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Fordham 38th Conference on International Antitrust Law and Policy, September 2011

EU COMPETITION LAW ENFORCEMENT

ELEMENTS FOR A DISCUSSION ON EFFECTIVENESS AND UNIFORMITY

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The authors acknowledge and thank the extremely valuable input received from Nicolas Petit, Mark English and other stakeholders who prefer to remain anonymous. We also thank the readers of the blog Chillin'Competition (<http://chillingcompetition.com>) for the suggestions offered on possible issues to discuss at the roundtable for which this contribution was eminently drafted. Any feedback on the issues dealt in this paper received from anyone present at the Fordham conference will be appreciated and duly acknowledged.

Preliminary note on the aim of this paper:

Discussions at top-notch conferences, particularly those involving the most senior representatives of the most relevant enforcement agencies, risk ending up in a manifestation of Panglossianism with the bottom line being that “all is for the best in the best of all possible worlds”.

*In our view, EU competition enforcement works satisfactorily and certain European competition authorities are undoubtedly amongst the very best in the world. But congratulatory statements are most often of little use, particularly when there is considerable room for improvement. We believe that it is more useful –and more interesting– to ask: **What can be done better?***

This paper builds precisely on that question. Whereas we acknowledge that many things work well, we will deliberately present you with a critical overview of the current situation, as we will attempt to identify the specific areas where problems have arisen or may arise. The paper seeks to identify aspects where stakeholders feel that there is room for improvement, and to point out at enforcement trends that, in the long term, could even compromise the ability of the enforcement system to accomplish effectively its goals. We believe that this exercise should be of interest not only to EU lawyers, but also to non-EU enforcers who may find valuable lessons in the European experience that could perhaps be exportable to their respective jurisdictions.

This paper has been tailored for the purpose of providing elements for a discussion with the heads of the main actors of this story; those entrusted with the ever difficult and always fascinating task of enforcing EU competition rules. Accordingly, it does not attempt to propose solutions, but to raise questions to be posed to the exceptional panellists who will take part in the Roundtable on “EU Competition Enforcement” at Fordham’s 38th Annual Antitrust Conference, and to provide some background as to why we deem those questions relevant. The interest lies not in our paper (in fact, we have made it long enough to minimize the risk of you reading it in full), but rather in the discussion that it will hopefully trigger.

This paper does not necessarily present the views of its authors. Its content and notably the questions it raises are rather the result of a previous “consultation process”, and thus reflect the views gathered from practitioners, officials and academics from within the EU competition law community, notably from readers of the blog Chillin’Competition. The identity of those consulted has in most cases been kept confidential (sometimes even to us). In order to avoid the unfairness implied in voicing out apocryphal views, we have quoted published works in support of each relevant proposition contained in the following pages.

This paper touches upon many issues, but does not attempt to deal in depth with all possible matters related to “EU Competition Enforcement”. Our contribution does not fully capture European competition enforcement, but rather part of the public enforcement of EU competition law. Competition cases brought under national competition laws are omitted, and so are cases before national courts as well as merger control and judicial review at both the EU and national levels. Capturing the details of administrative and judicial competition enforcement in all 27 Member States (plus the three members of the EFTA) constitutes a daunting task that we have deliberately chosen not to undertake, for even if we had, the picture would still be incomplete in light of the scarcity of publicly available information. We are fully responsible for the decision of what has been kept in and what has been left out of the scope of both the paper and the roundtable discussion.

This paper is unfinished. There are many aspects where it (we) could also do much better, which is why we look forward to receiving feedback from you. The following will be completed and substantially modified in order to reflect the results of the roundtable discussion and the input from its audience.

I.	INTRODUCTION	4
II.	EFFECTIVENESS OF EU COMPETITION LAW ENFORCEMENT	7
A.	Balancing effectiveness and procedural guarantees: institutional and organizational arrangements	7
1.	European Commission	8
2.	National competition authorities	9
B.	<i>Balancing effectiveness and procedural guarantees: investigation of cases:</i>	12
1.	European Commission	12
2.	National competition authorities	15
C.	<i>Enforcement discretion and prioritization</i>	15
D.	<i>From hard to soft enforcement of EU competition law?</i>	24
E.	<i>Enforcement based on negotiated solutions</i>	28
1.	Settlements	28
2.	Commitment decisions	29
F.	<i>Enforcing EU Competition law to accomplish regulatory goals?</i>	34
G.	<i>The appropriate mix of law and economics on competition law enforcement</i>	35
H.	<i>Optimal sanctions</i>	38
I.	<i>Interplay between public and private enforcement</i>	41
III.	UNIFORMITY OF EU COMPETITION LAW ENFORCEMENT	44
A.	<i>Procedural and substantive convergence</i>	44
1.	Procedural convergence	44
2.	Substantive convergence	46
B.	<i>Coordination mechanisms under Regulation 1/2003</i>	49
C.	<i>The role of the European Commission and NCAs within the ECN</i>	52
IV.	CONCLUSIONS	55

I. INTRODUCTION

To a very large extent, the story of the enforcement of European Union (“EU”) competition law is a story of success. A legal order which was brought into Europe less than five decades ago “in the backpacks of the American soldiers who came to fight World War II”,¹ has proven to be a most –perhaps the most- useful tool in the pursuance of a competitive internal market. At the EU level, competition law has enabled the European Commission (“EC” or “the Commission”) and EU Courts to eliminate artificial barriers to undistorted competition and trade to the ultimate benefit of all consumers and economic operators.

Throughout these past five decades EU competition enforcement has gone through radical transformations, perhaps the most significant of which was the decentralization of enforcement carried out in 2004 with the entry into force of the so-called “modernization package”, the cornerstone of which was Regulation 1/2003.²

The founding Treaties and the case law of the European Courts vested the Commission with very wide powers with regard to the execution of competition policy. It was decided that the EC should be granted the legal monopoly to apply the third paragraph of what is now Article 101 TFEU. Accordingly, and for many years, the EC played a pivotal role as the driving force and main enforcer of competition law in Europe. The responsibility placed upon the EC’s shoulders by virtue of the exclusive competence that was entrusted to it

¹ J. Garrigues, *La defensa de la Competencia mercantil. Cuatro conferencias sobre la Ley española de 20 de julio de 1963 contra prácticas restrictivas de la competencia*, Sociedad de Estudios y Publicaciones, Madrid, 1964, pp. 9-32.

² Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1 (4 January 1999), p.1. Besides Regulation 1/2003, the modernization package included an implementing Regulation as well as six new Commission Notices and Guidelines. 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 L 123 (27 April 2004), p.18, as amended by Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases, OJ L 171 (1 July 2008), p. 3; Commission Notice on Cooperation within the Network of Competition Authorities, OJ C 101 (27 April 2004), p. 43; Commission Notice on Cooperation between the Commission and the Courts of the EU Member States in the application of Articles 81 and 82 EC, OJ C 101, OJ C 101 (27 April 2004), p.54; 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 C 101 (27 April 2004), p.78; Commission Notice on the Handling of Complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ C 101 (27 April 2004), p.65; Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ C 101 (27 April 2004), p.81; and Guidelines on the application of Article 81(3) of the Treaty, OJ C 101 (27 April.2004), p.97.

eventually revealed itself to be too burdensome, and the enforcement system started showing worrying signs of fatigue.³

Ultimately, this led to what our host, Barry Hawk, famously labeled as a “system failure”.⁴ The EU competition system was in need of a radical reform. Support for such reform gained momentum at conferences such as the one gathering us here today.⁵ At the end of the day, European Institutions acted boldly and eventually adopted Regulation 1/2003 and its accompanying package.⁶

A different enforcement system was born. Notification disappeared and was substituted by a system of self-evaluation and directly applicable legal exemption.⁷ 27 national competition authorities and a myriad of national courts became empowered to apply the competition provisions of the Treaty in full and thereby effectively (?)⁸ replaced the European Commission as the primary enforcers of these rules.⁹ Indeed, out of more than 1, 400 administrative cases initiated under EU competition law since 2004, 1,180 have been undertaken by national competition authorities, and only 225 by the Commission.¹⁰

³ For an early account of these first signs of fatigue, see A. Schaub, *European Competition Policy in a Changing Economic Environment*, 1996 Fordham Corp. L. Inst. 71 (B. Hawk ed. 1997). The Commission White Paper on modernisation of the rules implementing Articles 81 and 82 of the EC Treaty, OJ C 132 of 12 May 1999, stated at paras. 9 and 40 that “the continued application of Regulation No 17 as drawn up in 1962, with its highly centralized system of prior authorization, [was] no longer consistent with the effective supervision of competition” and that retaining such system in an enlarged Union would be “cumbersome, inefficient and impose excessive burden on economic operators”.

⁴ Barry E. Hawk, *System Failure: Vertical Restraints and EC Competition Law*, 32 *Common Market L. Rev.* 973 (1995).

⁵ E. Fox, *Antitrust and Institutions: Design and Change*, 41 *Loyola University Chicago Law Journal* 473, at 480 (stating that “[s]upport [for the reform] was built from a small nucleus. The ideas were debated in internal dialog. Conferences, notably including the annual Fordham conference directed by Barry Hawk, and the annual workshop of the European University Institute directed by Claus Dieter Ehlermann and Giuliano Amato, were key intellectual and brainstorming events”).

⁶ For a detailed overview of the current enforcement framework, see L. Ortiz Blanco (ed), *EU Competition Procedure* (3rd ed, forthcoming 2012).

⁷ See S. Wilks, *Agencies, Networks, Discourses and the Trajectory of European Competition Enforcement*, 3(2) *European Competition Journal*, 437 (2007), at 461. Religious metaphors have been commonly used in commentaries about the reform, see e.g. J. Nazerali and D. Gowan, *Modernising the Enforcement of EU Competition rules- Can the Commission Claim to be Preaching to the Converted?*, 8 *European Competition L. Rev.* 442 (1999).

⁸ Certain stakeholders have expressed doubts as to the real extent of decentralization; see section III.C below.

⁹ It is worth noting that the change coincided with wider decentralization proposals arising out of a political context where subsidiarity was a main concern. See K. Lenaerts, *The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism*, 17 *Fordham Int'l L.J.* 846 (1999). See also R. van den Berg, *The Subsidiarity Principle and the EC Competition Rules: The Costs and Benefits of Decentralization*, *Constitutional Law and Economics of the European Union* 142 (D. Schmidtchen and R. Cooter eds. 1997).

¹⁰ See the statistics available at <http://ec.europa.eu/competition/ecn/statistics.html> (Last updated on 31 July, 2011).

Whereas there is no reliable data on judicial proceedings concerning the application of EU competition law, the number of cases before national courts has for some time –maybe too much time- been expected to experience and exponential increase that should also place them at the forefront of the enforcement of these rules.

In parallel with decentralization and in some cases as a consequence thereof, a number of institutional changes have taken place and enforcement trends have surfaced or consolidated in the past few years. To name a few, the EU Treaties themselves were modified by the Lisbon Treaty, which brought about formal(?) changes in the way competition policy is conceived by Member States;¹¹ sanctions have increased exponentially and some jurisdictions have even criminalized anticompetitive conduct; enforcers have undertaken institutional reforms to adapt their structure and procedures to the standards required by an enforcement system carrying such severe penalties; prioritization became more feasible and have proved crucial to the effectiveness of any system; economics has conquered competition law; a significant proportion of resources have been devoted to soft rather than hard intervention; negotiated solutions are on the rise; and the volume of proposals to encourage private enforcement has ballooned.

Today, with the privileged hindsight provided by the passing of more than seven years since the reform was implemented, we believe it might be useful to look back and inquire about the current state of affairs.

Admittedly, this is not a first. The EC undertook a similar task a few years ago under the form of its Report on the Functioning of Regulation 1/2003.¹² The bottom-line of the Report was essentially that “in this best of all possible worlds, everything is for the best.” However, our approach will be wider in focus, in the sense that we will not assess the situation exclusively from the EC’s standpoint. In addition, we will be more critical than the EC was towards “its baby”. There have been other most interesting works that have reviewed the status of competition enforcement in Europe, amongst we wish to particularly acknowledge

¹¹ See J.L. Buendía, *Writing straight with crooked lines: Competition Policy and Services of General Economic Interest in the Treaty of Lisbon*, EU Law after Lisbon (A. Biondi, P. Eeckhout and S. Ripley eds. forthcoming 2011); N. Petit, *Traité de Lisbonne et politique de concurrence- Rupture?*, *Revue de la Faculté de Droit de l’Université de Liège*, 2008/2; and N. Petit and N. Neynrick, *A Review of the Competition Law Implications of the Treaty on the Functioning of the European Union*, 1 *The CPI Antitrust Journal* (February 2010).

¹² Following a public consultation on the functioning of Regulation 1/2003, on 29 April 2009 the EC adopted the Communication from the Commission to the European Parliament and the Council, Report on the functioning of Regulation 1/2003 (COM(2009) 206 final, 29 April 2009), available at <http://ec.europa.eu/competition/antitrust/legislation/regulations.html>. The replies to the consultation process are also available at http://ec.europa.eu/competition/consultations/2008_regulation_1_2003/index.html. The Report was accompanied by a more developed Commission Staff Working Paper accompanying the Report on the functioning of Regulation 1/2003 (SEC (2009) 574 final, 29 April 2009). Prior to the publication of the Report, Commission officials had also articulated extremely interesting and detailed analysis of how the system had worked in practice. See E. Gippini-Fournier, *Community Report for the FIDE XXIII Congress 2008, The Modernisation of European Competition Law: Initial Experiences with Regulation 1/2003* in (H.F. Koeck and M.M. Karollus eds. 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1139776

the project undertaken Global Competition Law Centre of the College of Europe that culminated in a book containing excellent analyses and proposals for reform authored by more than 55 contributors.¹³

Since its inception -and particularly more so following the entry into force of Regulation 1/2003-, the ability of EU competition law to attain its goals has been conditioned to its effective and uniform enforcement. Recital 1 of Regulation 1/2003 clearly states that “[i]n order to establish a system which ensures that competition in the common market is not distorted, Articles [101] and [102] of the Treaty must be applied **effectively and uniformly** in the Community” (emphasis added). This need for effective and uniform enforcement of the competition provisions of the Treaty was thus the main driver of the reform at a time when the EU was enlarging from 15 to 27 Member States.

Given that the changes operated on the enforcement system essentially aimed at pursuing these objectives of effectiveness and uniformity, it is in light of them that its impact as well as its virtues and/or flaws will be assessed.

II. EFFECTIVENESS OF EU COMPETITION LAW ENFORCEMENT

European competition law enforcement is generally praised when it comes to assessing its effectiveness.¹⁴ Without challenging this general conclusion, this paper will assess and comment on many of the elements that altogether determine the effectiveness of a given legal system. Accordingly, we will hereinafter focus on questions pertaining to the institutional and organizational realm of enforcement, on enforcement discretion and prioritization, on the latest enforcement trends that have arisen in the EU, on the optimal sanctions to be applied for enforcement to be effective, and on the necessity for an adequate interplay between public and private enforcement. Let’s get started:

A. Balancing effectiveness and procedural guarantees: institutional and organizational arrangements

Organizational arrangements have a fundamental impact in the way competition law is enforced. Whereas such arrangements had until recently not been the focus of much attention, the mushrooming of the number of competition agencies all over the world has put this topic on the spotlight.

¹³ GCLC, Towards an optimal enforcement of competition rules in Europe, Time for a Review of Regulation 1/2003, GCLC Annual Conference (11-12 June 2009) (M.Merola ad D. Waelbroeck eds. 2010).

¹⁴ See, for instance, the EC’s Report on the functioning of Regulation 1/2003, supra note 12, at para. 10: “Regulation 1/2003 equipped the Commission with a renewed set of enforcement powers which are geared towards its principal objectives of effective and coherent enforcement. The Commission has used its new or revised powers actively, and overall successfully, for effective enforcement.”

At the institutional level, the most noticeable feature of EU competition enforcement is its relatively recent decentralized nature. In 1993 Robert Bork wrote that “in antitrust, it is possible to think the European Commission has wisely not followed the American example but has instead centralized all enforcement in a single government agency.”¹⁵ Nonetheless, the system change from a model where the Commission assumed the responsibility of being the prime enforcer to a model of theoretically shared competence amongst the European Commission and national competition authorities is generally reported to have yielded positive results.¹⁶ Today, some of the EU’s national competition authorities are amongst the most competent agencies in the world.¹⁷

In spite of the above, the comments received by the authors of this paper reveal that there are diverging perceptions as to the success of decentralization in EU competition enforcement. Some stakeholders refer to “fake decentralization” or “one-way” decentralization” arguing that the system is as centralized as ever, only more comfortable for the EC. We will deal with these observations and with other related to the adequate allocation of roles amongst the EC and national competition authorities (“NCAs”) under section III.C of this paper. For now, we will very briefly focus on institutional issues at the level of individual enforcers.

1. European Commission

Debates concerning the institutional arrangements that characterize the EC have for a long time been recurrent amongst commentators.¹⁸ The EC certainly is, in many ways, a peculiar enforcer. It is a supranational¹⁹ executive body performing administrative and quasi-judicial functions which combines investigation, prosecution and decision-making. It is entrusted not only with the protection of free competition, but also with myriad other tasks. Its final decisions are adopted by the College of Commissioners, amongst which only one member is explicitly entrusted with responsibility for the protection of competition in the EU.²⁰

¹⁵ Robert H. Bork, *The Antitrust Paradox: A Policy at War With Itself* (2nd ed. 1993), at 439.

¹⁶ Criticism to the changes brought about by Regulation 1/2003 is extremely rare. For a “rara avis”, see, e.g. B. Depoorter and F. Parisi, *The modernization of European Antitrust Enforcement: The Economics of Regulatory Competition*, 13(2) *George Mason L. Rev.*, pp. 309-23.

¹⁷ According to a recent Global Competition Review survey, 5 out of the 7 best-performing competition authorities are European (namely, the European Commission, the UK’s Competition Commission, the UK’s Office of Fair Trading, the French Conseil de la Concurrence and the German Bundeskartellamt; the 2 non-EU agencies are the US FTC and DOJ). GCR’s survey places 16 EU authorities amongst the top 30 world enforcers. See *Rating Enforcement 2011*, available at <http://www.globalcompetitionreview.com/surveys/survey/516/Rating-Enforcement>

¹⁸ See Roundtable on Reform of EC Competition Law, 1996 *Fordham Corp. L. Inst.* 175 (B.Hawk ed. 1997); or A. Pera and M. Todino, *Enforcement of EC Competition Rules: Need for A Reform*, 1996 *Fordham Corp. L. Inst.* 125 (B.Hawk ed. 1997).

¹⁹ S. Wilks and L. Mc Gowan, *The first Supra-national Policy in the EU: Competition Policy* 28 *European Journal of Political Research* 141 (1995).

