

The Modernization of European Competition Law: A Story of Unfinished Concepts

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SUMMARY

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In the late 1990s the European Commission started to conceive a complete overhaul of its competition policy. In view of the imminent enlargement of the Community to central and eastern Europe and the accession of a great number of new Member States, the Commission feared that it would be less and less able to ensure a satisfactory degree of enforcement of European competition law. In the spring of 1999 it therefore published a White Paper that suggested an entirely new structure for the enforcement of Articles 81 and 82 EC.¹ Its most important effect was that it replaced the previous monopoly of the European Commission to grant exemptions under Article 81(3) with a network of national competition authorities, which would be entitled to the direct application of Article 81(3) EC. This decentralisation, which will be outlined in the first part of this paper, is accompanied by a certain change in the application of the substantive provisions. It is probably due to an increased American and Anglo-Saxon influence on European competition law that a shift towards a more economic approach can be observed. Various Commission instruments give evidence of this trend. It comes to the surface most clearly in the new Merger Control Regulation 139/2004, which will be discussed in the second part. A third spectacular change of direction became visible in late 2005 and relates to private enforcement of Articles 81 and 82. The Commission had already hinted at the need for an increased use of private litigation in its early proposals for Regulation 1/2003.² A Green Paper on this subject was published in December 2005.³

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1. *Commission White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty*, COM (99) 101 final, 1999 O.J. (C 132) 1.

2. *See id.* paras. 99–100.

3. *Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM (2005)

I. DECENTRALIZATION

Ever since the promulgation of Regulation 17 in 1962⁴ European competition law has been characterized by the Commission's monopoly to grant exemptions under Article 81(3) EC. While national competition authorities and courts were allowed or even under an obligation to apply the prohibition of restrictive agreements laid down in Article 81(1) EC, they were not in a position to decide whether the case under scrutiny was exempted or not. Since the defendant undertakings usually invoke some justification for their anticompetitive behaviour, complaints lodged with a national competition authority or litigation started in a national court for violation of Article 81 were rather useless. Those who suffered from anticompetitive behaviour preferred to directly address the European Commission. The number of such complaints grew constantly with the accession of new Member States, and the Commission was less and less able to efficiently enforce European competition law.

The Commission used two instruments to cope with the problem. With regard to standard situations it issued block exemption regulations which declared Article 81(1) inapplicable to certain categories of agreements and concerted practices. Moreover, individual applications for exemptions were more and more often answered by so-called comfort letters. Without providing for definite clearance of the respective behaviour, they would state that the Commission, while reserving the right of later investigation, did not see any reason to intervene for the time being. The resulting uncertainty was most clearly felt when contracts containing anticompetitive clauses gave rise to private litigation: Would a national judge be allowed to consider a clause covered by a comfort letter as null and void under Article 81(2) EC, or would that clause have to be respected as valid until further action would be taken by the Commission?⁵

In view of the imminent enlargement of the Community towards central and eastern Europe and the accession of 10 new Member States, the Commission feared a flood of new cases would cause the situation to become untenable. It therefore gave up its monopoly on granting exemptions. Under Article 1(2) of Regulation 1/2003 "agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which satisfy the conditions of Article 81(3) of the Treaty shall not be prohibited, no prior decision to that effect being required."⁶ At the same time the competition authorities of the Member States are deprived of their discretion to apply either national competition law or Articles 81 and 82 when investigating anticompetitive behaviour. While the investigation as such remains discretionary, they have to apply Article 81 and 82 to behaviour that may affect trade between Member States if they decide to initiate proceedings.⁷ In respect of anticompetitive agreements, Article 3(2) explicitly establishes that Article 81 takes priority over a parallel application of national competition law. This rule and the direct

672 final (Dec. 19, 2005).

