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Spontaneous Harmonisation of National (Competition) Laws in the Wake of the
Modernisation of EC Competition Law*Hans Vedder**

1 INTRODUCTION

Harmonisation has always been at the forefront of European integration. To this express harmonisation one can now add what may be called spontaneous harmonisation. Spontaneous harmonisation can be described as the convergence of rules of the Member States following the example of comparable rules in the European Union without any express harmonising activity of that Union. This spontaneous harmonisation has taken place in the area of competition law. The European Community's competition rules have functioned as an example for the competition rules of most Member States in that the latter have amended or adopted their national competition laws so they mirror the Community's rules on competition.¹ While a spontaneous harmonisation can already be observed with regard to the Community's competition rules, the question is how this spontaneous harmonisation relates to the so-called modernisation of the Community's competition rules.

The modernisation of EC competition law is something that has in the approximately seven years since it was initiated led to a very considerable amount of legislation, legal writing and – to a lesser extent – case law. Regulation 1/2003, 139/2004 and the new Block exemption regulations, Guidelines and myriad articles and books are the visible result of this modernisation. Under the heading of the modernisation of EC competition law, the Commission has undertaken a major reform of the provisions of EC competition law that are addressed to undertakings² as well as those addressed to the Member States.³ Moreover, the modernisation initiated by the Commission appears to be accompanied by a new interpretation of the competition rules addressed at public undertakings by the European Court of Justice (ECJ), the effect of which is to grant the Member States more leeway in conducting their national policies without violating

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¹ See on this harmonisation: Drahos, *Convergence of Competition Laws and Policies in the European Community*, The Hague, Kluwer Law International, 2001.

² White paper on the modernisation of Articles 81 and 82 EC, Commission 28 April 1999, can be found on: http://europa.eu.int/comm/competition/antitrust/wp_modern_en.pdf.

³ See the various (draft) documents published in February 2004 on the framework for lesser amounts of state aid and the framework for the assessment of State aid which has limited effects on intra-Community trade, to be found on: http://europa.eu.int/comm/competition/state_aid/others/.

Community competition law.⁴ With regard to the competition rules addressed to undertakings the Court's recent case law appears to entail an approach that involves a bifurcation between practices that are (relatively) harmless or benign and those that are harmful or malign from a competition perspective.⁵ An example of the former approach would be the Court's judgments in *Albany*⁶ and *Wouters*⁷ whereas the latter branch of the case law is reflected in the *Polypropylene* judgments.⁸ With regard to the cases where the possible harm to competition is limited the Court adopts a, not always economically or legally correct⁹, approach to Article 81(1) EC, that enables it to take the agreement outside the ambit of that provision, thus obviating the need for an assessment under Article 81(3) EC. In the cases that deal with infringement decisions, the Court has adopted a rather more "cartel-busting" approach.¹⁰

This modernisation thus covers both the substantive rules as well as the procedures used for applying these rules. With regard to the substantive provisions, the changes can be brought under the heading of a "more economic" approach to Article 81 EC. The Commission has for example clarified and extended the scope of its De minimis Notice.¹¹ Furthermore, the safe-haven principle is now found in most Block exemption Regulations¹². The inclusion of some sort of rule of reason in the Vertical and Horizontal Guidelines also provide another indication of the substantive changes in Commission policy.¹³ Moreover, the Court appears also to have embraced the more economic approach to the first paragraph of Article 81 EC in respect of the appreciability test and the application of a form of the rule of reason.¹⁴ It is also the case that the more intensive use of increasingly complex economic models within the Merger Regulation appears to be part of the economic modernisation trend.

⁴ See, *inter alia*, the judgments in Case C-53/00 *Ferring SA v Agence centrale des organismes de securite sociale (ACOSS)* [2001] ECR I-9067, [2003] 1 CMLR 34, and Case C-280/00 *Altmark Trans GmbH, Regierungsprasidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747, [2003] 3 CMLR 12.

⁵ Basically, this bifurcation follows the lines of the distinction made in the text of Article 81(1) between "object" and "effect", cf. Joined Cases 56 & 58/64 *Etablissements Consten SA and Grundig GmbH v Commission* [1966] ECR 299, [1966] CMLR 418.

⁶ Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751. This is actually one of three nearly identical cases that are also referred to as the Brentjens and Drijvende Bokken cases.

⁷ Case C-309/99, *Wouters v. Algemene Raad van de Nederlandsche Orde van Advocaten* [2002] ECR I-1577, [2002] 4 CMLR 913.

⁸ *Eg* Case C-49/92P *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, [2001] 4 CMLR 17.

⁹ Cf. Vedder, *Competition law and environmental protection in Europe; towards sustainability?* Groningen, Europa Law Publishing 2003, p 126 *et seq.*

¹⁰ In *Anic*, see note 8 *supra*, the Court can be considered to have shifted the burden of proof in favour of the Commission in cases that involve concerted practices.

¹¹ OJ 2001, C368/13.

¹² The principle whereby an agreement falls under the block exemption as long as the market share cap is not exceeded. To a certain extent, the more economic approach inherent in this is undone by the presence of the so-called black list in these Regulations.

¹³ See, for example, paragraphs 24 and 187 of the Guidelines on horizontal agreements, OJ 2001, C3/2.

¹⁴ Cf. Joined Cases C-180/98 – C-184/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451, [2001] 4 CMLR 1, at para 91.

