competition authority? Not every Member State has a leniency programme. For instance, the NMa is busy establishing one. Setting up a national programme is only useful if those who want to make use of it can be sure that they will not be punished pursuant to this programme. On the basis of the principles of the network a dossier can be transferred to another NCA because, judging by the allocation criteria, the latter is the more appropriate authority. If this competition authority does not have a leniency programme or a similar arrangement, the consequences for the undertaking concerned will be major, because where one competition authority will grant a (major) reduction of a fine, this will not be the case with the investigating competition authority. The result of this danger will be that a national leniency programme will not work, which is at odds with the principles of the modernisation operation. Therefore, a scheme will have to be developed in which the rights of an undertaking as regards the use of a leniency programme will be safeguarded.

Another question is whether the parties concerned can raise objections to the fact that information acquired from the complainant is transferred. The answer seems to be no. However, a precondition is that the information which has been accepted as being industrially confidential at one competition authority, is also recognised as such by the investigating competition authority. For the proper functioning of the network the concept of industrially confidential information, and consequently the scope of information which is not disclosed to third parties, should be regulated at EC level.

There is also the question of whether information acquired by conducting an inspection for another competition authority can simply be transferred. A complicating factor in this respect may be that the inspection competences differ per Member State.

Conclusion

As a result of the new Regulation 17, cooperation between competition authorities will become very intensive. The advantages of this development are that enforcement will be more efficient. On the other hand, this offers competition authorities the possibility to learn from each other, seeing that they are all working in the same field. The system of the new Regulation offers a framework for this cooperation but is by no means sufficient. The very limited points discussed in this paper already show that procedures need to be developed which regulate the distribution of work between the different authorities. In addition, the exchange of information should be organised carefully. If this does not happen, the foundations of the cooperation will be very weak. Furthermore, in this connection, a uniform level should be determined for the information which is considered as confidential and is not disclosed to third parties. This means that there is still a great deal to be regulated where the operation of the network is concerned.

Phedon Nicolaides"

Development of a System for Decentralised Enforcement of EC Competition Policy

A mini revolution is brewing in the field of competition policy. This policy, which has remained virtually unchanged since the inception of the European Community/is now being modernised and decentralised. The proposed new Regulation[1] for the application of Articles 81 & 82 of the Treaty, in replacement of the old Regulation 17/62, is significant for several reasons:

- for the first time in the history of the EC, it empowers national authorities, including national courts, to apply the anti-trust exemption (Article 81(3)) together with the prohibitions (Articles 81(1) & 82);

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COM(2000) 582 final, 27.9.2000.

- this will bring to an end the 40-year "prior notification" regime whereby notification was necessary for undertakings in order to obtain exemptions;
- for the first time, national authorities are required to apply Community law instead of national law whenever cross-border trade is affected;
- for the first time, national authorities are required to consult the Commission before they adopt prohibitive decisions;
- for the first time, national courts have to submit copies of their rulings to the Commission;
- and the Commission will have the right to appear before national courts.

Objectives and Means of Reform

The public debate that ensued after the publication of the White Paper on Modernisation of Competition Policy[2] has shown that the Commission, national authorities and competition law practitioners believe that reform is long overdue, but for different reasons.[3] According to the Commission, there is a need for regulatory reform because the present system of "exemption by authorisation" suffers from a number of weaknesses:,

- notifications do not catch hard-core cartels (apparently only nine prohibitions have resulted from notifications without any subsequent complaint);
- national authorities are prevented from granting exemptions, resulting in a heavier workload for the Commission, which is not sustainable after enlargement;
- having to process notifications distracts the Commission from its real task of uncovering and prosecuting hard-core cartels;
- business bears excessive compliance costs;
- agreements falling within Article 81(1) are not legally secure or enforceable unless first notified; .
- yet, due to the excessive workload generated by the many notifications, the Commission issues only informal (administrative) "comfort" letters, whose legality in national courts is a matter of dispute.

With respect to the usefulness of the notification system, it has been argued by its proponents (mostly business representatives) that its main purpose is not to catch cartels but to provide a "service" to business; or at least an indication of the legality or otherwise of the various business practices and immunity from subsequent fines. Although they also acknowledge that the law advances mostly through negative decisions which interpret the prohibitions in Articles 81 and 82 and through the various guidelines and explanatory notices, they also believe that notifications offer to the Commission an important picture of the types of agreements concluded among undertakings and enable it to draw lessons about any necessary clarifications of competition policy concepts and practice. This, they argue, facilitates a pro-active role in enforcement on the part of the Commission.

It has also been argued that the notification system has grown to such an unmanageable[4] extent because the Commission has interpreted very widely the prohibition of Article 81(1). Exemptions and negative clearance are sought by business because almost everything is illegal. If the Commission had given more weight to the economic effects of agreements, there would be less need for notifications. Yet it would have been very difficult for it to enforce competition policy on the basis of such a "rule of reason" at the initial stages of the Community, when there was little experience with competition policy, the various concepts of which were still underdeveloped.

