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12 August 2005

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Acknowledgements.................................................................................. 3

I. Introduction.................................................................................................. 4

II. The Timing of Law Enforcement: Is Regulation 1/2003 a Change for the Better?

1. Overview ..................................................................................................... 6

2. Detecting Unlawful Acts at Lowest Costs.................................................. 7

2.1. The Economic Concept ......................................................................... 7

2.2. Detection of Unlawful Acts under 'Ex post' Enforcement......................... 7

2.3. The Cost Factor ..................................................................................... 9

2.3.1. Public Costs .................................................................................... 10

2.3.2. Private Costs .................................................................................. 10

2.4 Summary ................................................................................................ 13

3. Amount and Quality of Information Possessed........................................ 13

3.1. The Economic Concept ........................................................................ 13

3.1.1. The Choice between 'Ex ante' and 'Ex post' Enforcement................... 13

3.1.2. The Choice between Harm-Based and Act-Based 'Ex post' Intervention... 14

3.2. Information Available under the European antitrust enforcement rules .... 14

3.2.1. The Choice between 'Ex ante' and 'Ex post' Enforcement................... 14

3.2.2. The Choice between Harm-Based and Act-Based 'Ex post' Intervention... 15

3.3. Summary ................................................................................................ 15

4. Magnitude and Probability of Sanctions................................................. 16

4.1. Economic Concept .............................................................................. 16

4.2. Fining Policy and Probability of Sanctions under Regulation 17/62 ......... 16

4.3. Fining Policy and Probability of Sanctions under Regulation 1/2003 ....... 18

4.4. Summary ................................................................................................ 21

5. Overall Evaluation ..................................................................................... 21

III. Monetary and Non-Monetary Sanctions............................................. 23

1. Introduction ............................................................................................... 23

2. Can Decentralisation Affect Deterrence? ............................................. 24
### 3. Monetary Sanctions

- **3.1. Overview**

- **3.2. Optimal Deterrence and Expected Sanctions**

- **3.3. The Commission's Policy on Fines in Antitrust Law**
  - **3.3.1. The Method of Calculation for Setting Fines**
  - **3.3.2. Is There a Need for a Tariff?**
  - **3.3.3. Summary**

### 4. Non-Monetary Sanctions

- **4.1. Introduction**

- **4.2. Determinants for the Choice of Non-Monetary Sanction**
  - **4.2.1. Benefits from Committing Acts**
  - **4.2.2. Probability of Imposition of Sanction**
  - **4.2.3. Expected Harmfulness of Act**
  - **4.2.4. Overall Evaluation**

- **4.3. Obstacles to Criminalisation of Cartels**
  - **4.3.1. Attitude Against Cartels**
  - **4.3.2. Implications of a European "Cartel Offence"**

- **4.4. Criminal Legislation Against Cartels in the Member States**

### IV. Private Enforcement

- **1. Introduction**

- **2. Advantages of Private Enforcement**

- **3. Determinants for the Choice of Private Enforcement**
  - **3.1. Access to Information**
  - **3.2. Incentives for Private Enforcement**
  - **3.3. Overall Evaluation**

- **4. Obstacles to Private Enforcement**
  - **4.1. Procedural Obstacles**
  - **4.2. Institutional Obstacles**

- **5. Case Law and Recent Initiatives**
  - **5.1. Community Level**
  - **5.2. Member States**

### V. Conclusion
Authorship Declaration

I hereby declare and confirm that this thesis is entirely the result of my own work except where otherwise indicated. I have acknowledged on this page the supervision and guidance I have received from Prof. Nils Wahl.

12th August, 2005

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Acknowledgements

I sincerely acknowledge Prof. Nils Wahl, Stockholm University, for his thesis supervision and the guidance he has provided.

I am also indebted to Prof. Esperanza Buitrago Díaz, The Max Planck Institute for Intellectual Property, Competition and Tax Law, Munich, for reviewing my thesis and providing numerous very helpful comments.
I. Introduction

When the Council Regulation (EC) No. 1/2003 entered into force on 1 May 2004, the same day the European Union experienced its biggest enlargement round in history with the accession of 10 new Member States, it appeared that also for European Antitrust Law a new era had begun. With Regulation 1/2003 the European Commission (hereinafter "Commission") has accomplished a major overhaul of the system of application of Art. 81 and 82 EC replacing the enforcement mechanism of Regulation 17/62, which has been in force for more than 40 years. The new set of rules, meant "to ensure an efficient protection of competition in an enlarged Union" as Commissioner Monti put it, is the result of a long and highly debated reform process to increase the efficiency of the European competition rules, which only gained momentum with the adoption of the White Paper in 1999. The most fundamental change brought about by Regulation 1/2003 certainly is the switch from enforcement ex ante under the old Regulation 17/62 to ex post control under the new regime. In other words, by giving direct effect to Art. 81 (prohibition of anti-competitive agreements) and 82 EC (prohibition of abuse of a dominant position) in their entirety the new regulation has abolished the Commission's monopoly to grant individual exemptions for restrictive agreements pursuant to Art. 81 (3) EC. Consequently, the Commission has given up on notification, a procedure which can be described as prohibition coupled with authorization, in favour of a system of legal exception with decentralised enforcement based on deterrence. Therefore agreements that fall under Art. 81 (1) EC are now permissible without prior administrative decision, provided the conditions of Art. 81 (3) EC are satisfied.

In my paper I will try to assess the system change to ex post control from a Law and Economics standpoint, whereby a second focus of my analysis will be on the adjustments and improvements which appear to be essential with regard to both sanctions and procedural rules. While the latter should go hand in hand with a change in the enforcement mechanism, I will show that such provisions are far from being realized and try to give reasons why this is the case. To this aim I will use as measure what has been referred to as one of the "classical works" in Law and Economics, most prominently the three basic dimensions which according to Shavell determine the theoretically optimal structure of law enforcement.

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3 European Commission, "Modernisation of EC antitrust enforcement rules", p 3
5 Strictly speaking Regulation 17/62 cannot be described as "pure" ex ante system, since the notification to the Commission was not obligatory, see Di Federico/Manzini, "A Law and Economics Approach to the New European Antitrust Enforcement Rules", Erasmus Law & Economics Review (ELER), 2004, p 143, 148
6 For the purpose of this paper the focus however will be mainly on Art. 81 EC
7 Di Federico/Manzini, above 5, p 144
The optimal choice relates to an optimal degree of social welfare, which includes the social benefit of the conduct in question minus its harm and minus enforcement costs. The enforcement costs are in turn made up by the costs spent to identify both the harmful conduct and the person who acts, as well as the costs associated with the application of rules and the use of sanctions.

In Chapter Two I will apply Shavell’s analytical framework by comparing the three determinants for the timing of legal intervention with the corresponding factors of European antitrust law against the background of the new order for the enforcement of antitrust rules. First, the detection of unlawful behaviour and enforcement of sanctions at lowest possible cost. Second, the amount and quality of information available to the law enforcer. Third, the ratio of the magnitude of possible sanctions and the probability of their application. I will prove that despite some arguments that nevertheless speak in favour of the notification procedure the ex post control could be efficient, if not for the suboptimal ratio of probability and magnitude of sanctions. This has an important impact on deterrence.

In Chapter Three I will analyse the remaining two dimensions of optimal law enforcement, mainly in the light of the weak deterrent effect on potential infringements of European antitrust rules. Accordingly, I will discuss the current practice of the Commission with regard to monetary fines and its consequences with regard to deterrence. Additionally, I will evaluate whether and to what extent non-monetary sanctions, in other words imprisonment, should be taken into account as alternative instrument in view of the lack of deterrence under the new regulation.

I will then conclude with Chapter Four by taking a closer look on the question whether private enforcement, that is individual legal action for damages, can serve as complement and improve the deterrent effect of the new antitrust regime. Here I will contemplate various techniques, which seem feasible in order to achieve a substantial improvement in an otherwise underdeveloped area, where Member States still show “an astonishing diversity in approaches”, as even the Commission has observed.

In each case I will take into account the current policy as well as scope and effect of recent developments both on European and domestic level. It would, nevertheless, go beyond the purpose of this paper to analyse the numerous consequences of Regulation 1/2003 with respect to decentralisation in the area of antitrust law enforcement and the tangled web of authorities involved. Therefore I will address individual issues related to the co-operation procedure only insofar as they do have some impact on the economic assessment of the new enforcement system or on the question of deterrence.

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9 ibid., p 261; Wils, “The Optimal Enforcement of EC Antitrust Law” (2002), p 15
II. The Timing of Law Enforcement: Is Regulation 1/2003 a Change for the Better?

1. Overview

As already mentioned above, Shavell has recommended three parameters to be used for the determination of the theoretically optimal structure of law enforcement: First, the timing of legal intervention, second the choice between two forms of sanctions, that is monetary and non-monetary sanctions or rather monetary fines and imprisonment, and third the choice between public and private enforcement\textsuperscript{11}. The two latter variables are to be discussed in the subsequent chapters. In this chapter I will focus on the optimal stage of control, which is, when compared to the peculiarities of the European order of enforcement rules in competition law, the single most important determinant, given that on one hand European antitrust law does not consider imprisonment as proper form of sanction, while on the other hand private suits for damages so far have been virtually non-existent in Europe\textsuperscript{12}.

According to the analysis of the variables that define the timing of regulatory intervention, the legislator has to choose between techniques of law enforcement that seem to be the most suitable, also in relation to the specific purpose. Basically, there are two forms of intervention. The regulatory activity can take place before or after the harmful act has been committed, in other words through \textit{ex ante} (positive) or \textit{ex post} (negative) control\textsuperscript{13}. With regard to the former, the regulator can choose to allow a certain activity that is otherwise prohibited, a preventive technique that is normally combined with the grant of permits or licences through which individuals are exempted from the general prohibition, if they fulfil certain conditions. In the latter case, the law enforcer is faced with two options, that is whether to intervene by prohibiting an act after it has been committed (act-based \textit{ex post} control) or after the actual harm has been inflicted (harm-based \textit{ex post} control). This type of regulatory activity is commonly associated with a system of legal exception or by introducing so-called "black lists" in regulatory guidelines\textsuperscript{14}. I will consider three determinants to analyse the optimal stage at which to intervene, thus combining several factors compared to the variables used by Shavell, which for the purpose of this paper in each case do not deserve individual examination.

\textsuperscript{11} Shavell (1993), \textit{above} 8, p 257 et seq
\textsuperscript{12} Wils (2002), \textit{above} 9, p 19
\textsuperscript{13} Depoorter/Parisi, "The Modernization of European Antitrust Enforcement: The Economics of Regulatory Competition", GMU Law and Economics Working Paper Series, 05-09; Shavell (1993), \textit{above} 8, p 257; De Federico/Manzini \textit{above} 5, p 145;
\textsuperscript{14} Depoorter/Parisi, \textit{ibid.}, p 8
First, the possibilities of the law enforcer to detect infringements at the lowest possible costs. Second, the amount and quality of information available to the regulator relating to the harmful effects of a prohibited act. Third, the ratio between magnitude of sanctions and the probability of their application. Each of the factors relevant for the stage of intervention will be assessed against the background of the actual setting in which the change to *ex post* control through Regulation 1/2003 has taken place.

2. Detecting Unlawful Acts at Lowest Costs

2.1. The Economic Concept

If it is impossible or prohibitively expensive to single out violators, the optimal choice would be accordingly *ex ante* enforcement, especially if one takes into account that prevention may be less expensive than employing sanctions in order to deter infringements. An example is the fencing of a public reservoir to prevent people from dumping toxic substances, which may refrain people from doing so more effectively and at lower costs than when it is tried to apprehend the violators\(^\text{15}\).

Likewise, *ex post* control may be preferred when it comes to ensure that individuals respect certain act-based prohibitions, again taking the costs into consideration. This applies especially to cases where the prevention of harmful acts is difficult, if not impossible, whereas it is comparably easy and less expensive to sanction the conduct after it has been committed or after the harm has been inflicted. Taking traffic lights as example, it costs far less to fine car drivers where they have been observed driving through a red traffic light, rather than deploying police officers at every single junction as means of prevention. With regard to enforcement costs harm-based intervention may be preferable, given that in this case sanctions have to be applied less frequently, that is only when harm has been actually caused\(^\text{16}\).

