation.[202] The Directive provides that leniency documents may not be disclosed and at the same time empowers plaintiffs and courts to secure alternative documents from the files of the NCAs.[203] It remains to be seen if this ban is tested in the courts. As we noted above, leniency applicants are not jointly and severally liable for the harm caused by the infringements. Whether these protections suffice to keep firms interested in making leniency applications remains to be seen.[204]

When it comes to computing loss, the Directive states that courts should be free to estimate loss and should not impose on plaintiffs too high a standard of proof; it establishes a presumption that cartels cause harm, and empowers NCAs to assist the court in estimating damages.[205] These provisions are necessary as the litigation in the UK courts has shown how costly and complex litigation is on quantification of damages.

Finally, the Directive confronts the difficult issue of pass-on.[206] Suppose there is a cartel in the market for industrial paint which raises the price to rise by €2 per unit and the plaintiff wholesaler (the direct purchaser) resells the goods to an automobile manufacturer (the indirect purchaser) at a price that is €1 per unit higher than before the cartel, then the damages to be awarded to the direct purchaser should be only €1 per unit (passing on is a defence), while the indirect purchaser is also entitled to €1 per unit (passing on is the basis for a claim by the indirect purchaser). Under US Federal Law, the courts decided that dividing up a damages claim is so costly and indirect purchasers unlikely to seek compensation for relatively small losses, that it makes more sense, deterrence-wise, to allow the direct purchaser to sue for the entire overcharge and make no deduction for passing on. On the facts above the wholesalers would receive €2 per unit. The over-compensation is an incentive to bring the claim.[207] This approach was rejected by the legislature who believes in full compensation. Accordingly, the defendant wishing to plead a passing on defence has the burden of showing that the plaintiff passed on some or all of the

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[200] K. Wright, 'The Ambit of Judicial Competence after the EU Antitrust Damages Directive' (2016) 43(1) *LIEI* 15 for comprehensive discussion.
[201] *Bundeswettbewerbsbehörde* v. *Donau Chemie AG*, C-536/11, EU:C:2013:366.
[202] European Competition Network Resolution of the Meeting of Heads of the European Competition Authorities of 23 May 2012, 'Protection of Leniency Material in the Context of Civil Damages Actions'.
[203] Damages Directive, Articles 6–8.
[204] M. C. Buiten, P. van Wijck and J. K. Winders, 'Does the European Damages Directive Make Consumers Better Off?' (2018) 14(1) *Journal of Competition Law & Economics* 91.
[205] Damages Directive, Article 17.
[206] Caro de Sousa, 'EU and National Approaches to Passing on and Causation in Competition Damages Cases: A Doctrine in Search of Balance' (2018) 55 *CMLRev* 1751.
[207] W. M. Landes and R. A. Posner, 'Should Indirect Purchasers Have Standing to Sue under the Antitrust Laws? An Economic Analysis of the Rule in Illinois Brick' (1979) 46 *University of Chicago L Rev* 602.

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overcharge.[208] Indirect purchasers may raise a presumption that cartel overcharges were passed on to them, requiring the defendant to disprove that there was a total overcharge.[209]

To really stimulate indirect purchasers, who can at times be final consumers, a class-action regime that allows for a collection of all claims is necessary. However, the European Parliament has three concerns with class actions: the risk of abusive litigation; that opt-out class actions (that is, class actions that are taken on behalf of a large group of consumers, say all those that bought insurance policies at inflated prices because of a cartel among insurers, by a representative of the class and each member is included in the action unless they actively opt out) infringe individual autonomy and are contrary to Article 6 ECHR; and that any class action initiative should cover consumer claims in other fields as well (e.g. product liability).[210] In response, the Commission has issued a communication and a recommendation in an attempt to encourage Member States to adopt analogous procedures for class actions.[211] In the field of consumer law a 'New Deal for Consumers' proposes class actions but it is resisted by the legislature.[212]

(iii) Assessment

Of the fifty-four prohibition decisions issued by the Commission between 2006 and 2012, fifteen have led to follow-on actions: most in three Member States (United Kingdom, Germany and the Netherlands) and almost none were brought by consumers or small or medium-sized firms.[213] There are tensions between Member States that are worried about fomenting a litigation culture and those eager to facilitate claims.[214] It means that Member States will likely be the main players who design procedures to facilitate claims, for example class actions.[215]