With respect to the fact that notifications produce only comfort letters of ambiguous legality, it has been suggested that undertakings notify their agreements not necessarily to obtain legal certainty but to secure immunity from prosecution and fines (the Commission does not impose fines with respect to notified agree-

[2] White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, Commission Programme No. 99/027, 28.4.1999.

[3] See, for example, C.-D. Ehlermann: The Modernisation of EC Antitrust Policy, European University Institute, 2000; I. Forrester: The Reform of the Implementation of Articles 81 and 82 Following Publication of the Draft regulation, in: Legal Issues of Economic Integration, 2001, Vol. 28, No. 2, pp. 173-194; K. Holmes: The EC White Paper on Modernisation, in: Journal of World Competition, 2000, Vol. 23, No.3, pp. 348-358; K. Lenaerts: Modernisation of the Application and Enforcement of European Competition Law, paper presented at the conference on Modernisation of European Competition Law, University of Leuven, 22 June 2001; P. Mavroidis and D. Neven: From the White Paper to the Proposal for a Council Regulation, in: Legal Issues of Economic Integration, 2001, Vol. 28, No. 2, pp. 151-172; A. Schaub: Modernisation of EC Competition Law: Reform of Regulation 17, Fordham Corporate Law Institute, October 1999; M. Siragusa: A Critical Review of the White Paper on the Reform of EC Competition Law, Fordham Corporate Law Institute, October 2000; W. Wils: The Modernisation of the Enforcement of Articles 81 and 82: A Legal and Economic Analysis of the Commission's Proposal for a New Council Regulation, Fordham Corporate Law Institute, October 2000; T. Wissmann: Decentralised Enforcement of the EC Competition Law and the New Policy on Cartels, in: Journal of World Competition, 2000, Vol. 23, No. 2, pp. 123-154; M. van der Woude: National Courts and the Draft Regulation on the Application of Articles 81 and 82, paper presented at the conference on Modernisation of European Competition Law, University of Leuven, 22 June 2001.

ments which are subsequently banned for infringing Article 81(1)). Therefore, elimination of the requirement to notify at the same time removes the need to secure immunity. But doubt has also been expressed about the preference of undertakings to notify to gain immunity, given the practice of the Commission not to impose fines on non-notified agreements which are found to qualify in principle for exemption under Article 81(3). Hence, notification must have been sought by undertakings for legal certainty rather than for immunity. Since legal certainty is not provided by the present system, it seems that the Commission is right in seeking its reform.

The reform that is proposed in the draft Regulation aims primarily to achieve the following:

- establishment of a "directly applicable exception system" where no prior authorisation is necessary;
- sharing of the enforcement of Articles 81(1) and 82 and of the assessment of the applicability of Article 81 (3) between the Commission and national authorities, with much of the enforcement being undertaken by national authorities while the Commission concentrates on major, multi-country, infringements and policy development.

In this connection it is worth noting that Article 83(2)(b) stipulates that implementing the rules of competition policy must take into account "the need to ensure effective supervision ... and to simplify administration to the greatest possible extent" (this is apparently one of the very few references in the Treaty to the effective implementation of EC rules).

The proposed reform is to be achieved by means of:

- the amendment of implementing Regulations (Regulation 17/62 and the various regulations applying competition rules to transport);
- the introduction of a new rule about the conditions under which EC law and national laws are applicable (EC law will always be applied whenever cross-border trade is affected);
- the establishment of new cooperation procedures between the Commission and national authorities (information exchange, sharing of responsibility and tasks, consultation).

[4] Some practitioners believe that the 250 or so notifications per year do not impose an excessive burden on the Commission. If, as the Commission claims, they hardly raise any important issues, the Commission should have little difficulty in processing them quickly.

It is expected that the new regulation and measures will strengthen the enforcement of competition policy because it will:

- raise the number of enforcers of EC competition law;
- refocus Commission resources;
- increase the powers of investigation of the Commission;
- bring about a level playing-field through application of EC law to more cases; reduce parallel application of national and EC law; clarify the delineation of tasks between national authorities;
- remove the need for notification and therefore reduce bureaucracy;
- raise certainty for business in contractual relations.

The main criticisms that have been levied against the proposed measures are that:

- businesses will seek to lodge complaints in jurisdictions perceived to be "tough", resulting in forum shopping;
- there will be a tendency towards stricter application of competition law;
- costs for business will increase rather than decrease, because they will have to pursue multiple cases; and
- businesses will, as a consequence, be exposed to multiple cases in relation to the same issue (multiple jeopardy).

