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Decentralised Application of EU Competition Law: A Strategic Approach

I A Strategic Vision

The aim of this paper is to analyse the EU Competition Law enforcement model, designed by Regulation 1/2003, from the perspective of a strategic process adopted by an organizational system to its environmental changes. EU Competition policy may be explained as a system: an organized set of objectives, rules, functions (competences), procedures and authorities, acting as a unity. The notion of system is very illustrative. A system is a complex reality, immersed in a complex context. Any system fits a predefined structure, complies with an assigned mission and develops its activity in accordance with a particular "vision" – a *culture* -. The systemic conception of an institutional and legal model allows us to depict the model and formulate alternatives in pictorial fashion to facilitate consideration of a number of issues: the degree of centralization, coordination mechanisms, efficiency, risk of incoherency, uniformity, feedback, control, divergences resolution, allocation of tasks, flexibility, complexity, strategies to fill gaps and minimize failures.

Assuming the proposed affinity between EU Competition policy and the notion of a system, the paper is structured as follows. Part II explains further the chosen methodology: Competition law enforcement model as an organizational system trying to overcome its dysfunctionalities and adapt itself to environmental changes. From this methodological perspective, Part III inquires into the reasons for change, the motives that encouraged the modernisation initiative. Which were the failures of the former model? What are the opportunities and strengths of the new model? Part IV exposes the structural alternatives available to surmount the deficiencies of the previous model and outlines the ultimate pattern of the new model - ¿centralization or decentralization? These early sections focus on structural issues; Part V investigates briefly the substantive changes. Regulation 1/2003 may be considered as the introduction of a new culture in Competition law, a "vision" twist. We will analyse the effects of this new culture on legal certainty. Was the notification model a real ally of legal certainty? Is Competition law an exceptional law? To what extent is the *ex post* supervision model a threat to legal certainty?

II Legal Framework and Economic Methodology

Regulation 1/2003[1] introduces a systemic change to EU Competition law of unknown magnitude. The new regime implies more than a mere procedural change, it reveals a new culture[2] in Competition law, implemented through a new model, based on a new structural conception (coupling substantive and institutional changes). There have been a number of factors which have intensified pressure for modernisation and improvement. Internal dysfunctionalities of the former model and external forces arising from its changing context, both called for a reassessment of the coordinates of the Competition regime, and for its modernization.

The principal idea (and reality) behind decentralization of competition policy and the switch from an *ex ante* model (notification system) to an *ex post* one (legal exception system) both demonstrate a clear effort to smooth the deficiencies of the EU Competition law system and to react to new trends: enlargement of the Community, globalization and a more sophisticated and integrated market; and, moreover, the maturity of EU Competition policy.

From a functional perspective, this modernisation initiative[3] can reasonably be explained as

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[1] *Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*, OJ, 2003, L1/1. The Commission has adopted a "Modernization Package" following the *Communication pursuant to Article 33* of Regulation 1/2003, OJ, 2003, C243/3. The "Modernisation Package" is composed of the following texts: Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ, 2004, L123/18; Commission Notice on cooperation within the Network of Competition Authorities *O*J, 2004, C101/43; Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, OJ, 2004, C 101/54; Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ, 2004, C 101/65; Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters), OJ, 2004, C101/78; Commission Notice - Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ, 2004, C 101/81; Communication from the Commission - Notice - Guidelines on the application of Article 81(3) of the Treaty, OJ, 2004, C101/97.

[2] ILLESCAS ORTIZ, Rafael, "El futuro de la aplicación del Derecho Europeo de la Competencia tras el Reglamento (CE) 1/2003", *Foro Mercantil,* 2003, pp. 78-93; MARTÍNEZ-LAGE, Santiago, "Cambio de cultura. Aprobada, al fin, la reforma de las normas de aplicación de los artículos 81 y 82 CE", *Gaceta Jurídica de la CE y de la Competencia,* núm. 223, enero-febrero 2003, p. 3.

[3] On December 16, 2002, the Commission's "modernisation" proposal – *Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty,* September 27, 2000, COM (2000), 582 final, OJ, 2000, C 365E/284) - was transformed by the Council into Regulation 1/2003. The modernisation initiative focuses on decentralising powers concerning the enforcement of Art 81 to the NCAs and the national courts. *White Paper* of European Commission, 28 April 1999, relating to the reform of the implementing rules of Articles 81 and 82 of the EC Treaty (Commission Program nº 99/027). The first steps towards a decentralised application of the Competition rules date back at least to 1997, if not to the Commission's Annual Competition Report of 1983. In 1997, the Commission issued a *Notice on Co-operation between National Competition Authorities and the Commission in Handling Cases falling within the scope of Articles 85 and 86 of the EC Treaty,* OJ 1997, C313/3, so-called *1997 Co-operation Notice*. See also *Sabam* As. 127/73*, Delimitis* C-234/89*, Automec* T-24/90*, Wilhem* As. 16/68*, Guerlain* As. 253/78 and 1 to 3/79, and *Commission Notice on Co-operation between National Courts and the Commission in Applying Articles 85 and 86 of the EC Treaty,* OJ, 1993, C39*.* Nazareli, J., Cowan, D., "Modernising the Enforcement of EU Competition Rules – Can the Commission Claim to be Preaching to the Converted?", [1999] ECLR 442-445; Rodger, B.J., "The Commission White Paper on modernization of the rules implementing Articles 81 and 82 of the EC Treaty", (1999) 24 ELRev 653-663; Ehlermann, C.D., "The modernization of EC antitrust policy: a legal and cultural revolution", (2000) 37 CMLRev 537-590. *European Competition Law: A New Role for the Member*