2.2. Detection of Unlawful Acts under 'Ex post' Enforcement

Given this theoretical frame, the question is whether *ex post* control under the new order really can be described as the radical reform it appears to be. This also concerns the issue whether it has put the authorities in a better position to track down infringements than under Regulation 17/62.

\(^{15}\) Shavell (1993), *above* 8, p 265

\(^{16}\) *ibid.*
One difficulty to be taken into account here is that some violations can be detected more easily than others. For instance, exclusionary practices may not be concealed in the same way as other anti-competitive agreements like price-fixing cartels, while certain undertakings may show better skills in avoiding apprehension than others.\textsuperscript{17} Accordingly, one argument put forward in that respect is that a system based on notification was in no way suitable to fight the existence of hard-core cartels, which meanwhile has become the priority aim of the Commission in antitrust policy. It is obvious that their notification would make no sense whatsoever for the undertakings, for while they are unlikely to be exempted under Art. 81 (3) EC, it would eliminate their chances to remain undetected\textsuperscript{18}. Yet, as convincing as this reason may appear, this argument fails to explain what the notification procedure has to do with agreements that verge on the criminal. Also it is unclear why it should be easier to detect large-scale cartels under an \textit{ex post} control system\textsuperscript{19}. It does not change the fact that cartels will try to escape detection under any procedure. Hence, in absence of other methods, it is likely that they remain largely unaffected by a mere change of systems.

Nevertheless, one of the declared aims of the reform is to allow the Commission to concentrate on these most serious infringements\textsuperscript{20}. In order to have a case, it was argued that the abolishment of the notification procedure would considerably ease the workload of the Commission, allowing it to use its resources to track down severe anti-competitive practices, while being no longer distracted by the allegedly useless notification procedure which in its majority involved the assessment of non-contentious notifications such as joint research or production agreements\textsuperscript{21}. In this respect it is often brought forward that the low number of instances that eventually led to a prohibition\textsuperscript{22} is grossly disproportionate to what is described as overwhelming workload created by the "phenomenon of mass notification"\textsuperscript{23}.

However, the "workload argument" does not hold against the actual figures, which rather suggest a sharp drop in numbers of notifications from an average 200 in the 1990s to a mere 94 in 2001 following the new block exemptions regime introduced two years earlier\textsuperscript{24}. This bears the question why the Commission sees itself not in a position to cope with roughly the same amount of notifications the German \textit{Bundeskartellamt} has faced without a trace of difficulties, however with fewer staff\textsuperscript{25}.

\textsuperscript{17} Wils (2002), \textit{above} 9, p 25
\textsuperscript{18} Pirrung, "EU Enlargement towards Cartel Paradise?", ELER, 2004, pp 77, 90
\textsuperscript{19} Möschel, "Change of Policy in European Competition Law?", C.M.I.R., Vol. 37 (2000), pp 495, 496
\textsuperscript{20} Regulation 1/2003, \textit{above} 1, Recital 3
\textsuperscript{22} The White Paper mentioned nine cases in total, \textit{see above} 4, para 77
\textsuperscript{23} Di Federico/Manzini, \textit{above} 5, p 151 et seq
\textsuperscript{24} Riley, "EC Antitrust Modernisation", E.C.L.R., 2003, p 604, 614
\textsuperscript{25} \textit{ibid.}, p 615; Möschel \textit{above} 19, p 495
Besides, with regard to the low number of prohibitions the notification system apparently produced, it is obviously presumed that the remaining notifications were unproblematic. Yet, in most cases the notified agreements were only exempted under conditions or in connection with certain obligations. Moreover, the fact that only few prohibitions were issued under the old system could indeed speak in favour of its intact deterrent effect. Additionally, the notification system certainly had its merits to confine overboarding activity in the "grey" area of antitrust law while it offered a certain degree of transparency, which seems to be lost under an ex post regime.

Despite all the criticism the Commission has earned for obviously exaggerating the need for a reform, there is truth in the argument, that the ex ante mechanism could not be justified any longer as best solution in an enlarged Union. It is also submitted that self-assessment by undertakings, as it is now the case under the new regulation, has become the rule in recent years and therefore has rendered the notification process redundant to a large extent. While a prohibition of anti-competitive agreements was nothing short of a revolution in 1962, things have radically changed in the four decades between and the industry has learned to live with it, which is also why a system based on prevention can no longer be defended on the grounds of the novelty of such prohibition. Moreover, the Commission has become a highly specialized body which, based on a long experience, has developed a sophisticated set of instruments to control anti-competitive agreements. For this reason, there is hope that the Commission can live up to its own expectations to concentrate on and thus improve its ability to detect the most serious infringements. Nevertheless, while it remains yet unclear whether a decentralised enforcement can be a supportive element in terms of efficiency, the Commission should grasp the opportunity and make an effort to improve its own internal working process within its seven hierarchies, which has repeatedly described as "Kafkaesque". Commentators have submitted that the notification procedure has used up to half of the resources of the Competition Directorate-General that are not assigned to mergers or state aid related work, which alone speaks volumes.

2.3. The Cost Factor

With regard to the second element, I will now assess whether Regulation 1/2003 has brought a cost reduction or at least a more efficient allocation of costs compared to the recently abolished notification procedure and eventually improved the ratio of the ability to detect harmful behaviour and enforcement costs.

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26 Pirrung, above 18, p 91
27 Möschel, above 19, p 496
28 Pirrung above 18, p 87, 101
29 Riley, above 24, p 615
30 Möschel, above 19, p 495
31 Wils (2002), above 9, p 127 et seq
In order to get a clearer picture whether the cost factor would also speak in favour of a mechanism based on legal exception, I will differentiate between both public and private expenses and compare their reduction against additional costs that the reform potentially caused.

2.3.1. Public Costs

As already discussed above, the abolishment of the notification procedure has lightened the workload of the Commission inasmuch as the undertakings no longer have to apply for a prior decision in order to gain exemption. As a consequence the administrative costs are reduced by the amount previously spent on the bureaucratic proceedings to exempt notified agreements. It is argued however, that any such cost reduction is at least outweighed by the risen costs and resources required for the intensified cooperation and coordination between Commission, national competition authorities and national courts – the so-called European Competition Network (ECN) – under the "Modernization Package"\(^{32}\).

Moreover, it should also be considered that the Commission, in the absence of notification, faces increased information costs, because it no longer obtains information in the same degree and detail as previously revealed by the undertakings. This includes for instance details on anti-competitive agreements and data on the structure of the relevant market segment, which now has to be gathered through the authorities' own efforts\(^{33}\). Hence, there is the danger that a constant exchange of information coupled with repeated consultation between the involved authorities and courts potentially leads to an even greater amount of bureaucratic procedures and expenses the administration process of the notification could have ever accounted for\(^{34}\).

2.3.2. Private Costs

Similarly to what has been said with regard to the public costs, the abolishment of the notification procedure has also reduced the costs on the part of the undertakings both in view of administration costs and transaction costs. The former mostly concerns the costs of notification in a more narrow sense, that is by collecting and preparing the relevant information and necessary forms sent to the Commission and similar administrative expenses related to this process\(^{35}\).

\(^{32}\) above 3
\(^{33}\) Pirrung, above 18, p 101
\(^{34}\) Di Federico/Manzini, above 5, p 155
\(^{35}\) Whish, "Competition Law", p 164
The latter refers to inevitable delays the undertakings, especially small and medium-sized companies, had to endure under this bureaucratic procedure. While this cost considerable business time and forced them to postpone agreements, it also led to lengthy interruptions of proceedings before national competition authorities and courts. Notwithstanding that Regulation 17/62 did not foresee any time limit for a decision to be issued, subsequent case law required it to be taken within "reasonable" time. In one case the Court of First Instance assumed that a period of 45 months was still appropriate within this meaning.

While being relieved from the bureaucratic burden under the old regime, there are nevertheless additional costs undertakings must face following the transition to ex post control. As they can no longer rely on the Commission's stamp of approval, undertakings are now forced to judge themselves whether their activities are either compatible with Art. 81 (1) EC or otherwise fulfil the conditions of Art. 81 (3) EC. Accordingly, this may entail costs for legal compliance, while the greater degree of responsibility that now rests on the undertakings is also bound to increase their risk-bearing costs. With regard to the former, one should not forget that also under ex ante control compliance costs could not completely be avoided. Even though a notification was not mandatory under Regulation 17/62, an exemption under Art. 81 (3) EC could again not be granted without notification, even if the conditions were met. This means that most undertakings had taken Art. 81 (1) EC into consideration even before the reform, in order to make sure whether and when they should notify the Commission in a specific case.

Risk-bearing costs on the other hand are caused by an increased legal uncertainty, owing to the fact that negative clearance decisions and exemptions as well as the more informal "comfort letters" have become a thing of the past. It is argued in defence of the new regime that undertakings can nevertheless rely both on matured case law and on a wealth of guidance provided by the Commission, which render meaning and scope of Art. 81 (3) EC clear enough in order to give it direct effect. While this view seems to suggest that most major precedents of Art. 81 (3) EC have already been issued, it does not take in account that its conditions were not so much subject to interpretation by the European Court of Justice, but rather dealt with by administrative decisions in which the Commission enjoys wide discretion. Accordingly, the legal uncertainty will linger on, even more in a decentralised system, until subsequent case law has sufficiently clarified the scope of Art. 81 (3) EC.

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36 Depoorter/Parisi, above 13, p 5; Müller, above 21, p 725
37 Dutch Cranes Case, SCK/FNK v Commission, Judgment of 22 October 1997, T-213/95 and T-18/96, para 69
38 Whish, above 35, p 168
39 Di Federico/Manzini, above 5, p 148
40 Riley, above 24, p 615
41 Art. 5 of Reg. 1/2003 still seems to allow NCAs to issue decisions stating that the conditions of Art. 81 (3) EC have been fulfilled, see Fine, "The EU's new antitrust rules for technology licensing", E.L.Rev, 2004, pp 767
43 Bartosch, "Der Vorschlag der EG-Kommission für eine 'neue Verordnung Nr. 17'", EuZW, 2001, p 101, 106
In this respect, it also remains to be seen to what extent the Commission will make use of its retained right in Art. 10 (1) of Regulation 1/2003 to adopt decisions that no infringement has been committed. By this the Commission may set out its position in landmark cases and subsequently clarify the law and ensure its consistent application. It should however not go unmentioned in this debate that the block exemption system has survived the reform. This for a good reason, not least since block exemptions have accounted for a great part of legal certainty under the old regime, given that the Commission has issued a number of both sector-specific and industry-related exemption regulations, most notably on vertical restraints, which altogether cover a wide range of activities. In fact, one could say that block exemptions are the only form of legal certainty the Commission provides for under the new system.

Other expenses that could negatively influence the cost ratio under the new regulation include an increased probability of litigation. Such higher litigation risk arises simply out of the fact that with European antitrust law being directly applied on both national and European level the possibilities for legal action has been multiplied, alongside the usually high costs connected with it. This is even more valid, as the burden of proof regarding Art. 81 (3) EC is shifted to the party seeking to rely on it, as contained in Art. 2 of Regulation 1/2003. This means that once the alleged infringement of Art. 81 (1) EC has been established by the claimant, it is on the infringing party to prove that the exemption of Art. 81 (3) EC applies. Given the remaining legal uncertainty in interpreting the conditions in order to be exempted, as discussed above, this results in additional risk bearing.

It is doubtful, however, whether risk-bearing costs resulting from an increased degree of uncertainty and a higher probability of litigation, can be rightfully used as an argument against an ex post control mechanism. Clearly, it would be unfair to let undertakings bear the risk with regard to their investments made by certain agreements, where the law is under a large influence of political discretion with a high degree of inconsistency. But it would in turn grossly underestimate the character of European antitrust law and the work of the Commission to allege that this risk is all too different from the many other risks which undertakings have to face with regard to their investments.