²⁰ For a recent description of the institutional arrangements governing the EC’s enforcement, see, E. Fox, *Antitrust and Institutions: Design and Change*, supra note 5, p. 481-86.

The design is understandable if one takes into account that it was adopted at a time when competition law was seen as an instrument to accomplish the wider goals of the then newly-born European Communities. But over the years, as EU competition law transmuted, the system has come increasingly under the spotlight, with many arguing that the institutional set-up, particularly the combination of investigative, prosecutorial and decisional functions contravenes the right to a fair trial enshrined in Article 6 of the European Convention for Human Rights (“ECHR”).²¹ The EC, on the contrary, counter argues that this is not the case because of the effective control exercised by EU Courts.²² However, the robustness of the EC’s argument is contingent on the existence of a system of full judicial review.²³ Some stakeholders dismiss this argument on the basis that EU Courts do not exercise full jurisdiction over the lawfulness of the EC’s decisions and rather limit the scope of review to examining possible manifest errors of appraisal.

Against this background, we must ask:

- **Do current institutional arrangements for the enforcement of EU competition law respect fundamental rights and due process in view of the limited scope of the judicial review undertaken by EU Courts?**

2. National competition authorities

At the national level, institutional arrangements are very diverse, also amongst the enforcers present at this roundtable. Some of them, moreover, have recently embarked on major institutional reforms or are planning to do so in the near future:

France is one of the jurisdictions having undertaken profound institutional reforms in recent years. March 2nd, 2009 marked the birth of the Autorité de la Concurrence and the shift from a model of dual enforcement (Conseil de la Concurrence and Ministry for the Economy) to a single authority model. Other major institutional changes took place at the time. More than two years have now gone by since this overhaul of the French enforcement system; now appears a reasonable time to look back on the results it has delivered.

²¹ See, amongst others, D. Slater, S. Thomas and D. Waelbroeck, Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?, GCLC Working Paper 04/08, available at <http://www.gclc.coleurope.eu>; 21. For our own view on this discussion see L. Ortiz Blanco, Autoridad Única o Dual?, La Modernización del Derecho de la Competencia en España y la Unión Europea (S. Martínez-Lage y A. Petitbó Juan eds. 2005).

²² See, for instance, the EC’s submissions in case Lafarge v. Commission, Case T-54/03, ECR II-120, para. 35. In this sense, see also P. Lowe, Cartels, Fines and Due Process, 2 Global Competition Policy (June 2009), available at <https://www.competitionpolicyinternational.com/cartels-fines-and-due-process/>; W. Wils, The increased level of EU Antitrust Fines, Judicial Review and the ECHR, 33 World Competition (2010), and W. Wils, EU Antitrust Enforcement Powers and Procedural Rights and Guarantees: The Interplay between EU Law, National Law, the Charter of Fundamental Rights and the European Convention on Human Rights, 34(2) World Competition (2011).

²³ The General Court has acknowledged that the legitimacy of the system depends of the existence of effective judicial review; see Lafarge v. Commission, Case T-54/03, ECR II-120, para. 42.

The UK is also about to embark on a major institutional reform of a system whose outcomes have generally been praised by stakeholders. The reform would consist in the merger of two of the best internationally regarded enforcers, namely the OFT and the Competition Commission.

Institutional changes are also expected in Portugal, and in this case the decision to undertake a reform has a *sui generis* origin: reforms on the competition law enforcement system are amongst the conditions imposed upon Portugal by the institutions signatories of the Memorandum of Understanding on Specific Economic Policy Conditionality (the International Monetary Fund, the European Commission and the European Central Bank).²⁴ Section 7.20 of the MOU requires Portugal to “take measures to improve the speed and effectiveness of competition rules’ enforcement”, and goes on to detail a number of required changes.²⁵

➤ **What has been or will be the impact of the institutional reforms undertaken or contemplated in your respective jurisdictions? What features do you believe make your enforcement system more or less effective than others?**

Some last words are in order with regard to crucial aspects of competition enforcement that generally receive less attention, such as those related to the competences and resources attributed to competition law enforcers.

Competition enforcers are generally attributed all necessary competences to safeguard competition from private restrictions or distortions. It is nonetheless a fact that many -if not most- obstacles to competition have their origin in the acts of public authorities, and it is also a fact that many competition authorities are not in a position to combat such acts. The dismantling of public barriers to competition can be done either through competition

²⁴ Portugal, Memorandum of Understanding on Specific Economic Policy Conditionality, 17 May 2011, available at: http://ec.europa.eu/economy_finance/eu_borrower/mou/2011-05-18-mou-portugal_en.pdf

²⁵ In particular, the MOU requires Portugal to:

- (i) Establish a specialised court in the context of the reforms of the judicial system
- (ii) Propose a revision of the competition law, making it as autonomous as possible from the Administrative Law and the Penal Procedural Law and more harmonized with the European Union competition legal framework, in particular:
 - simplify the law, separating clearly the rules on competition enforcement procedures from the rules on penal procedures with a view to ensure effective enforcement of competition law;
 - rationalize the conditions that determine the opening of investigations, allowing the competition authority to make an assessment of the relevance of the claims;
 - establish the necessary procedures for a greater alignment between Portuguese law on merger control and the EU Merger Regulation, namely with regard to the criteria to make compulsory the ex ante notification of a concentration operation.;
 - ensure more clarity and legal certainty in the application of Procedural Administrative law in merger control.
 - evaluate the appeal process and adjust it where necessary to increase fairness and efficiency in terms of due process and timeliness of proceedings.
- (iii) Ensure that the Portuguese Competition Authority has sufficient and stable financial means to guarantee its effective and sustained operation.

advocacy as well as resorting to direct challenges, and whereas EU competition enforcers have been increasingly active in advocacy, few of them enjoy the ability to directly confront public restrictions. There are notable exceptions to this general rule, such as that of the Spanish CNC, which by virtue of the Article 12(3) of the 2007 Competition Act is entitled to “bring actions before the competent jurisdiction against administrative acts and regulations from which obstacles to the maintenance of effective competition in the markets are derived”.

One of our panelists, John Fingleton, has stated that competition agencies “should also be capable of challenging government restrictions on competition, such as regulatory barriers to entry or lack of competitive neutrality in markets for public services”.²⁶ Considering that international enforcers in other jurisdictions look up to the institutions led by our panelists, it is interesting to know how you feel about this:

- **Should competition agencies be given competences to challenge government restrictions on competition? Are there any other competences or instruments that you would like to have at your disposal with a view to enhancing effective enforcement?**

As regards resources, it is worth noting that most European competition enforcers remain under-resourced and/or understaffed. Against the current economic scenario there is a risk that national governments may choose to reduce the budgets allocated to their enforcers (a decision which would of course be presented as a step towards more “efficient” enforcement...). A word of caution against such attitude is necessary; it should be borne in mind that investing in competition enforcement always pays off.

The above mentioned MOU regarding the Portuguese bail out shows that international institutions are aware of this, since they require Portugal, despite its financial situation, to “[e]nsure that the Portuguese Competition Authority has sufficient and stable financial means to guarantee its effective and sustained operation”. For skeptical governments, the OFT’s experience appears to be interesting: the OFT is one of the European enforcers with the greater budgetary entitlement, and it is subject to a performance target, having agreed with HM Treasury that it would deliver measured benefits to consumers of five times its annual budget over the period 2008-2011.²⁷

- **How has this arrangement worked in practice?**

Finally, and although it may sound obvious, it is often forgotten that “the future effectiveness of the competition regime remains dependent on the effectiveness of the

²⁶ J. Fingleton, The future of the competition regime: increasing consumer welfare and economic growth, Speech at the Law Society Competition Section Annual Conference, p. 9, (25 May 2011), available at: http://www.oft.gov.uk/shared_oft/speeches/2011/1011.pdf

²⁷ As a result of this commitment, the OFT publishes annual estimates on the impact of its work. The methodologies used to elaborate the estimates are available at: http://www.oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/oft1250.pdf

people who work within it”.²⁸ Competition authorities should be able to recruit, retain and develop the most able officials. In this area there might still be work to do, particularly with regard to developing and retaining experienced staff.²⁹

The issue of staff recruitment is strongly connected to that of “revolving doors”. Whereas in the US such phenomenon is all the more common, moves such as that of Christine Varney are less frequent and not always well understood in Europe (in both directions: from private practice to public enforcement and the reverse).³⁰ The fact that public enforcers do not rely to a greater extent on staff with outside experience has been identified by some stakeholders as a problem.³¹

Lastly, it is worth noting that several EU competition authorities currently employ staff who are not nationals of their same jurisdiction. Such is the case of the OFT (of which Mr. Fingleton is the perfect example), the UK Competition Commission, the Dutch NMa, the Autorité de la Concurrence or the Portuguese Autoridade da Concorrência. This is a welcome development, and one that could give rise to a new market of an EU dimension, that of competition law enforcers.

➤ **What do you think about revolving doors in competition enforcement? Do/Should competition enforcers “compete” to recruit the most able staff?**

B. Balancing effectiveness and procedural guarantees: investigation of cases:

1. European Commission

As noted in the previous section, the EC is often praised for its effective enforcement as it is often criticized for the flaws of its enforcement system in terms of procedural guarantees. Criticism to the latter has been widespread amongst commentators and businessmen, in a way that is liable to affect the prestige of the enforcement system. In this sense, it has

²⁸ J. Fingleton, supra note 26, p. 17.

²⁹ See Global Competition Review, Rating Enforcement 2011, supra note 18, which shows that, in Spain, officials working at the competition authority rest there for an average of 3 years. Other EU authorities listed are Greece and Ireland (4); Poland (4,5); UK (CC), Netherlands, France and Belgium (5); European Commission and Denmark (6); Sweden, Slovak Republic and Portugal (7); UK (OFT) (7,5), Hungary (8); Finland (9); Lithuania and Germany (10); and Italy (11). The international enforcers which, according to this list, appear to be more successful in retaining staff are Japan (17) and Korea and the US (FTC) (13).

³⁰ Chilling Competition, Christine Varney on the move, available at <http://chillingcompetition.com/2011/07/08/christine-varney-on-the-move>

³¹ See Global Competition Review, Rating Enforcement 2011, supra note 18. Spain is the last EU enforcer on the list, which shows that only 4 out of the CNC’s 193 enforcers have worked for more than 5 years in the private sector.

recently been argued that “an institution as talented and prestigious as the Commission does not deserve such unique, and uniquely unsatisfactory, procedures.”³²

Regardless of whether the EC’s legal argument with regard to the compatibility of its institutional architecture with the exigencies flowing from fundamental rights is right or wrong, the EC appears to be –and if it is not, it should be– conscious of the fact that, just like Caesar’s wife, it must be above suspicion.

That might be why over the past few years, and in spite of the refusal to embark on major institutional reforms, the EC has made an effort and attempted to address part of the criticisms by tuning its enforcement procedures in order to introduce additional guarantees, such as peer review panels, Hearing Officers and, more recently, Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU.³³

The Best Practices are a welcome initiative on many fronts; they have brought about enhanced transparency and interesting novelties to the conduct of proceedings before the EC. But they are as inspired by good intentions as they are full of “escape clauses”. Moreover, whereas a binding EU General Code of Procedure could remedy some of the flaws of these flexible best practices, there remain issues –perhaps the most significant ones– that have not been dealt with.³⁴

The lack of a more in-depth review of enforcement procedures has become even more of a “hot” issue in light of the EU’s likely future accession to the European Convention of Human Rights.³⁵ In this sense, it has been argued that “[i]t should be a case for

³² I. Forrester, Due Process in European Competition cases, 34 *European L. Rev* (2009), pp. 817-43. (Identifying three main weaknesses in the system: “the adoption of a decision finding guilt by 27 political appointees who have not heard or studied the evidence; the lack of any hearing before a decision-maker; and the fact that the same case team in the Commission handles both the investigation of the case and the reaching of a decision”).

³³ European Commission, DG Competition, Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU, available at: http://ec.europa.eu/competition/consultations/2010_best_practices/best_practice_articles.pdf

³⁴ L. Ortiz Blanco, Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU: Talking business, or real business?, GCLC Lunch Talk Series, Brussels, 18 March 2010.

³⁵ Fuss has been made over the impact that the EU’s accession to the European Convention on Human Rights could have on competition law enforcement. Traditionally only Member States have been signatories of the Convention, which meant that the application of EU competition law was only subject to the scrutiny of the European court of Human Rights under the standards developed under Article 6 of the ECHR -which enshrines the right to a fair trial- whenever it was carried out by a national body. Admittedly, European Courts have exercised control over the Commission’s enforcement procedures compatibility with fundamental rights. However, EU courts have consistently refused to apply the ECHR directly on the grounds that is not part of EU law (see e.g. *Mannesmannrohren-Werke AG v Commission*, Case T-112/98, ECR II-729). This is relevant because in some aspects, the ECHR and the case law of the Court of Human Rights set out somehow more stringent standards than EU law (in part because competition law sanctions are deemed to be of a quasi-criminal nature for the purposes of the Convention). The situation has changed with the entry into force of the Lisbon Treaty, which provides for the EU’s accession to the Convention.

embarrassment that even though accession to the ECHR has been imminent for years, no relevant adaptation of processes has been made. It would be inexcusable to make no adaptation to current processes in light of currently-voiced concerns. The Commission must be ready to satisfy Art. 6 in some manner”.³⁶

In principle, the EC does not appear to exclude further changes not implying institutional overhauls. Commissioner Almunia has stated that even though he considers that the current system “complies with due process requirements at least at the same level than those based in the judicial principle”, he will be ready to introduce any changes that do not put at risk the fulfillment of the EC’s responsibilities.³⁷

➤ **Mr. Italianer: Do you believe that the EU’s accession to the ECHR may have any repercussion on the commission’s enforcement practices? Following the adoption of best practices, do you envisage any further tuning of the system?**

EU Courts have confirmed that the EC enjoys “freedom of action in the conduct of its investigations in competition cases”.³⁸ Accordingly, the EC –as well as most national competition authorities- enjoys considerable discretion when it comes to the exercise of investigative powers, being only subject to the limitations imposed for the protection of the rights of defense of the companies subject to competition investigations.³⁹

The results of a recent qualitative survey on DG Comp’s activities carried out at the request of the Institution indicated that stakeholders feel that the burden of written requests for information is greater than it needs to be. The aggregate report with the results of the survey indicates that “[t]he main criticisms across the stakeholder groups were, firstly, the volume of data requested - often perceived as unnecessarily large; secondly, the quality of the data requests in terms of questions asked by DG Competition – there were doubts as to whether they provide added value to the investigations; thirdly, the tight deadlines of the requests.”^{40 41} The aggregate report also refers to stakeholder’s specific suggestions with a view to

³⁶ I. Forrester, supra note 33.

³⁷ J. Almunia, State of Play and Future Outlook, European Competition Day, Belgium (21 October, 2010), SPEECH/10/576. (“[E]very time I will consider that our procedures, and the rights of the parties, can be improved without putting at risk the fulfillment of our own responsibilities, I am ready to introduce such changes.”)

³⁸ *Corus UK v Commission*, Case T-48/00, ECR II-2331, at para. 212.

³⁹ See, generally, L. Ortiz Blanco (ed), *EU Competition Procedure* (3rd ed. forthcoming 2012). See also W. Wils, *EU Antitrust Enforcement Powers and Procedural Rights and Guarantees: The Interplay between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights*, 34 *World Competition* 187 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1759209

⁴⁰ European Commission, DG Competition, *Stakeholder Study, Aggregate Report July 2010*, p. 7. available at http://ec.europa.eu/competition/publications/reports/aggregate_report_en.pdf (“Stakeholders’ views on the appropriateness of the burden DG Competition is putting on them in requesting information for investigations were polarised. Respondents from economic consultancies and Member State ministries were most sympathetic. In contrast, many lawyers and respondents from companies felt that the burden of requests is greater than it needs to be, referring with examples in

improving the situation “such as the Commission providing pre-warning of requests and a rationale about how the data will be used, streamlining questionnaires, following a timetable that is determined at the start of the case etc.”

➤ **What is your reaction to the criticism and to stakeholder’s suggestions?**

2. National competition authorities

By and large, respect for the procedural rights of parties is an inconvenience for enforcers, but they are a pain that needs to be endured. So the question becomes rather about how to handle them. So far, the main competition enforcers have opted for the introduction of Hearing Officers or analogous posts with a view to ensuring the respect of the parties’ rights of defense.⁴²

➤ **Is there in your jurisdiction any institution equivalent to the hearing officer/procedural adjudicator? If not, do you foresee introducing any similar post? If there is one, what has been your experience?**

Commenting on the specificities of enforcement procedures in all jurisdictions exceeds the scope of this paper. We will come back to national procedures in section III.I of this paper, which deals, inter alia, with procedural convergence.

C. Enforcement discretion and prioritization

The ability of competition authorities to enforce effectively competition laws is often hindered by the limited human and financial resources enjoyed by these agencies. In these circumstances, a crucial component of any enforcement system necessarily lies on the enforcer’s ability to use those limited resources in the most effective manner possible. The European Treaties and national laws are often silent in this respect, as a consequence of which enforcement prioritization is generally a matter left in principle to each enforcer’s discretion.⁴³

particular to the recent investigations in the pharmaceutical sector. Respondents from business associations and national competition authorities were mixed in their views”).

⁴¹ Questions on the limits that general principles of law impose to requests for information in competition proceedings are currently pending before the General Court in cases where the authors of this paper are involved. See, inter alia, pending case *Cementos Portland Valderrivas v Commission*, Case T-296/11 R. Summary application available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:238:0026:0027:EN:PDF>

⁴² It is interesting to remark that the EC’s Hearing Officer mandate currently only covers the “right to be heard”, which is more narrow than “rights of defence”.

⁴³ For an examination of the notion and rationale of discretion, see W. Wils, *Discretion and Prioritisation in Public Antitrust Enforcement*, in particular EU antitrust enforcement, forthcoming in 34(2) *World Competition* (September 2011), available at <http://ssrn.com/author=456087> For a detailed comparative study of the discretion exercised by competition authorities, see N. Petit, *Cross Country Survey of the*

Enforcement discretion manifests itself in several areas where competition enforcers are entitled to make choices. Some commentators have identified several areas where competition agencies enjoy some degree of discretion.⁴⁴ For the purposes of this paper, however, the term “enforcement discretion” refers to enforcer’s ability to define and pursue an enforcement policy and to prioritize actions and cases according to such policy.

At the first level, competition enforcers face the challenge of striking the right balance between two different but not mutually exclusive approaches to enforcement, namely proactive enforcement (based on ex-officio actions on the part of the enforcer) and reactive enforcement (based on complaints, leniency applications or referrals).