Despite these criticisms, the reform of competition policy is irreversible. Whether the new system will strengthen or weaken legal certainty or whether it will improve enforcement remains to be seen. What has not been settled yet is the method or methods of coordination and cooperation that will have to be adopted so as to ensure that all national authorities work towards the same goal.

The purpose of this paper is to explore the nature of the coordination and cooperation that may be needed, the mechanisms that have to be put in place and the potential pros and cons of such arrangements. Despite the voluminous literature that has already developed on the reform of the Community's competition policy, very little attention has been given to the question of how the various enforcing authorities can work in unison. As is evident from the brief

review of the issues above, this question has hardly been raised.

The plan of the paper is as follows. In the section below I examine the nature of collective enforcement of competition policy. Then I identify the basic issues concerning centralised and decentralised enforcement. I then consider the possibility of ineffective enforcement by national authorities. The paper concludes with recommendations on how both ineffective and overzealous enforcement may be avoided through appropriate cooperation and coordination procedures.

Enforcement as a Collective Task

There has been much debate in the literature about the risks from "forum shopping" and overlapping and excessively strict enforcement of competition rules. Relatively less attention has been given to the question of how a system in which enforcement is a collective task can function effectively. Collective action depends on cooperation. But what kind of cooperation? This paper will provide an answer to this question and also show that the cooperation provisions included in the draft Regulation are not adequate.

The main arguments of the Commission for decentralisation are, first, that the notification system does not work and that, second, as a result of too many notifications, the Commission itself bears a heavy workload that prevents it from using its resources efficiently. An obvious and direct solution to the second problem would be to increase the resources of the Commission. Decentralisation is a solution that shifts the burden to national authorities without necessarily reducing the overall burden. Therefore, decentralisation as such is a solution only if national authorities have excess capacity. The Commission has not argued this point. Instead, it has claimed that national authorities are better placed to deal with infringements of competition law in their own markets.

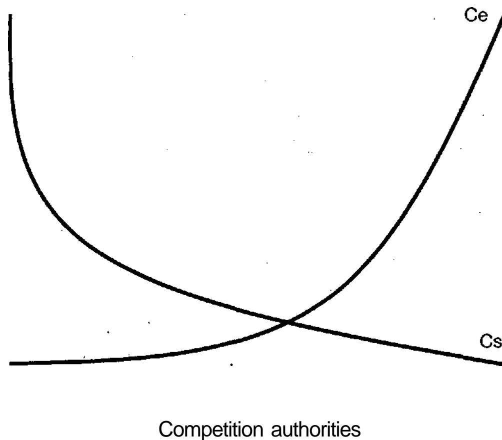
With respect to the first problem, it is not obvious either that decentralisation is a solution. Consider why perhaps decentralisation may be thought necessary when notifications are no longer possible. An argument for this purpose would run along the following lines. The prohibitions in Articles 81 & 82 have direct effect. National authorities and courts have so far been able to apply those prohibitions because they could ignore the consequences of Article 81(3) in relation to non-notified agreements. A non-notified agreement could not obtain the benefit of Article 81 (3). Notified agreements had in their defence either a negative clearance from the Commission or, more commonly, a comfort letter. Even though the comfort letters were of ambiguous legal value in national proceedings they were still taken into account. In a new system without notification, national authorities would also have to consider whether the conditions of Article 81 (3) are applicable. This is because some agreements that fall within Article 81(1) could also be exemptable for satisfying Article 81(3). Since they would not be able to obtain prior exemption through notification, the authorities would have to consider the totality of Article 81. That would be a more complex task than merely considering whether the conditions of Article 81(1) are applicable.

Surprisingly enough, only half of such an arrangement has been proposed by the Commission in the draft Regulation. National authorities would be allowed only to decide that Article 81(1) is applicable because the conditions of Article 81(3) are not satisfied. That is, they will not be able to consider Article 81 in its totality. Only national courts will have that power. But, with the exception of national courts, this is basically how the present system works. Hence, the elimination of notifications does not necessarily require decentralisation.

It seems to me that the real issue is not how or whether to relieve the Commission by shifting the burden of enforcement to national competition authorities. After all, for the European Union as a whole, it makes little difference whether Community or national resources are expended in enforcement. The real issue is whether such a re-allocation of tasks will raise the efficiency of enforcement either by enabling the Commission to catch more cartels or by empowering national authorities to do a better job. In other words, will the system as a whole become more efficient when the various authorities work together rather than separately? This is the subject matter of this paper.

Any system made up of components which have the capacity to act independently can work as a single entity when at least two conditions are satisfied. First, information must flow costlessly from any one component to any other component of the system. Second, each component must take into account the "interests" of the other components before it acts. That is, there must be some method of, first, defining collective interest and, then, "adding up" the

Figure 1
The Costs of Enforcement: Centralised v. Decentralised System



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individual interests of each component to maximise the collective interest.