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45 Regulation 1/2003, above 1, Recital 14
46 Riley, above 24, p 605
47 Fine, above 41, p 767
48 Di Federico/Manzini, above 5, p 154
49 Wils (2002), above 9, p 116 et seq
2.4. Summary

The assessment whether the newly introduced *ex post* system has improved the ratio of detection and enforcement costs remains largely inconclusive, at least with regard to public costs since new and different costs seem to have taken the place of those costs which allegedly could be reduced or eliminated. Turning to private costs in contrast, it is held that higher risk-bearing costs following a higher degree of legal uncertainty under an *ex post* system should optimally be internalised by the undertakings. As a result one could say that the mentioned ratio under *ex post* control relating to private resources has improved. This is owed to the fact that costs that can be saved as a result of the reform merely stand against expenses for compliance, which are unlikely to grossly exceed the costs expended for the same purpose under the old system.

Eventually, it cannot generally be said that the Commission through an *ex post* system is in a better position to detect unlawful acts. For there are strong indications, especially in view of the unresolved problems regarding the dragging working process within the Commission, that the resources freed by the abolishment of the burdensome notification are likely to be mostly re-shifted in order to manage coordination and cooperation between the Commission, national authorities and national courts\(^50\).

3. Amount and Quality of Information Possessed

In further evaluating the determinants of the optimal timing of legal intervention the second variable has been named as the amount of information the law enforcer can obtain with regard the character of a wrongful act and its potential harm. According to Shavell one can say as a rule of thumb that the more information possessed about the character of an act, the later the stage of intervention should be timed.

3.1. The Economic Concept

3.1.1. The Choice between 'Ex ante' and 'Ex post' Enforcement

The authority initially faces the choice between a system based on either prevention or deterrence. This depends largely on the information available. If there is a lack of information or the information available is not sufficient the regulator should opt to intervene at the earliest possible stage. Preventive measures, for instance pre-screening or licensing, allow to collect information and thus to learn more about a potentially harmful conduct\(^51\).

\(^{50}\) Bartosch, *above* 43, p 106

\(^{51}\) Wils (2002), *above* 9, p 15
Likewise, it can be said that prevention does not serve any purpose, if the regulator is fully aware of the harm caused. Hence, under those circumstances pre-screening merely means a waste of resources in terms of administrative efforts\(^{52}\).

### 3.1.2. The Choice Between Harm-Based and Act-Based 'Ex post' Intervention

If the authority does not know the causes of a potential harm, harm-based enforcement through \textit{ex post} control is to be favoured. This will be for instance the case, if the dangerousness of the act cannot accurately be estimated. Here harm-based intervention presents a more accurate way to proceed. For by postponing its enforcement the law enforcer has the opportunity to find out more about the conduct in order to get a complete picture as to its dangerousness. Likewise, the distorting effect of intervention is kept to a minimum, while less administrative effort is needed. Eventually, harm-based intervention seems to have an advantage \textit{vis-à-vis} act-based control, since it is applied less frequently, that is only when harm actually occurs\(^{53}\).

Hence, if there is thorough knowledge available on both the effects and the specific causes, \textit{ex post} act-based intervention is the optimal answer, that is enforcement before an actual harm is caused\(^{54}\). This is simply because with a degree of information available that is close to complete, there is no justification any longer to postpone legal intervention.

### 3.2. European antitrust enforcement rules

#### 3.2.1. The Choice Between 'Ex ante' and 'Ex post' Enforcement

Considering the concept above, the \textit{ex ante} approach followed by Regulation 17/62 was initially justified by the purpose to gather information on anti-competitive agreements, not least since their prohibition in Europe equalled a fundamental innovation, while however the ban of the abuse of a dominant position had been already part of the ECSC Treaty of 1951\(^{55}\). As mentioned before, the particular circumstances that once have justified a pre-screening procedure back in 1962 can hardly be compared with Art. 81 EC as it is interpreted today. The Commission has developed a high degree of experience in dealing with Art. 81 EC and the case law has matured ever since. This has produced a wealth of information available both on the effect and on the respective mechanisms usually displayed in restrictive agreements, at least with regard to certain practices.

\(^{52}\) Di Federico/Manzini, \textit{above} 5, p 156

\(^{53}\) Shavell (1993), \textit{above} 8, p 264

\(^{54}\) \textit{ibid.}, p 263

\(^{55}\) Wils (2002), \textit{above} 9, p 116 et seq
3.2.2 The Choice Between Harm-Based and Act-Based 'Ex post' Intervention

The particular model to be favoured with regard to the recently introduced \textit{ex post} system under Regulation 1/2003 is not a clear-cut affair as it appeared to be in the assessment of the \textit{ex ante} system and information to be obtained. It is well known that the available information of the effect and execution of individual anti-competitive activities tends to differ as sharply as related to their detectability. Differentiating between vertical and horizontal restraints may best highlight this. With regard to the former it is certainly true that generally speaking authorities possess some amount of information on the undesired effects of vertical restraints. Nevertheless, it remains extremely difficult \textit{ex ante} to reliably establish an anti-competitive impact caused by vertical restraints, at least in absence of a certain degree of market power\textsuperscript{56}. Likewise, since the existence of an anti-competitive effect rather depends on the individual circumstances of the case, this lack of qualified information would also render act-based intervention a blunt tool. On the contrary, it is likely that a lot more harm would be caused through intervention than by the practice itself, unless of course the negative effect can with certainty be linked to such a practice. The Commission, obviously having taken these inaccuracies into account, issued a block exemption concerning vertical restraints in 1999, which exempts activities where undertakings have a market share of less than 30%\textsuperscript{57}.

In contrast to vertical restraints it can be said that horizontal agreements usually are restrictive in nature and as such prohibited under Art. 81 (1) EC, unless they fulfil the conditions of Art. 81 (3) EC or are subject to block exemptions, for instance R&D agreements\textsuperscript{58}. From this perspective it seems to be pointless to subject horizontal agreements to \textit{ex ante} control, at least if the main intention is to obtain information as to whether their existence is linked with detrimental consequences on competition.

3.3. Summary

For the above reasons, the \textit{ex ante} procedure has become nearly obsolete as decisive factor. This seems even more to be the case, if the purpose is to put the authorities into a position to collect data on restrictive activities. While there may be remaining advantages compared to a mechanism based on legal exception, for instance obtaining costless information as well as a greater degree of transparency for third parties, they cannot hold under an overall evaluation. Thus, however important the need to gather information may have been in 1962, it has become less and less convincing over time to justify notification as indispensable factor.

\textsuperscript{56} Di Federico/Manzini, \textit{above} 5, p 156; van Gerven, "Substantive Remedies for the Private Enforcement of EC Antitrust Rules before national courts", p 53, 67

\textsuperscript{57} Commission Regulation 2790/99 of 22 December 1999 on the application of Art. 81 (3) EC to categories of vertical agreements and concerted practices, OJ L 336 (29 December 1999), p 21

\textsuperscript{58} Commission Regulation 2659/00 of 29 November 2000 on the application of Art. 81 (3) EC to categories of Research and Development Agreements, OJ L 304 (05 December 1999), p 7
4. Magnitude and Probability of Sanctions

The third and most important factor for the choice between *ex ante* and *ex post* enforcement is the ratio between the magnitude of possible sanctions and the probability of their application. Since by now the only form of sanctions used in European antitrust law are monetary fines, I will take this into account for the present analysis, while coming back later to the issue of deterrence in relation to non-monetary sanctions.

4.1. Economic Concept

One method used to achieve optimal deterrence is to set the expected sanction for a harmful conduct at least equal to the expected benefit derived from it\(^\text{59}\). This again stresses the importance of the mentioned elements, as they have direct impact on deterrence, simply because the expected fine from the perspective of a potential offender is determined by the nominal amount of the fine multiplied by the probability that a sanction is imposed\(^\text{60}\). If for instance the probability is equal to one third, the expected sanction amounts to a third of the nominal fine. Since it is the actual ratio between the two elements that is relevant to achieve a deterrent effect, there is more than one optimal combination of magnitude and probability.

As a result, there are two main observations that can be made with regard to the choice between *ex ante* control that is to work through prevention and *ex post* control that is to work through deterrence. First, at a given magnitude of sanction, *ex ante* control is to be favoured, if the probability is low, while an *ex post* system is to be given priority, if the probability is high. Second, at a given probability, an *ex ante* system is to be preferred, if the sanctions are relatively low, while *ex post* control should be chosen, if the sanctions are comparably high\(^\text{61}\).

4.2. Fining Policy and Probability of Sanctions under Regulation 17/62

In comparison to the economic insights presented above, the previous regime of enforcement rules in European antitrust law under Regulation 17/62 seems to have complied with this concept. Given the initial lack of experience in dealing with restrictive agreements this naturally corresponded to a low probability of detection of violations and subsequently a low number of sanctions imposed\(^\text{62}\). Moreover, again in accordance with the economic framework, Regulation 17/62 also provided for comparably low sanctions, not least since other than for instance antitrust law in the United States it only foresaw monetary fines from the start.

\(^\text{59}\) Wils (2002), *above* 9, p 22 et seq.; Pirrung, *above* 18, p 92
\(^\text{60}\) Wils (2002), *ibid.*, p 24 et seq
\(^\text{61}\) Di Federico/Manzini, *above* 5, p 149
\(^\text{62}\) *ibid.*
Despite a more or less stringent fine policy the Commission displayed in the first few years after the regulation came into effect, the level of fines declined and remained at a low level until the early 1980s. Only after the Commission had announced a "tougher, new fining policy" the fines for violations of antitrust law seemed to be on the increase. While this certainly was the case in isolated decisions, the fines on average however hardly exceeded the amounts of the previous period. It was not before the Commission began its still ongoing campaign to crack down hard-core cartels in the late 1990s, becoming more and more aware of the lack of deterrence resulting from the notification scheme, that the average fine has consistently increased, even though exemplary fines imposed for serious infringements resulted in ever more swingeing fines.

The reason for this is owed to the wide discretion the Commission enjoys in determining the fines, as Regulation 17/62 neither specified the purpose of fines nor defined factors for imposing them other than "gravity and duration" of the infringement. Nor did it contain detailed provisions on the amount of fines apart from a minimum amount of € 1000 and a maximum amount of € 1,000,000 or 10 % of the turnover in the preceding business year, if greater. Also the Guidelines on Fines the Commission has adopted in 1998 did not produce a higher degree of predictability of its fining policy, as will be shown in the following chapter.

Turning to the probability of fines to be imposed under the old system, it can be described as low, yet still on an acceptable level. As already mentioned, the fact that the notification system only produced very few cases that led to a prohibition cannot serve as sole evidence of its lacking effectivity to track down infringements and impose sanctions. In fact this argument only gives an incomplete picture, since it does not take into account the number of exemptions, which were issued only under conditions or in connection with certain obligations. Besides, the admittedly low number of prohibitions under the ex ante system could also be interpreted in the opposite way, that is by considering a possibly added deterrent effect ex ante control in itself can produce. This insofar corresponds with the economic concept that allows lower fines or lower probabilities under ex ante control as it implies added deterrence achieved by the pre-screening process. The absence of such pre-screening under ex post enforcement accordingly has to be compensated by a higher degree of deterrence, which can only be done by a different ratio of nominal fines and probability.

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63 Wils (2002), above 9, p 36
64 Thirteenth Report on Competition Policy (1983), para 65
65 Wils (2002), above 9, p 36
66 Jones/Sufrin: "EC Competition Law", p 1134
67 Regulation 17/62, above 2, Art. 15 (2)
68 ibid.; In the practice of the Commission 'preceding business year' refers to the year prior to the one in which the decision on the sanction is adopted, see van Bael, "Fining à la Carte", E.C.L.R., 1995, p 238
69 Guidelines on the Method of Setting Fines Imposed purs. to Art. 15 (2), OJ C 9/3 [hereinafter "Guidelines"]
70 Möschel, above 19, p 496
4.3. Fining Policy and Probability of Sanctions under Regulation 1/2003

When taking the economic insights as measure, this suggests that the switch to an *ex post* system must be accompanied either by increased nominal sanctions or by a higher probability of the sanction being actually imposed, assuming that the other variable remains unchanged respectively. Despite increasingly higher fines in a number of cases recently, most notably the € 497 million fine imposed on Microsoft in 2004 for infringement of Art. 82 EC and the total fine of € 855 million in the "Vitamins Cartel" case in 2001\(^{71}\), Regulation 1/2003 hardly suggests a turning point in the Commission's fining policy. Far from it, the provisions of Regulation 17/62 have been included into the new regulation nearly unchanged\(^ {72}\). This concerns both the ceiling of 10 % of the turnover as well as gravity and duration as only express factors for determining the amount of the fine. The fact that the maximum amount for violation of material rules has survived the reform almost untouched\(^ {73}\) surprises insofar as simultaneously the fines for breach of procedural rules and periodic penalty payments for defiance to comply with the Commission's requirements have been strongly increased\(^ {74}\). One would like to believe arguments that in spite of all this there is still room to increase fines for material infringements. Ironically, it is argued here that this may be achieved thanks to the discretion the Commission enjoys to fix fines, which for instance has already resulted in the mentioned higher fines, but also to case law and the role the European Court of Justice has played in the past to clarify the scope of an undertaking's turnover as main element to be used in defining a base sum\(^ {75}\).