With regard to procedural issues, the decentralisation of the application of Article 81(3) EC through Regulation 1/2003 together with the new state aid block exemption regulations have resulted in an (at least apparent) procedural decentralisation of EC competition law. The major players in this decentralisation are the Commission, the national competition authorities (NCA's) and the national judges. The aim of procedural modernisation is to shift some of the Commission's case load to the NCA's and the national judges. The NCA's are enabled to apply Article 81 and 82 in the same manner as the Commission whereas private parties must self-assess the compatibility of their agreements with Article 81 and 82. Ultimately, these private parties can turn to a national judge to obtain a ruling over the legality of an agreement in the light of Article 81 or 82 EC. Moreover, as a form of decentralisation in the area of state aid control and services of general interest, the Commission appears also to be expecting more self-assessment by the Member States.¹⁵

Modernisation thus involves substantive and procedural changes in more than one area of Community competition law. Even though the focus appears to be on the modernisation of Articles 81 and 82 EC, the picture emerging is one of a general overhaul of Community competition law across the board with attention primarily directed to the more serious threats to competition. This conclusion is confirmed by many statements in the relevant documents¹⁶ and the simple observation underpinning the reforms that limited resources must be effectively harnessed to ensure effective application of the competition rules.

Essentially, modernisation then appears to boil down to an efficiency operation the ultimate aim of which is to ensure a more effective enforcement of EC competition law in general. This paper first considers the spontaneous harmonisation that has taken place to this date. After that it identifies and examines three ways through which effective enforcement can be achieved. On the basis of these findings, the effects of the new modernisation regime will be examined. In this regard, the focus will be on the modernisation of the rules applying to Article 81.

2 SPONTANEOUS HARMONISATION

The concept of spontaneous harmonisation has already been mentioned in the introduction and was contrasted with (intended) harmonisation. Below, the concept of spontaneous harmonisation will be examined more closely. In this respect, the level or degree of harmonisation will first be studied. After this examination of the results of the spontaneous harmonisation, the reasons for this harmonisation, or in other words: the process of spontaneous harmonisation, will be considered.

¹⁵ See the documents mentioned in fn 3 *supra* and the Draft Community framework for state aid in the form of public service compensation, notably paragraph 19, to be found on:
http://europa.eu.int/comm/competition/state_aid/others/public_service_comp/en.pdf

¹⁶ See, *eg* the draft framework for lesser amounts of state aid para 10, *op cit* fn 3 *supra*, and the White paper on the modernisation of Articles 81 and 82 EC, chapter II, *op cit* fn 2 *supra*.

2.1 The degree of spontaneous harmonisation

With regard to most Member State systems of competition law a certain degree of similarity between those systems and EC competition law can be observed. It would be outside the scope of this paper to study all systems of competition law in Europe for their similarities and differences compared to EC competition law. This examination is therefore necessarily confined to a case study of two Member States' competition laws. For practical reasons and because these are of particular interest for this study, the Netherlands and Germany will be the subject of this examination.

In the Netherlands the Act on Economic Competition (*Wet economische mededinging*) was replaced in 1998 by the Competition Act (*Mededingingswet*). This new Act resulted from the express wish to have an effective system of competition law that should be “neither more stringent nor more lenient than the European Community’s competition rules”. Prior to 1998 the Netherlands could be considered to be a “cartel paradise” where the authorities came close to actually encouraging cartels. Restrictions of competition were addressed in the form of abuse control rather than by a prohibition provision and enforcement was lacking. From the 1980s onward, the competition rules were given slightly sharper teeth but only in the second half of the 1990s did plans emerge to put in place an effective antitrust regime on modern European principles.

From the outset, the Community’s competition rules and policy were seen as the guiding light for the Dutch legislators and in places, the Competition Act is even a direct copy of the Community’s competition rules.¹⁷ Apart from literally copying the EC provisions in certain key areas, the Competition Act includes dynamic references to European concepts that result in Dutch competition law being bound by European developments.¹⁸ The concept of an undertaking, for example, is defined as “an undertaking within the meaning of Article 81, first paragraph, of the EC Treaty”.¹⁹

Drahos concludes in her study that there has indeed been a remarkable degree of convergence between the competition laws and policies in Europe.²⁰ In terms of the degree of convergence, however, the “legal plagiarism” by the Netherlands legislature may be contrasted with the more autonomous reception by the German authorities of the European rules in the German Act against Restrictions of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*). The Act against Restrictions of Competition was enacted even before the EEC Treaty came into force.²¹ Even during its progress through Parliament there was considerable debate in Germany about the restrictions contained in the new Act with industry by and large in opposition to the Act. The initial Act was subsequently amended six times. The first five times concerned amendments that were

¹⁷ Articles 81 and 82 have been transposed in the Competition Act literally with only an amendment concerning the elements that relate to the territorial scope.

¹⁸ See, Slotboom, *De Mededingingswet: niet met handen en voeten gebonden aan het EG-recht*, SEW 1999, p 42-48.

¹⁹ Article 1, (f), Competition Act.

²⁰ Drahos *op cit* fn 1, at p 202, 203.

²¹ The new competition regime was discussed by the Ordoliberals during the second world war and the Act entered into force on 27 July 1957.

driven by domestic policy requirements and principally served to make the Act more effective.²² Only in the 1990s did German competition policy take on the objective of achieving convergence with the European Community's competition policy. The sixth amendment of the original Act introduced an Article 81(3)-like exemption clause into the legislative text.²³ This departure from the enumeration principle enshrined in the Act proved controversial and the reception of an exemption clause into German competition law was much more limited than in the Netherlands. As a result Section 7 is far from a copy of Article 81(3). The text of the amendment reveals that harmonisation has taken place only insofar as this would not hamper the "strict German tradition".²⁴ This example of Section 7 of the Act against Restrictions of Competition demonstrates both convergence and divergence between EC and German competition law.

These two cases make it clear that the spontaneous harmonisation that has taken place is a far cry from the total or complete harmonisation that has been enacted on the basis of, for example, Article 95 EC. Indeed if any of the terminology relating to harmonisation is to be used the most apt terms would appear to be framework harmonisation and soft harmonisation. Spontaneous harmonisation has resulted in widely differing approaches to the incorporation of the Community's competition rules and policy. Rather than resulting in identical (minimum) rules throughout Europe,²⁵ spontaneous harmonisation has resulted in the adoption of a more or less uniform culture of competition²⁶ and an acceptance of the need to have rules that will effectively protect competition. In choosing these rules, EC competition law provided the obvious example. This, however, does not explain the harmonisation itself nor the differing levels of harmonisation.