There is an extensive literature on the issue of conflicting interests and conflicting opinions on the application of the same set of competition rules. Conflicting interests arise when the same rules would be applied, or not applied, by each component of the system (i.e. each national authority) according to who bears the costs from either enforcement or non-enforcement. The White Paper and the draft Regulation assume that there are no such conflicts and that all member states and all authorities share the belief that in the longer term uniformly rigorous enforcement of competition rules is in their interest. I cannot judge a priori whether that indeed is the case. However, in view of the concerns expressed by other commentators, the following sections will consider the safeguards that may be introduced into the Community system of competition enforcement to reduce the likelihood that potential conflicts of interests will result in enforcement that would be collectively detrimental.

With respect to the conflicting opinions concerning the nature of the rules to be enforced and the precise circumstances under which these rules are applied, I take at face value the views of the Commission that after forty years of Community practice there is now a common understanding of how the principles in the Treaty are to be interpreted, how they are to be applied and when they should be applied.

However, coincidence of opinions does not necessarily mean that national authorities will have either the necessary information at their disposal or the incentives to use that information. Indeed one of the issues that is examined later on in the paper is how information exchange between the various authorities is a means for closer cooperation that promotes the collective interest.

The following section formalises the costs of divergent interpretation of competition principles, identifies the costs of enforcement, in a decentralised system and then considers the various possible remedies for reducing such costs.

Costs of Enforcement in Decentralised Systems

Every division of tasks or any system of specialisation/decentralisation raises two fundamental questions. First, does the division or specialisation increase the efficiency of the system as a whole by making at least one component more efficient (or productive) without making another one less efficient (or less productive)? Second, are there any added management or coordination or other decision-making costs arising from the fact that certain tasks have to be performed by more components of the system?

Figure 1 shows two types of costs that have to be taken into account when determining the extent of decentralisation or centralisation. Function Cs indicates how the overall cost of investigations varies with the number of enforcing authorities. It is assumed that it has a downward slope, at least initially. This is because each authority faces lower costs in investigating cases in its own market for which it has more accurate knowledge. If indeed each authority has a cost advantage or just a lower cost in home investigations, that would make curve Cs to be downward sloping as the number of authorities expands towards the number of distinct markets (assumed to be fifteen). This may be thought of as the effect of "specialisation".

However, the exact shape of curve Cs cannot be known a priori and it may not even be declining throughout the relevant range. There may be fixed costs that contribute to indivisibilities or cause the function to have a positive slope in some range of values. As the number of distinct markets exceeds a certain level, the costs of establishing new authorities will probably outweigh the benefits from accurate knowledge of ever smaller and, therefore, increasingly insignificant markets. Curve Cs should have an

upward slope after a certain value. The important point to note here is that if function Cs is convex then the point of minimum cost is unlikely to be either of the two extremes of a single authority or of too many authorities. To avoid cluttering Figure 1, the upward part of Cs is assumed to correspond to a number of authorities that exceeds sixteen (15+1).

Function Ce shows the cost of enforcement caused by divergent and perhaps conflicting decisions by the different competition authorities. These are the negative externalities that arise when the different components of the system have decision-making discretion. Naturally, with one authority, that cost is close to zero (assuming no time-inconsistent decisions). As the number of authorities increases, so do externalities. Function Ce, therefore, has a positive slope.

Note, that if the cost functions are convex and concave, respectively, the point at which the sum of the two costs is minimised is that which satisfies the following equality:

3Cs/3n = *dCe/dn,* where "n" is the number of authorities.

It follows that if the local-knowledge effects that give Cs its downward slope are sufficiently strong, the optimum number of authorities would be neither 1, nor 16. So, neither complete centralisation, nor complete decentralisation would be optimum arrangements. This is the case, for example, of the Federal Reserve system in the United States, where the jurisdiction of each of the Reserve banks covers more than any single State.

It appears that the proposed reform will take EC competition policy from one sub-optimum state to another (i.e. from 1 to 16). But perhaps this appearance is misleading. One of the Commission's main arguments justifying decentralisation is that, as a result of 40 years of practice, the concepts of the Community's competition policy are now well understood. Presumably, this means that national authorities will apply competition policy in a consistent way, minimising any externalities that would otherwise be caused by their decision-making discretion. In effect what the Commission argues is that curve Ce has shifted downwards. This is shown in Figure 2 as Ce*.