These arguments, obviously intended to relativise the failure to adjust the maximum fines in accordance with economic insights, surprise insofar, as they offer nothing that has not already been valid under the old system, where they did not have a great impact on the actual size of fines either. Nevertheless, while the few efforts to make the Commission's fining policy more efficient could hardly convince so far, there is reason to believe that its broad discretion and intransparent method to determine fines actually has a distorting effect on deterrence due to the swinging amounts of sanctions imposed. The lack of a consistent and predictable fining policy on European level should give rise to concern even more in face of a decentralized enforcement of European antitrust law. In future national competition authorities and, to a lesser extent, national courts will have a greater role to play, which means that sanctions will be imposed on the basis of the respective domestic procedural regime. Hence, the impact of swinging fines on overall deterrence will most probably increase, while varying fine-setting powers and methods must also be counted in\(^ {76}\).

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\(^{71}\) COMP/C-3/37.792, currently under judicial review: Microsoft v Commission, T-201/04 (pending); COMP/E-1/37.512, currently under judicial review: BASF v Commission, T-15/02 (pending)

\(^{72}\) Regulation 1/2003, *above* 1, Art. 23 (2)

\(^{73}\) Regulation 1/2003 however no longer uses objective monetary amounts in setting the maximum fine

\(^{74}\) Regulation 1/2003, *above* 1, Art. 23 and 24; Müller, *above* 21 , p 736

\(^{75}\) Di Federico/Manzini, *above* 5, p 149 et seq

The reference to case-law as one element to increase fines even under the unchanged framework of Regulation 1/2003 and its role to clarify the factors used for calculating the fine is even less convincing. There is not much room for clarification in face of largely unwritten factors in a still fairly intransparent process the Commission has continued to display even after the adoption of its guidelines\(^77\), which may have set up a method of calculation, but had no effect on the level at which the Commission can impose fines\(^78\).

Also with regard to the role the European Court of Justice has played in determining the interpretation of an undertaking's turnover, this mainly refers to a judgment the Court has delivered more than 20 years ago. Here it was ruled that the total turnover of an undertaking rather than that of the relevant market must be taken into account when fixing the fine\(^79\). While this finding has in fact been included in the new regulation\(^80\), the turnover meanwhile has lost much of its role as main factor used by the Commission for the determination of a base sum, even though it still finds use as an indicator of the "effective economic capacity" of an undertaking\(^81\). This is not to say, that the Court could have no impact on the determining factors used by the Commission in setting fines. However, its role in "tempering"\(^82\) the economic inconsistency of the ex post regime vis-à-vis the unchanged magnitude of fines is, for the reasons described above, too limited in order to be counted in.

In absence of adequately high fines to be expected under the new regime, an ex post control would be justified with a risen probability of being fined for harmful conduct in order to result in a higher degree of deterrence. It is obvious that this largely depends on the enforcement priorities of the Commission and its available resources. Accordingly, it is argued that Regulation 1/2003 will lead to a noticeable improvement in this respect, not least since the personnel previous used to cope with the workload created by the notification requirement is now free to assist in the Commission's effort to track down the most serious infringements\(^83\). This highly optimistic view seeks reaffirmation precisely by a decentralised enforcement, which, it is hoped, will induce national authorities and courts to support the Commission in this quest. As already stated above, this outcome is not very realistic, simply because the "Modernisation Package" demands huge efforts in co-operation and coordination between the three named players, which itself creates bureaucratic procedures at least at the same degree the notification has caused\(^84\).

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\(^77\) above 69  
\(^78\) Jones/Sufrin, above 66, p 1134  
\(^79\) Musique Diffusion Française v Commission, ECJ Judgment of 7 June 1983, C-100-103/80, para 119  
\(^80\) Regulation 1/2003, above 1, Art. 23(2)  
\(^81\) above 69; see Jones/Sufrin, above 66, p 1134; Richardson, "Guidance without guidance". E.C.L.R., 1999, 362  
\(^82\) Di Federico/Manzini, above 5, p 151 et seq  
\(^83\) Ibid.  
\(^84\) Bartosch, above 43, p 106
This seems even more likely with regard to the fact that the Commission has retained significant supervisory powers despite an apparent decentralisation introduced by Regulation 1/2003. Accordingly it will have to scrutinize the procedures of all national authorities and courts in order to underline its position as "primus inter pares".

But even if the available resources of the Commission had been increased by the reform, it is far from clear why a switch to an ex post control should automatically lead to an increased probability to detect and sanction anti-competitive agreements. Even one year after the modernisation there is yet no evidence that a decentralised enforcement will turn out as such a supportive element it is described by the optimists. The various bureaucratic obstacles I have named have the potential to hamper any such aspirations.

Similarly, when it is argued that the reform would help the Commission to crack down on the most serious infringements such as price-fixing cartels, it seems hard to conceive that the switch to an ex post control mechanism would actually improve the possibilities to do so. In fact, while cartels are unlikely to be notified under any system, the new conditions will not change anything in their determination to remain undetected. Yet it can be doubted that more resources left to carry out investigations would lead to a corresponding increase in the detection of these practices. If one considers the probability of an estimated 17% that a price-fixing conspiracy is uncovered in the United States, where the prohibitions corresponding to Art. 81 and 82 EC always were subject to ex post enforcement, this draws a much less optimistic picture than the Commission likes to accept, since there is no reason that would suggest a much different scenario in Europe.

Moreover, it seems not all too unlikely that a good part of the efforts put into investigations will be devoted to reduce the information asymmetry under the new order compared to the flow of information the Commission could rely on as a result of the notification procedure. This also implies that complaints lodged by competitors and private parties as well as the employment of leniency programmes have become ever important to be used as source of information complimentary to the authorities' own investigations. In face of the reduced amount of data that is now publicly available and the yet underdeveloped private enforcement of antitrust law in Europe, it needs not much imagination to predict that the number of proceedings started by a complaint is unlikely to increase anytime soon.

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85 Möschel, above 19, p 496
87 Wils (2002), above 9, p 37, 129 et seq
88 Pirrung, above 18, p 93
4.4. Summary

Having taken into account the various factors relative to both the magnitude of fines and the probability of their imposition, there is no proof yet that the new system has considerably increased the probability to be fined. In turn, the economic framework which determines the optimal choice for the timing of intervention commands that with said probability largely unchanged, the introduction of ex post enforcement would require higher fines, in order to maintain a ratio sufficient to deter under a legal exception system. This insight is however inconsistent with the fact that the provisions on fines for material violations have survived the reform more or less unchanged, above all however the maximum fine equal to 10% of an undertaking's turnover of the preceding business year. While the total amount of fines imposed by the Commission between 1999 and 2004 has added up to a reported € 4,55 billion\(^89\), this figure appears less impressive if compared with the enormous economic damage cartels cause\(^90\). Similarly, maintaining a maximum fine of 10% of the total turnover seems too low to deter large categories of the most serious – and most profitable – infringements of antitrust law, even more if taken into account that optimal deterrence requires the magnitude of the sanction to exceed the benefits obtained by the violation, if not equal to the harm inflicted\(^91\). Yet it is not wholly unlikely for a cartel to obtain a 10% price mark-up, which may also last over a couple of years\(^92\). While the probability to detect and sanction infringements has hardly increased under the circumstances the reform had taken place, the Commission has failed to compensate this foreseeable effect by an adequate adjustment of the maximum fine. Hence, the ratio of probability and magnitude of fines can only be described as sub-optimal from a Law and Economics perspective. This results in a low deterrent effect that does not even come close to a level it would be expected to be, if compared to the necessity that a system of legal exception is broadly based on deterrence.

5. Overall Evaluation

After having evaluated the recent transition from an ex ante to an ex post based system in European antitrust law on the basis of the analytical framework provided by Shavell with regard to the optimal stage of intervention, can it be said now that the reform has been really a change for the better in that respect? Even though I am tempted to answer with "more or less", it is clear that there cannot be a satisfactory answer until there is more empirical data available.

\(^{89}\) Monti, above 10, p3
\(^{91}\) Shavell (1993), above 8, p 261
\(^{92}\) OECD Report, above 90; Wils (2002), above 9, p 37
As we have seen above, *ex post* control has some decisive advantages over the notification mechanism, especially as it involves less transaction costs, which is mostly visible with regard to the expenses saved in absence of the bureaucratic procedure under the previous set of rules. Likewise, the ever-growing degree of experience in dealing with anti-competitive behaviour has produced enough knowledge in the last four decades in relation to both its effect and functioning to suggest that the notification process has seemingly passed its expiry date, as the examples have shown. Yet the reform remains incomplete inasmuch as some important adjustments have not been realised with regard to the deterring effect, which the insights from Law and Economics would command in view of a switch to *ex post* control. This unresolved issue leaves the Community with the paradox situation that an enforcement regime largely based on deterrence is to be accomplished by sanctions, which on average are too low to deter. The next logical step therefore must be to ask how the current situation can be improved. Assuming that the Commission's fining policy is unlikely to change a lot in the near future, an increasing deterrent effect of Regulation 1/2003 may only be achieved by improving the probability of being fined. This also makes sense if one takes into account that while high fines compared to a relatively low probability may well be optimal from an economic viewpoint, it would nevertheless appear to be arbitrary and unfair that the few offenders caught can expect hefty fines, while the rest would just get away with it. Also, in cases where the perceptions of possible sanctions are quite rough and based on a possible range rather than on true averages, increasing the average of the fine may have little effect compared to increasing the probability of being fined.

But how can said probability be substantially improved? One way is the already mentioned reform of the internal working process of the directorate-general for competition to improve its investigatory powers either by an increase of the number of staff or by a reallocation of existing resources, for instance from other directorates-general. Another more realistic method involves a different approach in relation to the subjects of prosecution and subsequently the choice of sanctions. It is often argued that prison sentences imposed on individuals responsible for the undertaking's actions can make a huge difference in terms of deterrence. Additionally, private enforcement is often named as having the potential to improve deterrence, while being an important supportive element to actions carried out by public authorities. Incidentally Regulation 1/2003 explicitly foresees an improvement of the basic conditions in order to facilitate private actions. The latter two of these propositions and their role in the deterrence issue will be discussed individually and in more detail in the remaining two chapters.

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93 Wils (2002), *above* 9, p 39
95 Cf. Whish, *above* 35, p 164
96 Wils (2002), *above* 9, p 40
97 ibid.
99 Regulation 1/2003, *above* 1, Recital 7
III. Monetary and Non-Monetary Sanctions

1. Introduction

In this chapter I will assess whether a choice between two forms of sanctions, that is between non-monetary sanctions - most notably imprisonment\(^{100}\) - and existing monetary fines, could be an element to improve the low deterrent effect after the modernisation of European antitrust enforcement, which I have demonstrated in the previous chapter. In its present form Regulation 1/2003 expressly excludes criminal legislation from its scope\(^ {101}\). According to Recital 8 criminal sanctions on natural persons may only be imposed where such sanctions are "the means whereby competition rules applying to undertakings are enforced". Yet this excerpt may explain the apparent contradiction with Art. 5 of the Regulation. While Art. 5 allows national authorities to impose fines "or any other penalty" their national law provides for, Recital 8 obviously forbids an interpretation of the regulation that would permit Member States to impose criminal sanctions for violations of Art. 81 and 82 EC, including imprisonment, pursuant to national law\(^ {102}\). It can therefore be presumed that Art. 5 only applies to possible criminal sanctions for executives of undertakings under scrutiny by a national authority, for instance if they gave misleading information or ordered to destroy evidence\(^ {103}\).