a strategic adaptation process of a system - coordinated and organized elements, acting as a unity[4] - to its changing environment. An "open" system is permanently influenced by the environmental conditions and simultaneously its patterns determine its ability to adapt itself to the environment and its power to affect the environment. This functional similarity justifies the suitability of the proposed methodology in this paper. Nevertheless, two further points of clarification are required:

a) The method of explaining the reform of EU Competition Law as an organizational system which is influenced by its context and reacts to changing forces, is a useful model of reference, but has limitations. It does not mean that all issues regarding any institutional and legal system can (and must) be explained within this framework. The methodology to be adopted is not merely a simplification of all institutional and substantive issues to an organizational question. The plan is to construct a partial model to describe, explain, and assess some structural and substantive aspects of the new Competition regime, those intensely affected by Regulation 1/2003.

b) Given its inherent limitations, the proposed methodology is reasonably suitable to perform our purpose, since it offers a very realistic model. Organizational theory and practice[5] provide useful and illustrative structural models, their advantages, opportunities and strengths, their risks and weaknesses, their suitability to specific environmental factors, and their efficiency[6]. The reform of EU Competition Law attempts to satisfy several objectives: effective decentralization, procedural simplification, uniform enforcement, and strict fulfilment[7]. Which is the most suitable structure[8], provided Competition policy's mission[9], the limitations of current model and the pressing forces of a new reality?

States, Congress organized, November 20 and 21, 2000 by the European Association of Lawyers, Bruxelles: Bruylant, 2001.

[4] According to general systems theory, the notion of a system is defined as a set of elements which, due to their close coordinating, ordering and interdependent relationships, acquire a unitary nature. The founder of the general theory was Ludwig von Bertalanffy, *Teoría General de los Sistemas,* Madrid: Fondo de Cultura Económica, 1976. Moreover, Lakatos, Imre, *Pruebas y refutaciones. La lógica del descubrimiento matemático,* Madrid: Alianza Editorial, 1978. From a sociological perspective, Morin, Edgar, *La Méthode,* Tome I, Paris: Éditions du Seuil, 1977. In Economic History, Voltes Bou, Pedro, *Teoría General de Sistemas,* Barcelona: Editorial Hispano Europea, 1978.

[5] Since markets and *hierarchies* are perceived as organizative models, Alchian, A.A., Demsetz, H., "Production, Information Costs and Economic Organization", 62 *American Economic Review,* num. 5, December 1972, pp. 777-795; Fama, Eugene F., Jensen, M.C., "Separation of Ownership and Control", (1983) 26 *Journal of Law and Economics* 301-325; and "Agency Problems and Residual Claims", published in the same volume pp. 327-349; Jensen, M.C., Meckling, W.H., "Theory of the firm: Managerial Behavior, Agency Costs and Ownership Structure", *Journal of Financial Economics,* vol. 3, num. 4, October 1976, pp. 305-360; Stigler, G.J., Williamson, Oliver E., *Markets and Hierarchies,* New York: Free Press, 1975; Willianson, Oliver E., *The Economics Institutions of Capitalism*, New York: Free Press, 1987; Williamson, Oliver E.; Winter, Sidney G. (ed.), *The Nature of the Firm. Origins, Evolution and Development,* New York-Boston: Oxford University Press, 1993. Coase, Ronald, "The Nature of the Firm"*, Economica,* 4, November 1937, pp. 386-405.

[6] Mintzberg, H., *La estructura de las organizaciones,* Barcelona: Ariel, 1993.

[7] "Reform of European Competition Law", Conference organized by the European Commission and the European Parliament, 9 and 10 November 2000 in Freiburg (http://europe.eu.int/comm/competition/conferences/2000/freiburg).