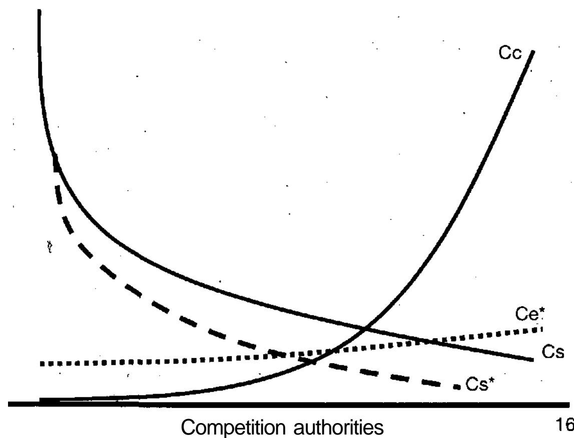
Note that, on its own, the elimination of the source of externalities cannot justify decentralisation. A very flat curve suggests that any number of authorities would do the job. The outcome would be indeterminate unless there is another factor to be taken into account. That other factor is the efficiency of investigating cases, monitoring conditions in the. national market, collecting local information and having a better understanding of the intentions and actions of locally active companies. All these effects are presumed to be captured by function Cs in its convexity. The minimisation of the sum of costs Cs and Ce* could probably justify extensive decentralisation.

But note that the advantage in investigating competition effects in local markets is not confined to just those cases which affect primarily each national market and for which the national authority is the lead authority. It especially concerns those cases which are investigated by other authorities or affect markets for which those other authorities are responsible. That is, establishing a system in which each national authority just investigated local cases, having only local effects, would not add much value. By contrast, such a system would add considerably more value if authorities helped each other investigate and appraise effects affecting their market but which emanate from other markets. Under these circumstances, a smooth flow of information from one authority to another is very important. The draft Regulation does provide for exchange of information. But it does not go far enough. It does not say anything on how that information is to be used by the recipient authorities. I will argue in the following sections that that is a major systemic weakness.

So far we have ignored coordination costs. These are different from the costs imposed by externalities when national authorities act separately. Coordination costs are precisely those costs which are incurred by acting together; as for example, through collecting and supplying regular reports and standardised information to each other, consulting each other and responding to queries and requests for assistance, waiting for comments from counterparts in other member states, adjusting own decisions to take into account others' opinions, organising and participating in meetings and resolving disputes between the various authorities.[5] This is the nature of being a partner in a network.

Coordination costs are given by function Cc as shown in Figure 2. It is no longer obvious that decentralisation would be justified even if the development of a common understanding of competition concepts and of a common competition culture significantly reduced externalities caused by individual decision-

Figure 2
The Costs of Enforcement: Effects of Decentralisation



making. Figure 2 suggests that if coordination costs in the EC are non-insignificant, the optimum number of competition authorities may be smaller than the number of member states. If political considerations restrict feasible alternatives to a choice between the two extremes, i.e. either one or 16 authorities, decentralisation may be a third-best option. This suggests that under certain cost configurations, complete centralisation may indeed be a second-best option.

However, I would admit that in the real world of policy-making, theoretical considerations of this nature are not very relevant for several reasons. First, the decision to decentralise has virtually been taken. Second, the theoretical possibility of the existence of such costs does not prove either that they indeed exist or that they are substantial. The latter is an empirical matter. Third, coordination costs are neither immutable, nor exogenously determined. They are amenable to institutional design. In the section on recommendations at the end of the paper, I will consider how institutional design may reduce coordination costs.

Figure 2 also shows the positive effects of cooperation in enforcement by exchanging information and helping other national authorities with information obtained from the local market of each authority. This effect in improvement in the efficiency of investigations and enforcement is shown by a downward shift of curve Cs to Cs*.

[5] It may appear at first glance that these costs are insignificant. But if resources are tied up in coordination tasks, there may be substantial indirect costs - those resources will not be available to prosecute anti-competitive practices.

To summarise so far, we have seen that in any context where there are economic cross-border effects and where the decisions of national authorities affect each other, there are costs caused by externalities, due to independent decision-making, and benefits associated with specialisation. Decentralisation generates extra coordination costs but at the same time it may improve the efficiency of enforcement if national authorities help each other with the collection of information which is relevant to their cases.

The Debate So Far on the Costs and Problems of Collective Action

As mentioned above, collective action generates costs that differ substantially from those incurred when decisions are made individually. A typical cost is deviation from the optimum position of each party. As long as the various parties involved have different preferences, adopting a common decision will be costly in terms of forgone benefits.

Another typical cost is that which is caused by the need for consultation, participation in meetings and dispute resolution. All these activities absorb resources which could be used directly in enforcement.

, These problems are normally remedied by the establishment of ex ante rules on procedures and rules on allocation of tasks. Any set of rules introduces a certain rigidity into the system and reduces its flexibility. Nonetheless, some rigidity may well be tolerated in order to avoid bigger costs of duplication of tasks and working at cross purposes.

So far, most commentary on the proposed reform of competition policy has focused on the following coordination problems:

- simultaneous investigations of the same cases;
- repeated (sequential) investigations of the same cases;
- a tendency towards tougher enforcement resulting from national authorities that ignore any positive effects of agreements that are experienced in other member states;
- the difficulty that the Commission may encounter in obtaining adequate information from national authorities.