Hence, monetary fines for now remain the only available sanction as far as Community law is applied following Art. 3 of the regulation. Nevertheless, since the United Kingdom by adopting the Enterprise Act in 2002\(^ {104}\) has placed itself in the yet thinly manned ranks of Member States, which have passed criminal legislation against anti-competitive behaviour, it is not wholly unthinkable that other Member States could soon follow this example\(^ {105}\). The various scandals that have made it to the headlines in the past years led to a greater public awareness of corporate crime, while the political climate has certainly become rougher also relating to conspiracies between undertakings. Accordingly, the Commission may in future face an increased pressure to treat antitrust enforcement as criminal rather than as civil issue, a principle which to date has been enshrined in Art. 23 (5) of the regulation.

\(^{100}\) While in this paper non-monetary sanctions are treated synonymously with prison sentences, it is recognized that this is only one example, other forms being for instance probation or community service, see Polinsky/ Shavell, above 94, p 4 (Note 5)

\(^{101}\) Regulation 1/2003, above 1, Recital 8

\(^{102}\) see Riley, above 24, p 607; contra Wils (2002), above 9, p 157

\(^{103}\) Riley, ibid.

\(^{104}\) s. 188 – 189, Enterprise Act 2002, in force since 20 June 2003

\(^{105}\) By now only few Member States have enacted at least some form of criminal legislation with regard to cartels, inter alia France, Greece, the United Kingdom, Germany, Ireland and the Slovak Republic, while only the last four also foresee prison sentences, see Joshua, "The UK's new cartel offence and its implication for EC Competition law", E.L.Rev., Vol. 28 (2003), p 620
2. Can Decentralisation Affect Deterrence?

The role national authorities may play in imposing sanctions leads to another issue, namely the question to what extent the deterrent effect will be affected in face of an apparent decentralised enforcement of European antitrust law. Since national authorities and courts now are free to directly apply Art. 81 and 82 EC in their entirety and thus to impose monetary fines according to their national law, it may be even questioned whether the Commission still finds itself in a position to have a major influence in determining the degree of deterrence through its own fining policy. It is recognized that a different level as well as varying methods to determine the relevant amount of fines applied by national authorities will have to be counted in as far as the overall deterrent effect is concerned, especially with regard to leniency programmes. Yet there is reason to believe that the Commission retained a significant position within the new enforcement scheme, which again suggests that its fining policy will continue to have a lasting effect on deterrence also in the long run.

In this respect it is submitted that the new regulation is not quite the radical step in terms of decentralisation, as it may seem at first glance. Far from it, the new rules hardly could change the central role the Commission always played with regard to the development and enforcement of competition law. In fact national competition law is now virtually excluded to apply to larger-scale infringements, given that under Art. 3 (1) of the regulation national authorities can no longer escape from Community jurisdiction, if the restrictive practice affects trade between Member States. In other words, as Riley put it, "where the footprint of Art. 81 (1) [EC] applies, national competition law is ousted". Art. 3 (1) concerns the role of the Commission insofar as it has strengthened its already existing power to relieve national authorities of their competences to apply Community law. The fact that the Commission has asserted that it does not intend to make frequent use of its right to open own proceedings, but merely to screen cases for their consistence with the policy of the Commission and case law, does not change much of its increased competences. Also, considering that most others of the Commission's powers have been equally upgraded, for instance regarding the exchange of information and the priority of its decisions vis-à-vis national authorities, there is no sign that the previous hierarchy has been seriously put into question by the new regulation.

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106 Regulation 1/2003, above 1, Art. 5
107 Burnside/Crossley, above 76, p 243
108 Riley, above 24, p 604, 606
109 Riley, ibid.
110 Regulation 1/2003, above 1, Art. 11 (6), already included in Art. 9 (3) of Reg. 17/62, above 2
111 Until September 2004 the Commission had done so in 11 cases, see Burnside/Crossley, above 76, p 242
Moreover, a decentralised enforcement system seems not to change much of the importance of the Commission's fining policy for deterrence, even more as by now a number of Member States have expressed their intention to change their own national enforcement rules in order to bring them in line with the new regulation\textsuperscript{112}. A most recent example in this respect is Germany, which has passed a reform of its antitrust law in June 2005, introducing a maximum fine of 10% of an undertaking's turnover corresponding to Regulation 1/2003 despite doubts brought forward with regard to the rule's definiteness\textsuperscript{113}.

3. Monetary Sanctions

3.1. Overview

Even if there is a choice between monetary fines and imprisonment, the economic analysis commands that priority should always be given to monetary sanctions, provided both forms are equally capable to deter infringements\textsuperscript{114}. The reason is simply that fines are less expensive to be imposed than prison sentences. While fines by their nature are transfers of money from the offender to the government and therefore socially costless, prison sentences involve high costs to society, including both the disutility of the person sanctioned and the costs for imposing the sanction, with the effect that they reduce social welfare\textsuperscript{115}. Therefore non-monetary sanctions should optimally be chosen only if monetary fines cannot deter appropriately, even when they are employed to the maximum extent feasible\textsuperscript{116}.

Taking these economic insights into account, it is implied in my analysis that monetary sanctions should be used mainly against undertakings, while non-monetary sanctions imposed on decision-makers are to be used in addition to fines on their companies. I will first concentrate on the question of how optimal deterrence through monetary fines compares to the current fining policy of the Commission. Accordingly the findings of this analysis then will be further evaluated in the following paragraph, namely as to whether non-monetary sanctions should be taken into account, given their potential effect to improve deterrence.

3.2. Optimal Deterrence and Expected Sanctions

In defining optimal deterrence through monetary fines the economic literature mainly concentrates on the question whether their imposition should be based on the gain obtained or rather on the harm inflicted by the sanctioned behaviour.

\textsuperscript{112} Burnside/Crossley, \textit{above} 76, p 243; van Gerven, \textit{above} 56, p 78
\textsuperscript{113} § 81 (4) Gesetz gegen Wettbewerbsbeschränkungen (GWB) [passed on 16 June 2005]; Karl/Reichelt: "Die Änderungen des Gesetzes gegen Wettbewerbsbeschränkungen", Der Betrieb, 2005, pp 1436, 1443
\textsuperscript{114} Shavell (1993), \textit{above} 9, p 265
\textsuperscript{115} Polinsky/Shavell, \textit{above} 94, p 10
It is often seen as natural in relation to deterrence to base fines on gain, which in turn requires that the expected sanction equals or slightly exceeds the expected benefits\textsuperscript{117}. As a consequence this would remove the wrongdoer's gain and thus discourage him to engage in the harmful activity\textsuperscript{118}. This idea has however been criticised, as it would hardly induce an offender to refrain from committing the act, since he would lose nothing more than the benefits. Likewise, given that gain-based sanctions may also result in over-deterrence, notably in situations where gain exceeds harm, their overall effect may not always be optimal in terms of both deterrence and social welfare\textsuperscript{119}. These side effects may be reduced by adding a "safety margin" on top of the amount equal to gain\textsuperscript{120}.

It would seem however more desirable to set the sanction equal to the harm inflicted. This implies that optimal deterrence will be achieved as long as the harm exceeds the benefits obtained, while at the same time parties are not discouraged from acts which create greater benefits than harm and are, in principle, desirable from the angle of social welfare\textsuperscript{121}. However, with regard to cartels it can be said that the harm inflicted to society will always exceed the gain obtained by the undertakings involved. In fact cartels not only cause a transfer of welfare from consumers to producers that occurs to an amount equal to the price increase times the quantity of the product bought. They also create a deadweight loss, which can be described as total loss of welfare owed to a misallocation of products proportional to the price artificially raised by the cartel and the corresponding decrease in production\textsuperscript{122}. This means that setting fines at least equal to the level of harm caused would optimally deter undertakings from engaging in anti-competitive activities.

3.3. The Commission's Policy on Fines in Antitrust Law

3.3.1. The Method of Calculation for Setting Fines

Prior to 1998 the imposition of fines for infringements of Art. 81 and 82 EC by the Commission was felt by commentators to be nothing short of a lottery\textsuperscript{123}. In the absence of a transparent fining policy based on a comprehensible method that would allow some degree of certainty the Commission frequently was accused of plucking figures from the air\textsuperscript{124}.

\textsuperscript{117} Cooter/Ulen, "Law & Economics", p 453
\textsuperscript{118} Cf. Shavell, "Economic Analysis of Public Law Enforcement and Criminal Law", National Bureau of Economic Research (NBER), Working Paper No. 9698 (May 2003), Ch. 20, p 4
\textsuperscript{119} Wils (2002), above 9, p 23
\textsuperscript{121} Shavell (2003), above 118, Ch. 20, p 2
\textsuperscript{122} Trebilcock/Howse, "The Regulation of International Trade", p 465; Wils (1998), above 120, p 255 et seq
\textsuperscript{123} van Bael, above 68
\textsuperscript{124} Jones/Sufrin, above 66, p 1127 et seq
By adopting the Guidelines on fines\textsuperscript{125}, the Commission, notwithstanding its obvious reluctance to apply "a mathematical exercise based on an abstract formula"\textsuperscript{126}, could at least partly counter its critics. The guidelines for the first time set out a methodology based on which fines are to be calculated, as they foresee several steps by which the individual circumstances of a case are considered to a greater extent.

The first step concerns the determination of a basic amount by considering both gravity and duration of the infringement, the only factors expressly named already in Regulation 17/62 to be considered in fixing the fine\textsuperscript{127}. By affording additional weight to these factors, the Commission has given up on its previous practice to use a percentage of the undertaking's turnover to calculate the basic sum. This has to be welcomed insofar, as it seems to be a step towards basing fines on the harm inflicted rather than on a criterion that is hardly justified by any legal or economic reason, and only serves as proxy to estimate the benefits obtained by an infringement\textsuperscript{128}. Moreover, depending on their gravity violations are accordingly classified as to their seriousness\textsuperscript{129}, which in each case corresponds to a specified range of the relevant base sum. In determining the gravity account must be taken of the nature of the infringement and the actual impact on the market as well as the size of the relevant geographic market. These terms used in the guidelines all concern factors, which in one way or the other the Commission has repeatedly considered in its previous decisions\textsuperscript{130}.

As mentioned above the basic amount is further influenced by the duration of the infringement, which according to the relevant category ("short", "medium" and "long") may be increased by up to 50\% of the amount determined by the gravity. In the following step the basic amount made up by both gravity and duration can be increased or reduced depending on aggravating or attenuating circumstances. A non-exclusive list of such factors included in the guidelines again reflects the practice of the Commission in its previous fining policy, as it refers for instance to repeat offences, co-operative attitude or involvement in the infringement. The Commission has however avoided to name specific amounts to which the basic sum can be altered. The remaining steps relate to the effect the Commission's "Leniency Notice"\textsuperscript{131} may have on the amount, as well as to adjustments that may be made in both directions by taking into account whether the undertaking manufactures one or several products.

\textsuperscript{125} above 69
\textsuperscript{126} Thirteenth Report on Competition Policy (1983), above 64
\textsuperscript{127} Now included in Art. 23 (5) of Regulation 1/2003, above 1
\textsuperscript{128} Wils (1998), above 120, p 255 et seq
\textsuperscript{129} "Minor Infringements", "Serious Infringements" and "Very Serious Infringements", s.1 Guidelines, above 69
\textsuperscript{130} see van Bael, above 68, p 239 et seq
\textsuperscript{131} Commission Notice on the Immunity from Fines and Reduction of Fines in Cartel Cases (19 February 2001), OJ C 45/3
3.3.2. Is There a Need for a Tariff?