2.2 The process of spontaneous harmonisation

To determine what the possible relation between this spontaneous harmonisation and modernisation is, we must first establish what caused the current spontaneous harmonisation. In her book, Drahos identifies a number of channels of influence through which EC competition law has had its spontaneous harmonising effect. She comes to the conclusion that there has been no explicit harmonisation and that there were only weak negative restraints on national competition laws.²⁷ What has occurred is in fact a broadening of the jurisdictional criterion according to which EC competition

²² Convergence with the EC rules was mentioned in the course of the fifth amendment but never became a reality, see further on this: WuW (1989) 3, p 226.

²³ Section 7 of the Act against Restrictions of Competition. See further with regard to this provision, Vedder, *op cit* fn 9, at p 362 *et seq.*

²⁴ *Cf* Drahos, *op cit* fn 1, p 275 *et seq* and 286.

²⁵ See, for an overview of the competition laws of the Member States of the EU, Dannecker & Jansen (eds), *Competition Law Sanctioning in the European Union*, The Hague, Kluwer Law International, 2004.

²⁶ The fact that in the Netherlands price fixing cartels were abundant after the SPO-decision, and even during the parliamentary investigation of these bid-rigging practices in the construction sector, shows how a competition culture is still far from universally accepted.

²⁷ Drahos, *op cit* note 1, p. 214.

law applies only if there is an effect on intra-community trade.²⁸ In *VCH*, this criterion was considered to be fulfilled in respect of a cartel that encompassed the entire territory of a Member State.²⁹ The effect of this ruling increased enforcement of Article 81 with regard to “purely national” cartels. Moreover, the principle of supremacy of Community law resulted in a further reduction of the freedom of national authorities to act.³⁰ On a more positive note, the increased cooperation between the European Commission and national competition authorities and national judges is a factor influencing convergence. A further factor that also facilitates convergence is the cost for business resulting from having to comply with different norms.³¹ As governments will generally want to minimise these costs, there is an incentive to arrive at common rules or at least rules that do away with the need to comply with several diverging sets of rules.

As we have seen above, spontaneous harmonisation has more than anything else resulted in a uniform culture of competition in Europe. This competition culture has consequences for the enforcement of the competition rules. The realisation that “competition mattered” was closely followed by the realisation that the competition rules in place would need to be enforced. It now almost seems as though the absence of a European competition culture was little more than an infant disease that, once it had been cured in the form of spontaneous harmonisation, the Commission was able to address the more important issues such as trying to ensure a more effective enforcement of Community competition law at the European level. Perhaps coincidentally, the scholarly interest for issues surrounding the enforcement of EC competition law appears also to be increasing.

3 THREE ROADS TO EFFECTIVE ENFORCEMENT

From a legal perspective there are three routes that can be taken to ensure effective application of a given rule. These are criminal, administrative and civil law routes. These three routes involve different intensities of state involvement in the enforcement process. Civil law leaves enforcement, in principle, to the civil parties involved in the dispute whereas the criminal law path entails a very intensive role for public authorities. Administrative law presents us with something of a middle way in between the two extremes of civil and criminal law. In these three different routes a balance must be struck between the powers, rights and duties of the three parties involved judge and public party (in administrative and criminal law procedures) and private party or the two private parties (in civil procedures).

²⁸ Joined Cases 56 & 58/64 *Etablissements Consten SA and Gründig GmbH v Commission* [1966] ECR 299, [1966] CMLR 418.

²⁹ Case 8/72 *Vereeniging van Cementhandelaren (VCH) v Commission* [1972] ECR 977, at para 29.

³⁰ Case 14/68 *Walt Wilhelm and others v Bundeskartellamt* [1969] ECR 1, at paras 6 – 9.

³¹ This was also relied upon by the German Business Association BDI in their approval of the plans to bring German competition law in line with EC competition law.

The following very schematic and certainly simplified overview of the three procedures may serve to clarify this analysis.³² In civil law procedures the parties basically lack any power to coerce each other to give information.³³ The principle of the autonomy of parties stands in the way. Furthermore, even though the scope of the principle differs between the various legal systems, the judge will generally be bound by the dispute and facts presented to him by the parties and will mostly be unable to adduce further evidence of his own motion. This can be described as a minimal procedure where the private parties' powers, duties and rights have a correspondingly low value. In administrative law procedures, the procedure itself is already more extensive as it will often involve some form of preliminary investigation. This already increases the value of the powers, duties and rights of the public authority compared to that of the private parties in a civil case. These powers of preliminary investigation are, however, coupled to, *inter alia*, procedural restrictions on the part of the public authority and rights for the private party involved, for example the right not to incriminate oneself. The private party, also has powers, duties and rights that can be valued higher than those in a civil procedure. Finally, the judge in administrative law procedures is not necessarily bound by the facts and dispute before him. Moreover, the administrative judge can, to a larger extent than the civil judge, request further information. The total value of the powers, rights and duties of the administrative judge is thus in balance with the higher value that is attached to the powers, rights and duties of the public and private party in the administrative procedure. In criminal law procedures, the powers, rights and duties of the parties and judge have an even higher value.

It is clear that greater judicial involvement will involve higher costs that are paid by society. There are also additional costs for the private party in the case, such as the cost of being detained for questioning. These additional costs are, to a certain degree, offset by the external benefits of these procedures. For example, the fact that criminal offences are prosecuted and punished contributes to deterring other people from committing criminal offences. Secondly, it is often stated that the involvement of a highly professional body such as a public prosecutor, will help limit the number of unmeritorious cases being brought before the judge.³⁴ However, that view is likely to be true only insofar as the public prosecutor is subject to a cost-benefit analysis. As long as the costs of having a public prosecutor are borne by the public and the prosecutor is not subject to any incentives not to bring unmeritorious cases, he is likely to bring such cases before the courts.