Within the EU, reactive enforcement seems to be prevalent nowadays, even though competition authorities seem to be aware of the risks of tilting the balance too much in favour of such approach and of the fact that agencies must “show ability to pursue cases proactively so that deterrence remains a credible threat.”⁴⁵ Indeed, according to a recent survey, “most [competition authorities] have –deliberately or not- focused their resources on reactive detection techniques and, in particular to the treatment of complaints [referring to Austria, Spain, Italy, France, Belgium, Hungary, Lithuania, Latvia, Sweden, Switzerland and Estonia] (...) By contrast, three countries (Austria, Germany and to a lesser extent the Czech Republic) seem to heavily rely on pro-active detection techniques, and only marginally follow reactive methods.”

➤ **Germany is regarded as an exception. Does this apparent divergence in enforcement approaches in Germany and other jurisdictions really exist? What are its pros and cons?**

Without prejudice to the possible existence of exceptions, it appears that reactive enforcement is the general rule in the EU. This apparent imbalance has been criticized by some of the stakeholders consulted with a view to drafting this paper, who concur with the idea that “the pervasiveness of reactive detection methods threatens the efficiency of competition law enforcement”.⁴⁶

Irrespective of whether one shares this view, shifting to a more proactive attitude by initiating of ex officio cases is not an easy task. Firstly, because as we will see below, some enforcers are under an obligation to thoroughly assess any complaint they receive. Secondly, how does a competition authority do that without incurring in fishing investigations? The initiation of any individual ex officio such cases must be based on indications of some sort pointing towards the existence of anticompetitive practices in a

discretion of competition authorities in the course of their enforcement activities, Report prepared for the LIDC International Conference, Vienna, 22-25 October 2009.

⁴⁴ N. Petit, supra note 44 (distinguishing between “detection discretion”, “target discretion”, “initiation discretion” and “outcome discretion”). See also W. Wils, supra note 44.

⁴⁵ See ICN, Anti-Cartel Enforcement Manual, Chapter IV- Cartel case initiation, section 3.3, cited by N. Petit, supra note 44, footnote, 37.

⁴⁶ N. Petit, supra note 44, p. 6.

given market, and such indications are not common and rarely obvious. They may originate from citizens other than complainants,⁴⁷ from the press (news appearing on the press have triggered several investigations by the Spanish CNC in which the authors have been involved), from the results obtained from the use of market screening instruments,⁴⁸ and from the results of sector enquiries.⁴⁹ The latter has been the most common, at least as far as the EC is concerned.⁵⁰ Nonetheless, certain stakeholders consulted have conveyed to the authors their concerns over the use of sector enquires, echoing in some sense the opinions formulated in the past by John Fingleton in relation to Market Investigation References.⁵¹ In particular, it was submitted that sector inquiries may oblige companies who comply with the law to devote extensive time and resources to a long-lasting investigation, that they may lead to putting “on hold” infringement proceedings concerning the sector at stake (as allegedly happened at the time the pharmaceutical inquiry was ongoing), that the resource requirements for the enforcer are excessive, or that they lack any deterrent effect with regard to other sectors.

- **Do you believe more proactive enforcement is needed? What would be your preferred way for initiating cases ex officio? (On the basis of screenings of market performance? On the basis of sector inquiries? On the basis of other information?) What indications on the possible existence of an infringement are necessary for you to initiate a case?**

⁴⁷ See Notice on the handling of complaints, supra note 2, para. 4. The EC has a special website to collect information about suspected infringements of the EU competition rules (<http://europa.eu.int/dgcomp/info-on-anti-competitive-practices>).

⁴⁸ N. Petit, supra note 44, p. 10, footnote 42.

⁴⁹ The triggering of this provision, contrary to traditional investigations, does not require any indication that an infringement may have occurred (L. Ortiz Blanco (ed.), EC Competition Procedure (2nd ed. 2006), at 5.04) and only requires a finding that “the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market”.

⁵⁰ Report on the functioning of Regulation 1/2003, supra note 12, at paras. 8 and 11. The launching of large scale inquiries in key sectors has been regarded by the EC as one of the positive consequences of decentralisation, even though the EC has also undertaken sector investigations under Regulation 17/62. According to the EC’s Report on the functioning of Regulation 1/2003, “[s]ector inquiries have become one of [the EC’s] key investigative tools and have enabled it to identify shortcomings in the competitive process of the gas and electricity, retail banking, business insurance and pharmaceutical sectors. They have provided a wealth of factual material that has supported the Commission’s enforcement of Articles [101] and [102] [TFEU] in individual cases”.

⁵¹ J. Fingleton, supra note 26, p.13. (“MIRs carry a high risk of chilling competition. Businesses can be investigated, over considerable time and at a substantial cost, even when they have complied fully with the relevant competition and consumer law. At the end of those investigations, the bespoke and specific nature of the findings means that MIRs result in specific regulation (structural remedies aside) different for each market, that requires monitoring and adjustment. This may prove to be less efficient than a general prohibition. The specific nature of the finding in turn means that MIR decisions have a very limited deterrent effect in other markets. In contrast, the model of enforcement of CA98 eschews a regulatory approach and puts compliance firmly within the responsibility of companies”).

It must nevertheless be acknowledged that not all competition authorities have the ability to shift towards more proactive enforcement. In certain jurisdictions, such as Portugal, France or Spain, the law places upon competition authorities a legal duty to respond to any complaint they receive on the merits, subject to strict judicial review.⁵² Such obligations consume a significant proportion of resources thus minimising the opportunity for proactive or ex officio interventions.

The situation varies considerably amongst Member States. In fact, the EC's Report on the functioning of Regulation 1/2003 concluded that "the ability of Member States' competition authorities to formally set enforcement priorities" was an area where divergences in national legislations were particularly acute and which "may merit further examination and reflection".⁵³ The findings of the report were focused precisely on negative prioritization.

Three of the jurisdictions present at the roundtable (France, Germany and the UK) have been referred to as the primary examples of three different systems.⁵⁴ To the best of our knowledge, in France the Autorité de la Concurrence cannot reject complaints for lack of priority interest; any complaint related to facts falling under the Autorité's sphere of competences must be investigated and a formal decision shall be adopted. In the UK, the OFT is compelled by the law to respond within 90 days to so-called "super-complaints" lodged by designated consumer bodies, but other rejection decisions have also been found to be appealable to the CAT,⁵⁵ and this has reportedly had an "enormous impact" on enforcement.⁵⁶ By contrast, in Germany there is no formal status of "complainant"; the Bundeskartellamt enjoys full discretion in this regard, and Courts decline to review their rejection decisions.⁵⁷

➤ **What are the pros and cons of your system? How does the obligation to deal with complaints affect those under it?**

We have examined the situation concerning rejection decisions at the national levels; let's now focus briefly on the EC:

The EC has traditionally enjoyed a greater discretion to reject, shelve or prioritize cases by virtue of its use of the notion of "Community interest". As the EC states –paraphrasing the EU Court's case law- in the notice on the handling of complaints, it "is entitled to give different degrees of priority to complaints made to it and may refer to the Community interest presented by a case as a criterion of priority. The Commission may reject a

⁵² Other jurisdictions where similar obligations exist are, amongst others, Belgium, Estonia, Latvia, Lithuania or Sweden). See N. Petit, supra note 44, p. 6.

⁵³ EC's Report on the functioning of Regulation 1/2003, supra note 12, para. 33.

⁵⁴ W. Wils, supra note 44, p. 24.

⁵⁵ CAT Judgment, *Aquavitae* [2003] CAT 17.

⁵⁶ J. Fingleton, UK Competition Policy: the first decade. Speech at the 40th Anniversary of Cleary Gottlieb Steen & Hamilton, LLP (11 May 2011), p. 5.

⁵⁷ W. Wils, supra note 44, p. 24

complaint when it considers that the case does not display a sufficient Community interest to justify further investigation”.⁵⁸

The concept of “Community interest” thus allows the EC to exercise a considerable degree of discretion to reject complaints or to decide to abandon the investigation of a case. As explained by AG Ruiz-Jarabo, “the lack of Community interest is no more than an abbreviated formula, a short-cut to describe, succinctly, the discretion –neither unfettered nor arbitrary, since it is subject to judicial review- which the Treaties confer on the Commission for its examination of a complaint alleging the existence of anti-competitive practices. The substance of that concept varies considerably, to the same extent as the widely differing circumstances which surround cases involving infringements of the competition rules”.⁵⁹ Whereas it is true that the EC’s discretion has always been subject to the review of the EU Courts, it has also been argued that the judicial scrutiny over such decisions has been rather lenient. In the *Automec* Judgment, the then Court of First Instance endorsed a narrow conception of the judicial scrutiny of such decisions by stating that “[w]here, as in this case, the Commission has decided to close the file on a complaint without carrying out an investigation, the review of legality which the Court must undertake focuses on whether or not the contested decision is based on materially incorrect facts or is vitiated by an error of law, a manifest error of appraisal or misuse of powers”.⁶⁰ In addition to the narrow scope of judicial review, experience reveals that EU Courts have traditionally adopted a deferential attitude towards the EC’s decisions in this regard.

A recent Judgment of the General Court (“GC”) may mark a break with respect to this traditional attitude.⁶¹ In its *CEAHR* Judgment of 15 December 2010, the Court undertook a stricter scrutiny of the EC’s arguments on the lack of Community interest of investigating a complaint related to an alleged refusal to supply spare parts of luxury watches to independent repairers on the part of luxury watchmakers and distributors. After noting that the Commission’s main considerations were vitiated by insufficient reasoning, failure to take account of relevant factors and manifest errors of assessment, the GC examined the

⁵⁸ *Ufex and others v. Commission*, Case C-119/97 P, ECR I-1341, para. 88. *Automec v. Commission*, Case T-24/90, ECR II-2223, paras. 77 and 85.

⁵⁹ *IECC v. Commission*, Case C-449/09 P, Opinion of AG Ruiz-Jarabo of 11 January 2001, at para. 57.

⁶⁰ *Automec v. Commission*, Case T-24/90, ECR II-2223, para. 80. See also para. 85: “[Unlike the civil courts, whose task is to safeguard the individual rights of private persons in their relations inter se, an administrative authority must act in the public interest. Consequently, the Commission is entitled to refer to the Community interest in order to determine the degree of priority to be applied to the various cases brought to its notice. This does not amount to removing action by the Commission from the scope of judicial review, since, in view of the requirement to provide a statement of reasons laid down by Article 190 of the Treaty, the Commission cannot merely refer to the Community interest in the abstract. It must set out the legal and factual considerations which led it to conclude that there was insufficient Community interest to justify investigation of the case. It is therefore by reviewing the legality of those reasons that the Court can review the Commission’s action”.

⁶¹ See A. Lamadrid de Pablo, *The General Court of the European Union annuls a Commission’s decision limiting its discretion to reject complaints and addressing the issue of market definition in the luxury watches repair services and spare parts markets (CEAHR)*, 15 December 2010, e-Competitions, No36450, available at www.concurrences.com

sole remaining ground, which related to national authorities and courts being well placed to deal with the complaint, an argument that had always been a winner for the EC since the *Automec* Judgment.⁶² The GC noted that the conduct at issue affected various national markets and that, consequently, “the decision of a single national authority or court could not make good the impairment of competition”, and distinguished its precedents endorsing prior rejections by the Commission under the argument that others were well placed by highlighting that those precedents “concerned situations in which the extent of the practices complained of were essentially limited to the territory of a single Member State and proceedings had already been brought before those authorities or courts“. Moreover, the Judgment states that “even if the national authorities and courts are well placed to address the possible infringement (...) that consideration alone is insufficient to support the Commission’s final conclusion that there is no sufficient Community interest“.⁶³

Whereas previous case law imposed upon the Commission the burden of “considering attentively all the matters of fact and of law which the applicant brought to its attention”, the GC has, by virtue of its in-depth review, turned those words -until now a mere formality- into a real, practical, obligation. In essence, this Judgment appears to replace the “manifest error of appraisal” test, with one based on assessing whether “action at European Union level could be more effective than various actions at national level”.⁶⁴

➤ **In light of the CEAHR Judgment of December 2010, does the EC plan to modify its current practices?**

And, on a related issue, the Report on the functioning of Regulation 1/2003 acknowledged that “it should be further examined how to streamline the handling of complaints that do not give rise to priority cases in accordance with the case law of the Community Courts”.⁶⁵ Has any such exercise been undertaken?

In light of the above, and notwithstanding the fact that prioritization decisions are subject to judicial review, it is a fact that all competition enforcers retain some degree of discretion with regard to the activities, practices and/or sectors on which to focus or not to focus their resources. As noted by commentators, “the idea that [competition authorities] can equally and efficiently deal with all complaints, markets and practices is unrealistic from a practical standpoint”,⁶⁶ and therefore it is hard to contest the notion that effective enforcement requires that enforcers enjoy a certain degree of discretion as to which cases to target and

⁶² *Automec v. Commission*, Case T-24/90, ECR II-2223, paras. 87-96.

⁶³ *Confédération européenne des associations d’horlogers-réparateurs (CEAHR) v. Commission*, Case T-427/08, paras. 157-178.

⁶⁴ *Id.*, at para. 176.

⁶⁵ Report on the functioning of Regulation 1/2003, para.16.

⁶⁶ N. Petit, *supra* note 44, p. 16.

which to abandon.⁶⁷ At the EU level, EU Courts have confirmed that the EC “is responsible for defining and implementing the orientation of Community competition policy” and that “in order to perform that task effectively (...) it is entitled to give differing degrees of priority to the complaints brought before it”.⁶⁸

On the other hand, too much “target discretion” in this regard may give rise to arbitrary discrimination amongst equally worthy cases. Such risk is aggravated given that, despite the fact that most -if not all- enforcers engage in priority setting, prioritization criteria are most often undisclosed and “shrouded in mystery.”⁶⁹ That is why, in order to avoid “discretion” becoming “arbitrary discrimination”, some commentators and enforcers have advocated for “[a] clear, publicized, legal basis for priority setting” or “prioritization criteria,”⁷⁰ as different from open-textured concepts –such as the notion of “Community interest”- which do not provide much guidance for stable enforcement nor predictability for business. The OFT has been cited by some stakeholders as an example to follow, since in October 2008 it issued relatively detailed prioritisation principles.⁷¹

➤ **Should prioritization criteria be published ex ante? Mr. Fingleton: What is your experience with published prioritization criteria?**

And, speaking about pre-stated prioritization criteria, would it make sense to establish priorities at the EU level, or do you rather believe in letting each enforcer pursue effectiveness in their own way?

The last elements for discussion that we would want to bring to the table are related to how EU competition authorities are currently prioritizing their work and to the effects that such decisions may have on the effectiveness of EU competition enforcement:

At the time Regulation 1/2003 was adopted, the EC announced that it “*intended to refocus its enforcement resources*” firstly “*on the most serious infringements*” and, secondly, in “*cases in relation to which the Commission should act with a view to define Community competition policy and/or to ensure coherent application of Articles [101] and [102]*”.⁷²

⁶⁷ For an overview of the reasons which may justify not dealing with all cases, see W. Wils, *supra* note 44, p. 25 et seq.

⁶⁸ See Judgments in *Masterfoods v. HB Ice Cream*, Case C-344/98, ECR I 11369, para. 45; *Ufex and others v. Commission*, Case C-119/97 P, ECR I-1341, para. 88; *Automec v. Commission*, Case T-24/90, ECR II-2223, paras. 73-77.

⁶⁹ See also N. Petit, *supra* note 44, p. 15.

⁷⁰ See N. Petit, *supra* note 44, p. 17. See also, International Competition Network, *Anti Cartel Enforcement Manual*, p. 17: “Publishing such criteria may further demonstrate openness, objectivity and accountability”.

⁷¹ OFT, *Prioritisation Principles* (October 2008). Available at http://www.of.gov.uk/shared_of/about_of/oft953.pdf

⁷² Notice on the handling of complaints, *supra* note 2, para. 11.

In practice, it has been submitted to the authors –whom in this case share the perception– that enforcement priorities are nowadays determined firstly on the basis of the nature of the practice, and, secondly, particularly concerning abuse of dominance cases, on the basis of the affected sector/market.^{73 74}

Cartels, as the “cancer of open market economy”, are logically at the forefront of the agenda.⁷⁵ In fact, one of the intended and most praised consequences of the “modernization” carried out by Regulation 1/2003 has been the freeing up of resources that were previously devoted to the operation of the notification system and their deployment on the prosecution of cartels, thus enabling the EC to address criticism over the insufficient attention it had paid in the past to cartel conduct.⁷⁶ This is an area where change has been most noticeable; as noted by I. Forrester, nowadays “*the Commission’s vigor in the war against cartels has passed striking and is approaching iconic.*”⁷⁷ Reality has exceeded expectations, and competition enforcers should be commended for it.

Non-cartel enforcement, and particularly abuses of dominance, appears to occur mainly in network industries or in information, communication and technology markets characterized by network effects. Outside cartels and network industries, there appears to be a widespread perception that the EC has chosen to shift from intervention by means of individual cases to more general guidance.⁷⁸

Stakeholders have conveyed to the authors of this paper the impression that to a great extent NCAs have adopted similar prioritisation decisions, focusing eminently on cartels and network industries. We are not sure of the extent to which this may be the case in other

⁷³ In the latter case, it is also argued that abuse of dominance cases in network industries are often put to an end by virtue of commitment decisions. See section II.E.2 below.

⁷⁴ Stakeholders have also observed that some types of infringements are excluded from the authorities’ agendas (e.g. collective dominance and excessive pricing cases).

⁷⁵ See Notice on the handling of complaints, supra note 2, para. 4. See also Comm’n, Report on Competition Policy (2005), available at: http://ec.europa.eu/competition/publications/annual_report/2005/en.pdf, at 25: “Whistleblowing and leniency applications are given the highest priority. Cartels are the worst form of anticompetitive activity and the Commission devotes significant resources to taking action against them”. See also J. Almunia, Taking stock and looking forward: a year at the helm of EU competition, Revue Concurrences conference: New frontiers of Antitrust 2011, SPEECH/11/96 (11 February 2011): “The importance of enforcement is clearest in our fight against cartels, which I regard as the most serious offence in competition law (...) The reason why I always will be tough on cartels is very simple, and has to do with the priorities of the Commission policies”.

⁷⁶ James S. Venit, Future Competition Law, in C.D. Ehlermann & L. Laudati (eds.) 1997 European Competition Law Annual: Objectives of Competition Policy 567 at 567-68.

⁷⁷ Forrester, supra note 33, p. 818.