4. Council Regulation 17, 1962 J.O. (13) 204 (EEC); amended by Council Regulation 1216/1999, 1999 O.J. (L 148) 5 (EC).

5. See Schröter, *in* VERTRAG ÜBER DIE EUROPÄISCHE UNION UND VERTRAG ZUR GRÜNDUNG DER EUROPÄISCHEN GEMEINSCHAFT – KOMMENTAR (Groeben & Schwarze eds., 6th ed. 2003), Art. 81 EC, para. 229 with further references.

6. Council Regulation 1/2003, art. 1, 2003 O.J. (L 1) 7 (EC).

7. See *id.* art. 3(1).

applicability of Article 81(3) EC are supposed to prevent the distortion of the uniform substantive principles of Article 81 by the simultaneous application of national competition law.

But is that presumption justified? Is the obligation to apply uniform substantive standards sufficient to ensure uniform practice? We would be prepared to accept that assumption in the context of uniform private law in, for instance, the law of the international sale of goods or in respect of international transport conventions. But in competition law national interest and political involvement are much stronger than in traditional private law. In this respect the traditions differ widely among the 25 Member States. Economic policy in some of the old Member States, such as France, has always focused on the support of large national corporations whereas the economic policy of other countries, in particular Great Britain and Germany, has traditionally stressed the need for a competitive environment for the sake of consumer welfare and economic freedom. In most of the new Member States, competition law and policy are new achievements. Economic and political leaders of the older generation may have difficulty with competition policy, and the new generation sometimes appears to reject state intervention altogether even if it is meant to protect competition. The divergences are far-reaching and raise serious doubts about the possibility of a uniform competition regime under which administration is largely left to national authorities.

The Commission has been aware of the risks inherent in decentralization. The concept underlying Regulation 1/2003 provides for replacement of the Commission's monopoly—not by the decisions taken by single national authorities, but by a network composed of the Commission and the competition authorities of the Member States which are put under an obligation of close cooperation. The mechanisms of information and consultation are set forth in various provisions of Regulation 1/2003 and in further Community instruments (in particular a common declaration⁸ and a so-called network communication⁹). In this context only some basic structures can be explained.

A basic issue relates to the allocation of cases to a national competition authority. Given the effects doctrine which has been espoused by many national competition laws of Member States, anticompetitive behaviour affecting trade between Member States will often give rise to investigations conducted by two or more competition authorities of different countries. Their respective competence cannot be doubted, but it goes without saying that parallel proceedings conducted in several Member States may generate excessive costs and lead to contradictory results. Article 13 of Regulation 1/2003 therefore allows Member States to suspend or terminate proceedings in view of proceedings initiated by the authority of another Member State. Contrary to the objection of *lis alibi pendens* in civil procedure, it is not necessarily the court first approached that will conduct the proceedings. Rather, the allocation of a case will be decided by a consultation between the Member States involved and the Commission.

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

9. Commission Notice on Cooperation Within the Network of Competition Authorities (EU) of 27 Apr. 2004, 2004 O.J. (C 101) 43.

According to the network communication, the case should be allocated to the authority best suited for that purpose.¹⁰ While some relevant considerations are set forth in the communication, their mutual relation is unclear. For example, the case may be allocated to the authority of a Member State where most of the relevant proof is located, but it would also be possible for the case to be left to the authority of another Member State which has the resources for investigation at the relevant time. After two years of operation, officials 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. Take the example of criminal sanctions for the responsible managers, which exist only in some Member States, such as Great Britain 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 Convention¹¹ and in Article 47 of the Charter of Basic Rights?¹²