[8] Williamson, Oliver E., "Comparative Economic Organization: The Analysis of Discrete Structural Alternatives", 36 *Administrative Science Quarterly,* June 1991, pp. 269-295

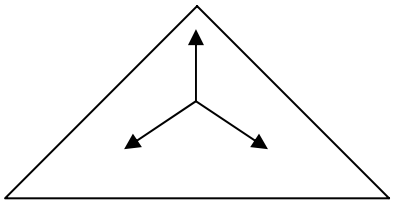
[9] The notion of mission, derived from business management terminology, refers to the controversial question of antitrust goals and the historical battle between efficiency advocates (namely the

III Failures in the Model: Reasons for Change

The model designed by Regulation 17/62[10] can be simply described as a centralized model based on a notification system[11]. The legal, institutional, economic and political context led to this option. The lack of an "*antitrust culture*" required a central authority engaged in creating a uniform body of rules, promoting integration in EU level and filling the institutional and regulation gaps in several Member States. More than four decades later the scene is considerably different. New characters, and new scenery, need a new script.

Two types of factors can be detected: internal and external ones. System failures[12] and new challenges combine as rationales for reform.

a). ***Failures in the model.*** The combination of a centralized structure and a notification model has limited the possibility of providing a balance between efficient supervision and simplified control.



Chicago School) - Bork, *The Antitrust Paradox, A Policy at War with Itself,* 2ª ed., Nueva York, 1993; "Legislative Intent and the Policy of Sherman Act", 9 *Journal of Law and Economics,* 1966, pp. 7 y ss; Bork, Robert H.; Bowman, Ward S. Jr., "The Goals of Antitrust: A Dialogue on Policy", 65 *Columbia Law Review,* March 1965, issue 3, pp. 363-376; Areeda, "Introduction to Antitrust Economics", 52 *Antitrust Law Journal,* 1983, pp. 535 y ss; Elzinga, "The goals of Antitrust: Other than competition and Efficiency , what else counts?", 125 *University of Pennsylvania Law Review,* April 1977, issue 4, p. 191 and so on; Posner, Richard A., "The Chicago School of Antitrust Analysis", 127 *University of Pennsylvania Law Review,* April 1979, issue 4, pp. 925-948 - and populists (*New Coalition*) - Eleanor M. Fox, "The Modernization of Antitrust: A New Equlibrium", 66 *Cornell Law Review,* 1980-1981, p. 1143, and "The Battle for the Soul of Antitrust", 75 *California Law Review,* 1987, pp. 917 y 918 - in United States, EU Competition policy has adopted its own perspective, introducing the market integration as an specific goal of antitrust. Hawk, Barry E., "The American (Anti-trust) Revolution: Lessons for the EEC?", 9 *European Competition Law Review,* issue 1, 1988, p. 53; Dara, Gabriele, "Antitrust Law in the European Community an the United States: A comparative analysis", 47 *Lousiana Law Review,* number 4, March 1987, pp. 761-790; Fox, Eleanor M., "Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity and Fairness", 61 *Notre Dame Law Review,* 1986, pp. 981-1020; Hawk, Barry E., Book Review (*Policy and Methods in German and American Antitrust Law: A Comparative Study* by James Maxeiner, New York: Praeger Publishers, 1986), 82 *American Journal of International Law,* number 1, January 1988, pp. 208-214; Overton, Todd R., "Substantive Distinctions between United states Antitrust Law and the Competition Policy of the European Community: A Comparative Analysis of Divergent Policies", 13 *Houston Journal of International Law,* number 2, Spring 1991, pp. 315-342.

[10] Council Regulation (EEC) 17/62 First Regulation implementing Articles 85 and 86 of the Treaty, (OJ 13, 21.2.1962, p. 204/62).

[11] The key elements of the reform focus on enforcement of anti-competitive agreements (decisions and concerted practices) as defined in Art. 81. The impact on Art. 82 is less extensive than on Art. 81, since the Commission has never had exclusive competence over the application of Art. 82, contrary to its monopoly on applying Art. 81 (3) of the Treaty.

[12] Miles, Raymond E.; Snow, Charles C., "Causes of Failure in Network Organizations", *California Management Review,*vol. 34, num. 3, Summer 1992, pp. 53-72.

a.1. The increase in EU Competition Law caseload has caused a **collapse** in Commission procedures, incapable of formally dealing with hundreds of notifications. The procedure has become slow, bureaucratic, and extremely inefficient, resulting in a harmful waste of resources. Other important refinements have sought to ease the enforcement system: the *de minimis* doctrine[13], adoption of block exemptions and the refusal to investigate a case lacking Community interest[14].