⁷⁸ We will come back to this idea on the next section of the paper.

jurisdictions, but such appreciation does accurately match the reality of Spain, a jurisdiction we know well.⁷⁹

This state of affairs is seen by some as unfortunate given the current background of EU competition enforcement. It is argued that, by focusing almost exclusively on restrictions by object (a category that, moreover, is being enlarged by European enforcers),⁸⁰ EU competition authorities are failing to provide sufficient precedents on the application of Article 101(1) and, most worryingly, of Article 101(3), on which there is little experience,⁸¹ particularly on the part of national judges.⁸² This observed lack of precedents and individual guidance is allegedly aggravated by the non-adoption of inapplicability decisions by the EC,⁸³ the inability of national enforcers to adopt such inapplicability decisions following *Tele2Polska*,⁸⁴ as well as by the scarce use of the possibility to issue informal guidance on novel issues. Against this background, commentators have submitted that “the current system is in danger of getting out of balance, and that EU competition law is at risk of stagnating if this trend continued and no adjustments are made”.⁸⁵

⁷⁹ L. Ortiz Blanco and P. Ibañez Colomo, *Evolving priorities and rising standards: Spanish Law on abuses of market power in the Light of the 2008 Guidance Paper, European Competition Law: The impact of the Commission’s Guidance on Article 102* (L. Pace ed. 2011).

⁸⁰ See A. Lamadrid de Pablo, *Information Exchange=cartel?*, *Chillin’Competition* (9 March 2011), available at <http://chillingcompetition.com/2011/03/09/information-exchangecartel/> (noting in relation to the identification of information exchanges as cartels: “[m]y main concern lies on the spill-over effects of the content of the Guidelines. The European Commission has a role as *primus inter pares* that carries with it a special responsibility. In this sense, it may not have been prudent to include this rather novel and ample statements because they run the risk of being overstretched by other enforcers. I fear that the Commission may be providing an “alibi” to enforcers willing to avoid the burden of undertaking sophisticated analyses. Hasn’t the Commission noticed that enforcement at the national level tends nowadays to automatically resort to the object category?”); and A. Lamadrid de Pablo, *RE: Information Exchange=cartel?*, *Chillin’Competition* (9 March 2011), available at <http://chillingcompetition.com/2011/03/29/re-information-exchangecartel>

⁸¹ See Global Competition Law Centre, *The Directly Applicable Exception System and the Direct Applicability of Article 81(3) EC: Positive Enforcement and Legal Certainty, Towards an optimal enforcement of competition rules in Europe, Time for a Review of Regulation 1/2003*, GCLC Annual Conference (11-12 June 2009) (M.Merola ad D. Waelbroeck eds. 2010), pp. 7-122.

⁸² *Id.*, at. 67 (“In particular, the lack of transparency surrounding the application of Article [101(3)] may help to explain two trends in litigation before national courts: (i) an inclination by national judges to shy away from making a positive application of Article [101(3)] combined with a preference for shifting the substantive positive analysis to Article [101(1)]; and (ii) the tendency to conclude that restrictive clauses or agreements which fall outside the scope of a block exemption are automatically incapable of fulfilling the conditions set out in Article [101(3)] to warrant individual exemption. If confirmed, both trends create the risk that Article [101(3)] will hardly ever be applied by national courts. This is a problematic development since it falls almost entirely to national courts to apply Article [101(3)].”

⁸³ Report on the functioning of Regulation 1/2003, *supra* note 12, para. 15.

⁸⁴ *Prezes Urzedu Ochrony Konkurencji i Konsumentow v. Tele2 Polska sp. Z o.o.*, Case C-375/09. not yet published.

⁸⁵ Global Competition Law Centre, *supra* note 83, p. 71.

In view of the above, stakeholders consulted by the authors criticize enforcers' reluctance to take on "smaller" cases which could give rise to useful precedents. As expressed recently by Mr. Fingleton, "it is important to strike the right balance: between "bread and butter" or routine cases that increase the probability of deterrence and more complex and novel questions"⁸⁶. Indeed, [v]ery often the main benefit of enforcement action in a given case lies however precisely in the deterrent and precedent effect beyond the case concerned."⁸⁷

- **Are EU competition enforcers deploying their resources adequately with respect to the fulfillment of their mission to set useful precedents and provide guidance in individual cases?**

D. From hard to soft enforcement of EU competition law? ⁸⁸

The EC's Report on the functioning of Regulation 1/2003 acknowledged that the system change had implied a shift "from giving comfort to individual agreements to a system in which the emphasis is on general guidance that can be helpful to numerous undertakings and other enforcers". The emphasis on general guidance on the part of the EC has been undeniable, and considerable resources have been devoted to drafting white and green papers, block exemption regulations, notices, guidelines, guidance papers, and different sorts of reports. Other competition enforcers have adopted a similar attitude by issuing similar documents. As a result, a great part of enforcer's activities have moved from direct intervention and the achievement of deterrence through individual cases ("hard enforcement") to indirect intervention and the fostering of compliance by virtue of non-decisional instruments that strongly influence the behavior of economic operators ("soft enforcement").

Enforcers' efforts to foster clarity and certainty by publicly stating their understanding of the law as well as the principles and criteria that will govern their action are generally welcome, and so is the combination of "hard" and "soft" enforcement techniques. The OFT's Chief Executive, John Fingleton, recently stated that enforcers "should aim to change business behavior rather than simply punishing as many transgressors it can, complementing targeted and hard-hitting enforcement and deterrence with help and advice to business wanting to comply with the law. This "softer" work, into which category I would include the short form opinions and extensive guidance produced by the OFT, will allow the new agency to optimize benefits to the economy from its interventions. Related to this, in many cases, the right intervention is no intervention. A great deal of being an effective markets agency relies on allowing the market to sort issues out, intervening only where one can clearly achieve net improvements, and without unintended consequences".⁸⁹

⁸⁶ J. Fingleton, supra note 57.

⁸⁷ W. Wils, supra note 44, p. 27, citing the OFT's Prioritisation Principles, supra note 72, at 113.

⁸⁸ See, for an overview of this trend, N. Petit and M. Rato, From Hard to Soft Enforcement of EC Competition Law- A Bestiary of 'Sunshine' Enforcement Instruments (2008). Available at <http://ssrn.com/abstract=1270109>

⁸⁹ J. Fingleton, supra note 27, p. 8.

Along these lines, the OFT has recently undertaken a very interesting study on “drivers of compliance”.⁹⁰

➤ **How do competition authorities determine what is the right mix between ensuring deterrence through individual cases and fostering compliance by virtue of “soft enforcement”?**

Regardless of the above, the prominent role recently acquired by soft enforcement in EU competition law has not been without criticism.

Stakeholders consulted by the authors have submitted that general guidance is useful but that it cannot replace the guidance offered by individual decisions. According to these sources, the uncertainty caused by the lack of positive decisions concerning restrictions by their effect or the application of Article 101(3) has not been and cannot be dissipated by general guidelines. Similar concerns have been voiced out by some commentators, who argue that the precedential value of non-decisional soft law instruments “is by definition limited since they (i) cannot anticipate everything, and in particular, they cannot keep abreast of all commercial and technological development; (ii) cannot be adapted, and changed, so swiftly as individual decisions; (iii) rely on general, abstract, wording that often gives rise to interpretative difficulties; (iv) are not necessarily based on experience acquired as a result of real cases and regular interactions with private parties but may also be based on more theoretical and general views”.⁹¹

It has also been argued that other non-decisional instruments -such as sector reports (including the “Issues Report” and “Final Report” adopted pursuant to Article 17 of Regulation 1/2003), avis or recommendations adopted by some competition authorities-⁹² are somehow akin to positive decisions in the making: they contain only provisional findings and do not prescribe remedies. Yet, they are a considerable source of concern for the companies targeted in such reports. They make individualized statements on market definition, dominance, abuse and so on. In practice, they may trigger follow-on complaints from third parties, litigation, etc. In contrast with positive decisions adopted as a result of formal proceedings, the companies targeted by such reports enjoy few procedural rights.⁹³

Further comments on the use of non-decisional soft law instruments by EU competition enforcers have focused on the fact that they have gone beyond clarifying the state of the law as defined by EU Courts and have rather been used to advance progressive interpretations

⁹⁰ See OFT, Drives of Compliance and Non-Compliance with Competition Law (May 2010). Available at <http://www.of.gov.uk/OFTwork/publications/publication-categories/reports/competition-policy/oft1227>

⁹¹ N. Petit, supra note 44., p. 40.

⁹² For instance, the French competition authority has an important track record in relation to such reports. The French competition authority adopted earlier this year a report (avis) on Google and more generally on search advertising. See N. Petit, Word of Warning, Chilling Competition (14 December 2010), available at <http://chillingcompetition.com/2010/12/14/googleopoly>

⁹³ See N. Petit and A. Lamadrid de Pablo, Fordham Brainstorming Room (I), Chilling Competition (15 June 2011), available at <http://chillingcompetition.com/2011/06/15/fordham-brainstorming-room-i/>

of the law or to move the law forward in a given direction.⁹⁴ One stakeholder has pointed out at the possibility (intended by some and feared by others) that legal innovations contained in soft law instruments may end up impacting the case law of the Courts, perhaps even without the Courts being fully aware of it.

The EC has traditionally argued that leading such developments is part of its mission,⁹⁵ and such views enjoy the support of some –but not all- commentators.⁹⁶ Advocate General Kokott, for instance, made it clear, precisely in relation to an important Article 102 case, that “the Commission would have to act within the framework prescribed for it by Article [102 TFEU] as interpreted by the Court of Justice.”⁹⁷ A member of the General Court has

⁹⁴ VW-Audi Forhandlerforeningen, acting on behalf of Vulcan Silkeborg A/S v Skandinavisk Motor Co. A/S , Opinion AG of 27 April 2006, Case C-125/05, at para. 37: “[T]he communications in question do not have the nature of binding legal rules, but serve to clarify how the applicable primary and secondary Community legal rules are to be interpreted. (...) Given the scale and complexity of Community competition rules, one might also sometimes observe that the Commission, as the responsible executive body, sometimes has a ‘progressive perception’.” (Emphasis added).

⁹⁵ The fact that the EC has in certain occasions gone beyond the principles laid down by EU Courts was recently acknowledged by Commissioner Almunia: “The decisive turn in terms of economic analysis took place after 1990, when we started to introduce such analysis dealing with mergers. In the two decades since then, we have extended this approach to our competition enforcement industries – most recently to exclusionary abuse of dominance. We were not led by the Court in these developments. While the Court focused on types of conduct, we tried to look more at the effects of the conduct (...) I believe we have the responsibility to lead this sort of development; a responsibility which it would be very difficult for a court of justice to fulfill.” See J. Almunia, SPEECH/10/449, Due process and competition enforcement IBA, 14th Annual Competition Conference Florence (17 September 2010). See P.Lowe, Enforcement Authorities, 2005 Fordham Corp L. Inst 2005, (B.Hawk ed. 2006) p. 52: “One counter-argument that has been raised is that it is difficult to engage in policy developments in face of the existing case law of the European Courts. I do not agree with this argument. Of course, the Commission’s decisions are controlled by the Courts, but history has shown clearly that competition law is not written in stone, either in the EU or in the United States. Competition law deals with economic issues and therefore has an in-built evolution in thinking, as our understanding of economic issues evolves. Furthermore, in reviewing cases involving complex economic assessments, the European Courts have left a certain margin of appreciation to the first adjudicator, namely the Commission. Therefore, although I am not saying that I foresee a radical shift in our policy, I do think that certain adjustments in comparison to the existing policy and case-law are and should be possible- while of course acknowledging that the Courts have the final say”.

⁹⁶ See, for instance, A. Komninos, EU Competition Law and Policy in 2025: Modernization-Mission Accomplished?, 1 CPI Antitrust Journal, (December 2010), p. 4: “Voices that criticize the Commission (or rather DG-COMP) for embarking on an approach of conflict with existing case-law on Article 102 TFEU, are simply misplaced. While there is no doubt that the EU Courts are the only organs that can interpret Article 102 TFEU, it is equally true that it is not and should not be the business of the Courts to set competition policy in Europe. Competition policy is determined only by the Commission through the cases it decides to bring- or not to bring. This is certainly not an affront to the Luxembourg Courts. The latter can always review the decisions taken by the Commission, including decisions rejecting complaints in Article 102 TFEU cases, but within very specific limits”

⁹⁷ British Airways v Commission, Case C-95/04P, Opinion of Advocate General Kokott of 23 February 2006, at para. 28.

also stated unambiguously –albeit in a personal capacity- that “an abuse of a dominant position is what the Court says it is”.⁹⁸

These divergences –which reportedly also exist within the EC, particularly amongst members of its Legal Service not so fond of effects-based approaches- prompted the decision not to adopt Guidelines on abuse of dominance but rather a “Guidance document” aimed at stating the Commission’s priorities. Stakeholders consulted by the authors have also underlined the risks that may arise from such compromise solutions, and point precisely at the Guidance on Article 102 as an example of a compromise document that in reality does not provide clear guidance nor safe harbors.

- **What is your reaction to these comments? What are the pros and cons of moving from positive enforcement to general guidance through soft law instruments? Is it legitimate for enforcers to use guidelines to advance progressive interpretations or developments of the law?**

As clearly stated on the above-quoted paragraph of the report on the functioning of Regulation 1/2003, the general guidance documents issued by the EC are addressed to the companies that must undertake the self-assessment of their practices as well as to other competition enforcers. In the words of one stakeholder consulted by the authors: “the Commission writes the music and expects national competition authorities and undertakings to play it”.

How do other enforcers react to that assessment? The German Federal Cartel Office, for instance, has been heavily criticized for sticking to precedent instead of fully embracing “effects-based” approaches; in its 2006 enforcement ranking, Global Competition Review explained that “Federal Cartel Office was once perhaps the world’s most influential antitrust authority [but] now finds itself adrift from the mainstream, clinging stubbornly to the per se rule of anticompetitive behavior”. A source was also quoted as saying that “[i]t used to be a luminary, but it has gradually become more isolated and out of touch.”⁹⁹ Ouch!

- **What is the Bundeskartellamt’s reaction to this criticism? Is the Bundeskartellamt isolated or “clinging against the mainstream”?**

⁹⁸ Judge Meij quoted by W. Wils, supra note 44, footnote 9.

⁹⁹ Global Competition Review, Ranking Enforcement 2006.

E. Enforcement based on negotiated solutions

Another most visible trend in EU competition law enforcement is the increased reliance on “negotiated solutions”, a concept that we understand as encompassing commitments, settlements and leniency.¹⁰⁰ The EC refusal to admit that settlements imply any negotiation, even though it admits that there will be discussions by means of which it could be persuaded to modify its initial stance¹⁰¹ reminds us of Magritte’s “ceci n’est pas une pipe.”¹⁰² Some commentators have even argued that the “Commission’s consistent negation of any negotiation space may well be part of its bargaining strategy”.¹⁰³

For the purposes of this paper and the roundtable discussion, we will focus on settlements and commitments:

1. Settlements

In 2008, the EC amended Regulation 1/2003 in order to introduce a new settlement procedure in cartel cases,¹⁰⁴ pursuant to which the parties subject to a cartel investigation may acknowledge their participation in a cartel and their liability for such infringement in exchange for the opportunity to discuss with the EC about the nature, duration and effects

¹⁰⁰ For a similar understanding of the concept of “negotiated procedures”, see also D. Gerard, *Breaking the EU antitrust enforcement deadlock: re-empowering the courts?*, forthcoming in 36 *European Law Review* (2011); D. Waelbroeck, *Le développement en droit de la européen de la concurrence des solutions négociées (engagements, clémence, non-contestation des faits et transactions): que va-t-il rester aux juges?*, GCLC Working Paper 1/08, available at <http://www.gclc.coleurope.eu>; and D. Waelbroeck, *The development of a new “settlement culture” in competition cases. What is left to the Courts?*, *Alternative Enforcement Techniques in EC competition law* (C. Gheur and N. Petit eds. 2009).

¹⁰¹ See Press Release, *Antitrust: Commission calls for comments in a draft legislative package to introduce settlement procedure for cartels – frequently asked questions- MEMO/07/433* (26 October 2007) (stating that it “will not give companies the chance to negotiate with the Commission as to the existence of an infringement of Community law or the appropriate sanction”, but admitting that “however, parties will also be heard effectively on the framework of the settlement procedure and parties will therefore have the opportunity to influence the Commission’s objections through argument”).

¹⁰² See L. Ortiz Blanco, A. Givaja Sanz, A. Lamadrid de Pablo, “Fine Arts in Brussels: Punishment and Settlement of Cartel Cases Under EC Competition Law” in Raffaelli (ed.) *VIII Antitrust: Between EC Law and National Law*. For similar views on this respect See also M. J. English, *An offer you can’t refuse? An analysis of EC cartel settlement*, *Derecho de la competencia europeo y español Vol. X* (L. Ortiz Blanco and E. Sanfrutos Cano eds. 2009). M. Schinkel, *Bargaining in the Shadow of European Settlement Procedure for Cartels*, *ACLE Working Paper 2010-17*, available at <http://ssrn.acle.nl>, p. 16 (arguing that since the basic amount to which the settlement reduction is applied is “a function of the Commission’s assessment of the case, which in turn, depends on the information the Commission has and how it chooses to interpret that information (...), the fine ultimately levied (...) is open to negotiation”).

¹⁰³ M. Schinkel, *supra* note 103, p. 2.

¹⁰⁴ Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases (Text with EEA relevance), OJ L 171 (1 July 2008), pp. 3–5; Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases (Text with EEA relevance), OJ C 167 (2 July 2008), pp. 1–6

of their infringement and of their participation on it and for a reduction on their fine.¹⁰⁵ The introduction of the settlements procedure in EU competition law was intended to “enable the Commission to handle faster and more efficiently cartel cases”. Following its first experiences in the DRAMs and Animal Feed cases, the EC has manifested its satisfaction with the use of this tool.¹⁰⁶

Regardless of certain technical questions that arise in relation to the practical application of settlements,¹⁰⁷ for the purposes of this paper and of the roundtable discussion it is sufficient to underline that the European experience has revealed the potential contribution of settlements to effective enforcement, and that in spite of such positive experiences, the laws of several EU Member States do not expressly provide for settlements procedure. Stakeholders have lamented this situation, and have advocated for the introduction of formal settlement procedures all across the EU.

- **Do the enforcers at this roundtable have similar procedures in their own jurisdictions? If so, what has been your experience? Otherwise, do you contemplate having this type of procedures in the future?**

2. Commitment decisions

As recently acknowledged by Commissioner Almunia, “[o]ne trend that is emerging from a growing number of antitrust cases is our search for effective –and sometimes structural– commitments when they would more efficiently prevent competition concerns in the longer term”.

¹⁰⁵ The fine reduction will be of 10% over the amount resulting following the application of the 10% cap. Moreover, any specific increase for deterrence used in regard of the settling party will not exceed multiplication by two. See K. Mehta and M.L. Tierno Centella, EU Settlement Procedure: Public Enforcement Policy Perspective, European Competition Law Annual 2008: Antitrust Settlements under EC Competition Law (C.D. Ehlermann and M. Marquis (eds. 2009), pp. 391-422.

