Contents

Introduction and Acknowledgements

1 The Reform of Competition Law Enforcement Brought About by Regulation No 1/2003

1.1 The Reform of Competition Law Enforcement Brought About by Regulation No 1/2003

1.1.1 Regulation No 1/2003 and its Implementing Measures

1.1.2 The Core of the Reform: The Replacement of the Centralised Notification and Authorisation System for Article 81(3) EC by a Directly Applicable Exception System

1.1.3 The Historic Justification for a Centralised Notification and Authorisation System, and Why This Justification is No Longer Valid Today

1.1.4 The Benefits Resulting from the Introduction of a Directly Applicable Exception System

1.1.4.1 Impact on Private Litigation in which Article 81 EC is Used as a Shield

1.1.4.1.1 Agreements which Fulfil the Conditions of Article 81(3) EC are No Longer Void

1.1.4.1.2 National Courts are Now Able to Apply the Four Conditions of Article 81(3) EC Themselves

1.1.4.2 Impact on the Commission’s Enforcement Priorities

1.1.4.2.1 What Should the Commission’s Enforcement Priorities Be?

1.1.4.2.2 The Notification System Distorted the Commission’s Enforcement Priorities

1.1.4.2.3 Regulation No 1/2003 Allows the Commission to Set its Enforcement Priorities Correctly

1.1.4.3 The Application of Articles 81 and 82 EC by National Competition Authorities

1.1.4.3.1 Regulation No 17 Discouraged the Application of Articles 81 and 82 EC by National Competition Authorities

1.1.4.3.2 Regulation No 1/2003 Encourages the Application of Articles 81 and 82 EC by National Competition Authorities
1.1.4.3.3 The Powers of National Competition Authorities as Compared to Those of the Commission 15

1.1.4.3.4 Why Should National Competition Authorities Prosecute Violations of Articles 81 and 82 EC? 16

1.1.4.4 The Direct and Hidden Costs of the Notification System Have Disappeared 17

1.1.4.5 Impact on Private Litigation in which Article 81 EC is Used as a Sword 19

1.2 Areas of Potential Concern 22

1.2.1 Block Exemption Regulations 22

1.2.2 Burden of Proof 23

1.2.3 Self-Assessment 24

1.2.4 Capability of National Courts to Apply Article 81(3) EC 25

1.2.4.1 The Issue Put in Perspective 25

1.2.4.2 Article 15 of the Regulation 27

1.2.4.3 Training and Specialisation 29

1.2.5 Allocation of Cases Within the Network of Competition Authorities 29

1.2.5.1 Principles of Allocation 29

1.2.5.2 Re-Allocation 30

1.2.5.3 Rights of the Private Parties Concerned 31

1.2.5.4 Parallel Action and the Principle of Ne Bis In Idem 33

1.2.6 Extraterritorial Powers of National Competition Authorities 35

1.2.7 Capability of National Competition Authorities 38

1.2.8 National Bias and Renationalisation 39

1.2.8.1 Article 11 of the Regulation Insures Against National Bias 39

1.2.8.2 Article 3 of the Regulation Prevents Renationalisation 41

1.2.9 Consistent Application of Articles 81 and 82 EC 44

1.2.9.1 The Issue Put in Perspective 44

1.2.9.2 Articles 11, 15 and 16 of the Regulation Ensure Consistency 45

1.2.10 Separation of Investigative, Prosecutorial and Adjudicative Functions 46

1.2.10.1 The Various Systems for the Public Enforcement of Articles 81 and 82 EC 46

1.2.10.2 The Regulation Recognises the Wide Variation in the Public Enforcement Systems of the Member States 47

1.2.11 Differences in Type and Level of Penalties 50

1.2.11.1 The Issue Put in Perspective 50

1.2.11.2 Article 12 of the Regulation 51
2 The European Competition Network, the European Convention on Human Rights and the Charter of Fundamental Rights of the EU