The guidelines certainly have added some degree of transparency by allowing outsiders to find out in retrospect about the amounts the Commission has used in its calculation. Yet little has changed with regard to the foreseeability of fines imposed. This is owed to the fact that the Commission prudently used ambiguous and inexact phrasing as well as ill-defined categories to maintain a maximum of discretion. It is widely held that the absence of a coherent fining policy has a negative impact on deterrence. Nevertheless, some commentators have repeatedly suggested quite the opposite by arguing that a tariff would actually remove the deterrent effect, which is achieved precisely by an intransparent and thus unpredictable fining policy. For would the undertakings be in a position to calculate the likely amount of the expected fine, they are most certainly bound to base their decisions whether to engage in anti-competitive behaviour on a cost-benefit analysis. Therefore a wide discretionary power of the Commission is regarded a suitable way compared to a tariff, in order to prevent undertakings from calculating whether to violate the law or not. It is left to speculation whether the Commission has subscribed to this position, given its fairly ambiguous guidelines, yet the whole line of argumentation supporting this view appears somewhat curious. The deterrent effect of fines is actually based on the assumption that undertakings do act by making a cost-benefit analysis and can work only if the offender is thereby induced not to engage in the sanctioned activity. A proper tariff, comparable to the standards used by civil courts in damage suits or the guidelines developed by the United States Sentencing Commission with regard to criminal antitrust cases, is therefore desirable from a deterrence perspective. This is at least the case if it is either detailed or flexible enough to provide for the circumstances of individual case. While the Commission guidelines do contain some of these elements, they still leave much to be desired in terms of increased transparency, legal certainty and, hence, increased deterrence.

3.3.3. Summary

According to what has been said above, it can be doubted that the current fining policy displayed by the Commission is anywhere close to fit the description of optimal deterrence. Its still largely intransparent decision-making process and the wide discretion in fixing fines have a distortous effect on deterrence, since it allows the Commission to issue unpredictable and swingeing fines.

132 see the formula in Wils (1998), above 120, p 257, nn. 20, 21
133 Richardson, above 81, p 371
134 Cf. van Bael, above 68, p 237 Richardson, above 81, p 367
135 Cf. Jones/Sufrin, above 66, p 322
136 Wils (1998), above 120, p 257; van Bael, above 68, p 237
In total the guidelines adopted to meet some of the criticisms, arguably however also to improve the Commission's record before the European Courts which have altered the amount of fines in all too many cases\textsuperscript{137}, have changed little to this effect. While they may have set out the method of fixing the fine, they did not introduce the tariff system many have hoped for. In absence of any disciplining scales and standards the Commission still can more or less freely choose the level it wishes to set fines at.

4. Non-Monetary Sanctions

4.1. Introduction

Since non-monetary sanctions involve high costs compared to the socially costless monetary sanctions, they should optimally be chosen only, if monetary fines cannot deter appropriately, even when they are employed to the maximum\textsuperscript{138}. While insufficient deterrence may result out of general reasons such as an ill-adapted fining policy, other factors may depend rather on the individual offender. For instance, parties often turn out to be "judgment-proof", that is when violators are not in a position to come up for the whole amount of the fine, because it exceeds their financial capacity. Since wealth poses a natural limit for monetary fines, wrongdoers can only be deterred up to a specific amount, which from this point on results in under-deterrence\textsuperscript{139}. This commands that their "tax" must then be shaped differently, that is through imprisonment, in order to deter\textsuperscript{140}.

With regard to undertakings however, the reason for lacking deterrence may be quite the opposite. Since corporate pockets are usually sufficiently deep, it could be desirable to impose sanctions against those individuals responsible for antitrust violations committed by their companies, to uphold the deterrent effect\textsuperscript{141}. It can be said from experience that fines imposed on undertakings alone will never dissuade decision-makers from engaging in cartels, an impression that is supported by the fact that undertakings hardly ever penalize their employees involved in such activities\textsuperscript{142}. The link between individuals and undertaking for instance has found recognition in the United States, where both can be equally prosecuted under section 1 of the Sherman Act.

\textsuperscript{137} Richardson, \textit{above} 81, p 361
\textsuperscript{138} Polinsky, \textit{above} 116, p 11
\textsuperscript{139} Wils (2002), \textit{above} 9, p 26
\textsuperscript{140} Friedman, "Why Not Hang Them All: The Virtues of Inefficient Punishment", Journal of Political Economy, Vol. (107), 1999, p 259
\textsuperscript{141} Wils (2002), \textit{above} 9, p 17
\textsuperscript{142} Joshua, \textit{above} 105, p 639; Wils (2002), \textit{above} 9, p 38
Accordingly, imprisonment could be a way to boost the deterrent effect, while conveying a powerful message in terms of showing a "zero tolerance" attitude towards anti-competitive conduct. This is owed to the fact that prison sentences will usually be more spectacular and therefore produce more headlines than monetary fines, which in turn means that the impact both on other executives as well as on the public at large will be much higher. At the same time the immoral side of cartels is more likely to be perceived rather than the still dominant notion that anti-competitive conduct is an inevitable economic phenomenon.

Eventually this may be a step towards a greater awareness of competition rules and subsequently the creation of a "culture of competition" among market participants, a nevertheless distant aim the Commission has formulated on an earlier occasion.

4.2. Determinants for the Choice of Non-Monetary Sanctions

Economic analysis has illustrated that even when a fine is used to its maximum, this may not automatically make the use of a non-monetary sanction appear desirable. Rather, the question of imprisonment should depend on whether the potential advantage of increased deterrence through its imposition seems to be worth the social costs caused. This again implies that at some point the choice has to be made on whether non-monetary sanctions should be employed, either to replace or to complement monetary sanctions, for which purpose the following determinants named by Shavell may provide a test.

4.2.1. Benefits from Committing Acts

According to Shavell the gain obtained through an undesirable act is closely connected to the choice of sanctions in order to achieve an adequate deterrent effect. It can be said therefore that the higher the expected benefits, the higher the degree of deterrence must be set through monetary sanctions, yet the more unlikely that their use alone will suffice. It is no secret that illegal gains of cartels can be extremely high, even more if they remain undetected for a longer period. The OECD has previously estimated that the average benefits reaped by a conspiracy between undertakings amount to 10% of the selling price.

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143 Wils (2002), *above* 9, p 40
144 Joshua, *above* 105, p 639
145 Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ C 101 (27 April 2004), p 65, para 16
146 Polinsky/Shavell, *above* 94, p 12
147 Shavell (1992), *above* 8, p 266
148 *ibid*.
149 OECD Report, *above* 90, p 1 et seq
4.2.2. Probability of Imposition of Sanctions

A second variable that may be vital for the choice between the two forms of sanctions is the probability of detection and subsequently the likeliness that the sanctions are eventually imposed. As it has been demonstrated in relation to the optimal timing of intervention, higher fines may optimally offset a low probability. This however will work only up to a point, where the probability is that low, that the according fine would exceed the offender's wealth, so that only imprisonment may guarantee a sufficient degree of deterrence.

It is estimated that only one in three cartels ever runs the danger of getting exposed, while more pessimistic views even regard a detection rate of one out of six as more realistic, which equals some 17% of all cases. Accordingly, if Shavell's model is taken as measure, considering a probability of 17% means that the level of the fine would have to be at least six times higher than the benefits in order to deter. Even though such a fine most likely would hit the undertakings quite hard, it is also implied that the gain of the cartel would have to be extraordinarily high in order to bring its participants to the brink of bankruptcy.

4.2.3. Expected Harmfulness of Act

The last important factor to be considered from an economic perspective is the expected harm the sanctioned behaviour causes. Here it is subscribed to the rule of thumb that the higher the expected harm, the more society should be prepared to bear the additional costs connected with the imposition of prison sentences, in order to achieve a deterrent effect that otherwise cannot be upheld by the use of monetary sanctions alone.

According to the OECD the harm of cartels can amount to up to 20% of the volume of commerce affected by the cartel, while in some cases this has even resulted in price increases of up to 70% despite falling prices of raw material. This implies an enormous overall economic damage, even more on a worldwide scale, if one considers that the recently exposed cartels in the United States alone have accounted for a damage of over US$ 10 billion (approximately € 8.1 billion).

150 Shavell (1992), above 8, p 266
151 Joshua, above 105, p 639
152 Bryant/Eckard, above 86, p 531;
153 Shavell (1992), above 8, p 266
154 Joshua, above 105, p 639
155 OECD Report, above 90, p 12
4.2.4. Overall Evaluation

With regard to the economic evaluation on whether non-monetary sanctions should be considered in European antitrust law, two situations must be differentiated. First, taking into account the findings in the first chapter, if the magnitude of fines can generally be described as being too low to deter, this would naturally suggest that monetary and non-monetary sanctions are not capable to deter equally good. Hence, the priority should lie on adjusting monetary fines up to a corresponding level, before the use of non-monetary sanctions is seriously considered. From the point of view of deterrence non-monetary sanctions would thus only appear to be a real alternative, if a necessary adjustment of monetary fines cannot be achieved for whatever reason. Second, if assumed that the monetary fines are adapted so to get an equally good deterrent effect and are employed up to their maximum feasible, an actual choice between fines and imprisonment on the basis of said determinants would then appear appropriate.

In that case economic analysis seems to suggest that non-monetary sanctions are desirable at least for a type of infringement whose expected benefits are likely to exceed the highest possible sanction, so that neither monetary fines nor a corresponding probability can produce a sufficient degree of deterrence any longer. But even such sub-optimal deterrence does not forcibly mean that prison sentences should be the next step. The expected harm inflicted by the infringement must first be weighed against the additional social costs caused by building and operating prisons as well as the lost productivity of individuals during their imprisonment. Given the enormous economic damage caused by hard-core cartels, which are rightly seen as the most serious form of antitrust law violations, it can be assumed that it is justified to employ non-monetary sanctions, not least against types of activities that seem to be most harmful to this effect.

4.3. Obstacles to Criminalisation of Cartels

The variables assessed above should certainly be counted in so as to judge the necessity of prison sentences from the angle of deterrence and efficiency. Nevertheless, there are other factors that also need to be considered when contemplating the use of non-monetary sanctions, which relate both to their political ends as well as to the legal setting.

4.3.1. Attitude Against Cartels

As mentioned before, the use of imprisonment may further the aim to create an attitude against cartels which is fed by a certain level of public awareness of the role a functioning competition plays in the economy.

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156 Cooter/Ulen, above 117, p 495; Shavell (2003), above 118, Ch. 21, p 1
To this aim increased penalties go part of the way in changing attitudes, while on the other hand the imposition of non-monetary sanction should be based on a strong popular support. Any attempt to criminalise cartels therefore requires that offences must reflect the anti-social behaviour in the relevant activity. Otherwise the sanction may exceed a level that is generally regarded by the public as appropriate and is subsequently perceived as "unfair". In some jurisdictions cartels are already treated as sophisticated form of theft, which deserves to be named alongside economic offences such as money laundering or insider trading. This mainly applies to the United States where antitrust enjoys a different status also in view of its long history in legislation, which explains why the use of imprisonment for over a century now is widely agreed on in public opinion. In contrast, the fight against cartels in Europe seems to be more part of a political project rather than expressing the public indignation in view of undertakings conspiring to the disadvantage of the consumer. Nevertheless, it has to be recognized that public awareness of other forms of corporate crime has become more explicit also in Europe in the aftermath of the financial scandals in recent years.

4.3.2. Implications of a European "Cartel Offence"

Also from a strictly legal perspective the criminalisation of cartels would pose a challenge to European antitrust law at an even bigger scale than the recent procedural reform did. A first difficulty to be encountered would be defining the scope of a cartel offence, which is related to the question when anti-competitive behaviour should be regarded as sufficiently serious to be sanctioned by imprisonment. It is clear that a European cartel offence for the purposes of criminal prosecution would not be able to rely on the scope of the current provisions of European antitrust law. Criminal legislation typically is based on other, completely different criteria including "mental elements" in order to define the wrong of an offence committed by individuals. Art. 81 (1) EC contains a purely administrative prohibition and is as such hardly suitable to serve as statutory definition for criminal proceedings and was never designed to be. Its scope is widely drawn and invites interpretations that include virtually any type of restrictive agreement rather than only cartels. Moreover, the conditions for exemption under Art. 81 (3) EC require the assessment of economic criteria, which is not quite appropriate for criminal procedures. Also according to the Court of First Instance there are no "per se"-infringements of Art. 81 EC, as far as the character of an agreement is concerned, that inherently would not be capable to qualify for exemption. While of course a hard-core cartel is highly unlikely to ever be exempted, this alone does not say much in relation to the purpose of criminal prosecution.