¹⁰⁶ Almunia, Concurrences: “the new tool works well and is becoming a practical option to handle cases”. European Union Press Release SPEECH/11/96, New Frontiers of Antitrust 2011, EU competition Revue Concurrences conference (11 February 2011) “As to settlements, of the five cartel decisions adopted in the post months, we’ve already used this new instrument twice, in the DRAMs and Animal Feed cases. The DRAMs case –in which ten companies were fined e 330 million, including a 10% reduction for settling- was a Milestone. The benefits of setting were immediately apparent: there have been no appeals – which in standard procedures can last for years- and our investigations gave rise to a ripple effect of leniency applications in related sectors. The other settlement case to date –Animal Feed Phosphates- was also a success. (...) Although nota ll the parties settled –we call this a hybrid settlement case-, the procedure proved to be highly efficient, including the fact that we expect only one appeal.”. See also Interview with Alexander Italianer, The Antitrust Source, (18 February 2010), available at: http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/apr11-italianerintrvw_4-20f.authcheckdam.pdf

¹⁰⁷ See L. Ortiz Blanco, A. Givaja Sanz and A. Lamadrid de Pablo, supra note 103; M. Siragusa and E. Guerri, Antitrust Settlements under EC Competition Law: The Point of View of the Defendants, European Competition Law Annual 2008 (C.D. Ehlermann and M. Marquis eds. 2009), pp. 251-260. M. Schinkel, supra note 103; M. English, supra note 103; S.P. Brankin, The first cases under the Commission’s cartel-settlement procedure: problems solved?, 4 European Comp. L. Rev. 165 (2011).

The possibility for the EC to make commitments offered by undertakings binding and enforceable upon them was one of the novelties of Regulation 1/2003.¹⁰⁸ In the time that has elapsed since the entry into force of Regulation 1, commitment decisions have emerged as the preferred alternative to high fines (see section II.H) and “soft enforcement” (see section II.D).¹⁰⁹ This has surprised most stakeholders, who did not envisage the use of commitment decisions save in exceptional circumstances.¹¹⁰

The tendency to resort to commitment decisions is visible in relation to cases concerning the application of both Articles 101 and 102, but is particularly acute with regard to cases related to alleged abuses of dominance. Indeed, 14 out of the 17 most recent abuse of dominance cases decided by the EC were out to end by virtue of commitment decisions pursuant to Article 9 of Regulation 1/2003.

Enforcer’s tendency to resort to commitments is strongly linked to the goal of ensuring “administrative efficiency”,¹¹¹ and with a natural predilection for immediate and impactful solutions. Commitments decisions are often preferable from the standpoint of the enforcer since such solutions allow them to “increase their decisional output (in terms of cases brought to completion); reduce their administrative strain (because the evidentiary burden on the [competition authority] is lower than in standard decisional procedures); and intrusively regulate markets through behavioral and structural commitments”.¹¹²

Companies, in turn, also have all incentives to reach a negotiated solution¹¹³ in so far as it enables them to avoid possible huge fines as well as going through lengthy, costly and uncertain proceedings which divert their attention from their business. This is particularly the case in abuse of dominance cases, given that companies can avoid a declaration of

¹⁰⁸ Article 9(1) of Regulation 1/2003 provides that “Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission. For analyses of this provision see, inter alia, H. Schweitzer, Commitment Decisions under Art. 9 if Regulation 1/2003: The Developing EC Practice and Case Law, EUI Working Paper no. 2008/22, available at <http://ssrn.com>; W. Wils, Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No. 1/2003, 29(3) World Competition (2006) 345; C. Cook, Commitment Decisions: The Law and Practice Under Article 9, 29(2) World Competition, 209.

¹⁰⁹ E. Gippini, supra note 12, p. 42 (pointing out that “[i]t is easy to see that, quantitatively, Article 9 decisions have represented a significant proportion of formal decisions terminating proceedings adopted by the Commission in recent years”).

¹¹⁰ See J. Temple Lang, Commitment decisions and settlements with antitrust authorities and private parties under European antitrust law, 2005 Fordham Corp. L. Inst. (B. Hawk ed. 2006), pp. 265-324

¹¹¹ EC’s Report on the functioning of Regulation 1/2003, supra note 12 paragraph 13: “Article 9 pursues the objective of enhancing administrative efficiency and effectiveness in dealing with competition concerns identified by the Commission where the undertaking(s) concerned voluntarily offer commitments with a view to address these concerns”.

¹¹² N. Petit, supra note 44, p. 32.

¹¹³ See D. Gerard, supra note 101.

dominance or abuse thereof and in light of the traditional deference shown by Courts to the EC, which so far has never lost any Article 102 case in court.¹¹⁴

Many stakeholders as well as the authors of this paper welcome the use of negotiated solutions, and particularly of commitment decisions. However, it has been submitted that excessive reliance on such solutions may end up compromising the effectiveness of EU competition law enforcement:

One of the main concerns in this regard arises with respect of the identification of cases where commitments appear as a reasonable solution. At the EU level, Regulation 1/2003 simply provides that commitments will not be an option in cases in which the EC intends to impose a fine.¹¹⁵ At the national level, some national legislations do not explicitly provide for the possibility of adopting commitment decisions, and even when they do, most national legislations do not offer much clarification. In practice, some authorities only exclude adopting negotiated solutions in cartel cases, whereas others have chosen to exclude “long lasting” restrictions. It is submitted that vague legislations and divergences in this respect are liable to give rise to inconsistencies and arbitrary discrimination between infringers and cases.¹¹⁶ However, the authors of this paper believe that this is an area where flexibility for enforcers is welcome.¹¹⁷

Moreover, even when national legislations envisage the possibility of resorting to negotiated solutions, conditions for companies to submit commitments appear to differ from the conditions under Regulation 1/2003. For instance, the Spanish CNC recently rejected a request to initiate negotiations with a view to arriving to a negotiated solution alleging that the company involved had not offered to admit the unlawfulness of the conduct at issue. Such approach reveals an understanding of commitments which differs from the one adopted by the EC.¹¹⁸

These problems could be avoided by stating *ex ante* the criteria that enforcers will take into account for the purpose of deciding whether commitments appear more reasonable than a positive decision.¹¹⁹ Moreover, in our opinion, the conditions for a company to be able to

¹¹⁴ This fact is, by the way, in stark contrast with that observed in the US, where agencies have traditionally had more difficulty to prevail in court in Section 2 cases.

¹¹⁵ Recital 13 of Regulation 1/2003: “Commitments decisions are not appropriate in cases where the Commission intends to impose fines”. This exclusion has been regarded as “somewhat strange and overly inclusive”. N.Petit, *supra* note 44, p. 38.

¹¹⁶ *Id.* p. 37 et seq.

¹¹⁷ See also E. Gippini, *supra* note 12, p. 43.

¹¹⁸ Interestingly, the CNC’s approach in this case (in which the authors are involved) also differs from its previous practice, thus underlining the need for pre-stated criteria. See Spanish CNC pending case 2786/07, Luxury watchmakers.

¹¹⁹ N. Petit, *supra* note 44, p. 32: “[O]utcome discretion may lead to discrimination between infringers, with [competition authorities] promoting settlements in some cases, and adopting negative decisions in other, equivalent, cases. To take an example from the EC decisional practice, one may question why in cases of abusive loyalty rebates such as Intel a hefty fine was deemed the right approach, whilst on other similar cases like Coca Cola, the Commission considered a settlement to be appropriate. Of course there

request a negotiated solution under EU competition law should be identical regardless of the identity of the enforcer in each particular case.

- **What is the approach towards negotiated solutions in your respective jurisdictions? What are the criteria to select the cases where a commitments solution can be explored? Do you think it would be useful to state more clearly the criteria used to identify cases in which commitments seem appropriate? Should those criteria be unified in all cases undertaken pursuant to EU competition law regardless of who the enforcer is?**

Additional concerns conveyed by stakeholders relate to the effect of commitment decisions on precedent-setting, to their instrumentalisation as “exit strategies” and to the insufficient judicial review of their proportionality:

With regard to precedent-setting, stakeholders point out at the fact that commitment decisions do not contain a final position on the existence or non-existence of an infringement and simply conclude that “there are no longer grounds for action.” Accordingly, there is concern that if such decisions become the standard way of dealing with cases –which would then be left substantively unresolved-, this would imply blurring the contours of the law, thus further aggravating the risks created by the lack of individual guidance and the shortcomings of general guidelines.¹²⁰

The contrary situation –one when an enforcer suddenly shifts a case from the settlement track in order to adopt a decision finding an infringement for the sake of setting a

might be legitimate reasons for the adoption of different approaches in those cases. However, they should certainly be clarified ex ante to eradicate risks of arbitrary discrimination”.

¹²⁰ See, similarly, W. Wils, *Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No 1/2003*, 29 *World Competition* 345 (2006), at 350, (arguing that commitment decisions should only replace infringement decisions “in those cases where the benefit in terms of an earlier termination of the infringement and the saving of the cost of longer proceedings outweigh the benefit of the other contributions to the enforcement of Articles [101] and [102] [TFEU] which infringement decisions could make, in terms of clarification of the law, public censure, deterrence, disgorgement of illicit gains and punishment, and facilitation of follow-on actions for compensation”. See also E. Gippini, *supra* note 12, p. 43 (stating the following: “my personal view is therefore that, in the system set up by Regulation 1/2003, Article 9 decisions should be viewed as a tool to be used sparingly, under particular circumstances, and not as a standard device to dispose of cases. The suppression of notifications, the legal exception regime and the increased involvement of national authorities and judges are all intended to free resources for the Commission to focus in its role of prosecuting and sanctioning the most serious infringements in the Community interest. The Commission is now better able to select the cases it investigates itself; in the normal course of things the cases it retains are serious infringements which other authorities in the ECN are not better placed to investigate. Under these conditions, it will be only in unusual circumstances that the public interest would recommend forgoing prosecution and retribution, limiting the Commission’s own power to prosecute the case in the future, and leaving the case undecided as a matter of law. If Article 9 decisions became standard substitutes for infringement decisions under Article 7 of Regulation No 1/2003, the question would inevitably arise whether it is reasonable for the Commission to retain cases, only to finally close them with a decision which leaves the substantive questions unresolved, and the door open to national proceedings.”)

precedent-¹²¹ might also be problematic in so far as it may compromise the parties' legitimate expectations.¹²²

Another source of concern derives from the usual resort to commitments decisions lies on their possible instrumentalisation as “exit strategy” by competition authorities.¹²³ That could be the case in situations where competition authorities feel that they have a weak case or one about which they are not confident, particularly when resources have already been devoted to it (sunk costs) in the past. In these cases, commitments decisions may seem like a reasonable solution from the point of view of the authorities, who can “save face” by putting forward that the deployment of resources was effective. In this respect, stakeholders have again insisted that commitment decisions should also be used in clear-cut cases, and not in dubious situations.¹²⁴

Thirdly, stakeholders disagree with the solution adopted by the ECJ in the Alrosa case, and consider that it gives great leeway for the EC to require disproportionate commitments from undertakings.¹²⁵ Most stakeholders consulted rather tend to side with the solution previously given by the GC in the same case, which favored a stricter judicial control of the EC's discretion by requiring commitment decisions to be proportionate to the competition concerns identified by the EC.¹²⁶

- **What is your reaction to the concerns expressed above? Many practitioners tend not to agree with the ECJ's Judgment in Alrosa, thinking that the GC had offered a more sensible solution. How do you feel about this? What is the situation with regards to the judicial review of the proportionality of commitments at the national level?**

¹²¹ This appears to be what happened in the first EU Microsoft case according to the words of then Commissioner Mario Monti, who is quoted as saying that it “was “certainly” his most difficult case; [...] Not for its technical complexity, but because of the rather drastic trade-off to be made after the long investigation. After three days of intensive negotiations with the CEO to achieve a settlement, a good phase in the mutual negotiations, we concluded that we were interested [...] to achieve a precedent”. D. Lumdsen, Monti warns of threat to competition law from within, M-Lex (14 September 2009).

¹²² N. Petit, *supra* note 44, p. 33.

¹²³ *Id.*

¹²⁴ See also Gippini, *supra* note 12, p. 43. “I would therefore reserve Article 9 for cases not raising novel or difficult issues of principle, where the likely infringement appears relatively clear but not particularly serious, and where an exhaustive investigation followed by an Article 7 decision would not be the better use of the Commission's resources. The benefits of immediate termination in such cases may outweigh other considerations”.

¹²⁵ See *Commission v. Alrosa*, Case C-441/07P, para. 48 where, in light of the alleged “voluntary” nature of commitments, the ECJ accepted that these “may go beyond what the Commission could itself impose on them in a decision adopted under Article 7 of the Regulation after a thorough examination”; and ruled that judicial review “relates solely to whether the Commission's assessment is manifestly incorrect”(para. 42) and precludes the examination of alternative “less onerous solutions”. In addition, the ECJ reprimanded the GC and annulled its previous Judgment, on the grounds that it had encroached on the discretion enjoyed by the Commission instead of merely reviewing the lawfulness of its assessment.

¹²⁶ See *Alrosa v. Commission*, Case T-170/06, ECR II-2601.

*F. Enforcing EU Competition law to accomplish regulatory goals?*¹²⁷

Claims over the alleged instrumentalisation of competition law enforcement have been common amongst experts in EU competition law, who have pointed out at the role played by competition decisions in the liberalization of European markets, particularly in the telecommunications and energy sectors at moments where political disagreements hindered consensus within other European Institutions.¹²⁸ As noted in a recent piece, concerns about the risks of competition law becoming an alternative route to the accomplishment of regulatory goals have revived with the adoption of Regulation 1/2003.¹²⁹

A recent work accepts that it is legitimate for competition law to be enforced in an ex ante and prescriptive manner, resembling in some aspects the application of regulatory regimes. Nonetheless, this piece addresses the substantive concerns arising from the instrumentalisation of the law with a view to achieving sector-specific objectives. In particular, it is submitted that -given the ex ante application of the law, the EC's bias for intra-market rivalry, the influence of non-economic concerns and the fact that network markets are often subject to sector-specific regulation-¹³⁰ "competition law tends to become regulatory in nature where the market in which it applies presents natural or network monopoly features".

It has been submitted that such attitude is problematic in so far as it may (i) "alter the expected standards of intervention by the authority" by reference to the relevant precedents;¹³¹ and (ii) lead to the imposition of remedies that "may exceed what would be necessary to bring an end to the infringement identified by the authority".¹³² Such contention is supported and illustrated with convincing examples extracted from cases related to exclusive licensing of television rights and the remedies imposed to open the premium

¹²⁷ This section is heavily based on an excellent piece by Pablo Ibañez Colomo. See P. Ibañez Colomo, *On the Application of Competition Law as Regulation: Elements for a Theory*, *Yearbook of European Law* 2010 (P. Eeckhout and T. Tridimas (eds. 2010), 261-306.

¹²⁸ See G. Monti, *Managing the Intersection of Utilities Regulation and EC Competition Law*, LSE Law, Society and Economy Working Papers 8/2008, available at <http://www.lse.ac.uk>; G. Monti, *New Directions in EC Competition Law*, *European Union Law for the Twenty-First Century-Rethinking the New Legal Order*, Vol. 2 (T. Tridimas and P. Nebbia eds. 2004), pp. 177-94; and P. Larouche, *Competition Law and Regulation in European Telecommunications* (2000), p. 268 et seq.

¹²⁹ P. Ibañez Colomo, *supra* note 128, at 261 ("Following the adoption of Regulation 1/2003 there are revived concerns about the application of competition law as regulation. The remedies adopted (or contemplated) in recent cases against copyright collecting societies, dominant operators in "new technology markets" and incumbents in the energy sector provide examples in which the Commission allegedly used its powers under Articles 101 and 102 TFUE to shape and influence its evolution").

¹³⁰ *Id.* pp. 280 et seq.

¹³¹ A further problem is that lowered standards will then apply as precedents to sectors all across the board, thus damaging competition law's coherence and compromising businesses competitiveness.

¹³² For a comment on the relationship between these tendencies and current "hot" cases, see A. Lamadrid de Pablo, *Microsoft's complaint against Google, Chilling Competition* (31 March 2011), available at <http://chillingcompetition.com/2011/03/31/microsoft%C2%B4s-complaint-against-google/>

content bottleneck;¹³³ from other recent cases in the energy sector;¹³⁴ and from the Microsoft saga.¹³⁵ With regard, for instance, to the latter, attention is drawn to the lowering of standards regarding the “new product” test and the “indispensability” criterion in the 2004 Microsoft Decision, as well as to the disproportion of the “must carry” remedy adopted in the 2009 Microsoft Decision, which treated Windows as a public utility and intended to create a “level playing field” in the market by eliminating a “distribution advantage” unrelated to the infringement.¹³⁶ Other authors have also noted how in other network industries the EC has in the past adopted remedies which went beyond the infringement at issue in each case with a view to pursuing regulatory goals.¹³⁷

EU Courts appear to have no objections to this alleged instrumentalisation. As noted above, the Alrosa Judgment of the ECJ.¹³⁸ A very similar solution has been adopted by the GC in the field of merger control.¹³⁹ But, regardless of the blessing of the Courts:

- **What is your reaction to these observations? Could such observed developments be leading to a sort of (i) sector-specific regulation through competition law; and (ii) a sector-specific competition law, even in, in principle, non-regulated sectors such as the Information Communication and Technology sector?**

G. The appropriate mix of law and economics on competition law enforcement¹⁴⁰

Whereas so far we have attempted to convey views that are not necessarily our own, in this section we will not act as intermediaries and will rather state our own ideas. In previous papers we have argued that the growing influence of economics in competition law enforcement has brought about many positive consequences, but that we should be mindful of letting the about pendulum swing too far. It was submitted that there is a limit to the concessions that a legal regime can make without renouncing its nature, and that effects-

¹³³ Id, pp. 288-292. See e.g. the Commission Decision of 23 July 2003, UEFA Champions League, OJ L 291/25 (2003) and Commission Decision of 19 January 2005, Joint selling of the media rights to the German Bundesliga, OJ L 134/46 (2005) and Commission Decision of 28 March 2006, FA Premier League, Case COMP/C-2/38.173.

¹³⁴ P. Ibañez Colomo, *supra* note 128, pp. 296-301.

¹³⁵ Id. pp. 292- 296.

¹³⁶ Id.

¹³⁷ See P. Larouche, *supra* note 129, p. 268 et seq. and G. Monti, *New Directions...*, *supra* note 129, pp. 177-94.

¹³⁸ See footnote 126 above.

¹³⁹ EDP v. Commission, Case T-87/05 ECR II-3745, paras. 86 et seq.