Furthermore, one might doubt whether damages actions are desirable in competition law at all. Insofar as the aim of deterrence is concerned, public enforcement is a superior form of deterrence for a number of reasons. First, antitrust authorities have more effective investigatory and sanctioning powers, in particular with the network of NCAs being developed. Secondly, private plaintiffs are motivated by profit and not necessarily motivated to bring claims against practices that injure the public interest, whereas NCAs will tend to bring claims of most value to the economy. Thirdly, private enforcement is more costly than pubic enforcement because NCAs are repeat players, who specialise in competition law and thus the marginal cost of additional actions is lower for them.[216] But this view has, however, come under fire, with the argument that NCAs are superior being questioned on the basis that while private enforcement is imperfect, it is

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[208] Damages Directive, Article 13. [209] Damages Directive, Article 14.

[210] European Parliament Resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress' (2011/2089(INI)).

[211] Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law [2013] OJ L 201/60.

[212] 'Proposal for a Directive on Representative Actions for the Protection of the Collective Interests of Consumers', COM (2018)184 final. S. Augenhofer, 'Comments on the Proposal for a Directive on Representative Actions for the Protection of the Collective Interests of Consumers' (2018), www.uni-erfurt.de/fileadmin/user-docs/wirtschaftsrecht/Dies_und_das/Comments_Susanne_Augenhofer_6.10.2018.pdf.

[213] A. Howard, 'Too Little, too Late? The European Commission's Legislative Proposal on Anti-Trust Damages Actions' (2013) *Journal of European Competition Law and Practice* 455.

[214] J. S. Kortmann and C. R. A. Swaak, 'The EC White Paper on Antitrust Damage Actions: Why the Member States are (Right to Be) Less than Enthusiastic' (2009) 30 *ECLR* 340.

[215] For discussion, see A. Higgins and A. Zuckerman, 'Class Actions in England? Efficacy, Autonomy and Proportionality in Collective Redress', University of Oxford Legal Research Paper Series No. 93/2013 (2013).

[216] W. P. J. Wils, 'Should Private Antitrust Enforcement Be Encouraged in Europe?' (2003) 26 *World Competition* 473.

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not an argument against allowing those who are able to mount an action to do so, and the risk that private parties will litigate unmeritorious claims is one which affects all private litigation, and which can be tempered by judges striking out worthless claims.[217] The Commission's justification seems to be that the estimated cost to antitrust victims ranges between €25 and €69 billion,[218] and that 'EU-wide infringements are becoming more and more frequent.'[219] However, don't these findings suggest that the Commission should focus on measures to improve public enforcement, for instance by increasing the level of fines?

6 BREXIT

The obligations of the UK to continue to apply competition law under the Withdrawal agreement have been discussed in Chapter 10. The focus here is on what relationship may emerge after the UK exists the EU. Before considering what a bespoke agreement between the United Kingdom and the European Union might look like, we outline the way the Union relates with other third States. The deepest form of cooperation is found in the European Economic Area (EEA) agreement. This establishes an independent agency (the European Free Trade Association (EFTA) Surveillance Authority) which performs a role analogous to that of the Commission for matters that fall within the competence of the EEA. The competition provisions mirror those in the TFEU, so essentially the same rules are applied with similar procedures. The EEA agreement provides for case allocation: if a matter affects trade in the EU and the EEA then the Commission will handle the matter.[220] The Commission may apply EEA law in parallel.[221] There is intensive cooperation between the two sides when cases interest both markets as well as in investigations. Furthermore, the Authority may participate in ECN meetings discussing policy issues, to ensure homogeneous interpretation of EEA and EU rules.[222]

Cooperation agreements with other competition authorities are much less intense: each agency reserves the right to apply their national law (so parallel procedures are common for cartel and merger cases). Increasingly agencies coordinate cartel inspections, but there is no sharing of confidential information between agencies. Comity clauses are frequently inserted so that when one party acts in competition matters it undertakes to take into account the important interests of the other side.

In 2013 the European Union entered into its first 'second generation' bilateral agreement with Switzerland: this includes provisions for coordination of enforcement and exchange of evidence.[223] The Swiss agreement might be of interest to the United Kingdom since, in the Brexit Policy Paper of July 2018, it proposed the following: 'committing to a common rulebook on State aid, to be enforced and supervised in the UK by the Competition and Markets Authority (CMA); maintaining current antitrust prohibitions and the merger control system with rigorous UK enforcement of competition law alongside strong cooperation with EU authorities'.[224] This

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[217] C. A. Jones, 'Private Antitrust Enforcement in Europe: A Policy Analysis and a Reality Check' (2004) 27 *World Competition* 13.