157 Joshua, above 105, p 639 et seq
158 Shavell (1992), above 8, p 262
159 Wils, above 9, p 15; Between 1955 and 1993 the US Dept. of Justice has imposed prison terms in 372 cases
160 Joshua, above 105, p 622
Eventually the enforcement of European antitrust law in its present form is not meant to be of
criminal nature, as expressly laid down in Art. 23 (5) of Regulation 1/2003. A change of this
principle would bring along many implications, the Commission obviously wanted to avoid
when it introduced said provision\textsuperscript{162}. Under the current regime, only constrained by a possible
judicial review by the European Courts, the Commission fills out the role of prosecutor, judge
and jury in one proceeding. It both initiates and investigates a case, before reaching a verdict,
which subsequently allows the Commission to decide more or less freely over the fine, should
it state a violation. Therefore it does not require much imagination to realise that major
changes relating to both the evidential principles and the procedural framework would be
unavoidable, if penalties were to become penal in effect. The mere appointment of a Hearing
Officer, introduced after the \textit{Pioneer} case in order to protect the party's rights under Art. 6 (1)
ECHR\textsuperscript{163}, will hardly meet the standards required under criminal procedure.

4.4. Criminal Legislation against Cartels in the Member States

As already mentioned in the introductory paragraph, the activity level of Member States with
regard to criminal prosecution of cartels to date is extremely low, even more if compared to
other big economies like the United States and Japan, where prison sentences are common.
There are only few Member States that have passed at least some form of criminal legislation
relating to cartels. And the number becomes even smaller when it comes to the question
whether these criminal statutes also foresee imprisonment and whether they are enforced
seriously. Until recently only Germany, Ireland and the Slovak Republic have foreseen prison
sentences up to five years, while the relevant offence often included very specific activities,
such as collusive tendering in case of Germany. There are however, as of 2003, no reported
cases in which a prison sentence was imposed in any of these countries\textsuperscript{164}. Only recently the
United Kingdom joined these countries, after the Enterprise Act 2002 introduced a new cartel
offence, which also foresees prison sentences. Ironically, by taking this step the United
Kingdom, which not so long ago was said to have one of the weakest antitrust regimes in the
developed world, could give a signal for other Member States to follow suit, should the new
criminal provisions prove to be a success in the fight against cartels. Again, such a
development, which at least seems not all too unlikely, would put additional pressure on the
Commission to review its current fining policy. Also, should it become a practice between
Member States to conclude agreements on criminal cases allocation, executives may seek
leniency from these jurisdictions first. As a result this may anticipate the procedure to be
initiated by the Commission and consequently undermine its position under Regulation
1/2003 in relation to the national authorities\textsuperscript{165}.

\textsuperscript{162} \textit{see} Richardson, \textit{above} 81, p 367

\textsuperscript{163} Musique Diffusion Française \textit{v} Commission, \textit{above} 78, para 6

\textsuperscript{164} Joshua, \textit{above} 105, p 620 n.2

\textsuperscript{165} Riley, \textit{above} 24, p 672
IV. Private Enforcement

1. Introduction

Within European antitrust enforcement private parties are meant to play a double role. On one hand they may bring in complaints and thus initiate public enforcement. For authorities may start investigations on the basis of the complaint and eventually require the undertaking concerned to bring the infringement to an end\textsuperscript{166}. On the other hand, they may take action through litigation on national level and therefore complement public enforcement, for instance where authorities lack of resources to deal with the case. Nevertheless, as even the Commission has recognized, the role of national courts is limited as yet, while actions by third parties, most notably consumer associations, for infringement of competition law remain quite rare across Europe\textsuperscript{167}.

Information plays a vital role as for the choice between public and private enforcement, since victims of harm naturally will have some knowledge of the responsible party\textsuperscript{168}. Giving those parties a possibility for legal action or removing existing obstacles to pursue a claim may induce them to make better use of their information, which is otherwise lost for public authorities to detect infringements. As a consequence violators could not only expect to become subject to public proceedings but also to be taken to court by third parties, which makes private enforcement a valuable element to provide additional deterrence to anti-competitive behaviour.

Having said that, all this also bears the question to what extent it would seem desirable for private enforcement to replace actions carried out by public authorities. Again, it depends largely on the information available or rather on the efforts and expenses needed to find out about the identity of a wrongdoing party and the nature of the infringement. This is why public agents in general seem to be in a better position to fill out that function, especially if one considers the difficulty to track down hard-core cartels\textsuperscript{169}. However, if there is a reward, for instance through high awards following successful court actions, excessive private enforcement can lead to a wasteful effort in finding violators, which Polinsky and Shavell compared with the endeavour to catch a fish from a common pool\textsuperscript{170}. This problem is certainly less acute in Europe than for instance in the United States, where private enforcement makes up almost 90 % of competition law enforcement, not least thanks to the prospect of being awarded with treble damages by the courts\textsuperscript{171}.

\textsuperscript{166} Regulation 1/2003, \textit{above} 1, Art. 7
\textsuperscript{168} Polinsky/Shavell, \textit{above} 94, p 3
\textsuperscript{169} Monti, \textit{above} 10, p 2
\textsuperscript{170} Polinsky/Shavell, \textit{above} 94, p 3
\textsuperscript{171} Woods et al, \textit{above} 98, p 37; Wils (2002), \textit{above} 9, p 19
2. Advantages of Private Enforcement

The use of legal actions by third parties may prove to be a key complement to public enforcement and therefore rightly be regarded as the "final piece of the enforcement jigsaw puzzle"\(^{172}\). At the same time it is a suitable way to improve the deterrent effect. Generally, private enforcement can improve the degree of compliance with competition rules to a similar extent as sanctions, with the difference that fines are being replaced by actions for damages before national courts. Likewise, they relieve the Commission and national authorities from additional workload\(^ {173}\). Apart from that it is certainly true to say that a greater involvement of private parties in the enforcement of antitrust rules will gradually lead to a greater public awareness of competition law, one condition for the still distant aim to create a "culture of competition" in Europe. Yet increased private enforcement may in addition be beneficial for the private litigants as well. The prospect of being compensated for loss suffered would thus imply a greater protection for individuals, which eventually includes consumers. Moreover, among various other procedural advantages, a court is seemingly in a better position to accelerate the proceedings when dealing with complaints compared to a purely administrative process, as it can for instance grant faster relief through interim measures\(^ {174}\).

3. Determinants for the Choice of Private Enforcement

Economic analysis essentially knows two main factors with a decisive influence on the question whether one can rely on private parties relating to the enforcement of legal rules or whether society should rather entrust public authorities with this task. The first element is the already mentioned effort needed to gather information relevant for the enforcement\(^ {175}\). The other determinant relates to the incentive a private party with such information has to invest resources in enforcing the law in order to obtain a socially optimal amount of enforcement.

3.1. Access to Information

The choice between private or public enforcement depends to a big part on the effort to be expended in order to get into possession of information crucial to the enforcement. On one hand the victim of a harm usually finds itself in the best position to gather the relevant information, for instance identifying the person to whom law should apply or the nature and extent of the violation. However, in other situations an extensive amount of effort may be necessary in order to find the offender. Here enforcement most likely requires public authority with access to more effective techniques.

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\(^{172}\) Lowe, above 167, p 9
\(^{173}\) Monti, above 10, p 3
\(^{174}\) Woods et al, above 98, p 32
\(^{175}\) Wils (2003), above 9, p 18
A different situation in this respect exists however in the United States, as here private litigants can resort to a pre-discovery device that is not available in Europe or at least not to the same extent\textsuperscript{176}. In contrast several techniques commonly used to detect offenders require a sometimes huge degree of co-ordination between a number of individuals or bodies. This for instance applies to certain information systems such as databases, whose benefits would hard to be captured if used by private parties alone\textsuperscript{177}. Accordingly, it can be said that the more effort needed to obtain information, the more law enforcement should rely on public agents.

### 3.2. Incentives for Private Enforcement

Parties who possess information required for enforcement, either through legal actions or by complaints to the relevant authority, usually have sufficient incentive to do so. In this respect their motive could be financial gain, for instance rewards or the prospect of damages awarded, avoiding financial losses or future harm or may be simply retributive in nature, that is to see that "justice is done" to those who have acted wrongly\textsuperscript{178}. On the other hand, where effort is needed to track down parties responsible for violations, these motives in turn may not provide incentive enough for private parties. In these cases public enforcement is required. Also the fear of reprisal will most likely dampen a party's incentive, so any action may depend on the society's ability to afford protection, which is generally provided by the criminal law regime that outlaws such behaviour.

Apart from that, there is also the risk that a private party's motive may either fall short or exceed the socially adequate motive\textsuperscript{179}. In the former case, a party will not act, if it is unlikely to benefit from the marginal deterrence that would be created if the offender would be exposed and made liable for his wrongful act. It is clear that private enforcement is much more influenced by costs and benefits for the individual, which are not always aligned to public costs and benefits\textsuperscript{180}. In the latter case, the incentive to find offenders could be more than it is socially desirable, since it would induce parties to use an excessive amount of resources for that end, which again is of limited use for society in terms of deterrence\textsuperscript{181}.

### 3.3. Overall Evaluation

With regard to Regulation 1/2003 it can be observed that it has potentially facilitated the use of private enforcement, not least since national courts are now free to directly apply Art. 81 (3) EC. As a result the role of private parties may increasingly become important in cases where information is available to victims, for instance if related to vertical restraints.

\textsuperscript{176} ibid.

\textsuperscript{177} Shavell (1993), above 8, p 268 et seq

\textsuperscript{178} ibid.

\textsuperscript{179} ibid.

\textsuperscript{180} Cooter/Ulen, above 117, p 476

\textsuperscript{181} Wils (2003), above 9, p 18
This is insofar in line with the economic concept, as it is recommended in such cases to rely
on the initiative of private parties rather than spending public resources. Nevertheless, this all
does not change the fact that also under the new regime public enforcement remains by far to
be the dominant method of enforcement. An approach that again can be justified by the fact
that private parties cannot detect most practices without expending a great degree of effort,
which for instance is the case with horizontal restraints. Moreover, for the above reasons it is
not desirable for the current enforcement rules to exclusively rely on either public or private
enforcement, even if one disregards the fact that private enforcement in Europe is hardly
equal to this task. In this light it seems reasonable that the role of private enforcement is
merely intended to complement the role of the authorities\textsuperscript{182}, the latter which continue to be of
critical importance to detect anti-competitive practices. In addition, incentives for private
enforcement have not changed a lot after the modernisation, even though this will generally
depend on the circumstances of each case. The motive to recover damages and avoid future
harm will predominate in actions relating to vertical restraints for instance, since in these
cases litigants are in a position to assess the amount of harm to be recovered through legal
action. In absence of the possibility for a court to award punitive damage in Europe, the
motive of financial gain will only play a minor role, and only if the private party has some
knowledge unknown to the authorities.

Likewise, the fear of reprisal does not seem to inhibit private enforcement, even if it is held
that for example distributors may not be re-included into the distributing system when they
take action against vertical restraints\textsuperscript{183}. Given that in most cases the business relations
between the parties will already be destroyed, if a civil action is contemplated, the prospect of
not being re-admitted to the distribution system seems to be a less dominant motive in this
respect than the intention to recover the harm suffered.

With that in mind, the arguments brought forward by Di Federico and Manzini\textsuperscript{184} who seem
to suggest that the new enforcement rules have initiated a move towards a system that is
mainly private-oriented are a bit off the mark. While it may admittedly be a matter of time for
national courts to play a greater role within a decentralized enforcement system, they do not
take into account that private enforcement in Europe still is very much in its infancy. This
situation will not profoundly change in the coming years, even in view of recent initiatives
intended to facilitate private actions both by the Commission and on national level. For it
cannot be contested that private litigants have to overcome various other obstacles, which to
remove the Member States seem to be far less enthusiastic. An all too optimistic depiction of
the role of private litigation within a wider enforcement scheme therefore seems to be
inappropriate.