¹⁴⁰ This section is based on a previous presentation of the authors. L. Ortiz Blanco and A. Lamadrid de Pablo, *Expert Economic Evidence and Effects-Based Assessments in Competition Law Cases*, Sixth Annual Conference of the Global Competition Law Centre (7- 8 October 2010).

based legality tests approach decision-making to economic divination to the prejudice of legal certainty.¹⁴¹

The quest for a “more economic approach” in all areas of competition law and enforcement has unquestionably been the driving force of the seemingly never-ending evolution undergone by EU competition law in recent years.¹⁴² Commentators have underlined that “the philosophy and expert base of competition administration is shifting from law to economics”;¹⁴³ at the EC level, some have referred to this phenomenon as the “economic reconstruction of DG COMP”.¹⁴⁴ Indeed, under the legitimate aim of avoiding excessive formalism in the formulation and application of legal principles, economists have conquered competition law. The rising influence of economics in competition law enforcement is beyond question. Its consequences, however, are more uncertain.¹⁴⁵

In many ways, the rising profile of economics is excellent news; after all economics provides the intellectual foundations that ultimately justify and legitimize the existence of this legal order and, accordingly, it must inspire and inform legal rules. Economists –and we know astonishingly good economists working for competition enforcers- have brought a lot of sense to many debates. At the same time, they may have brought a bit of non-sense too...

Whereas excessive formalism shall be banished from EU competition law, we should avoid swinging the pendulum too far in the opposite direction, as so often happens in antitrust and in life.¹⁴⁶ And, in our view, a visible phenomenon of “marginalization” of legal principles with regard to the enforcement of legal rules has been on the rise for several years, its most visible manifestation being the embracing of “effects-based” legality tests at the expense of legal certainty. Such phenomenon has been made possible by the idea that law is unscientific and unreliable coupled with an illusory view of economics as more objective and closer to scientific certainties. But, in our view, resorting to economic analysis to assess

¹⁴¹ Id.

¹⁴² See, in general, I. Lianos, *La transformation du droit de la concurrence par le recours à l’analyse économique* (2007).

¹⁴³ S. Wilks, *The European Competition Network: what has changed?*, EUSA Conference (Montreal 17-19 May 2007), available at <http://aei.pitt.edu/8067/1/wilks-s-08h.pdf>, at 3.

¹⁴⁴ OECD, *Competition Law and Policy in the European Union*, Paris, OECD (report prepared by Michael Wise (2005), p. 12.

¹⁴⁵ S. Wilks, *supra* note 7, p. 457: “Identifying an enhanced role for economics in the enforcement of European competition policy is (...) easy enough, but it is far more demanding to analyze its effect on the goals of policy, the effectiveness of enforcement, the predictability of enforcement, the bias in the administration and the substantive impact on national and the European economics”.

¹⁴⁶ Pendulum narratives have also been very interestingly applied to the evolution of US Antitrust law. See W. Kovacic, “The Modern Evolution of US Competition Policy Enforcement Norms”, 71 *Antitrust Law Journal*, 377-478 (2003).

the effects of a given conduct often proves inconclusive, and yields results which are as debatable or contestable as pure legal reasoning.¹⁴⁷

Another cause, or perhaps rather a consequence, of the adoption of such tests is that the prestige of competition law within the legal community, and of law within competition law, is not at its highest. In fact, saying what we are saying is not “cool”: we risk being labeled as quintessential “stone-age” formalistic lawyers or, even worse, ordoliberalists! Many will surely be surprised (if not outraged) by hearing us say what would seem to be obvious: that law is law, that legal certainty also has an economic value, and that the enforcement of legal rules –the matter of their design being a different issue-¹⁴⁸ cannot disregard basic general principles of law.

But don’t get us wrong. We do believe that the greatest effort must certainly be made to reconcile legal principles and economic thinking for the enforcement of competition law to make any sense.

What we put forward is that there must be a limit to the concessions in terms of legal certainty that a legal regime can make without renouncing its nature; and that the coexistence between law and economics, however convenient, cannot be deemed amongst equal disciplines. In our view, failing to acknowledge the asymmetry of this relationship is not only detrimental to the interests of those subject to competition law, but also to the ability of the discipline to effectively accomplish its mission.

- **Do you share with us the perception that there is a risk that we may be letting the pendulum swing too far?**

¹⁴⁷ See also P. Areeda, L. Kaplow and A. Edlin, *Antitrust Analysis, Problems, Text and Cases*, Aspen Publishers, 6th Edition, 2004, p. 105: “Although economic theory is indispensable to our task, clear-cut answers are often impossible. The complexities of economic life may outrun theoretical tools and empirical knowledge. We often will remain uncertain about the economic results of the particular practice or market structure under examination. Nor can we always predict the consequences of prohibiting some particular behavior. Thus, we shall time and again meet this question: How far must we search for economic truth in a particular case when the economic facts may be obscure at best, when the relevant economic understanding may be controversial or indefinite, and when the statute does not give us a clear-cut value choice?”

¹⁴⁸ In our view, the greatest contribution that economics can make to competition law lies in aiding to the formulation of legal rules which are economically sound and, at the same time, administrable. It is therefore at the level of the formulation of rules where we can –and must- ensure that economic theory and substantive law go hand in hand.

H. Optimal sanctions

Sanctions for the breach of EU competition rules have attracted a great deal of attention in recent years, notably as a consequence of the exponential increase of pecuniary fines.¹⁴⁹

The fining policy of the EC and of national competition authorities certainly raise a number of most interesting legal controversies,¹⁵⁰ but for the purposes of this paper and of the roundtable discussion we will leave those concerns aside and focus rather on the relationship between fines and effective enforcement:

The EC has defended that the most effective and deterrent enforcement policy is one based on large fines,¹⁵¹ and that the larger the fine the greater its deterrent effect.¹⁵² EU Courts have in the past endorsed the policy of imposing sky-rocketing fines affirming that the EC is entitled to raise the level of sanctions with a view to enhancing their deterrent effect.¹⁵³

The escalation in the level of fines has moreover led us to a situation that underlines the “specificity” of competition law with regard to other areas of law enforcement. As noted by a commentator present in this room, fines imposed by the Commission “exceed fines imposed by the public authority in any democracy of which I am aware for any offence.”¹⁵⁴ Indeed, it is interesting to remark the differences between the amounts of the fines imposed on competition law offenders compared to those imposed for the breach of other corporate-related offences, such as those involving environmental damage, breaches of health and

¹⁴⁹ See, e.g. W. Wils, *The Increased Level of EU Antitrust Fines, Judicial Review and the ECHR*, 33 *World Competition* 5, (2010); or L. Ortiz Blanco, A. Givaja Sanz, A. Lamadrid de Pablo, *supra* note 103.

¹⁵⁰ For a discussion on our concerns with regard to fines for breaches of EU competition law (notably in relation to non-retroactivity, proportionality, parent-subsidiary responsibility and legal certainty in leniency cases), see L. Ortiz Blanco, A. Givaja Sanz, A. Lamadrid de Pablo, *supra* note 103. See also Global Competition Law Centre, *Enforcement by the Commission- The Decisional and Enforcement Structure in Antitrust Cases and the Commission’s Fining System, Towards an optimal enforcement of competition rules in Europe, Time for a Review of Regulation 1/2003*, GCLC Annual Conference (11-12 June 2009) (M.Merola ad D. Waelbroeck eds. 2010), pp. 197-286; and E. Barbier de la Serre and C. Winkler, *A Survey of Legal Issues Regarding Fines Imposed on EU Competition Proceedings* (2010), *Journal of European Competition Law and Practice* (2011), p. 5.

¹⁵¹ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(A) of Regulation No. 1/2003, OJ C 210 of 1 September 2006, paras. 4, 7, 25, 30 and 37.

¹⁵² N. Kroes, SPEECH/09/408, *The Lessons Learned 36th Annual Conference on International Antitrust Law and Policy*, Fordham University New York, (24 September 2009): “Fines were not deterrent in previous decades. (...) Year after year we would catch a cartel and impose a fine that would have little or no effect on a company’s incentives. What is the point of that? Now, taking better account of the economic impacts of abuses and cartels, we fine in order to deter, linking the fine to the relevant sales of the infringing company (...) So, in adopting a clear policy basis for deterrent fines and a focus on the most serious infringements of course the fines have increased.”

¹⁵³ See, *inter alia*, *Musique Diffusion Francaise and others v Commission*, Joined Cases 100/80 to 103/80, ECR 1825, paras.106-109.

¹⁵⁴ I. Forrester, *supra* note 33, p. 825.

safety regulations,¹⁵⁵ or even for the initiation of a world-wide financial crisis by the misuse of collateralized debt obligations... Against this background, our question is:

➤ **Why should competition law be so different from all other domains?**

As noted earlier in this paper, EU competition authorities have been strikingly active in the fight against cartels. Large fines have undoubtedly played an important role in this crusade, and have succeeded in raising the profile of competition law with headline grabbing fines and statistics.¹⁵⁶

Nonetheless, many stakeholders and commentators question whether large ever-increasing fines really constitutes the most effective approach to deter cartel activity.¹⁵⁷

Indeed, enforcers success in uncovering cartels also reveals the shortcoming of the system: cartel activity is still nowadays common in many EU markets; maybe less so that several years ago (we are not saying that things have been done badly), but still persistent (what we are saying is that they could be done better).

¹⁵⁵ Id. pp. 824-25. Forrester adds that: “We must of course recognise that the comparability of sentences is a very slippery and imprecise science. Driving at an excessive speed, breaches of the peace, physical assault and theft of money from an employer are morally different in several ways, yet judges have to do their best in each case to set a proper penalty for each particular offence. I do not say that an enterprise which neglects safety precautions on a railway network, or pollutes a river through negligent lack of care or deliberate willfulness, is more or less morally guilty than the enterprise whose employee discusses with a competitor what prices or customers each should pursue. Each of these kinds of behavior damages society and can injure citizens. Each may be committed through negligence or deliberately. Each is prohibited, yet may generate profit for the enterprise by saving expense or increasing income. Perhaps competition infringements, which may damage consumers over a lengthy period and which can cover several countries, are different to other economic crimes, and no doubt some would argue they are worse or at least more deserving of punishment. But a thousand times worse? I doubt it”. We doubt it too.

¹⁵⁶ Despite its acknowledged contribution to the visibility of competition law, there are obvious risks associated to this attitude. As noted by one of the current Hearing Officers at the EC, “a potential risk of abuse, if that dubious cases might be pursued or fines might be inflated in order to keep up the statistics”. Wils, “The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function” (2004) 27 World Competition Law and Economics Review, 202 at 217.

¹⁵⁷ See Stakeholder Study, supra note 41, para. 42: “Fines were recognised by the majority of respondents across most of the stakeholder groups as being an effective deterrent, particularly as they have become so high. Some lawyers stressed that the size of fines has reached the acceptable level and that their deterrent effect would not increase proportionately. Some lawyers also warned that the high level of fines may deter companies from being cooperative with DG Competition and applying for leniencies. In contrast, some company respondents see leniency policy as contradicting the purpose of competition regulations, since the company applying for leniency benefits from the anticompetitive conduct and becomes exempt from paying a fine. A number of stakeholders across all groups stressed that, while fines are an effective deterrent, they are not the only tool available to DG Competition. A number of alternatives were suggested (criminal sanctions, publication of the companies' infringements, compensation payments for harmed consumers, etc.) but with mixed views about whether individual criminal liability should be introduced as an additional deterrent”. See also, amongst others, B. Vesterdorf, Are fines the final answer to cartels in Europe, 1 Concurrences (2009).

Moreover, the authors of this paper have argued in the past that “*the progressive increase of the amount of fines could eventually undermine the financial situation of many companies, thereby damaging the innocent (workers and shareholders), while leaving those responsible for the infringement (the managers) unscathed.*”¹⁵⁸ A recent study on the follow-on effects of fines on investment and employment also concluded that “*a large fine on a cartel member will have a knock-out effect across the economy as a whole, impacting on firms and workers who were not involved in the original cartel.*”¹⁵⁹ Stakeholders have pointed out that even the companies’ customers could end up suffering the indirect consequences of sanctions as a result of possible price increases adopted with a view to recouping the losses incurred as a result of a fine.¹⁶⁰

It does therefore not appear that huge fines in themselves constitute the optimal sanctions for competition law infringements. Individual sanctions (pecuniary, criminal and director disqualification) on responsible executives stand out as possibly the most effective alternatives.¹⁶¹ It is individuals who engage in cartel conduct, often regardless of the companies’ efforts to prevent such conduct. Individuals often decide to enter into cartels because their compensation may be linked to performance, but not to a possible fine on the company (which, in addition, may be imposed once they have already left the company). In our view, as well as in that of many stakeholders,¹⁶² the optimal way to ensure deterrence would be to target the individuals who are actually responsible for the infringement.¹⁶³

In the current status of EU competition law, where the sanctions envisaged for competition law infringement have not been harmonized, some jurisdictions, such as the UK, do envisage such individual penalties. Their experience in this sense is therefore of the maximum interest for other enforcers.

¹⁵⁸ See L. Ortiz Blanco, A. Givaja Sanz and A. Lamadrid de Pablo, supra note 103. See also A. Lamadrid de Pablo, *The Massacre of the Innocents, Chilling Competition* (18 June 2010), available at <http://chillingcompetition.com/2010/06/18/the-massacre-of-the-innocents/>

¹⁵⁹ Oxford Economics, *Study on the follow-on effects of cartel fines on investment and employment*, (May 2010), available at <http://www.oef.com/samples/cartels.pdf>

¹⁶⁰ See also W. Wils, *Does the Effective Enforcement of Articles 81 and 82 EC Require Not Only Fines on Undertakings, but also Individual Penalties, and in Particular Imprisonment?*. *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (C.D. Ehlermann and I. Atanasiu eds. 2003) 409.

¹⁶¹ L. Ortiz Blanco, A. Givaja Sanz and A. Lamadrid de Pablo, supra note 103. See also I. Forrester, supra note 33, p. 826: “If the purpose is to change the behaviour of the individuals who commit misdeeds, there is a much more efficient way if doing so than fining their employers ever higher sums of money. Imposing penalties on the individuals personally is much more likely to make a change in the behaviour of others”. See also W. Wills, supra note 161.

¹⁶² See footnote 158.

¹⁶³ Even though the EU does not have the competence to impose criminal sanctions, it could adopt a Directive requiring Member States to envisage such penalties for violations of EU competition law. For a discussion on this issue, see A. Dawes and O. Lynskey, *The ever-longer arm of EC law: the extension of community competence into the field of criminal law*, 45(1) *Common Market L. Rev* (2008).

- **Are ever-increasing fines the best instrument to achieve deterrence? What role do you see for individual sanctions (criminal sanctions, fines, or director disqualification...)?**

I. Interplay between public and private enforcement

When we first asked for suggestions on topics to be dealt with at the roundtable, someone told us that “the elephant in the room” would be the interplay between public and private enforcement.¹⁶⁴

Fostering private enforcement has indeed been one of the main objectives of the modernization of EU competition law,¹⁶⁵ and to a great extent such objective has not been accomplished.¹⁶⁶ Particular attention was drawn to this issue following the 2001 ECJ’s Judgment in *Courage v. Crehan*, where the ECJ pointed out that the prohibition of restrictive agreements “would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition” and noted that “actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community”.¹⁶⁷

Even though responsibility for the establishment of the adequate conditions to facilitate private enforcement falls primarily upon EU and national legislators, competition authorities have a significant role to play in this area. In particular, they can (i) take the lead responsibility in advocating and proposing legislative change; (ii) assist national judges in the assessment of specific cases; and (iii) tailor their ordinary activities with a view to facilitating private actions.

The EC has been particularly active in this regard. Following the entry into force of Regulation 1/2003 it commanded a comparative report which was issued in 2004,¹⁶⁸

¹⁶⁴ For discussions on this subject, see A. Komninos, *Relationship between Public and Private Enforcement, quod Dei Deo, quod Caesaris Caesari* (June 23 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1870723 and W. Wils, *The Relationship between Public Antitrust Enforcement and Private Actions for Damages*, 32(3) *World Competition* (2009).

¹⁶⁵ The EC’s proposal that led to Regulation 1/2003 indicated that it “aims at promoting private enforcement through national courts” by declaring the direct applicability of Article 101(3). See Commission Proposal for a Council Regulation on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, COM (2000) 582 final (27 September 2000), at 6.

¹⁶⁶ For a detailed overview of the current state of the judicial application of EU competition law, see FIDE, *The Judicial Application of Competition Law*, G.C. Rodriguez Iglesias and L. Ortiz Blanco (eds. 2010).

¹⁶⁷ *Courage v. Crehan*, Case C-453/99, ECR I-6297, paras. 27-28.

¹⁶⁸ D. Waelbroeck, D. Slater and G. Even Shoshan, *Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules*, available at http://ec.europa.eu/comm/competition/cartels/studies/comparative_report_clean_en.pdf

released a Green Paper in 2005,¹⁶⁹ and a White Paper in 2008,¹⁷⁰ which were followed by open consultation processes. At the end of 2010 the EC also launched a public consultation of collective redress with the aim of contributing to the establishment of a framework for collective redress that “would become the basis for possible legislative initiatives in several policy areas, including competition, environment, consumer protection and others”.¹⁷¹ Commissioner Almunia also announced his intention “to present a Draft directive on antitrust damages actions, hopefully in the second half of 2011 (...) The initiative would set common standards and minimum requirements for national systems of antitrust damages actions to ensure that rights are a reality for all”.¹⁷²

Beyond taking the initiative on matters of general policy, stakeholders generally agree that each enforcer can, in the course of its daily activities, greatly facilitate private actions. Such potential could be deployed by providing solid basis for follow-on actions, and by assisting national courts in the assessment of cases.

Observations conveyed to the authors nonetheless reveal concerns over the effects of competition authorities’ prioritization decisions on private enforcement and of national court’s ability to satisfactorily deal satisfactorily with the controversies brought before them. It is argued that the absence of positive enforcement and its focus on restrictions by object implies that national courts are given very little guidance as to how to assess restrictions of competition by effect under Article 101 and as to how to apply Article 101(3). It is paradoxical that these are precisely the cases that are supposed to be better handled by national courts! The risks that this situation poses to competition law enforcement have been accurately noted in the past by other commentators.¹⁷³ The authors of this paper agree with these comments, and even believe that they apply to certain national competition authorities that could even be labeling restrictions by their effect as restrictions by object in order to avoid assessments which are perceived as too burdensome. Such development represents an unwelcome trend that may compromise the utility of EU competition law by attempting to over-simplify it.

¹⁶⁹ Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM (2005) 672 final (19 December 2005).

¹⁷⁰ Commission White Paper on damages actions for breach of the EC antitrust rules, com (2008) 165 of 2 April 2008, and accompanying Commission staff Working Paper, SEC (2008)404;

¹⁷¹ J. Almunia, Speech 10/576, 21 October 2010, State of Play and Future Outlook, European Competition Day, Belgium, Brussels.