[218] 'Impact Assessment Report', SEC(2008)405, paras. 42–3. [219] *Ibid.* para. 32. [220] EEA Agreement, Article 56.

[221] E.g. COMP/E-1/38.113 – *Prokent-Tomra* (Decision of 23 March 2006) para. 330 where the abuse of dominance occurred in the EU and Norway.

[222] EEA Agreement, Protocol 23 concerning the cooperation between the surveillance authorities (Article 58).

[223] Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws (2014) OJ L 347/3.

[224] HM Government, *The Future Relationship between the United Kingdom and the European Union*, Cm. 9593, July 2018, para. 108.

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assumes that an *ad hoc*, bilateral agreement would be signed between the two sides, which is less onerous than the EEA, but seeks closer links with the Union than other agreements. We explore what this might entail by considering two issues: the CMA's expected workload and cooperation arrangements.

(i) Workload

Competition law in the United Kingdom is principally enforced by the CMA, which applies both competition law and consumer law (the latter also is largely based on EU law).[225] It is expected that the CMA's workload post-Brexit is set to increase.[226] Pre-Brexit the European Commission would take cases that have EU-wide impact and so the UK market was protected by the interventions of the Commission – consider for instance the infringement action against Google which is intended to benefit all EU markets. Post-Brexit the enforcement action of the Commission will not always serve to protect the UK market and so the CMA will have to act alongside the Commission (both for cases of restrictive practices and mergers). To cope for this expansion, the CMA's budget for 2018–19 was increased by £23.6 million. It is foreseen that 240 additional staff will be recruited to handle consumer and competition issues, of which 150 will handle competition law matters (a 39 per cent increase in staffing).[227]

While it is definitely the case that parties to a merger will notify in the United Kingdom to secure merger clearance (global mergers are notified in multiple transactions), one has to wonder if the forecast that the United Kingdom will have more cases of greater complexity outside of the merger field is realistic. First, the CMA has not shied away from complex cases in the past and there is little evidence to suggest that the Commission presently monopolises the more difficult issues. One may also question whether the volume of cases is really likely to increase. Consider a typical example of a case handled presently by the Commission: a global cartel among large firms. Clearly, if the CMA decides to act then this will be a resource-intensive exercise. However, one has to wonder whether it is in the CMA's interest to take these cases at all. As discussed in this chapter, the aim of public enforcement is deterrence and one has to wonder whether the relatively lower fine that the United Kingdom will set for cartels which will be fined by the Commission can make a meaningful contribution to deterrence. On the other hand, the time-sensitivity of merger cases might mean that the CMA is diverted away from applying antitrust rules and focuses much more on mergers.

(ii) Cooperation

A key to successful management of cross-border cases is cooperation with the Commission. The government indicates that '[r]eciprocal commitments that go beyond those usually made in FTAs will be particularly important to support the breadth and depth of the future UK–EU economic partnership'.[228] In other words, some of the information-sharing facilities found in Regulation

[225] For a discussion of the possible impact of Brexit on consumer law see S. Augenhofer, 'Brexit: Marriage "With" Divorce? – The Legal Consequences for Consumer Law' (2017) 40(5) *Fordham Int'l LJ* 1443.

[226] Brexit Competition Law Working Group, para. 8.2.

[227] Comptroller and Auditor General, *Exiting the EU: Consumer Protection, Competition and State Aid*, Session 2017–19, HC 1384, 6 July 2018.

[228] See n. 224 above, para.105.

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1/2003 is seen as important for the CMA's enforcement, in particular the ability to obtain confidential information from the Commission when the two are addressing the same offence, each in their jurisdiction. The EU/Switzerland Antitrust Agreement would allow for such cooperation.

In terms of private enforcement, the UK courts are one of the principal sites where damages claims resulting from international cartels are brought. Post-Brexit it is not clear whether follow-on actions based on Commission decisions may still be brought to UK courts. This applies both to decisions taken pre-Brexit ad those afterwards.[229] This could have such a significantly negative impact on the business that British courts bring in that it is expected some arrangements will be sought so that international cartel claims can still be brought in London.

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[229] P. Roth, 'Competition Law and Brexit: The Challenges Ahead' [2017] *Competition LJ* 4, 9–10.

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