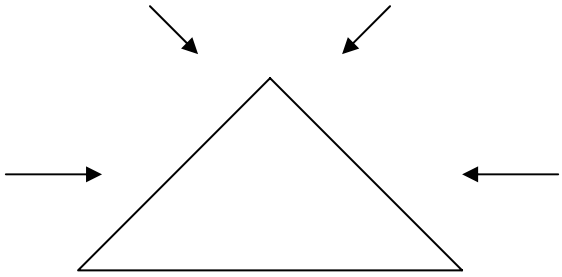
a.2. Despite these refinements, some efforts to alleviate the "paper" overload has led to a reduction in **transparency** through the issue of administrative letters, the anomalous *comfort letter,* which are neither published nor binding.

a.3. The fragmented implementation of Art. 81 by national competition authorities (NCA) and the Commission has avoided an integral understanding of Article and a consistent approach to "*ententes*"[15]. The potential multiplicity of authorities involved has provoked a **pathological use** of the notification system partly in order to block national procedures and restrict economies of scale[16].

a.4. Unnecessary **compliance costs** for industry due to the notification model. The cost of compliance is too high, since nearly all agreements must be notified, involving time and expenses.

a.5. The **notification** burden has overloaded the Commission, which has been absorbed in handling less serious cases instead of concentrating all its resources and attention on detecting and punishing serious issues. Consequently, the deterrent effect is weak and antitrust goals are not fully achieved.

b). ***New challenges.*** The EU Competition Law enforcement model is set in a changing context. The economic, social and political coordinates of the European and international scene have altered, including the following factors:



b.1. The progressive **enlargement** of the Community, now up to 25 members with the incorporation of new countries, new markets, new cultures and new economic conceptions.

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[13] *Comisión Notice on Agreements of Minor Importance,* ([1986] OJ C 231, p. 2/86). Revised as [1997] OJ L 172/13.

[14] *Automec II,* [1995] 5 CMLR 431.

[15] Braun, Antoine, Gleiss, Alfred, Hirsch, Martin, *Droit des ententes de la Communuté Économique Européenne,* Bruxelles : Maison F. Larcier, 1977; Deringer, Arved, *The Competition Law of the European Economic Community,* Chicago-Illinois: Commerce Clearing House, 1968, par. 105-114; Galán Corona, Eduardo, *Acuerdos restrictivos de la competencia,* Madrid: Montecorvo, 1977; Guyénot, Jean; D'evegnée, Charles P., *European Antitrust Law of the Common Market,* Paris : Economica, 1976; Korah, Valentine, *An Introductory Guide to EC Competition Law and Practice,* 5th ed., London: Sweet & Maxwell, 1994.

[16] Gream, Matthew, "An overview of EC Regulation 1/2003 as the new implementing regulation for the rules on competition laid down in Articles 81 and 82 of the EC Treaty", http://matthewgream.net/content/overview_ec-reg-1.2003_paper.doc.

b.2. The **globalization** of markets signifies the presence of new operators, amplifies competitive effects, and intensifies the problems in investigating infringements. The European model must compete within the "competition of systems"[17]. This competitive pressure should lead to more efficient rules, procedures, and structures[18].

b.3. EU Competition policy has matured. A solid jurisprudential, interpretative and experience body has been consolidated, NCAs are significantly active, and a real "**antitrust culture**" is prevailing.

The modernisation reforms seek to smooth the failures and to internalize the new challenges. A structural twist is proposed and implemented by Regulation 1/2003. Is the new "organizational system" best suited to the new context? Has it overcome its dysfunctionalities? What are the future risks, the new weaknesses?

III Two Models and Multiple Solutions

The options for the reform can easily be modelled according to two extreme alternatives: a centralized structure and a decentralized one. Considering that the former model responded to a centralised authorisation system, the logical way to surmount the purported deficiencies would be to decentralise the implementation of EU Competition law. However, the criterion of centralization degree in practice, as a descriptive element of an organizational structure potentially generates multiple solutions. Thus, the panorama of relevant options is not bi-dimensional but multi-dimensional. The alternative solutions can be described in accordance with the relative balance between two parameters: coordination and decentralization.

The system resulting from Regulation 1/2003 is not properly defined simply as a decentralised model. The decentralised aspect is only one of the relevant features in understanding the new regime. Control mechanisms, resolution of divergences and strategies to ensure consistency constitute the really sensitive issues. What are the "functional substitutes" of centralization? Control, coordination, harmonization in rules or in procedures, "last word" or approval mechanism, or all of them?

a) Decentralisation: opportunities and strengths.

The decentralising and 'downsizing' process can mean a (total or partial) inversion of the organizational pyramid, or merely a shared role situation. Some obvious advantages are usually associated with this type of scheme:

a.1. **Proximity**. The close position of the enforcing authority with regard to the examined reality may ensure a more efficient activity: local knowledge, more suitable solutions, potential specialization, less resources involved in each case, ability to discriminate serious infringements, acceleration of processes, minor risk of bureaucratization, are all relevant practical factors. In legal terms, the proximity criterion could help to ensure an effective attainment of the principle of subsidiarity.

a.2. **Enrichment of interpretative body**. The increase in authorities involved will multiply the opinions, interpretations, and applications of EU Competition rules. Assuming the existence of a fairly consolidated "antitrust culture" in the EU and adopting a minimal view of the potential effects of inconsistency, the intervention of a larger number of authorities should

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[17] Monti, Mario, "Competition in a social market economy", Conference on the "Reform of European Competition Law", 9 and 10 November 2000, in Freiburg.