2.1 Introduction

2.2 The European Competition Network
   2.2.1 General Provisions
   2.2.2 Efficient Allocation of Cases Between the Members of the Network
   2.2.3 Assistance Between Members of the Network in Respect of Fact-Finding
   2.2.4 Coordination to Ensure the Consistent Application of Articles 81 and 82 EC
      2.2.4.1 Exchange of Information Between the Members of the Network
      2.2.4.2 Consultations Within the Network
      2.2.4.3 The Commission's Powers of Control

2.3 The European Convention on Human Rights
   2.3.1 Relevant Provisions
      2.3.1.1 Right to a Fair Trial and Other Guarantees Protecting Defendants in Criminal Proceedings
         2.3.1.1.1 Right to a Fair Trial (Article 6 ECHR)
         2.3.1.1.2 Right Not to be Tried or Punished Twice (Article 4 Protocol No 7)
      2.3.1.2 Protection of Private Life and of Property
         2.3.1.2.1 Right to Respect for Private Life (Article 8 ECHR)
         2.3.1.2.2 Protection of Property (Article 1 Protocol No 1)
   2.3.2 Legal Status

2.4 The Charter of Fundamental Rights
   2.4.1 Introduction: The Charter and its Relationship with the European Convention on Human Rights
   2.4.2 Relevant Provisions
      2.4.2.1 Right to a Fair Trial and Other Guarantees Protecting Defendants in Criminal Proceedings
         2.4.2.1.1 Right to a Fair Trial (Article 47 CFR)
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.6.2.3 Where the Difference is Due to a National Law or Community Law Providing for a Level of Protection Exceeding the Requirements of the Convention and the Charter</td>
<td>85</td>
</tr>
<tr>
<td>2.7 Possible Problems Related to Coordination to Ensure Consistency</td>
<td>85</td>
</tr>
<tr>
<td>2.7.1 Different Levels of Protection of the Confidentiality of Information Exchanged</td>
<td>85</td>
</tr>
<tr>
<td>2.7.2 Consultations Within the Network and the Right to Adversarial Proceedings</td>
<td>86</td>
</tr>
<tr>
<td>2.7.2.1 The Problem</td>
<td>86</td>
</tr>
<tr>
<td>2.7.2.2 The Case Law of the European Court of Human Rights</td>
<td>87</td>
</tr>
<tr>
<td>2.7.2.3 Administrative Authorities Versus Independent and Impartial Tribunals</td>
<td>88</td>
</tr>
<tr>
<td>2.7.2.4 Administrative Authorities</td>
<td>89</td>
</tr>
<tr>
<td>2.7.2.5 Independent and Impartial Tribunals</td>
<td>89</td>
</tr>
<tr>
<td>2.7.3 The Commission's Powers of Control and the Independence of National Competition Authorities</td>
<td>90</td>
</tr>
<tr>
<td>2.8 Conclusion</td>
<td>92</td>
</tr>
<tr>
<td>3 The Principle of Ne Bis In Idem</td>
<td>93</td>
</tr>
<tr>
<td>3.1 Introduction</td>
<td>93</td>
</tr>
<tr>
<td>3.2 The Principle of Ne Bis In Idem in the European Convention on Human Rights and in the Charter of Fundamental Rights of the European Union</td>
<td>94</td>
</tr>
<tr>
<td>3.2.1 Article 4 of Protocol No 7 to the European Convention on Human Rights</td>
<td>94</td>
</tr>
<tr>
<td>3.2.2 Article 50 of the Charter of Fundamental Rights of the European Union</td>
<td>96</td>
</tr>
<tr>
<td>3.3 The Economics of Ne Bis In Idem</td>
<td>98</td>
</tr>
<tr>
<td>3.3.1 The Problems of Over-Punishment and Under-Punishment</td>
<td>98</td>
</tr>
<tr>
<td>3.3.2 The Cost of Multiple Prosecutions</td>
<td>99</td>
</tr>
<tr>
<td>3.3.3 Incentives for Efficient Prosecution</td>
<td>100</td>
</tr>
<tr>
<td>3.3.4 The Risk of Vexatious Multiple Prosecutions</td>
<td>101</td>
</tr>
<tr>
<td>3.3.5 Incentives for Efficient Coordination Between Prosecutors</td>
<td>101</td>
</tr>
<tr>
<td>3.4 Multiple Prosecutions by the European Commission</td>
<td>102</td>
</tr>
<tr>
<td>3.4.1 Adoption of a Second Decision Where a First Decision Has Been Annulled for Procedural Reasons</td>
<td>102</td>
</tr>
<tr>
<td>3.4.2 Adoption of a Second Decision Where a First Decision Has Been Annulled for Lack of Evidence</td>
<td>104</td>
</tr>
<tr>
<td>3.5 Multiple Prosecutions and Multiple Fines in the EU Network of Competition Authorities</td>
<td>105</td>
</tr>
<tr>
<td>3.5.1 The Old Situation Under Regulation No 17</td>
<td>105</td>
</tr>
<tr>
<td>3.5.2 The New Situation Under Regulation No 1/2003</td>
<td>106</td>
</tr>
</tbody>
</table>
4 Should Private Antitrust Enforcement Be Encouraged?  