¹⁷² See J. Almunia, Speech 10/554, 15 October 2010, Common Standards for group claims across the EU, University of Valladolid, School of Law, Valladolid.

¹⁷³ GCLC, supra note 81, at 67 (“In particular, the lack of transparency surrounding the application of Article [101(3)] may help to explain two trends in litigation before national courts: (i) an inclination by national judges to shy away from making a positive application of Article [101(3)] combined with a preference for shifting the substantive positive analysis to Article [101(1)]; and (ii) the tendency to conclude that restrictive clauses or agreements which fall outside the scope of a block exemption are automatically incapable of fulfilling the conditions set out in Article [101(3)] to warrant individual exemption. If confirmed, both trends create the risk that Article [101(3)] will hardly ever be applied by national courts. This is a problematic development since it falls almost entirely to national courts to apply Article [101(3)].” See also pp. 58-76.

It has also been submitted that in cases where positive enforcement does take place competition authorities could draft their decisions in such a way that they would maximize the chances of private follow-on actions.¹⁷⁴ Nonetheless, stakeholders have pointed out at further problems that indicate that even in these cases follow-on actions may be hindered.

As explained earlier in this paper, positive enforcement currently refers mostly to cartel decisions, and these generally are a result of either leniency or settlements, or both altogether.

With regard to decisions adopted as a result of a settlement, stakeholders have pointed out at a risk that settlement decisions may be less detailed than “standard” decisions.¹⁷⁵ If true, this would be counterproductive for private plaintiffs seeking to alleviate their burden of proof by initiating follow-on actions, thereby increasing the costs and reducing the incentive to bring such private actions. Some commentators have even argued that this is likely to be one of the most appealing arguments for settling cartel members to submit to the settlement procedure.¹⁷⁶

Different issues arise in connection with the interplay between leniency cases and private follow-on litigation. Firstly, some have argued that in order for private actions not to ruin leniency initiatives, it could be necessary to extend leniency rewards to immunity in civil proceedings.¹⁷⁷ Secondly, a great controversy has recently been spurred by the ECJ’s Judgment in the Pfleiderer case, where the Court ruled that “EU antitrust rules, and in particular Regulation 1/2003 do not, in general, preclude a person who has been adversely affected by an infringement of EU competition law rules from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement. However, disclosure must be done in accordance with national law and preceded by a

¹⁷⁴ The EC’s press releases announcing the adoption of infringement decisions are often accompanied by a standard section on “actions for damages” stating that “[a]ny person or firm affected by an anti-competitive behaviour as described in this case may bring the matter before the courts of the Member States and seek damages. The case law of the Court and Council Regulation 1/2003 both confirm that in cases before national courts, a Commission decision is binding proof that the behavior took place and was illegal. Even though the Commission has fined the companies concerned, damages may be awarded without these being reduced on account of the Commission fine”.

¹⁷⁵ See J. Burcher and D.J. Zimmer, Reflections on the Implementation of a Plea Bargaining/ Direct Settlement System in EC Competition Law, European Competition Annual 2006, (C.D. Ehlermann and I. Atanasiu eds. 2007), pp. 611-624. See also M. English, supra note 103.

¹⁷⁶ M. Schinkel, supra note 103, p. 10.

¹⁷⁷ See remarks by B. Lasserre in Enforcement Authorities Roundtable, 2005 Fordham Corp L. Inst. (B. Hawk ed. 2006), 94: “[T]here is an initiative which certainly would be productive, to make proposals to better articulate leniency programs with private enforcement. That is something we need. If we don’t articulate leniency with private enforcement, we risk to ruin in fact the first steps we have made in leniency. If leniency is limited to administrative fines and doesn’t include civil proceedings, we could miss the objective”. In favor of immunity extensions see A. Komninos, supra note 165. Contra, see, e.g., W. Wils, supra note 165. One of the proposals made by the EC in its White Paper envisaged the possibility of a limited-immunity from private claims. See White Paper, supra note 171, p. 10.

balancing test whereby a national court must ponder both the interests in favour of disclosure and the ones in favour of leniency protection”.¹⁷⁸

- **What are the authorities you lead doing to encourage private enforcement? How can leniency policies be better adapted to take private enforcement into account? What are the reactions to the ECJ’s Pfleiderer Judgment of June 2011?**

III. UNIFORMITY OF EU COMPETITION LAW ENFORCEMENT

Decentralization of EU competition law enforcement carried with it a significant risk of fragmentation. In order to avoid such risks becoming a reality, Regulation 1/2003 envisaged certain mechanisms aimed at ensuring substantive convergence in the application of EU and national competition laws and granted the EC a role as “primus inter pares”. Coordination, discussions and assistance amongst EU competition law enforcers have mainly been channeled through the European Competition Network (“ECN”).

In the following sections we will first examine the extent to which stakeholders are satisfied with the current degree of procedural and substantive convergence; we will take stock of the practical application of the cooperation mechanisms envisaged in Regulation 1/2003 and, finally, attention will be paid to the workings of the ECN and to the roles that the EC and national enforcers are to play within the network.

A. Procedural and substantive convergence

1. Procedural convergence

In absence of harmonized EU rules on the conduct of infringement proceedings for competition law infringements, and pursuant to the principle of procedural autonomy, each Member State is competent to retain its own procedural rules for the enforcement and of EU competition law, subject only to the requirements flowing from the principles of effectiveness and equivalence. Pursuant to these principles, national rules must allow the effective enforcement of EU competition law, and cannot make it more difficult than the enforcement of national competition law.¹⁷⁹

¹⁷⁸ Report on the functioning of Regulation 1/2003, supra note 12, clearly stated the contrary position of the EC with regard to this solution. (In para. 39, it was stated that “[t]he Commission is a strong proponent of effective civil proceedings for damages, in particular, against cartel participants. However, disclosure of information from the Commission file in the context of private litigation in third country jurisdictions, in particular of information voluntarily submitted during the investigation, may seriously undermine the effectiveness of public antitrust enforcement.”)

¹⁷⁹ For a recent case in which the EU courts have shown their willingness to apply the principle of procedural autonomy see *Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewerkers ‘VEBIC’ VZW v Raad voor de Mededinging, Minister van Economie*, Case C-439/08, not yet reported.

The EC's report on the functioning of Regulation 1/2003 observed that there remain significant divergences in the national enforcement frameworks (with regards, e.g. to fines, criminal sanctions, liability of undertakings or associations of undertakings, succession of undertakings, limitation periods, standard of proof or the power to impose structural remedies, inspection powers) which require further reflection.¹⁸⁰ The Commission's Staff Working Paper further highlighted that there remain "divergences on important procedural issues that may influence the outcome of individual cases."¹⁸¹ In practice, the existence of diverging procedural standards has made necessary the inclusion of procedural safeguards aimed at guaranteeing that the rights of defense are not compromised, particularly in relation to collection, transmission and use of evidence collected in one jurisdiction for its use on another jurisdiction pursuant to Articles 12 and 22 of Regulation 1/2003.¹⁸²

A recent (and excellent) report by the GCLC¹⁸³ on the enforcement by NCAs and on the ECN discusses in depth these problems and the unsatisfactory solutions offered by Regulation 1/2003 and the ECN Notice, concluding that "since the decentralization system exposes [private parties] to the application of "double standards", effective judicial protection requires the implementation of "double safeguards", meaning that "a control of legality before the competent authority and according to the domestic law of the Member State of the transmitting NCA must be combined with a control of admissibility before the competent authority and according to the domestic law of the Member State of the receiving NCA."¹⁸⁴

However, many stakeholders see those safeguards as insufficient and do not consider the current situation to be satisfactory. Stakeholders have conveyed that, in their view, the principle of procedural autonomy enables Member States to craft their own procedural rules, but that it should not allow them to deviate from a uniform standard of protection.¹⁸⁵

¹⁸⁰ Report on the functioning of Regulation 1/2003, *supra* note 12, para. 33.

¹⁸¹ See Commission Staff Working Paper on the Functioning of Regulation 1/2003, *supra* note 12, para. 203.

¹⁸² See M. Araujo, *The Respect of Fundamental Rights Within the European Network of Competition Authorities*, 2004 Fordham Corp. Law Institute, (B.E. Hawk ed. 2005), pp. 511-531.

¹⁸³ Authored by Silke Brammer, Damien Gerard, Marc van der Woude and Robert Wagner, with input from Marcos Araujo, Tarik Hennen, Luis Pais Antunes and Agnieszka Stéfanowicz-Baranska.

¹⁸⁴ Global Competition Law Centre, *Report on the Enforcement by NCAs and on the ECN, Towards an optimal enforcement of competition rules in Europe, Time for a Review of Regulation 1/2003*, GCLC Annual Conference (11-12 June 2009) (M.Merola ad D. Waelbroeck eds. 2010), p. 318. See also the discussion in pp. 312-321.

¹⁸⁵ EU Courts have moreover established that where national authorities enforce EU law they shall hold themselves to the standards for the protection of fundamental rights established at the EU level. See: *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft*, Case C-5/88, ECR 2609, paras. 17-19; *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Dennis Clifford Bostock*, Case C-2/92, ECR I-955, para. 16; *Booker Aquaculture Ltd, trading as Marine Harvest McConnell and Hydro Seafood GSP Ltd v The Scottish Ministers*, Joint cases C-20/00 and C-64/00, para. 88; *Kjell Karlsson and Others*, Case C 292/97, ECR I-2760, para. 37.

Procedural rules have a crucial influence over the outcome of cases, and the solution to each case should not depend on the particular procedural arrangements adopted in each jurisdiction (why can a case be terminated pursuant to commitments/settlements in some jurisdictions and not in others? why can certain lawyer-client communications be used as evidence in some jurisdictions but not in others? why should deadlines or rules on access to the file be different?).¹⁸⁶ Moreover, it has been submitted that the establishment of different standards depending on whether enforcers apply EU or national law is artificial and unsatisfactory.

Along these lines, the authors have also argued in the past that there should be one single standard for the protection of fundamental rights, and that this common standard should offer the maximum protection in each case.¹⁸⁷

➤ **Are divergent national procedural laws not an obstacle to effective EU competition law enforcement?**

Stakeholders feel that the need for further convergence is particularly acute with regards to sanctions. Indeed, both the criteria for the imposition of sanctions as well as the amounts of the fines imposed by each enforcer are surprisingly divergent.¹⁸⁸ In our view, in a coherent enforcement system sanctions for competition law infringements should not vary so greatly depending on the enforcer that imposes them.

➤ **In 2005 Mr. Lasserre asked at a previous edition of this same conference at Fordham: “Can we be members of the same network while having different practices in terms of fines?.”¹⁸⁹ Our question today is: can you?**

2. Substantive convergence

Whereas the principle of procedural autonomy gives leeway for the existence of diverging procedural rules, the situation should, in principle, be different in relation to substantive

¹⁸⁶ It nonetheless has to be acknowledged that all Member States have voluntarily converged on the adoption of leniency programs, and that some degree of increased coordination can be seen in other areas. But even though enforcers have highlighted a certain success regarding the common adoption of leniency and the progress made by virtue of the ECN model leniency program, stakeholders continue to feel that there is much to be done in relation to the coordination of leniency regimes. In this sense, see S. Wilks, supra note 7, at p. 442: “It is widely accepted that there are problems with the operation of the ECN, especially in respect of the crucially important leniency programmes, where the diverse legal arrangements across the Union make filings and negotiation highly uncertain”

¹⁸⁷ L. Ortiz Blanco and A. Lamadrid de Pablo, *El procedimiento sancionador y sus garantías*, Los acuerdos horizontales entre empresas (S. Martínez Lage y A. Petitbó Juan eds. 2009).

¹⁸⁸ As an illustration of wide divergence with regard to the level fines, GCR’s Rating Enforcement 2011 includes the following list of average fines per enforcer: European Commission (410); France (36.7); Germany (22); UK (OFT) (255); The Netherlands (11.4); Italy (24.2); Spain (8); Hungary (26.9); Greece (6.7); Belgium (3.5); Czech Republic (1); Lithuania (0.2); Slovakia (0.1); Portugal (0.5).

¹⁸⁹ See remarks by B. Lasserre in Enforcement Authorities Roundtable, 2005 Fordham Corp L. Inst. (B. Hawk ed. 2006), p. 72.

convergence, given that both the EC and national competition authorities shall apply the competition provisions of the Treaty in accordance with the case-law of the EU courts, and in light of what is provided in Article 3 of Regulation 1/2003.¹⁹⁰

The EC has in the past revealed itself to be sensitive to the necessity of convergence and coherent enforcement on a worldwide basis;¹⁹¹ the need for such coherence is more acute in the EU, where we are trying to achieve a level-playing field within an integrated internal market. So far, the EC seems to be very satisfied with the current status.¹⁹² In the words of a prominent Commission official “inconsistencies were only alleged by stakeholders in a handful of cases and these were typically about matters where experts can validly disagree.”¹⁹³ This approach (which appears to replicate the “manifest error of assessment”

¹⁹⁰ Article 3 of Regulation 1/2003 reads as follows:

“1. Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article [101(1)] of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Article [101] of the Treaty to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article [102] of the Treaty, they shall also apply Article [102] of the Treaty.
2. The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article [101(1)] of the Treaty, or which fulfil the conditions of Article [101(3)] of the Treaty or which are covered by a Regulation for the application of Article [101(3)] of the Treaty. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.” (Underlining added).

¹⁹¹ J. Almunia, Spech/10/722, 3/12/2010, Converging paths in unilateral conduct, ICN Unilateral conduct workshop, Brussels, ICN Unilateral Conduct Workshop Brussels (3 December 2010): “Reducing –and eventually eliminating- conflicting rules in the different jurisdictions can bring only benefits to business and to competition authorities. And of course, we will eventually benefit consumers. Conflicting rules are bad for business, because they often translate into higher compliance costs for companies. A global level playing field –in contrast- gives forms more transparency and predictability.”

¹⁹² See Report on the functioning of Regulation 1/2003, para 23 (“After five years, it is apparent that the challenge of boosting enforcement of the EC competition rules, while ensuring their consistent and coherent application, has been largely achieved), para. 28 (“Experience indicates that national competition authorities are generally highly committed to ensuring consistency and efforts undertaken in the ECN have successfully contributed to this aim. Pursuant to Article 11(4), a practice of informally discussing the national authority's proposed course of action at services' level and within the confines of confidentiality in the network has been developed.”) and para. 42 (“The EC competition rules have to a large extent become the “*law of the land*” for the whole of the EU. Cooperation in the ECN has contributed towards ensuring their coherent application. The network is an innovative model of governance for the implementation of Community law by the Commission and Member State authorities.”).

¹⁹³ C. Esteva Mosso, A Critical View on Chapter 2- Relationship Between EC Competition Law and National Competition Laws, Towards an optimal enforcement of competition rules in Europe, Time for a Review of Regulation 1/2003, GCLC Annual Conference (11-12 June 2009) (M.Merola and D. Waelbroeck eds. 2010), p. 453: “We are satisfied with the largely coherent application of the competition rules in the EC over the last 5 years. None of the cases which the Commission has been informed of pursuant to Article 11(4) of Regulation 1 has resulted in initiating proceedings under Article 11(6), and

review that EU Courts apply to the EC) is arguably too generous: EU competition law provisions are simply contained in a handful of paragraphs in the EU Treaties, and this leaves ample scope for infinite issues on which “experts can validly disagree”.

However, stakeholders from different Member States convey that, in practice, the substantive application of EU competition law is less uniform than it should be. A number of reasons are given to support this contention.

Firstly, it is argued that although we have to live with the fact that competition law is inherently open to differing interpretations (some say “nebulous”) and subject to evolution, it would be desirable for enforcers to attempt to apply common criteria, instead of having each enforcer acting in accordance with its particular preferences and interpretations of the law. Stakeholders suggest that one possible way to ensure coherence in the application of the law would be to draft guidelines common to all EU competition enforcers.

Secondly, stakeholders have submitted that the mechanisms envisaged in Regulation 1/2003 have not been adequately used in order to ensure coherence. In this sense, it has been observed that, in spite of the Masterfoods doctrine¹⁹⁴ codified in Article 16 of Regulation 1/2003,¹⁹⁵ experience has shown that national enforcers do not necessarily feel bound by precedents with which they do not agree, and deviate from them by operating more or less subtle distinctions.¹⁹⁶

in less than 10% of cases it has provided more significant “comments” to the NCA concerned. In the public consultation preceding the Report on the functioning of Regulation 1/2003, inconsistencies were only alleged by stakeholders in a handful of cases and these were typically about matters where experts can validly disagree.”

¹⁹⁴ Masterfoods Ltd v. HB Ice Cream Ltd, Case C-344/98, ECR I-11369, paras. 51-57.

¹⁹⁵ Pursuant to Article 16 of Regulation 1/2003, “1. When national courts rule on agreements, decisions or practices under Article [102] or Article[102] of the Treaty which are already subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission . They must also avoid giving decisions whiuc would conflict with a decision contemplated by the Commission in proceedings it has initiated. To that effect, the national court may assess whet it is necessary to stay its proceedings. (...)2. When competition authorities of the Member States rule on agreements, decisions or practices under Article [102] or Article[102] of the Treaty which are already subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission”. For a discussion on the practical effects of this provision, see GCLC, Articles 15 and 16 of Regulation 1: The Tools Intended to Achieve Consistency in the Application of the Competition Rules by National Courts, Towards an optimal enforcement of competition rules in Europe, Time for a Review of Regulation 1/2003, GCLC Annual Conference (11-12 June 2009) (M.Merola ad D. Waelbroeck eds. 2010), pp. 377-383.

¹⁹⁶ In the UK, the House of Lords has ruled that Commission’s decisions are “simply evidence properly admissible (...) which, given the expertise of the Commission, may well be regarded as highly persuasive”. A very recent example of this attitude -which can also be observed with regard to case law- can be found in a very recent Spanish case concerning dual pricing aimed at curbing parallel trade of pharmaceuticals, in which the CNC adopted a decision which was at odds with –and, in fact, did not even mention- the relevant case law of EU Courts. On 13 June 2011 the Court of Appeal (Audiencia Nacional) overturned the CNC’s challenged decision to reject the complaint at issue.

Furthermore, it is argued that the EC has shown excessive deference towards certain national enforcers when the latter have applied the law in a questionable manner. It is alleged that in some cases the EC has criticized in private –orally or in written form- the approach chosen by national authorities in particular cases in so far as it conflicted with established EU law, but that nevertheless it has refused to intervene by resorting, for instance, to Article 11(6) of Regulation¹⁹⁷ 1/2003 or by submitting more critical observations under Article 11(4). In our view, a possible partial solution to this concern would consist in providing that the comments sent by the EC with regard to specific cases pursuant to Article 11(4) shall always be written and included in the case-file so that they can be accessible parties or, at the very least, by judges at the stage of judicial review.¹⁹⁸ By stating clearly its objections on any given case the EC would be giving the national enforcer the possibility to engage in a reasoned debate over its case, and would be enabling the judge to decide in a more informed manner.