Regulation 1/2003 provides for many obligations in the field of information and consultation.¹³ It also allows the competition authorities of Member States to carry out investigations on behalf of the competition authority of another Member State in order to establish whether there has been an infringement of Article 81 or 82.¹⁴ It must, however, be stressed that this type of cooperation is voluntary. How can we expect a thorough investigation into a cross-border cartel if Member States' authorities are not obligated to carry out investigation requests from the national authorities of other Member States? The underlying assumption is that the national competition authority designated by the network is to carry out such a comprehensive inquiry into all effects of anticompetitive behaviour wherever they are felt within the Community. This assumption may be optimistic, however. Regulation 1/2003 does not put the designated competition authority under an obligation to extend its investigation beyond the national boundaries of its own state. Given the difficulties of taking evidence abroad and the delay caused by transnational cooperation, national competition authorities are likely to limit their investigations to their respective national territories. If that is true, the case allocation mechanism has to be questioned. If an anticompetitive behaviour affects several Member States and the national authority designated by the network only investigates the effects felt in its own territory, case allocation may lead to underpunishment since the effects in other Member States will not be taken into account by the investigating authority when fixing the amount of the fine.

To sum up, decentralization may intensify the public enforcement of Articles 81 and 82. On the other hand the structure of the European competition network as

10. *Id.* at 43, para. 7.

11. Convention for the Protection of Human Rights and Fundamental Freedoms, Apr. 11, 1950, 213 U.N.T.S. 221.

12. Charter of Fundamental Rights of the European Union, Dec. 18, 2000, 2000 O.J. (C 364) 1, 20 (discussing the right to an effective remedy and to a fair trial).

13. *See, e.g.*, Council Regulation 1/2003, *supra* note 6, arts. 11, 12 and 15; *see also* Commission Notice on Cooperation, *supra* note 9, art. 2.2 (discussing concrete mechanisms of cooperation).

14. *See id.* art. 22.

enshrined in Regulation 1/2003 is conceptually incomplete and inconsistent; it will most probably lead to underpunishment. This is underpinned by the final observation that there is no mutual recognition and enforcement of decisions within this network of competition authorities. Regulation 1/2003 is no more than a first step towards a true network of competition authorities.

II. A MORE ECONOMIC APPROACH IN MERGER CONTROL

A second distinctive feature of the modernization of EC competition law is the increased significance of economics.¹⁵ Clear evidence for this shift in methodology can be found in the guidelines on horizontal cooperation¹⁶ and in the block exemption Regulation for vertical restraints.¹⁷ But the most significant legal instrument that reflects this evolution is the substantive test of merger control adopted by the new Merger Control Regulation no. 139/2004.¹⁸

The control of concentrations has been introduced into Community law by Regulation 4064/89.¹⁹ Under its Article 2(3), a concentration “which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded” had to be declared incompatible with the common market. The second element of this two-tiered test turned out to be rather insignificant in its practical application. Whenever the Commission assessed the creation or strengthening of an individual or collective dominant position, a significant impediment of effective competition was presumed to result therefrom.²⁰ The dominance test was inherently linked to Article 82: if the abuse of a dominant position is forbidden under that provision, the law should be reluctant to accept the emergence of dominant positions except for the case of internal growth. As a consequence of Regulation 4064/89, the same concept of dominance of the relevant market could be used for both merger control and the control of abusive practices. In particular, the judicial presumption of dominance flowing from a market share of more than fifty percent²¹ and the test of collective dominance espoused by the Court of Justice²² could be used in both contexts.²³

15. See, e.g., Doris Hildebrand, *Der “more economic approach,”* in *DER WETTBEWERBSPOLITIK – DYNAMIK UND AUSBLICK* 513 (2005); ARNDT CHRISTIANSEN, *DIE “ÖKONOMISIERUNG” DER EU-FUSIONSKONTROLLE: MEHR KOSTEN ALS NUTZEN?* 285 (2005); ULF BÖGE, *DER “MORE ECONOMIC APPROACH” UND DIE DEUTSCHE WETTBEWERBSPOLITIK* 727 (2004).

16. Commission Notice: Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements, 2001 O.J. (C 3) 2 (EC) [hereinafter Commission Notice: Guidelines].