4.1 Introduction  
4.1.1 Overview  
4.1.2 The Current Role of Private Enforcement in Europe  
4.1.3 Private Enforcement in the United States  
4.1.4 Calls to Stimulate Private Enforcement in Europe  

4.2 The Goals of Antitrust Enforcement  

4.3 The Inherent Superiority of Public Enforcement  
4.3.1 Investigative and Sanctioning Powers  
4.3.2 Divergence Between the Private and the General Interest  
4.3.3 Cost  

4.4 No Need for Supplementary Private Enforcement  
4.4.1 No Need for Private Enforcement to Provide Additional Sanctions  
4.4.2 No Need for Private Enforcement to Bring Additional Cases  

4.5 The Pursuit of Corrective Justice through Compensation  

4.6 Conclusions  

5 The Collection of Intelligence and Evidence from Antitrust Violators  

5.1 The Law  
5.1.1 Powers of Investigation  
5.1.2 The Privilege Against Self-Incrimination  
5.1.3 Leniency  

5.2 An Economic Analysis  
5.2.1 Direct Force  
5.2.2 Compulsion  
5.2.3 Leniency  

6 The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function  

6.1 Introduction  
6.1.1 Overview  
6.1.2 The Current EC System  
6.1.2.1 Articles 81 and 82 EC  
6.1.2.2 The EC Merger Regulation  
6.1.3 The US System(s)  
6.1.3.1 The Department of Justice and the FTC (under the Pre-Merger Notification Programme)  
6.1.3.2 The FTC's Administrative Procedure  
6.1.4 The Legal Debate: Compatibility with Article 6(1) ECHR and Scope for Change Under the Current EC Treaty
6.1.4.1 Compatibility With Article 6(1) ECHR 157
6.1.4.2 Scope for Change Under the Current EC Treaty 160
6.1.5 The Wider Policy Debate: Criteria for Choosing the Better System 161

6.2 Accuracy: The Risk of Prosecutorial Bias 161
6.2.1 Introduction 161
6.2.2 Empirical Evidence 163
6.2.3 Three Possible Sources of Prosecutorial Bias 164
   6.2.3.1 Confirmation Bias 164
   6.2.3.2 Hindsight Bias and the Desire to Justify Past Efforts 165
   6.2.3.3 The Desire to Show a High Level of Enforcement Activity 167
6.2.4 Professional Ethics and Credibility of the Enforcement System 167
6.2.5 Separation of the Adjudicative Function from the Investigative and Prosecutorial Function 168
6.2.6 Internal Checks and Balances 169
6.2.7 Subsequent Judicial Review 170

6.3 Administrative Cost 171
6.4 Summary and Conclusion 173

Table of Legislation 175
Table of Cases 178
Subject Index 185