[18] Choi, Stephen J.; Guzman, Andrew T., "National Laws, Internacional Money: Regulation in Global Capital Market", 65 *Fordham Law Review,* 1997, pp. 1855 and so on; Fischel, Daniel, "Organized Exchanges and the Regulation of Dual Class Common Stock", 54 *U.Chi.L.Rev.,* 1987, pp. 119-152, Mahoney, Paul G., "The Exchange as regulator", 83 *Virginia Law Review,* 1997, pp. 1453-1500.

enrich the understanding and application of Community competition rules, by increasing the opportunity of testing different approaches. The multiplication of actors should provide a beneficial stimulus to the development of EU Competition law on a multilateral basis.

a.3. **Enforcement at different levels**. The assessment of different categories of competition law infringement is more efficient when competences are allocated at different levels. Thereby, the Commission is able to refocus its supervision on serious (*hard core*) infringements, while national authorities can use their resources in relation to minor ones. Such a two-tier scheme should improve the attainment of EU Competition policy objectives: to ensure that competition in the common market is not distorted.[19]

a.4. **Efficiency**. The notification model and centralised system lacked flexibility and did not facilitate efficient supervision or simplified administration.

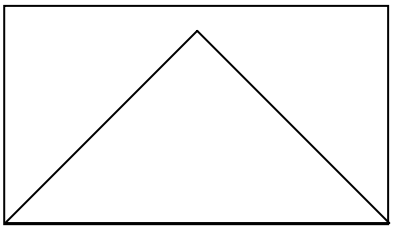
a.5. **Direct and uniform applicability of Art. 81 of EC Treaty**. Many of the deficiencies of the former model will not simply be overcome by introduction of a decentralised scheme. The switch from a notification model to a legal exception one allows the new system to become a source of real efficiencies. Industry compliance costs will be drastically diminished and Art. 81 can be applied under a "*rule of reason*" approach, since a balance of anticompetitive and pro-competitive effects is allowed.

b) Decentralisation: risks and weaknesses.

b.1. **Disintegration**. Any decentralised organization is permanently threatened by disintegration, incoherency, divergence and breach of uniformity. Thus, this kind of structure needs effective mechanisms to provide consistency, coherence and convergence; to ensure unity within diversity. As a matter of law, some concerns are frequently associated with the disintegration effect: *forum shopping,* legal uncertainty and the "*nationalization*" of Competition law.

In organizational theory and practice, this risk is managed by three categories of measure:

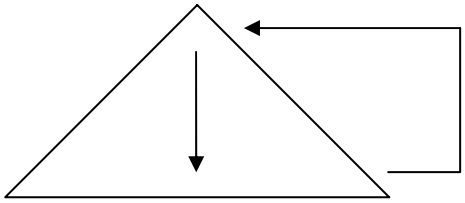
b.1.1. *Ex ante* mechanisms consisting of harmonised rules and procedures, and detailed guidelines, which avoid major divergence in application and interpretation by decentralised authorities.



NORMALIZATION OF RULES

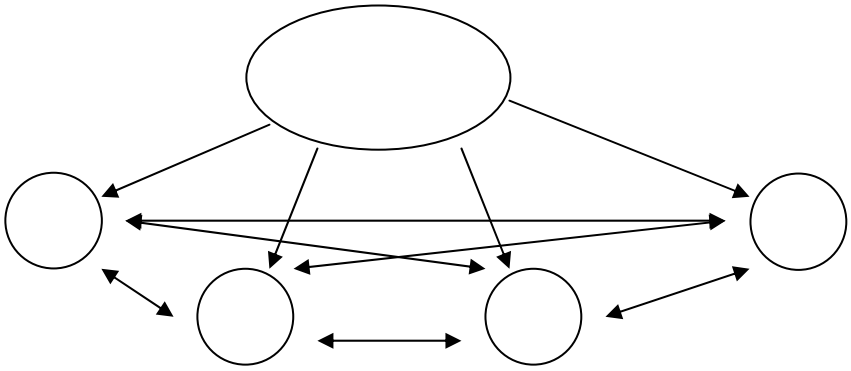
b.1.2. *Ex post* mechanisms consisting in ulterior control or revision power by the central authority.

[19] Shavell, Steven, "Specific versus General Enforcement of Law", 99 *Journal of Political Economy,* nº 5, October 1991, pp. 1088-1108.



FEEDBACK CONTROL

b.1.3. Facilitating uniformity by adding multiple elements on a cooperative basis.