The higher costs of greater public involvement can also be offset by the external benefits of achieving a just outcome in cases where private party interests would not have resulted in a case before a judge. This is likely to happen in cases where the parties' possible gain arising from the just outcome will not outweigh the costs incurred

³² For one, the description of the civil law procedure ignores the fact that there are methods of resolving civil disputes that do not involve judges such as mediation.

³³ This contrasts with the liberal rules on discovery in the U.S. *cf* Wils, 'Should Private Antitrust Enforcement be Encouraged in Europe?', (2003) 26(3) World Competition 473, at p 480

³⁴ See further on this, Jones, 'Private Antitrust Enforcement in Europe: A Policy Analysis and Reality Check', (2004) 27(1) World Competition 13, at p 20.

in bringing the case to court. This explains to a large extent why criminal offences are predominantly in the public prosecutors domain. The application of such externalities reasoning can also be used to explain why other disputes are resolved in the private domain or within the framework of administrative law.

The core of the argument is that the balance of powers, rights and duties on one side are always compensated with increased powers and rights on the other side. With an increase in powers, rights and duties procedures become less easily accessible and judicial involvement increases, along with the costs.

The question is then how this logic relates to the enforcement of competition law. Violations of competition law are seen as something of general interest to the society as a whole whilst at the same time there may be clear and quantifiable damage to a limited number of parties.³⁵ Does this place enforcement of competition law in the civil or in the more public enforcement sphere? In other words: to what extent does the presence of externalities point in the direction of a more public or private enforcement?

3.1 Enforcement paths used in competition law

In order to establish what a violation of competition law exactly entails, we must first establish what exactly competition law seeks to protect. In that respect, it must be acknowledged that the objectives of competition law may vary between the different systems of competition law.³⁶ On the whole one goal appears to be widely accepted: the optimisation of consumer welfare. Competition, whether perfect, workable or effective, is considered to lead to optimal consumer and producer welfare because of its positive effects on productive, allocative and dynamic efficiency. Distortions or restrictions of competition generally are accompanied by the phenomenon of market power.³⁷ Market power may already exist and be abused or it may actually be created by a number of companies that coordinate their behaviour on the market. In the context of EC competition law, the former is the subject of Article 82 EC whereas the latter falls within the ambit of Article 81 and the Merger Regulation.

In order to address abuses of market power, that is either created through coordination or already in the hands of dominant undertakings, most systems of competition law contain a prohibition of coordination and unilateral behaviour that restricts competition. These restrictions of competition are considered to be detrimental to society in general because of the damage they inflict on consumer welfare. In this respect there are clear external benefits to be gained from enforcing competition laws. In the case of the Netherlands, the bid-rigging cartel in the building sector provides an interesting example of damage to consumer welfare. The building industry has been involved in a wide-ranging bid-rigging cartel. As the biggest purchasers in the building industry are government agencies, the higher prices that they have paid translate into a

³⁵ See further on this, Wils, *op cit* fn 33, p 486 *et seq.*

³⁶ See further with regard to the objectives of competition law, Ehlermann & Laudati (eds), *The Objectives of Competition Policy*, Oxford, Hart, 1998.

³⁷ Distortions of competition may also result from government interference in the market (*eg* subsidisation) where, unless one is willing to endow the government with market power, market power is not necessarily present.

loss of consumer welfare across the board.³⁸ In such cases there is a clear argument to be made that there are external benefits in enforcing competition law in these cases and consequently pointing in the direction of enforcement through public bodies. However, following the first decisions by the Netherlands Competition authority a number of municipalities have started civil procedures against contractors in order to recoup the ill-gotten cartel benefits.³⁹ In these cases, a major problem will be to establish exactly what the difference was between the price paid and the market price. As a result, it remains to be seen whether these actions will be successful and to what extent the excess price will be recouped.

Competition cases can also be taken along the civil law route. Currently, however, in Europe the principal route is administrative.⁴⁰ Furthermore, the emergence of a third route may be discerned; that of criminal law enforcement.⁴¹ In this respect, competition law enforcement in Europe has followed a markedly different path from US antitrust law where private and criminal law enforcement are much more common.⁴² What, then, explains this difference? With regard to the more intensive use of civil law enforcement in the US, the more liberal rules on discovery in civil law procedures, and the availability of treble damages appear to be major factors.⁴³ The first allows for better access to documents that are relevant to the infringement, thus reducing the evidence risk on the side of the plaintiff.⁴⁴ The treble damages factor also creates a major incentive to start such procedures in the first place. Then there is the impact of criminal antitrust law. The use of criminal law in the antitrust field can probably be traced back to the belief that cartels are just white collar crime and basically boil down to theft from society in general.⁴⁵ US antitrust law appears therefore to have very consciously, albeit perhaps *avant le lettre*, incorporated the externalities reasoning in setting up its enforcement system. This also holds true with regard to the deterrent effect of sanctioning violations of competition law. Even though treble damages are considered by some not to have sufficient deterrent effect,⁴⁶ the introduction of

³⁸ These higher prices were ultimately paid by all consumers and producers in the form of taxes.

³⁹ NRC Handelsblad 12 maart 2004, “bouwfraude toch voor de rechter” (construction fraud brought before the judge nonetheless).

⁴⁰ Indeed, the Commission has recently tendered a study into the conditions for the award of damages for breach of the EC competition rules, COMP/2003/A1/22. In the background document, the Commission states that ‘it is well established that private enforcement of the EC competition rules is lagging behind public enforcement’.