With the exception of the last problem, all the others refer to situations where national authorities pursue enforcement overzealously. With respect to the possibility of multiple enforcement (simultaneous or sequential), the draft Regulation contains specific provisions to prevent it. These issues have been examined at length in several recent papers.[6] I have nothing new to add here apart from the observation that it seems that most critical comments tend to be overly pessimistic. Given that the draft Regulation seeks to prevent multiple enforcement, there is no reason to expect either that it will develop into a major problem or that the Commission will allow it to get out of hand.

With respect to the possible tendency towards stricter enforcement, which according to some would lead to "disintegration" because positive effects in other markets will be ignored, I do not see why this is believed to be a potential problem. If national authorities have to apply EC law over national law, they will have to take into account the effects in the EC as a whole.

In this respect, as far as Article 82 is concerned, competition effects (or, conversely, the manifestation of dominance and market power) are inextricably linked to the definition of the relevant market. It is rather inconceivable that a national authority will ignore these effects in the relevant market it itself has defined. The argument, then, between national authorities and companies will be on the extent of the relevant market. Moreover, Article 82 hardly admits any defence on the basis of countervailing positive effects, so there is no danger of overzealous enforcement here because there are no positive effects to be ignored. However, there is indeed the possibility that a national authority would define very narrowly the relevant geographic market to cover just its own territory. It may thus ignore the existence of competitors in a broader geographic market. Such a narrow definition of the relevant geographic market is in principle acceptable in the case law. But in this case the national authority in question would have to demonstrate why it leaves out other markets. It cannot simply ignore them, especially in the face of the counter-arguments put forth by the defendants.

Admittedly the situation is slightly different in the case of Article 81 which normally does not require a definition of the relevant market unless the *de minimis* rule or the market thresholds of block exemptions apply. The Commission, however, routinely defines the relevant market in its Article 81 decisions, even though it does not put the same emphasis on that as it does in Article 82 or merger decisions.^But again, a national authority that wants to apply the prohibition of Article 81 (1) has to demonstrate that the conditions of Article 81 (3) do not apply. This is not something that can be done by default in the sense of simply ignoring certain facts of the case. It has to be proven why any positive effects are irrelevant or insufficient.

There is one more factor in such considerations that has been virtually ignored by those who believe that there will be a tendency towards stricter enforcement. And that is the presence of at least two parties in the proceedings, each with opposing interests. Had national authorities been given power to grant exemptions, then indeed there wpuld be real concern that some authorities would respond favourably to petitions by certain national companies since requests for exemption would be a matter between one authority and the applicants, and no counter-arguments would be heard. This is not the case with the powers conferred by the draft Regulation. There will always be a complainant or defendant who will vigorously argue their point of view. This does not mean that enforcement will necessarily be either weaker or stricter than otherwise. It only means that it will not be so easy for any national authority to dismiss obvious positive effects or define the relevant market in an over-restrictive manner. The point here is that if glaring benefits are not to be ignored, then it is not obvious a priori that there will be overzealous enforcement.

The issue is how to help national authorities not to ignore or overlook positive effects in other member states. That is, we have to make a distinction between capacity and willingness. I have argued above that the national authorities should have that willingness if only because defendants will force them to adopt a broader perspective. The question is how to help national authorities to improve their capacity to consider effects outside their borders. I will deal with this issue in the section after next. First, however, I want to examine in the following section the relatively ignored opposite of overzealous enforcement - that of lax or ineffective enforcement.

Ineffective Enforcement

When the Commission first aired its initial ideas for decentralisation, most commentators thought that it would lead to lower standards of enforcement through "forum shopping". After they realised that national

[6] Seel. Forrester, op. cit; P. Mavroidis and. D. Neven, op. cit.; M. van der Woude, op. cit.

authorities would not have the power to grant exemptions, their attention shifted to the possibility of excessively strict enforcement. I think, however, that it is premature to discount the likelihood of inefficient enforcement.

One of the main reasons for reform of competition policy is that soon the European Union will have up to 13 new members. The Commission wants enforcement to be decentralised because otherwise it will not be able to cope with the increased workload. Over the past four years the Commission has published annual progress reports on the preparation of the candidate countries to assume the obligations of membership. Every year these reports highlight the weaknesses of the administrative systems of those countries. Particular mention is made of the difficulties they encounter in enforcing competition policy, both anti-trust rules and state aid rules. It would seem, therefore, that the main problem in an enlarged Community will not be overzealous application of the rules but ineffective application of the rules. Close examination of the draft Regulation reveals that it has no provision for such an eventuality, apart from the possibility that the Commission or a national authority may decide to reopen a case which has been dismissed by another authority. But as explained below, this provision does not solve all the problems.