COORDINATION

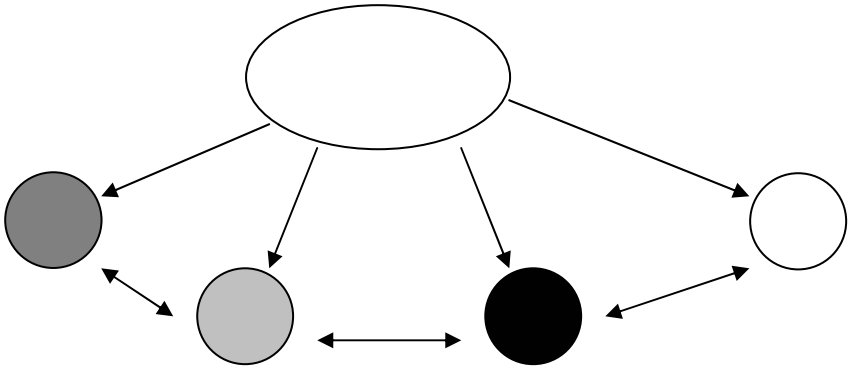
b.2. **Duplication or Overlapping**. Whereas centralised systems suffer from being too big, bureaucratic and unwieldy, decentralised systems are vulnerable to duplication. The strategic decision to decentralize involves the possibility of several types of dysfunctionality: no economies of scale, the risk of overlapping, destructive rivalry among decentralised centres and an inefficient duplication of institutions, procedures, rules and resources.

The costly effects of duplication intend to be minimized by the following measures:

b.2.1. Rules providing for clear allocation of tasks.

b.2.2. Rules providing for joint/collective action to deal with cases which affect several levels: on a purely shared basis or by designating a team leader.

b.2.3. Strict supervision by the central authority to avoid conflict and take over multi-state (with multiple authorities involved) cases.



ALLOCATION
PARALLEL ACTION
DIRECT SUPERVISION

c) Mechanisms implemented by Regulation 1/2003 to ensure coherence and avoid duplication.

c.1. **Vertical coherency**. A disintegrated system is severely threatened by the breach of vertical (hierarchical) unity. To avoid vertical incoherency, between the Commission and the NCA, the central element of the system should be empowered to centralise decision-making, control consistency by information, consultation or feedback mechanisms, recover competence and solve overlapping between low-tier decisions and high-tier ones. This objective can be achieved by a form of selective *recentralization*.

- Reinforcement of the central (Commission's) regulatory and decision making power: structural remedies (Art. 7), binding commitments (Art. 9), finding of inapplicability (Art. 10), powers of investigation (Chapter V), severe sanctions (Chapter VI), withdrawal in individual cases (Art. 29) and implementing provisions (Art. 33). These measures respond to a process of partial decentralization or decentralization at intervals, aiming to establish, as with any organization, centralised action in serious situations (strategic) and decentralised action in other cases.
- *Vis attractiva* in favour of the Commission by the initiation of proceedings leading to the adoption of a decision under Chapter III, which relieves the NCAs of their competences (Art. 11.6) prior consultation – political deference - (in accordance to the limitations laid down in Art. 35). This provision effectively operates as recentralization measure to maintain the central position of Commission in enforcing EU Competition Law.
- Management of compatibility relationships between national competition law and Articles 81 and 82 of EC Treaty on a priority basis in favour of European rules (regarding Art. 81 EC Treaty) when there is a convergence of goals (Art 3 Regulation 1/2003). This mechanism is directly aimed at reducing any potential divergence in decision-making by NCAs in comparison with Commission decisions, by asserting the supremacy of EU Competition law – abandoning the so-called "double barrier" theory. Compatibility via provision of Commission opinions may reinforce uniformity around a centralised interpretation and application of Competition rules. As a matter of equilibrium, decentralised organizations have to avoid the danger of gravity displacement, in this instance by maintaining a centre of gravity in the tasks regarding interpretation and application of EU Competition Law.
- Vertical mechanisms between the Commission and the NCAs include the following: the downward documentation delivery mechanism (Art. 11.2); the upward information mechanism regarding the beginning of first formal investigative measures (Art. 11.3) and

thereafter at the adoption of a decision (Art. 11.4); the upward consultation mechanism on any case involving the application of Community Law (Art. 11.5); bidirectional (up and down) information mechanism (Art. 12). Similar mechanisms are provided for in relation to national courts (Art. 15) although careful about any received threat to the independence of judicial power and also to avoid any alleged serious interference by an administrative authority in judicial proceedings (*amicus curiae*). This is achieved by a restricted justification based on coherency ("where the coherent application of Article 81 or Article 82 of the Treaty so requires"), and a prescribed procedure, at least for oral observations ("with the permission of the court").