⁴¹ See in this respect, Section 188 of the Enterprise Act, discussed by Rodger, ‘The Competition Act and the Enterprise Act Reforms: Sanctions and Deterrence in UK Competition Law’, in Dannecker & Jansen, *op cit* fn 25.

⁴² See, with regard to civil law enforcement, Wils, *op cit* fn 33 and Jones, *op cit* fn 34 and with regard to criminal law enforcement in the US, Magney & Anderson, ‘Recent Developments in Criminal Enforcement of US Antitrust Laws’, (2004) 27(1) *World Competition*, p 101-106.

⁴³ In the case of *Empagran v Hoffmann-La Roche* the award of treble damages was considered possible even to companies not established in the US, US Court of Appeals for Columbia 17 January 2003

⁴⁴ See further on the evidence risk (bewijsrisico): Prechal & Hancher (eds), *Europees bewijsrecht: een verkenning*, Deventer, Kluwer, 2001.

⁴⁵ See for an overview of criminal law to sanction violations of US antitrust law, Wise, ‘The System of Sanctions and Enforcement Co-Operation in US Antitrust Law’, in Dannecker & Jansen, *op cit* fn 25, p 200.

⁴⁶ *Cf* Wils, *op cit*. fn 33.

custodial sanctions on the basis of criminal law appears to have been the result of a determination to enhance deterrence. The reasoning behind this is that the profitability of cartels in combination with the relatively small chance of detection and sanctioning would have to result in enormous fines in order to provide a sufficient deterrent.⁴⁷

In Europe most enforcement of the competition rules takes place along the administrative law route.⁴⁸ As far as the European Community is concerned, Regulation 17 as well as Regulation 1/2003, expressly rule out the criminal character of decisions taken on the basis of those Regulations. Similarly, the enforcement of the Netherlands Competition Act takes place within the framework of the General Administrative Law Act (*Algemene wet bestuursrecht*). In this respect, the convergence with the EC has not been completely followed through even though certain elements of the procedure used in the Netherlands can certainly be said to have a European counterpart.⁴⁹ Both Article 81(1) and its counterpart in the Netherlands Competition Act (Article 6), can be invoked before a civil judge but this has in fact occurred only a few times.⁵⁰ Because of the Competition Act's setting in an administrative law framework, some peculiarities relating to the enforcement of competition law in the Netherlands can be noticed here.⁵¹ Regarding the investigatory powers of the Netherlands Competition Authority, there has been considerable debate as to the exact extent of these powers. The Authority⁵² is a so-called supervisor (*toezichtbouder*) and the concept of supervision needs to be distinguished from that of investigation (*onderzoek*). Supervision involves checking to see whether or not the general norms are complied with irrespective of whether or not there has been a concrete violation. Basically, supervisors are to identify themselves and may enter business premises without the consent of the owner.⁵³ Private homes may only be entered with the consent of the occupant.⁵⁴ If the owner refuses to cooperate, a fine may be imposed⁵⁵ and the authority may call on the police to assist with the investigation.⁵⁶ No prior judicial authorisation is necessary for the exercise of any of these powers as the duty upon the supervisor to respect the proportionality

⁴⁷ Cf Wils, *op cit* fn 33.

⁴⁸ For an overview of the sanctioning systems used see, Dannecker & Jansen, *op cit* fn 25.

⁴⁹ In fact, the Netherlands Competition Authority and the Advisory Committee on Administrative Appeals do refer to caselaw of the ECJ with regard to the European equivalent of the elements of the Dutch procedure.

⁵⁰ Several hundreds of cases have already been dealt with by the authority following the entry into force of the Netherlands Competition Act.

⁵¹ For a more detailed overview the reader is referred to Jansen's contribution to Dannecker & Jansen, *op cit* fn 25, p 669 *et seq* or Vogelaar (ed), *Competition Law in the EU, its Member States and Switzerland*, Deventer, Tjeenk Ewillink, 2000.

⁵² Actually, one would have to refer to the director-general of the Authority and the civil servants of the Authority acting on his behalf. In this paper I will refer to the authority in general.

⁵³ Article 5:12 and 5:15 General Act on Administrative Law.

⁵⁴ They may also be entered in accordance with the provisions of the General Act on Entry (*Algemene wet binnentreden*). Basically, this requires prior authorisation by a judge. In this respect it may be noted that to the best of my knowledge, the power to enter without permission a part of a private home that is actually an extension of the business, has not been tested in the Netherlands.

⁵⁵ Indeed, in the course of the investigation into the construction fraud, several enterprises have refused to cooperate and this has resulted in fines for non-cooperation.

⁵⁶ Article 5:15 (2) General Act on Administrative Law.

principle⁵⁷ is already considered to entail sufficient protection of the private life. As can be expected from this legal setting, the ECHR's judgment in *Colas Est* has been deployed by those companies that do not wish to cooperate with the investigations of the Authority. In this respect, the argument is often made that the Authority is crossing the border between actual supervision which involves looking around and checking whether the business operations are in accordance with the rules and a thorough search (*buiszoeeking* in the terminology of Netherlands criminal law). This is not so strange since these supervisory powers have, until applied by the Authority, primarily been used in connection with environmental law. In this area of law, supervision involves checking whether or not a specific process, production method or product complies with the standards laid down in a permit. This situation is fundamentally different from that where the supervision relates to the rather abstract and generally formulated norms laid down in the Competition Act and leads to a broadening of investigatory powers. In this connection, the Authority has also been accused of having gone on fishing expeditions because of the vagueness of the purported object of their supervision. Of course, the Authority has the power to inspect business information and documents which may then be copied.⁵⁸ Finally, the rights of defence as they have been established with regard to EC competition law are incorporated in the Competition Act and the General Act on Administrative Law.⁵⁹

In his 2002 speech the then director-general of the Authority called for an increase of the Authority's investigatory powers. He considered it necessary to also have the power to enter private dwellings without the permission of the occupant. Secondly, he appeared to ask for a power to also conduct thorough searches, a power that at this moment only the police are able to undertake. Interestingly, these statements coincided with the publication of the Commission proposal for what we now know as Regulation 1/2003. In this proposal the Commission also sought the power to undertake investigations at private dwellings.