In cases where a national authority made glaring mistakes in seeking to *prohibit* an agreement or a practice by a dominant undertaking, the Commission would be able to intervene either by conveying its opinion to the authority before it adopted its formal decision, or by opening its own investigation, forcing in this way that authority to stay its procedure. Where the national authority does not intend to apply the prohibitions of Articles 81 or 82, the Commission does not have the option of conveying its opinion because there is no requirement in the draft Regulation for prior consultation. The only requirement in the draft Regulation is for national authorities to inform the Commission of all cases they initiate. But information at the initiation stage will be limited and certainly will not contain the text of a draft decision in which the intentions of the authority will be more obvious. How will the Commission and other national authorities detect any mistakes in dismissals of cases (i.e. non-application of the prohibitions of Articles 81 & 82)? Even worse, how will they know of refusals even to initiate investigations?

This raises the very important question of how will the Commission evaluate the effectiveness of national authorities? I mentioned above that all cases in the future will have either complainants or defendants (because there will be no applicants for exemption). Where a case is opened on the basis of a complaint, it is possible that the complainant will then turn to the Commission if the national authority refuses to pursue a case further or if it closes the case without a prohibition. By contrast, where a case is opened on the initiative of a national authority or where the authority simply fails to act on its own initiative, the actual or potential defendant will not complain further if there is no investigation or no prohibition. Both of these possibilities imply that if the Commission wants to ensure the effectiveness of the application of competition law by national authorities it will have to re-open cases. This outcome must be unacceptable to the Commission if indeed one of the main reasons for reform is to prevent a flood of cases that national authorities in an enlarged Union fail to process themselves.

To prevent this kind of situation from arising, national authorities will have to take into account each others' interests and function as components of the same system or the same network.

The Functioning of the Network of National Competition Authorities: Spokes v. Web

Assume that national authorities truly wish to do their job well. Will the proposed system help them? Perhaps not as much as it could. A major institutional weakness of the system proposed in the draft Regulation is that in essence it describes a system of bilateral relationships between the Commission and national authorities. It is like a bicycle wheel with the Commission in the centre connected by spokes to each national authority. This means that the Commission will receive and send information to national authorities, but with the exception of initial notifications (Article 11 of the draft Regulation), it is not clear how national authorities will receive information from other national authorities. The draft Regulation provides for the exchange of information on request, rather than on an automatic basis as for the information submitted to the Commission.

A network of competition enforcers that has to ensure that no infringements pass through the net should resemble a spider's web rather than a set of spokes. In the web, all the members of the system inform all the other members. This will be especially useful in preventing both overzealous enforcement

and ineffective enforcement. Overzealous enforcement could be prevented by national authorities which inform the investigating authority of the positive effects of an agreement in their jurisdictions. Ineffective enforcement could be prevented by national authorities which inform the investigating authority as to whether or not cooperation between two or more undertakings had eliminated competition in their markets and, for this reason should be prohibited. This may happen, for example, when competition in country A is significantly weakened, but the authority of that country has no evidence of collusion and therefore does not formally issue a prohibition. If the authority in country B subsequently discovers evidence of an agreement between undertakings, before deciding whether to prohibit or not, it should take into account the negative effects in the other country. Such cases will be caught only if there is a routine exchange of information among all authorities, not just between the Commission and each of the national authorities, at all stages of the proceedings (not just covering notifications of initiation of proceedings).

Although the draft Regulation does not prevent the Commission from circulating to all national authorities information its receives, there is no explicit requirement for it to do so (again, with the exception of initial notifications). However, a system where information flows via the Commission instead of being sent directly by each authority may be more costly. This is because, if information is circulated via the Commission, it could result in delays and even higher costs. The number of recipients will be the same (i.e. 14+1) irrespective of whether the Commission does it or the notifying national authority does it itself. The difference is that someone at the Commission will have to collect and process all that information.

Apart from circulating information, if the system is really to function as a cohesive network with a single purpose (to fight collusive and abusive practices), all the members of that network should be able to make an input into the decisions of all the other members. This means that they should have both the obligation to take into account their counterparts' views and the right to make those views known and expect that they would be considered. At present the draft Regulation gives explicit, powers in this respect only to the Commission. It may submit its opinion on cases dealt by national authorities and if it does not like the draft decision of an authority it may withdraw the case from it by opening its own investigation.

There are two problems with these provisions. First, national authorities may exchange information, but as mentioned above, there is no requirement that they routinely inform each other when they initiate investigations or when they are about to take a decision. Moreover, there is no requirement that they should take into account the opinions of their counterparts or respond to the concerns they may express. Second, the powers conferred to the Commission jump from exchange of information to the extreme measure of case withdrawal with nothing in between.