A third and major source of divergence lies in Article 3(2) of Regulation 1/2003, which enables Member States to retain stricter national laws in relation to unilateral conduct. This provision is seen by stakeholders as major problem for the attainment of a level-playing field in the EU,¹⁹⁹ and whereas the EC appears to share this opinion, the extension of the convergence rule to unilateral conduct appears not to have enough political support.²⁰⁰

If true, the lack of substantive convergence in our decentralized enforcement system would to some extent be frustrating the aim of establishing a level-playing field within an integrated internal market.

- **Are you satisfied with the current status of the EU competition law in terms of substantive coherence and convergence? Are the mechanisms envisaged in Reg. 1/2003 sufficient to guarantee coherence across different jurisdictions?**

B. Coordination mechanisms under Regulation 1/2003

Regulation 1/2003 established a number of mechanisms aimed at facilitating coordination amongst the multiple enforcers in the new system. Looking back on the experiences of the past few years, the EC has declared itself to be satisfied with the practical application of these instruments in relation to case allocation,²⁰¹ fact-finding purposes,²⁰² assistance and

¹⁹⁷ Article 11(6) of Regulation 1/2003 provides that “the initiation by the Commission of proceedings for the adoption of a decision under Chapter III shall relieve the competition authorities of the Member States of their competence to apply Articles [101] and [102] of the Treaty”. According to the GC’s Judge Marc Van der Woude, the EC acts as the headmaster in the Framework of the ECN, and Article 11(6) represents “the headmaster’s stick.” See M. van der Woude, *The modernization paradox: controlled decentralization*, Paper to a seminar on Europeanisation of National Systems, IBA, Brussels.

¹⁹⁸ See also GCLC, *supra* note 185, p. 308

¹⁹⁹ See GCLC, *supra* note 196.

²⁰⁰ See C. Esteva Mosso, *supra* note 194.

²⁰¹ See Report on the functioning of Regulation 1/2003, *supra* note 12, para. 25: “[w]ork sharing between the enforcers in the network has generally been unproblematic. Five years of experience have confirmed

submission of comments,²⁰³ and simply noted that there existed discussions “on whether the ban on the use of information by a national competition authority for the imposition of custodial sanctions which has received the information from a jurisdiction which does not have such sanctions, as provided for by Article 12(3), is too far-reaching and is an obstacle to efficient enforcement”.²⁰⁴

We therefore learn that enforcers are apparently very satisfied with the practical application of these provisions. We nonetheless do not know much about the opinion of other stakeholders,²⁰⁵ who, given the lack of transparency over the application of these provisions, have only been able to comment in the abstract.²⁰⁶

Whereas enforcers acknowledge the “very discretionary” nature of the system governing case allocation, they appear to be satisfied with its practical results.²⁰⁷ Stakeholders consulted by the authors have nonetheless lamented this lack of transparency, particularly concerning case allocation.

In this sense, it has been submitted that “[s]ince enforcement priorities,²⁰⁸ doctrines and theories of harm,²⁰⁹ and most importantly procedural rights²¹⁰ and the level of sanctions²¹¹

that the flexible and pragmatic arrangements introduced by Regulation 1/2003 and the Network Notice work well. Discussions on case-allocation have come up in very few cases and have been resolved swiftly.”.

²⁰² Id. at 26: “Cooperation mechanisms for fact-finding purposes within the ECN have worked well overall. The possibility to exchange and use information gathered by another competition authority enhances the overall efficiency within the network and is a pre-condition for a flexible case-allocation system. Moreover, the power of national competition authorities to carry out inspections or other fact-finding measures on behalf of another national competition authority, while encountering some limitations as a result of the diversity of national procedures, has been used actively in appropriate cases and has contributed to effective enforcement.”

²⁰³ Id, at para. 28.

²⁰⁴ Id, at para. 27.

²⁰⁵ For a similar comment with regard to case-allocation, see J. Basedow, *The modernization of European Competition Law: A Story of Unfinished Concepts*, 42 *Texas International Law Journal*, 429 at 432 (“[O]fficials of the Commission and of national competition authorities appear to be highly satisfied with the results. We know much less, however, about the evaluation by industry. The discretionary character of case allocation may generate unforeseeable risks and high costs for businesses.”)

²⁰⁶ For very interesting comments and solutions on these issues, see GCLC, *supra* note 185.

²⁰⁷ See remarks by B. Lasserre in *Enforcement Authorities Roundtable*, 2005 *Fordham Corp L. Inst.* (B. Hawk ed. 2006): “*Case allocation discussions have been very smooth ad very constructive (...) the criteria to decide who would take the case has been very vaguely worded in the Regulation 1/2003 (...) in spite of this very discretionary legal system, discussions have been very, I would say, constructive and without any nationalistic behavior*”.

²⁰⁸ On prioritization decisions, see section II.C above.

²⁰⁹ On substantive convergence, see section III.A.2 above.

vary significantly from Member State to Member State, the allocation of a case can have important legal consequences for the undertaking and possibly also for the individuals concerned”.²¹²

Accordingly, it has been suggested that case allocation rules should be clarified, included in Regulation 1/2003 and made binding; that the case file should contain sufficient elements to identify the criteria that led to a particular allocation decision in each case; and that such decisions should be subject to judicial review.²¹³

One commentator has summarized some of the problems outlined above by posing the following question, that we now put to you:

- **Take the example of criminal sanctions for the responsible managers, which exist only in some Member States, such as the UK or Slovakia. Suppose that a case, which has its centre of gravity in a country such as Germany, where criminal sanctions are unknown, is allocated by the discretion of the network to the Slovak or the British competition authorities. Could we really assume that such discretionary case allocation would be in line with basic rights such as those enshrined in Article 6 of the European Human Rights Convention and in Article 47 of the Charter of Fundamental Rights?”²¹⁴**

As observed above, coordination amongst EU enforcers appears to have worked satisfactorily within the ECN in spite of the network operating under consensus and its lack of competences to impose binding solutions. There are no apparent disagreements, and the ECN seems to be working in perfect harmony. According to the public statements of relevant officials, the ECN would appear to be a sort of “candy land”, where everyone is joyful and everything seems to be “the best in the best of all possible worlds”.

This reported serenity has exceeded the expectations of many, who had pointed out to the existence of “substantial centrifugal forces with the potential to introduce conflict into the Network” such as “wide disparities in agency competence, pressures of agency self-interest, divergence in national competition laws and disparities in national economic expectations and industrial (and consumer) priorities”.²¹⁵

²¹⁰ See section III.A.1 above.

²¹¹ See section III.A.1 and footnote 189 above.

²¹² GCLC, supra note 185, pp. 307-308. Footnotes added.

²¹³ Id. 307-311.

²¹⁴ J. Basedow, The modernization of European Competition Law: A Story of Unfinished Concepts, 42 Texas International Law Journal, p. 432.

²¹⁵ S. Wilks, supra note 7, p. 420. See also p. 442 (“The ECN is operating much more smoothly than early critics anticipated and more effectively than regulatory networks in other areas”). See also Kekelekis, Mihalis. (2009) *The European Competition Network (ECN): It Does Actually Work Well*. 1 EIPAScope 35 (2009).

But whereas this “candy land” sounds pretty attractive to most of us, stakeholders have noted that “the political and normative solidarity” that characterizes the ECN “could be regarded as excessively strong” to the extent of becoming problematic.²¹⁶ Against this background, our question is the following:

- **The ECN has reportedly worked satisfactorily on an informal way and on the basis of strong solidarity (some say too strong). Do you see this method of working as one that is here to stay? What will happen, particularly with regard to case allocation, once we are beyond the “honeymoon period”? Would it be desirable to increase transparency with regard to the ECN’s workings?**

C. The role of the European Commission and NCAs within the ECN

As described above, Regulation 1/2003 and the accompanying “modernization package” provided for several instruments aimed at ensuring uniform and consistent enforcement of EU competition law by its numerous enforcers in light of fears that the new system would give rise to incoherent and fragmented enforcement. In practice, coordination efforts have been channeled through the ECN.²¹⁷

As underlined in the previous question, the ECN - which was not envisaged as such in Regulation 1/2003-²¹⁸ is a peculiar “uniquely independent supra-national network”.²¹⁹ The Network is governed by a Notice that is binding not only upon the EC, but also upon Member States given their commitment to abide by it,²²⁰ but that merely contains very wide and flexible working principles. In many ways, the ECN represents an “innovative model of governance for the Commission and Member States to implement Community law”.²²¹ Just

²¹⁶ S.Wilks, supra note 7, p. 463. (“[T]he ECN is characterized by a level of political and normative solidarity that could be regarded as excessively strong. That strength could become problematic if, as suggested by some scholars, DG Comp has developed a particular policy stance in the form of a neoliberal interpretation of competition policy which, whilst shared by competition agencies, is resisted by “old fashioned” industrial policy protagonists and by defenders of the managed and state models of national capitalism within Europe”). See also pp. 450 et seq.

²¹⁷ Id, p. 440: “At first glance (...) looks like a recipe for incoherence, divergence and fragmentation, which is the nightmare prospect that the ECN was designed to dispel.”

²¹⁸ Recital 15 of Regulation 1/2003 simply stated that the “*Commission and the competition authorities of the Member States should form together a network of public authorities applying the Community competition rules in close cooperation*” “*For that purpose it is necessary to set up arrangements for information and consultation.*” For an overview of the refinements leading to the creation of the ECN, see CD. Ehlermann and I. Atanasiu (eds), *European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities* (Oxford, Hart Publishing, 2004).

²¹⁹ W. Wilks, supra note 7, p. 416.

²²⁰ Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities (EU) No. 15435/02 (10 December 2002).

²²¹ A. Sinclair, V. Juknevičaitė and I. Breit, Regulation 1/2003: How has this landmark reform worked in practice?, 2 *Competition Policy Newsletter* (2009), p. 23.

as the EU provided a lab room for political cooperation and regional integration, EU competition enforcement and the ECN are also a model from which to extract useful lessons for an increasingly interrelated modern international antitrust enforcement .

Without denying the contribution of the ECN towards effective and uniform enforcement, stakeholders and commentators have observed that, in practice, the ECN has to some extent led to a “fake decentralization”.

One stakeholder has conveyed to the authors the impression that there has only been a “one-way” decentralization (for the bad, not for the good), arguing that legal certainty has been lost and centralization reinforced –with the sole exception of judges- so as to make things more comfortable to the Commission, which, in this stakeholder’s view, was “what decentralization was all about”.²²² According to this stakeholder, the ECJ’s recent Judgment in *Tele2 Polska* confirms these observations and allows the EC to retain its monopoly over Article 101(3).²²³

Similarly, commentators have stated in the past that “decentralization” was “a political masterstroke” pursuant to which the Commission “has given the impression of radical reform to the Member States” while it “has in fact managed to centralize European competition law more than under Reg. 17”.²²⁴ Along the same lines, others authors have asserted that “the ECN has developed into an effective enforcement mechanism which has been corralled by DG Comp along lines defined by DG’s policy trajectory”.²²⁵

In this respect, many expected resistance on the part of national competition authorities, and it was argued that “[it] is hardly likely that the leading European agencies will be wholly in agreement with advice and initiatives emerging from Brussels and they may be influenced by the distinctive industrial politics and industrial organisation of their respective countries. It might further be imagined that the national agencies will be resentful of the way in which the Modernisation regulation has displaced or marginalized the operation of national law”.²²⁶

Nonetheless, this doesn’t –or at least it didn’t- appear to be the case: at a similar roundtable here at Fordham in 2005 Mr. Lasserre asked: “isn’t this network a subtle way for the

²²² According to this stakeholder, it must nevertheless be acknowledged that “we would probably be worse off with some national authorities” and that “the less competences certain authorities obtain the better”.

²²³ See *Prezes Urzędu Ochrony Konkurencji i Konsumentów v. Tele2 Polska sp. z o.o.* Case C-375/09, *devenue Netia SA.*, not yet published. See N. Petit, *The Perverse Effects of the Court’s Ruling in Tele2 Polska*, *Chilling Competition* (17 June 2011), available at <http://chillingcompetition.com/2011/06/17/the-perverse-effects-of-the-courts-ruling-in-tele2-polska/>

²²⁴ A. Riley, *EC Antitrust Modernisation: The Commission Does Very Nicely- Thank you! Part One: Regulation 1 and the Notification Burden*, *European Comp. L. Rev.* p. 604 (2003).

²²⁵ S. Wilks, *supra* note 7, p. 463.

²²⁶ S. Wilks, *supra* note 144, p. 6.

European Commission to keep its leadership as, I would say, a master amongst obedient dogs?,”²²⁷ and replied that so far there were no reasons answer in the affirmative.

- **Certain commentators have argued that decentralization is not complete, that decentralization was “a political masterstroke” pursuant to which the Commission “has given the impression of radical reform to the Member States” while it “has in fact managed to centralize European competition law more than under Reg. 17. Other authors state that “the ECN has developed into an effective enforcement mechanism which has been corralled by DG Comp along lines defined by DG Comp’s policy trajectory”. Would you agree with these statements?**

²²⁷ See remarks by B. Lasserre in Enforcement Authorities Roundtable, 2005 Fordham Corp L. Inst. (B. Hawk ed. 2006), 74. Mr Lasserre added that “I take this image, and at the same time it is strange for me, because I can’t imagine, even in their secret dreams, Neelie Kroes or Philip Lowe in that position...”.

IV. CONCLUSIONS

Formulating conclusions at the end of a contribution that is not aimed at providing solutions but rather at spurring debate may appear to be somewhat odd. Nonetheless, the process of drafting this paper –which has included much listening and much reading- has led us to wider reflections, and we would like to present those to you as elements for further discussion.

In our view, EU competition enforcement works well. It has delivered positive outcomes to consumers and to economic actors and has contributed significantly to the achievement of an internal market in the EU. Whilst it is difficult to dispute the conclusion that the modernization of EU competition law has enhanced its effectiveness, it is equally difficult to argue that things cannot be done better, or even, much better.

Indeed, the modernization process and the consequences it has brought about have been so widely praised that they seem to be regarded by many as a sort of “end of history” of EU competition law enforcement. But, if you ask us, that view is very far from reality.

Drafting the present contribution has increased our awareness of several enforcement trends –some of which are a consequence of decentralization and modernization; others are not- that may undermine the coherency and effectiveness of our discipline to the extent of compromising its ability to attain its goals.

The facts and opinions contained in the pages above reveal that such risks arise on many fronts which include, inter alia: (a) an arguably insufficient protection of fundamental rights offered by current institutional and procedural frameworks;²²⁸ (b) a prioritization trend that leads public enforcers to focus eminently on restrictions by object, thus failing to provide precedents and guidance to other authorities and judges who, in turn, now tend to undertake expedient assessments under Article 101(1) and to prematurely rule out the possible application of Article 101(3), thus over-simplifying and distorting the scope and content of this provision;²²⁹ (c) a trend of increasingly resorting to unbalanced Article 9 commitment procedures in cases for which commitments are not the most suitable tool (for instance, because they involve complex issues which would deserve to be dealt with carefully and on the merits), or to instrumentalize commitment decisions to pursue regulatory goals;²³⁰ (d) the relativizing influence of “tea-party” economics, that risks turning competition law adjudication and self assessment into economic divination;²³¹ (e) the insufficient deterrence and collateral damages associated to ever-increasing pecuniary fines;²³² (f) the imperfect

²²⁸ See section II.A of this paper.

²²⁹ See sections II.C and II.I of this paper.

²³⁰ See sections II.E and II.F of this paper.

²³¹ See section II.G of this paper.

²³² See section II.H of this paper.

interplay between public and private enforcement;²³³ (g) the coexistence of diverging procedural and substantive standards within the EU;²³⁴ or (f) the combination of the lack of transparency and of clear and binding rules within the ECN with the arguably excessive informality, discretion and solidarity that prevails amongst its members.²³⁵

Behind those trends there appear to be two interrelated principal causes:

The first can be traced back to the mystification of efficiency not only as the ultimate goal of competition law, but also as a guiding principle of its day-to-day enforcement. Those with the courage and the time to have read our paper in full may have noticed how efficiency-related ideas play within practically each aspect of EU competition enforcement.²³⁶ Indeed, the cause –and to some extent also the consequence– of the trends outlined above is that aside from having conflated societal welfare with economic efficiency,²³⁷ enforcement has also moved towards legal efficiency, whereby legal concepts are reduced and simplified to the minimum necessary.

The second element that we posit to be at the root of some worrying and possibly dangerous trends is the widely accepted assumption that competition law is an exceptional branch of the law that deserves a special treatment, and that neither competition law nor its enforcement shall be constrained by ordinary legal standards.

It is submitted that this perception on the uniqueness of competition law is particularly acute in Europe due to several endogenous and exogenous reasons.

The endogenous factors relate to its “double-exotic” nature given, on the one hand, its economic substrate and, on the other, its inextricable links with EU law, which enable any competition law related “square peg” to fit into any national legal framework “round hole”. The exogenous factors include its specialized nature, the fact that until recently it was only fully applicable by expert enforcers in Brussels, and the resulting small epistemic community of academics, enforcers and practitioners (do you not know, or at least recognise, a significant proportion of the people in this room?). Our feeling that what we do is very special (and the feeling by others that what we do is something weird and that for that reason possibly special) has determined the widespread conception of EU competition law as something unique and, indeed, deserving of special treatment.

But the problem lies not in the perception of competition law as an exceptional branch of the law. Its specificity –which, after all, is shared with other exceptional areas of the law– is not necessarily a source of concern: what worries us is the assumption that competition law

²³³ See sections II.I of this paper.

²³⁴ See section II.A of this paper.

²³⁵ See sections III. B and III.C of this paper.

²³⁶ Others may, like us, notice this trend in areas other than competition law enforcement.

²³⁷ Whether societal welfare should be evaluated or pursued exclusively. We would recommend anyone interested in this debate to read A. Sen, *Development as Freedom* (2000).

is to be treated differently in derogation of standard legal principles and guarantees. Such widely held assumption has also impregnated the Courts. Indeed, both EU and national courts have consistently refused to enter into “complex assessments”, thereby embracing what we regard as excessively deferential standards of judicial review. Such judicial deference has to some extent endorsed and exacerbated the above-mentioned incorporation of “legal efficiency” into EU competition law enforcement. The resulting reality of this all is –let’s face it- that many aspects of competition law enforcement are an anomaly compared to the wider legal systems in which such enforcement takes place.

In line with the spirit of this paper, we will end with a question:

Is it not time to move away from the conventional wisdom that holds up competition law as a special branch of law requiring correspondingly special deference?