3.2 Effect of modernisation on the three paths

As we have seen above, modernisation consists of more than just Regulation 1/2003 and the Commission's efforts at decentralising the application of the Article 81. The ECJ has also had a hand in decentralising the application of EC competition law. In general, modernisation entails giving the national judiciary and private parties a greater role in the enforcement of EC competition law while allowing the Commission to concentrate on hard core restrictions and distortions of competition. Not only is modernisation aimed at the Commission being able to devote more of its manpower to combating hard-core cartels, it also increases the Commission's powers in the fight against cartels. The most obvious example of an increase in the Commission's powers

⁵⁷ Article 5:13 General Act on Administrative Law

⁵⁸ This includes data on computer networks, see judgment by the President of The Hague Court in the case brought by Van Hattum & Blankevoort against the State, can be found on www.rechtspraak.nl under LJN-nummer AF 7069.

⁵⁹ See for an overview of these rights, Jansen, 'Country Analysis – The Netherlands', in Dannecker & Jansen, *op cit* fn 25, p 765 *et seq.*

has been the introduction of the power to search private homes in Regulation 1/2003. Furthermore, the power to share information between the various members of the network contained in Article 12 Reg. 1/2003 is a perhaps less visible, but still very noticeable increase in the powers of the competition law enforcers. All in all, the Commission appears to have increased its powers to fight hard core cartels.⁶⁰ On the whole, the procedures used in enforcing competition law in relation to hard core cartels appear to have acquired more of a criminal law character with tougher sanctions and increased investigatory powers. This increase in investigatory and sanctions powers and the consequent reformulating of antitrust procedures in a criminal law direction is not confined to the European Commission. Across Europe there is an ongoing debate about the introduction of criminal sanctions and some Member States have already introduced criminal law enforcement of competition law suggests that this trend, at least in respect of hard core antitrust offences is only likely to strengthen. Finally, because the enforcement of EC competition law is still taking place within the framework of administrative law, it benefits from the relatively low-key administrative law procedure. Standards of proof regarding infringements appear to be more relaxed than under criminal law. For example, the very broad definition of an infringement under Article 81 as an “agreement, concerted practice or decision of a business association”, given by the ECJ would be unacceptable under most systems of criminal law.⁶¹ Furthermore, this caselaw has already resulted in the Netherlands Competition Authority not seeking to define an infringement and instead holding that there has been an agreement or a concerted practice even though the existence of an agreement could arguably have been proven. Another example of the relaxed way of dealing with burdens of proof in an administrative law setting can again be found in relation to the case law on hard core cartels and concerted practices. In *Anic* the Court appears to have shifted the burden of proof onto the parties who have to show that the assumed causal link between the concertation and the practice, that the Commission is not required to prove, does not exist. Again, this reasoning applies *in particular* to complex and long-term cartels and thus it cannot be ruled out that simpler and one-off concertations will also fall within its scope. Finally, the caselaw notably of the Court of First Instance (CFI) regarding the rule of reason and the appreciability test in combination with the Commission’s De minimis notice, render any evaluation of the agreement in its economic and factual context unnecessary. A purely legalistic reasoning will suffice for a hard core restriction.

The modernisation has some completely different effects on the enforcement of competition law with regard to non-hard core restrictions. By making Article 81 as a whole, directly effective, the Commission is basically inviting private parties to enforce this provision among themselves. In terms of the three routes identified above, this takes the enforcement of EC competition law down the civil law route. Moreover, in all the decentralisation that is taking place, it must not be forgotten that the Commission

⁶⁰ Cf Goyder, *EC Competition Law*, Oxford, Oxford University Press, 2003, p 551-553.

⁶¹ This becomes even more poignant once it is taken into account that the ECJ did not rule out that this doctrine also applies in less complex and not so long term infringements, see: Case C-49/92 P *Commission v Anic Partecipazioni Sp.A* [1999] ECR I-4125, [2001] 4 CMLR 17, at para 131 *et seq.*

may still want to set the competition law agenda with regard to these non hard-core restrictions. In this respect, the Commission has been willing to adopt a more economic approach not only in adopting new block exemption regulations but also in new decisions in individual cases. It cannot be ruled out that the Commission will continue along this path applying EC competition law in a more economically sensible way to benign restrictions of competition. The result of this continued economisation together with the decentralisation will be that national civil judges are confronted with complex and, possibly, from a legal perspective puzzling economic dossiers.⁶² Fortunately, the Commission and National Competition Authorities are there to lend a hand pursuant to Article 15 of Regulation 1/2003. Interestingly, the position of these “Article 15 experts” is quite different from that of “normal experts” in civil procedures as the latter are appointed following common accord of the parties and either party can object to the appointment of a particular expert. This introduces a concept that is alien to, at least Netherlands, civil law.

4 MODERNISATION AND SPONTANEOUS HARMONISATION

The spontaneous harmonisation described above has already resulted in the competition laws of the Member States all to a varying degree mimicking those of the EC. Not only have the substantive competition rules converged, the general system of enforcing these rules has also been the subject of convergence. As a result, the bifurcated system of civil law and administrative law enforcement can now be found in a number of Member States, including, the Netherlands.

Modernisation may have two further consequences in terms of spontaneous harmonisation. Firstly, it is to be expected that the Member States will adopt the general system laid down in Regulation 1/2003, i.e. giving up exemption monopolies for national competition authorities and giving these authorities increased enforcement powers. In this sense, the process that is taking place is little more than an extension of spontaneous harmonisation to also include Regulation 1/2003. Secondly, the modernisation has and will continue to lead to a “cross-fertilisation” between the three enforcement routes identified above and more generally between the administrative and civil law systems of the Member States. Below, these two relations between spontaneous harmonisation and modernisation will be tentatively explored.