\textsuperscript{182} Regulation 1/2003, above 1, Recital 7
\textsuperscript{183} Di Federico/Manzini, above 5, p 157 et seq
\textsuperscript{184} ibid.
4. Obstacles to Private Enforcement

Direct applicability of Art. 81 (3) EC certainly has removed one major obstacle for private enforcement of antitrust rules in Europe, not least because this makes it no longer possible for parties to delay court actions by forwarding a notification to the Commission\(^{185}\). The fact that private enforcement shows a "total underdevelopment" in Europe however involves other factors as well\(^ {186}\). To begin with, it can doubtlessly be said that cultural differences in general, especially if compared with the United States, may at least partly be blamed for a lower level of litigiousness and hence a largely lacking competition culture in Europe.

4.1. Procedural Obstacles

Nevertheless, while cultural reasons certainly have to be taken into account, it seems to be the case that most obstacles for private enforcement can be found in the inflexible and rather conservative procedural rules private litigants are subject to across Europe. As already mentioned information plays a key role in private court action. But even if the party has access to some degree of information, law suits can nevertheless involve substantial information costs, due to the significant information asymmetries between private parties on one and undertakings on the other side. This makes it even more difficult to collect detailed data relating to an alleged infringement\(^ {187}\). Again it also increases the risk that the private party eventually has to bear extensive legal costs that in many instances will be enough reason for the plaintiff to refrain from legal action, even more if he faces a defendant with a lot greater financial power\(^ {188}\).

Along with unfavourable provisions as to the burden of proof this may consequently result in a too high threshold to initiate legal proceedings. While the situation has not really improved to this effect, in face of lacking transparency following the abolishment of the notification procedure, it is questionable whether this alone could account for the low number of private court actions. Instead it is likely that it has a lot more to do with the court rules on national level. If the aim is to stimulate civil prosecution of cartel offences, parties must accordingly be given more incentives to enforce their legitimate claims in court. To do so it must be contemplated to facilitate legal actions by introducing some powerful elements that have the capacity to at least relativise the risk-bearing cost of the plaintiff and therefore to lower the threshold of legal action. For instance, the information cost may substantially be reduced by means of pre-trial discovery mechanisms and less stringent burden of proof rules through which the defendant can be ordered to come up with the evidence required\(^ {189}\).

\(^ {185}\) Wils (2002), above 9, p 150
\(^ {186}\) Waelbroek et al, above 10, p 1
\(^ {187}\) Pirrung, above 18, p 102
\(^ {188}\) Riley, above 24, p 613
\(^ {189}\) van Gerven, above 56, p 73
Provisions that would allow or facilitate collective claims mechanisms would also have the potential to avoid parallel court proceedings and therefore multiplied information costs, which are wasteful from a social point of view. These so-called class actions could also have the advantage to increase overall deterrence, as it would allow more than just a fraction of victims to sue for damages. Apart from that, the risk-bearing costs may extensively be reduced while correspondingly creating higher incentives for private parties to enter into court litigation, if contingency fees would be an option also in Europe. Instead they are still widely regarded contrary to public policy. The same goes for treble damages, which may strongly influence the motives for legal action, but simultaneously may lead to socially undesirable effects that arise out of excessive private enforcement, as I have demonstrated earlier. Nevertheless, when comparing private enforcement in Europe and in America, one should not overlook the disadvantages experienced in the United States, where the measures discussed above often are applied to the extreme and thus have led to various uncertainties in the legal proceedings. Also it seems to be no coincidence that they have mostly served the financial interests of the lawyers.

4.2. Institutional Obstacles

Another point frequently raised when it comes to evaluating the potential of private actions in antitrust enforcement is whether national courts have the capacity to deal with the complex economic assessment when applying Art. 81 (3) EC. It is clear that an ordinary civil court does not show the same level of expert knowledge and economic skills as a specialised competition authority. However, in my view allegations that suggest that civil courts are hardly trained to carry out an economic assessment seem to be exaggerated. National courts have been applying Art. 81 (1), 82 and 86 EC for decades now, which involve economic analysis to no lesser extent than Art. 81 (3) EC does, while at the same time one should not forget that applying any of these provisions nevertheless requires a legal mind. Having said that, judges as well as advocates need to be trained appropriately in order to lower the probability of legal errors, a measure already foreseen by the Commission, while putting more weight on the importance of law and economics in competition law. In organisational terms it could therefore be helpful in the long run to give the competence to hear cases in competition matters to a smaller number of specialized courts, which would also enable them to build up the knowledge and experience required to carry out a profound economic analysis.

190 Möschel, above 19, p 498
191 Möschel, ibid.; van Gerven, above 56, p 73
192 Craig/De Búrca, "EU Law", p 1081
195 Pirrung, above 18, p 98
5. Case Law and Recent Initiatives

5.1. Community Level

Given that the recent enthusiasm the Commission has shown for private enforcement is not likely to produce major changes in near future, it could be on the European Court of Justice to give some necessary impulses in order to strengthen the role of third parties in the enforcement of antitrust law. However, actions for damages for breach of Community law remain relatively rare, most likely also owed to the fact that many actions are settled out of court\textsuperscript{196}. The European Court of Justice already indicated in 1974 that Art. 81 and 82 EC produce direct effect in relations between individuals, which in turn creates rights to be safeguarded by the national courts\textsuperscript{197}. However, many related questions, for instance whether Community law provides for such damages, were left open and – at least in relation to Art. 81 EC – remained largely unclear until Crehan\textsuperscript{198}.

Here it was stated that any individual, including a party to an anti-competitive contract, could rely on Art. 81 EC to claim damages for a loss caused by such a contract or else any conduct that distorts competition. To that effect national law and even parties to a contract must not impose any absolute bar to prevent parties from such action\textsuperscript{199}. While the Court has thereby improved the effectiveness of Art. 81 EC and contributed to its deterrence, expectations which as a result predicted a notable increase of private actions before national courts have not been fulfilled as yet\textsuperscript{200}. Nevertheless, it can be said that after eliminating the Commission's monopoly in the interpretation of Art. 81 (3) EC private enforcement is bound to play a stronger role in the context of a wider scheme. The Commission's aspirations to stimulate private parties to have more frequent recourse to national courts will become more clear by the end of 2005, when the Green Paper setting out options for improvements in this area will be published\textsuperscript{201}.

\textsuperscript{196}Woods et al, \textit{above} 98, p 34
\textsuperscript{197}BRT v SABAM, 127/73, ECJ Judgment of 30 January 1974, para 2
\textsuperscript{198}Bernard Crehan v Courage Ltd and Others, C- 453/99, ECJ Judgment of 20 September 2001
\textsuperscript{199}\textit{ibid}., para 28; Craig/De Búrca, \textit{above} 192, p 1084
\textsuperscript{200}Di Federico/Manzini, \textit{above} 5, p 159
\textsuperscript{201}Lowe, \textit{above} 167, p 9
5.2. Member States

From what has been said by now it is not surprising that there is only very limited case law in the Member States relating to damages awarded for breach of EC competition law, namely a reported 12 cases since 1962\textsuperscript{202}. At the same time the record under national competition law looks hardly any better in comparison\textsuperscript{203}. In May 2004 the English Court of Appeal for the first time in a claim for breach of Art. 81 EC has awarded provisional damages amounting to £ 131,336 (approximately € 190,000) in Crehan v Inntrepreneur\textsuperscript{204} and thereby overturning a first instance decision\textsuperscript{205}. Remarkably, this was the same proceeding in which the European Court has established the principle, which is thought to have cleared the way for damages for breach of Art. 81 EC\textsuperscript{206}. Apart from that, there are a number of other recorded actions for breach of EC competition law to be mentioned, most notably in Italy, France and the Netherlands, while in the remaining jurisdictions no direct damages seem to have been awarded so far\textsuperscript{207}.

A most recent example for legislative measures with potential impact on private enforcement is the reform of the German competition law adopted in June 2005, which has become necessary also due to the new order on Community level. The amending law now includes a relaxation of the "protective purpose" condition, which previously has limited the possibility for third parties to subsequently claim damages against violators. It now expressly foresees the possibility to call in consumer associations as summoned third parties to a procedure before the national competition authority\textsuperscript{208}. However, plans to give consumer associations a right to collective action in order to skim off profits obtained by undertakings through anti-competitive conduct, as foreseen in the initial draft, were abandoned in the course of negotiations in the mediation committee between the Bundestag and the Federal Council\textsuperscript{209}.

Even more recently there has been some movement with regard to the Swedish Act on Class Actions of 2003\textsuperscript{210}, which has also introduced an "opt in" possibility. While previously class actions were limited to aggrieved parties having a contractual relationship with the infringing party, an amendment that came into force on 1 August 2005 now has extended this possibility also to consumer associations and individual parties, provided they can prove that they have been affected by the infringement\textsuperscript{211}.

\textsuperscript{202} Waelbroek at al, above 10, p 1
\textsuperscript{203} \textit{ibid.}; Monti, \textit{above} 10, p 4
\textsuperscript{204} Crehan v Inntrepreneur Pub Company PCP, Court of Appeal, Judgment of 21 May 2004, [2004] EWCA 637
\textsuperscript{205} Clifford Chance, Antitrust Review, July 2004, p 11 (available under cliffordchance.com)
\textsuperscript{206} Crehan v Courage Ltd, \textit{above} 198
\textsuperscript{207} Woods et al, \textit{above} 98, p 33
\textsuperscript{208} § 54 II Nr.3 GWB; Karl/Reichelt, \textit{above} 113, p 1443
\textsuperscript{209} Frankfurter Allgemeine Zeitung, Nr. 138 (17 June 2005), p 11
\textsuperscript{210} Act on Class Actions, 2002: 599
\textsuperscript{211} Frankfurter Allgemeine Zeitung, Nr. 177 (2 August 2005), p 10
V. Conclusion

In this paper I have shown that the reform of European antitrust enforcement, which was accomplished by Regulation 1/2003 can be largely justified with the economic concept of the optimal structure of law enforcement. The system switch from notification to legal exception can be condoned mainly for the cost reducing effect, but also for the insight that the grown experience in dealing with anti-competitive activities has made the once indispensable flow of information largely redundant. However, the reform is incomplete insofar, as it does not provide for an optimal level of deterrence that would seem to be appropriate under ex post control. In absence of a substantially raised probability to apprehend and sanction violators the Commission has failed to adjust its fining policy correspondingly to meet the conditions set out by economic analysis. The gap in deterrence that has opened as a result shows the need for a more a transparent and coherent fining policy as well as for a regulator willing to make better use of its fining scope. The wide discretion enjoyed by the Commission in setting the amount of monetary sanctions led to unpredictable and ever more swingeing fines. The somewhat tougher approach displayed by the Commission in imposing stiff fines in a number of cases recently can be understood as a sign that it finally means business. But as long as this is confined to isolated cases the distorting effects on deterrence will continue to predominate.

The Commission's approach remains inconclusive also when it comes to consider other methods, which may have a lasting effect on deterrence. Criminal sanctions, especially imprisonment, seem to be not even an issue as yet in the enforcement of antitrust law. As I have outlined above prison sentences seem to be an alternative only, if the deterrent effect of monetary fines alone does not suffice. Since the decision-makers responsible for anti-competitive strategies are hardly deterred by fines imposed on undertakings, non-monetary sanctions on individuals could prove a valuable instrument in the fight against cartels. In view of growing tendencies to criminalise cartels on national level the Commission soon will face increased pressures to change its current way of thinking.

In contrast, the Commission displayed a far greater enthusiasm in its endeavour to make private litigation a settled element within its antitrust enforcement scheme. However, one year after the reform little has been achieved in this respect. It is doubtful whether the recent initiatives both on national and European level are enough to make a difference, as long as the inflexible procedural framework in the Member States cannot provide more incentives for third parties to engage in costly legal actions. The Green Paper to be published in due time will put us in a better position to judge whether the Commission is on a good way to stimulate private parties to play a stronger role in antitrust enforcement.

These issues partly left open by the Commission, deliberately or not, seem to guarantee that Regulation 1/2003 will not remain substantively unamended for another forty years, as it was the case with Regulation 17/62.
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