- The uniform application of EU Competition law (Art. 16): avoiding (upward) conflicts, contradictions or incompatibility with Commission decisions. This is, at first sight, the most patent design of a conflict avoiding mechanism. However, the avoidance of any direct conflict with the Community authorities does not necessarily ensure uniformity. A conflict implies the existence or the foreseeable existence of two decisions which contradict each other. Accordingly, this provision is merely a reactive remedy, rather than a proactive one. Uniform application needs not only to minimize divergence but also to ensure convergence.
- Undertaking of inspections by NCA at the request of the Commission, if pertinent, with the assistance of officials or other accompanying persons authorised by the Commission (Art. 22).
- The issue of informal guidance regarding novel situations or unresolved questions for the application of EU Competition rules sought by individual undertakings (Recital 38). In novel issues only centralised guidance is appropriate to facilitate uniformity and consistency in a developing competition law system.

c.2. **Horizontal coherency: Networked system.**[20] The mechanisms to minimize horizontal incoherency act in combination with those provided to smooth vertical divergences. Indeed, there are no clear-cut criteria to distinguish horizontal from vertical divergences, and, consequently, their resolving mechanisms may function in an overlapping way. Vertical-divergences-avoiding mechanisms capture intense hierarchical elements. Nevertheless, even if the central authority (Commission) participates in a horizontal-divergences-avoiding mechanism, the pivotal element is not maintaining the logic of the hierarchy but inserting a cooperative component in the mechanics of the system.

- The most suitable structure to design cooperative systems is that of a network. Regulation 1/2003 channels this cooperative ethos, required to overcome the dysfunctionalities derived from the breach of centrality, through a "network of public authorities applying the Community competition rules in close cooperation" – the *European Competition Network* (ECN). The structure of the network is a centralised one, pivoting on the prevailing position of the Commission in the peak. The pyramid is not collapsed. A networked system promotes multilateral information flow, reciprocal consultations and the creation of a form of common (or shared) input.
- In addition to the vertical mechanisms discussed above, the network is tied by multilateral information mechanisms (Art. 11.4, even widely interpreting Art. 12).

[20] Nohria, Nitin; Eccles, Robert G., *Networks and Organizations: Structure, form, and action,* Boston, MA: Harvard Business School Press, 1992; Larson, Andrea, "Network Dyads in Entrepreneurial Settings: A Study of the Governance of Exchange Relationships", *Administrative Science Quarterly,* vol. 37, num. 1, March 1992, pp. 76-104

- In accordance with the logic of a centralised-networked structure, a common 'place' must be built. The *Advisory Committee* as defined and regulated in Art. 14 performs this co-ordinating task in a multilateral, governable (manageable) and operative manner.

c.3. **Avoiding duplication.** Duplication effect, or 'overlapping danger', represents one of the major problems facing any decentralised system. Duplication means a waste of resources, and overlapping of authorities on the same case increases the probability of divergence.

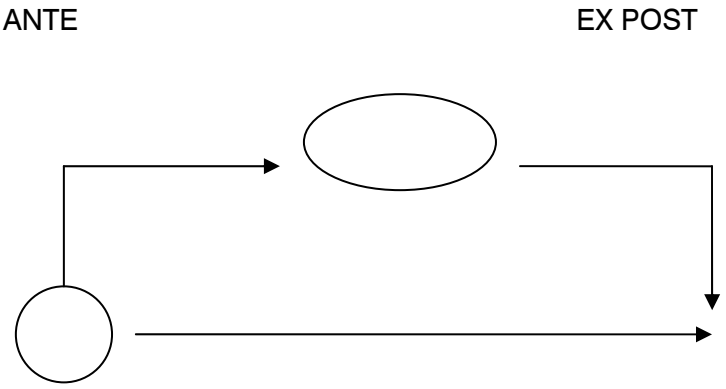
Assuming a network of parallel competences, the formulation of principles of allocation are crucial in order to extract maximum efficiency by an appropriate division of work and specialization. Three situations can be envisaged: unique competence of a decentralised authority, parallel competences of decentralised authorities, or competence concentrated on the central authority (Commission).

Article 13 of Regulation 1/2003 attempts to design the rules to solve this situation of coincidence on a priority basis. This rule on the temporal allocation of tasks rule appears to be very inconsistent and likely to produce arbitrary results, taking into account that suspension is optional. The *Notice on Cooperation within the Network* seekss to develop the principles of allocation by providing the following guidelines:

- A prevailing territorial criterion in accordance with the effects theory;
- A subsidiary criterion of the effectiveness of single action even if there are multiple affected territories. Consequently, where single authority action will be insufficiently effective, parallel intervention is justified.
- The involvement of three affected countries (cross-border markets covering more than three Member States or several national markets) establishes that the Commission is well placed to deal with case. In addition to this quantitative factor, other requirements, such as those derived from the implication of other Community provisions or the interest of developing Community Competition policy may indicate the need for centralised action.