In the Netherlands acts are evaluated every five years and so the Competition Act that entered into force in 1998 was reviewed in 2003. This evaluation coincided with the publication of the Commission proposal and Regulation 1/2003. As a result of the evaluation, it was decided to amend the Competition Act in accordance with the new system laid down in Regulation 1/2003.⁶³ Consequently, the investigatory powers of the Netherlands Competition Authority are to be increased, by contrast the application of the exemption clause is to be left in the hands of the national civil courts. As the powers of the Authority are already at the moment controversial from the perspective of the European Convention on Human Rights and the general principles of sound

⁶² Cf. Goyder 2003, *op cit* fn 60, p 559.

⁶³ Parliament, TK 29 272, nr 1, at p 4.

administration, it is to be expected that such reinforced powers are likely to lead to more legal challenges concerning their compatibility with, notably, the Convention. In this respect it should also be taken into account that the Minister for Economic Affairs is also contemplating the introduction of a further sanction for private persons involved in infringements of competition law in the form of an exclusion of such persons from management positions. This development appears to be an example of something capable of “bubbling up”⁶⁴ through the network. This shows that the effects of spontaneous harmonisation may not only be top down but also bottom up. Moreover, it indicates the potentially powerful role of the network in bringing about spontaneous harmonisation. Moreover, if more Member States adapt their systems of competition law enforcement to the general trend that was identified above, it increases even further the chance of a spontaneous harmonisation in the form of a cross-fertilisation.

As was said above, the powers of the Netherlands Competition Authority are not uncontroversial. In particular, many lawyers argue that the investigatory powers are contrary to, among others, Article 8 of the European Convention on Human Rights and several aspects of the procedure are also held to violate Article 6 of the Convention. Similarly, arguments are deployed to support the adoption of criminal law standards of proof in competition law. Thus, in the Netherlands context, the free doctrine on proof (*vrije bewijsleer*) would have to be abandoned in favour of the criminal law standard according to which proof must be legal and convincing (*wettig en overtuigend*). Particularly with regard to the requirement that proof must be “legal” this would entail a significant departure from the existing situation in administrative law where illegally obtained evidence is not a priori inadmissible. At the moment, the applicability of Article 6 and 8 of the Convention to the administrative enforcement procedure is subject to extensive debate and discussion. However, following the increased powers of the Authority the discussion is more likely to be decided in favour of those who argue that the administrative fines imposed by the Authority do in fact constitute a criminal charge within the meaning of Article 6. Furthermore, it could be argued that, on the basis of *Bronner*,⁶⁵ a Dutch judge dealing with questions concerning the legality of a decision by the Netherlands Competition Authority can probably make a preliminary reference to the ECJ.⁶⁶ Such a ruling on the compatibility of national law moulded on the European example would have important effects for European law. Certainly, a ruling that would put an administrative sanction on the basis of the Competition act within the meaning of Article 6 of the Convention must also have an effect on Article 23(5) of Regulation 1/2003. Whether or not this criminalisation will actually lead to a different approach to evidence in competition law procedures depends in first instance on the authorities and legislatures, and in second instance on the Courts controlling the authorities. Another area that lends itself to spontaneous harmonisation is the fining and leniency policies of the Member State authorities and

⁶⁴ Wording used by Ehlermann in Ehlermann & Atanasiu (eds.), *European Competition Law Annual, The modernisation of EC antitrust policy*, Oxford, Hart, 2001.

⁶⁵ ECJ Case C-7/97 *Oscar Bronner v Mediaprint (Bronner)* [1998] ECR I-7791.

⁶⁶ Or, once this possibility has been used, the Court of First Instance.

the European Commission. In the network, the danger of forum shopping for leniency or, to a lesser extent, the smallest fine is more likely to become a reality.⁶⁷ It is to be expected that national and Community rules on, for example, limitation periods, setting of fines and leniency but also on legal privilege will converge as a result of the modernisation.

With regard to the civil law enforcement of EC competition law and national competition law a number of other effects may result from spontaneous harmonisation. In this regard the discussion about whether or not Community competition law is sufficiently well-established in order to give the national magistrates sufficient guidance and thus guarantee legal certainty will not be repeated. What will need to be dealt with is the question whether national competition laws of the Member States are sufficiently well developed. This becomes particularly interesting in view of the fact that national competition laws, even though they have converged with EC competition law, may have their own peculiarities. In the Netherlands, for example, there has been a debate as to whether or not the EC's firm stance on clauses that limit the sale of goods outside selective distribution systems need to be subject to the same rather stringent approach that the Commission has adopted in view of the need to establish the internal market. Since this internal market and parallel trade-logic does not apply to the national situation, it is rather difficult to qualify such clauses as very severe restrictions of competition.⁶⁸ Finally, the position of the national judge may be made more difficult because of the combination of so-called integration clauses in the EC Treaty and the fact that the Commission has to this date given only limited guidance on how to deal with, for example, environmental agreements. Certainly, Article 15 of Regulation 1/2003 prohibits a national judge from rendering a judgment that runs counter to a Commission decision in an earlier case. Nevertheless, it is submitted that Article 15 does not keep a national judge from integrating environmental concerns into his own judgment to a greater extent than the Commission has done.⁶⁹

Furthermore, the position of the judge and the Commission or national competition authority acting as *amicus curiae* in these matters should be carefully considered. Parties may very well be less than enthusiastic about a judge bringing in the Commission or a national competition authority to whom a copy of the documents that they have submitted, must be forwarded. This is particularly interesting in view of the fact that normally it is close to impossible, at least in the Netherlands, to obtain the procedural documents of the parties.⁷⁰ Furthermore, the position of the judge is likely to be become less passive. It cannot be ruled out that the national judiciary will be faced with constructed cases that only serve the purpose of obtaining for the parties a degree of

⁶⁷ Cf van Oers, 'Fines and the Reform of European Competition Law: The view of a national competition authority', in Dannecker & Jansen, *op cit* fn 42, p 117 *et seq.*

⁶⁸ See, *e.g.* the judgment of the Rotterdam Court in the Basilicum G-Star-case, to be found on www.rechtspraak.nl under LJN-nummer AO 3912.