These provisions may be contrasted with those of the proposal for a new framework directive in telecoms (submitted by the Commission in July 2000). It includes a more detailed and multi-stage procedure beginning with information exchange, progressing to consultation and then to explanation of adopted decision. It is only after the intermediate steps are exhausted that the Commission may ask a national authority to postpone its decisions until it adopts an appropriate measure at the Community level. Although the draft directive is subject to amendment and its cooperation procedures have been criticised for encroaching too much on national sovereignty and the independence of national regulators, it demonstrates that at least such intermediate steps are not unrealistic. After all, they have been put forth by the Commission itself. They have been criticised in the context of telecoms policy where the rules binding the various authorities are not as strict as those of competition policy. More importantly, in a system where the Commission has the right to withdraw a case, I am not proposing anything radical by suggesting that before the Commission proceeds to open its own investigation, the national authority concerned should be asked to respond to the comments submitted by the Commission.

Perhaps the idea that national authorities should take into account and even have the obligation to respond to the comments of other authorities is more radical. But this is the only way, I believe, that national authorities in an enlarged EU will be integrated in a multi-sided network and develop a common culture. Perhaps there will also be less inclination to reopen cases when national authorities know that their concerns have already been addressed.

This is also the only way that authorities will be able to develop an effective "peer review" system and learn from each other. Peer review of this kind will also contribute to making national authorities more accountable.[7] National authorities will know they

cannot act arbitrarily and independently .of the concerns of the other members of the network. Indeed, this is what it means to have a system that functions cohesively.

How to Make the System Work without Excessive Coordination Costs

Any system which functions as a network whose members' have decision-making capacity is bound to incur costs in acting in a coordinated manner. At the same time, independent action is also costly on the members of the network. Any efforts^to make the system function smoothly should not be carried away with too much coordination. Smoothness of this kind does not come free. Coordination and any other form of cooperation are costly. The issue, as always, is not whether to coordinate/cooperate or not, but to what extent or degree to coordinate/cooperate.

• The establishment of a new mechanism of collective decision-making or review of national decisions will add to the costs of coordination, will slow down procedures, will introduce new uncertainties into the system (as authorities would be double-guessing the draft decisions of their counterparts) and could also make the whole system less flexible and more uniform as decisions could reflect the lowest common denominator. This is not a viable proposal.

A more feasible alternative would be to require national authorities to obtain the views of their counterparts and consider the information submitted by them. This would resemble the procedures envisaged in the existing Regulation 17/62 for interested undertakings and other third parties and in Regulation 659/99 on state aid. The draft Regulation merely provides for exchange of information. I believe it should not only be mandated in all instances (initiation of investigation, draft decisions concerning prohibition, draft decisions concerning dismissals of complaints and closure of cases opened at own initiative), but in addition the recipient authority should be required to reason adequately on how it has used the information provided by other authorities.

[7] D. Neven, R. Nuttall and P. Seabright: Merger in Daylight: The Economics and Politics of European Merger Control, Centre for Economic Policy Research, London 1993, argue convincingly that regulatory authorities in general and competition authorities in particular become more accountable not necessarily when they are given a narrow mandate but when their decision-making procedures are open and transparent, interested parties have easy access to submit their comments and when they have to explain both their decisions and how they have used the information that was submitted to them.

This form of cooperation would not add any significant costs to the investigating authority because it would, anyway, have to take into account all the relevant information. It would be costly to the authorities providing information if they had to comment on all notified cases. But the provision of such commentary or information can be voluntary (unless explicitly requested, of course, by another authority). So each authority would have to decide for itself whether to expend resources to provide input in foreign cases whenever it has not been explicitly asked to do so. But then it will do it only if it can justify the added costs by expected benefits from more rigorous enforcement.

It would not be necessary to give the right of reply to authorities submitting information because the parties involved in each case would have strong incentives to show whether submitted information is unused or misused. This system of mandated notification of cases, information exchange and adequate reasoning of how it is used would make national authorities more accountable. Their decisions or non-decisions would be more transparent, more credible, better understood and, hopefully, better investigated and argued.

Concluding Remarks

The competition policy of the European Community is[v] being reformed and decentralised. The draft Regulation revising Regulation 17/62 appears to be primarily concerned with ensuring the integrity of Community competition law. For this reason, although it eliminates the requirement for prior notification in order to obtain exemption, it confers to national authorities only the power to prohibit agreements. This paper has argued that more explicit and extensive cooperation mechanisms are needed to make the network of enforcers function smoothly and cohesively as a single system.

The paper has identified the various costs of collective enforcement. It has shown that decentralisation may make the system more effective, but at the same time it generates new kinds of costs; mainly those caused by coordination.

To ensure the effectiveness of the system without imposing too high coordinating costs, it has proposed mandated information exchange and adequate reasoning of the use of that information as remedies against ineffective enforcement. This would also strengthen the accountability of national authorities.