V New Culture and Legal Certainty

Article 81(3) lies at the core of decentralisation. In fact, the modernisation initiative does not really imply a switch from a totally centralised system to a totally decentralised one. The new culture responds to the combination of residual decentralization and a twist from an *ex ante* to an *ex post* model.



The welcome result of this twist of vision is that Art. 81, previously fragmented by a procedural bifurcation, acquires a clearer interpretation by promoting the use of a sound

economic analysis (a *new approach*)[21], avoiding the fragmentation of "reality" in its interpretation by a duplicity of authorities.

In addition to this substantive (re)integration of the legal provision through a process of institutional decentralization, the "vision" has been altered diametrically. As a consequence of this "re-vision", it is claimed that the legal certainty will be seriously damaged. In relation to this debate on the relationship between legal certainty and administrative authorization, it is submitted that there are no irrefutable reasons for considering competition law as an exceptional set of rules, either substantively or procedurally. Self-assessment is the norm in relation to legal regulation and its impact on business activities.[22] Nonetheless, an increase in the provision of guidelines – without risking the creation of a disguised informal "notification" model -, may provide further clarification[23] of competition rules and generally encourage the use of sound economic analysis[24]. The optimal degree of certainty in legal provisions and consistency in their interpretation is required to ensure an optimal level of deterrence, balancing the risks of "over-compliance" and "under-compliance"[25].

A system based on prior administrative authorization in business dynamics should not be unavoidably considered more desirable than a *iusprivatista* model (Private Law-like) based on a presumption of legality, correctness and good faith.

Conclusions

The European Competition law enforcement model functionally mirrors an open system acting in an environment and reacting to external forces. The modernisation program can be deemed a strategic effort to smooth internal deficiencies and to adjust its structure and operate within a changing context.

A centralised system seems unsuited to a context framed by the ongoing enlargement of Community, competitive pressure and the progressive sophistication of markets.

Since an "antitrust culture" is widely consolidated in Member States, a matured system is prepared to decentralize. The reform designs a complex model of residual decentralization + selective recentralization. The pyramidal structure is downsized but still remains strongly hierarchical and centred.

Decentralization systems are seriously threatened by disintegration (incoherency) and duplication. Crucial solutions include (formal and informal) coordination, cooperation and division of work. As a consequence, the adequate and complete description of the new system must integrate cooperative components within the decentralised conception, which determine the degree of system cohesion.

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[21] Galán Corona, Eduardo, "Notas sobre el Reglamento (CE) nº 1/2003 del Consejo, de 16 de diciembre de 2002, para la aplicación de los artículos 81 y 82 del Tratado de Roma", *RDCE,* núm. 15, mayo/agosto 2003, p. 509; Wils, "Notification, Clearance and Exemption in EC Competition Law: A Economic Análisis", *E.L.Rev.,* vol. 24, 1999, p. 138.

[22] Montag, Frank, Rosenfeld, Andreas, "A solution to the problems? Regulation 1/2003 and the modernization of competition procedure", *ZWeR.* 2/2003, pp. 116-117. Moreover, the new model will result in the assumption by advising legal practitioners of a higher degree of responsibility. Gilliams, Hans, "Modernisation: from policy to practice", *E.L.Rev.,* vol. 28, August 2003, p. 471.

[23] On the concept of rule precision, Diver, Colin S., "The Optimal Precision of Administrative Rules", 93 *Yale L.J.,* 1983-1984, pp. 65-110.

[24] Venit, James S., "Brave New World: The modernization and decentralization of Enforcement under Articles 81 and 82 of the EC Treaty", *C.M.L.R.,* vol. 40, nº 3, June 2003, pp. 545-580.

[25] Calfee, John E., Craswell, Richard, "Some effects of Uncertainty on Compliance with Legal Standards", 70 *Va. L. Rev.,* 1984, pp. 965-1003.

Ex ante mechanisms are the most efficient mechanisms, since they avoid divergence through normalization techniques. Detailed and objective guidelines are excellent instruments for achieving coherency. This kind of mechanism based on normalizing rules and procedures may be completed by *ex post* mechanisms, seeking to resolve situations of actual divergence.

Efficiency in the attainment of Competition policy goals is mainly encouraged by the switch from a notification model to a legal exception one; but the trade-off between efficiency and legal certainty, after the reform, leans towards the first objective at the expense of undertakings. Moreover, the success of institutional reform is not so clear. The new structural design appears to be an appropriate response to new environmental challenges and a quite satisfactory resolution of internal deficiencies of the previous system. A conclusive evaluation of the new regime cannot be provided in the abstract at present, but requires testing the efficiency of the coordination mechanisms as they are implemented in practice in due course.