⁶⁹ See in more detail: Vedder, *op cit* fn 9, p 194 *et seq.*

⁷⁰ Certainly in comparison with the situation in the US.

legal certainty.⁷¹ In these circumstances, it is unacceptable for a judge to simply have to accept the facts as they are presented to him by the parties.⁷² This holds all the more true when the facts presented to him are in fact economic opinions. Finally, the Court's qualification of Article 81 EC as a matter of public policy;⁷³ in this regard the emergence of more or less uniform rules is to be expected as a result of the *Reve-Comet*-rule.⁷⁴ The result of this could be the spontaneous emergence of common European procedural rules.

5 CONCLUSION

One of the apparent successes of EC competition law is the spontaneous harmonisation that has taken place: almost all the Member States of the EC have modelled their competition laws on EC competition law. In doing so, they have however, embedded the substantive rules and some of the procedural rules deriving from that body of law in their own national procedural rules. This spontaneous harmonisation embedded in a national procedural context can be seen very nicely in the Netherlands where the substantive rules "should be neither more supple nor more stringent than those of the EC". However, as far as the procedural side of competition law is concerned, the legislator adopted some elements from the European procedure but explicitly chose to embed these in the specifically Dutch context of the General administrative law act. This paper has sought to make visible some of the effects of this spontaneous harmonisation on national systems of competition law. Furthermore, it has tried to clarify the effects of modernisation on this spontaneous harmonisation. As far as the primarily legal changes involved in harmonisation are concerned (*i.e.* relinquishing the exemption-monopoly), spontaneous harmonisation can be said to have occurred as the Netherlands competition authority as of 1 August no longer has the power to grant an exemption.

Another and potentially more intrusive spontaneous harmonisation may be the result of the choice of enforcement paths that appears to underlie the modernisation of EC competition law. As was seen, both the Courts and the Commission appear to make a clearer distinction between harmless and harmful restrictions of competition whereby the latter are treated to an increasingly criminalised system of enforcement whereas the latter are handed over to the more low key realms of private enforcement. This bifurcation between harmful (hard core) and harmless restrictions together with the

⁷¹ Case C-379/98, *PreussenElektra AG v Schleswag AG*, [2001] ECR I-2099, [2001] 2 CMLR 36, [2001] All ER (EC) 330, is exactly such a constructed case that only served to clarify the compatibility of a particular German rule with EC law. Eventually, preliminary reference was considered admissible.

⁷² As, for example, a civil judge in the Netherlands would have to do, cf Brouwer, 'Bewijsproblemen bij de toepassing van het EG-mededingingsrecht in de nationale context', in Prechal & Hancher, *op cit* fn 44, p 103.

⁷³ Case C-126/97, *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-3055, [2000] 5 CMLR 816, [1999] 2 All ER (Comm) 44, at, paras 35-39.

⁷⁴ According to this rule national procedural rules may not make the possibility to invoke EC law more difficult or impossible, see Cases 33/76 *Reve-Zentralfinanz eG et Reve-Zentral AG v Landwirtschaftskammer für das Saarland (Reve)* [1976] ECR 1989, and 45/76 *Comet BV v Produktschap voor Siergewassen* [1976] ECR 2043, summarised in Case C-343/96 *Dilexport Srl v Amministrazione delle Finanze dello Stato* [1999] ECR I-579, [2000] 3 CMLR 791, [2000] All ER (EC) 600.

decentralisation (through the network) will have important implications for the national systems of competition law. It is predicted that there will be a spontaneous harmonisation and criminalisation of the national procedural competition laws. For example, rules on fines, leniency and time-limits are very likely to be harmonised as a result of forum shopping by cartel members. The network can certainly function as a valuable platform for such a spontaneous harmonisation.⁷⁵ The effect of the increasingly criminal character of this (spontaneously harmonised) administrative enforcement, will probably be the adoption of a high(er) standard of proof and increased applicability of Articles 6 and 8 of the European Convention on Human Rights.

With regard to the private enforcement of competition law, a spontaneous harmonisation of national civil procedural law can be expected. Apart from the arrangements that were necessitated by Regulation 1/2003, rules on, for example, the passiveness of judges in civil proceedings, will probably be the subject of a number of preliminary references. Already the *Reve-Comet*-rule,⁷⁶ has been given a very broad and interventionist interpretation in a number of ECJ judgments.⁷⁷ It is expected that the increased reliance on Article 81 EC – if it takes place of course, before civil judges will lead to a spontaneous harmonisation of the procedural laws of the Member States. This should not come as a surprise but it should rather be seen as the European way of achieving uniformity in diversity.

⁷⁵ See, for example, the Principles for Leniency Programmes, adopted 3 and 4 September 2001 by the European Competition Authorities (ECA), that can be seen a predecessor to the network.

⁷⁶ See fn 74 *supra*.

⁷⁷ Such as Cases C-224/01 *Köbler v. Austria* [2003] 3 CMLR 28, [2004] All ER (EC) 23, C-453/00 *Kühne & Heitz NV v Productschap voor Pluimvee en Eieren*, and C-201/02 R (*on the application of Delena Wells*) *v Secretary of State for Transport, Local Government and the Regions (Wells)* [2004] 1 CMLR 31.