17. Commission Regulation 2790/1999, 1999 O.J. (L 336) 21 (EC).

18. Council Regulation 139/2004, 2004 O.J. (L 24) 1 (EC).

19. Council Regulation 4064/89, 1989 O.J. (L 395), 1 (EEC).

20. For the discussion on the relevance of this element, see *Immenga*, in *Immenga/Mestmäcker*, *EG-Wettbewerbsrecht*, Vol. I (1997), Art. 2 FKVO, para. 18 seqq.; *Rösler*, in *Frankfurter Kommentar zum Kartellrecht*, Vol. 6, Art. 2 FKVO, para. 216 seq.

21. See, e.g., Case C-85/76, *Hoffmann-La Roche v. Comm’n*, 1979 E.C.R. I-461; Case C-62/86, *AKZO Chemie v. Comm’n*, 1991 E.C.R. I-03359 (both concerning abuse of dominance law).

22. See, e.g., Joined Cases T-68/89, T-77/89 & T-78/89 *Società Italiana Vetro SpA v. Comm’n*, 1992 E.C.R. II-1403; Case C-393/92, *Almelo v. NV Energiebedrijf Ijsselmij*, 1994 E.C.R. I-1477; Joined Cases C-140/94, C-141/94 & C-142/94, *DIP SpA v. Comune di Bassano del Grappa*, 1995 E.C.R. I-3257; Joined Cases T-24/93, T-25/93, T-26/93 & T-28/93, *Compagnie Maritime Belge Transports SA v. Comm’n*, 1996 E.C.R. II-1201; Joined Cases C-68/94 & C-30/95, *French Republic v. Comm’n*, 1998 E.C.R. I-1375; Case T-102/96, *Gencor Ltd. v. Comm’n*, 1999 E.C.R. II-753; Case T-342/99, *Airtours plc v. Comm’n*, 2002 E.C.R.

Article 2(3) of Regulation 139/2004 has changed the order of the two elements of the substantive test of merger control. At present, a concentration “which would significantly impede effective competition . . . in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.”²⁴ Under the new rule the dominance test is only an example for a significant impediment of effective competition. The latter now provides the main criterion. As a consequence, even a merger that does not satisfy the dominance test can be prohibited under the new SIEC test.

This amendment may appear marginal at first sight. But it has the effect of depriving the previous case law of much of its significance. Given the impediment to economic competition exemplified by the dominance test, it is unlikely that a merger that satisfies the latter will be declared compatible with the common market. On the other hand, the application of the dominance test is not exhaustive. There may be mergers that are not caught by the dominance test that still constitute a significant impediment to economic competition.

In order to explain the need for this additional possibility of control, recital 25 of Regulation 139/2004 refers to the non-coordinated or unilateral effects that a merger may have in oligopolistic markets. A good illustration of these uncoordinated effects is the *Airtours* case, decided by the Court of First Instance.²⁵ It relates to the British market of all-inclusive tours to the European continent and its surroundings. Among the four leading tour operators, numbers three and four, with market shares of 15 and 19.4% respectively, had merged.²⁶ As a consequence, the merged entity was now number one, with a 34.4% market share; this placed it in front of the previous leader, which had a 30.7% market share, and the fourth company, which had a 20.4% market share.²⁷ The Commission had prohibited the merger, stating that it would strengthen a collective dominant position of the four leading undertakings.²⁸ On review, the Commission decision was declared void by the Court of First Instance. The Court pointed out that, for the assumption of collective dominance, considerable transparency of the market would be required so that every member of the leading oligopoly could monitor with sufficient precision and speed the behaviour of other market actors.²⁹ Moreover, collective dominance would require the ability of the members of the oligopoly to impose severe sanctions on deviating members, therefore discouraging them from any attempt to push forward in competition.³⁰ The Court held that the Commission had not sufficiently proven the presence of these elements of collective dominance in the case at hand.³¹

It is not unlikely that the collective dominance test has reached its limits in this case. Apparently, one of the basic requirements of collective dominance, i.e., the

II-2585 [hereinafter *Airtours*].

23. In assessing market shares, one has to be aware, however, that due to the prospective character and the more dynamic approach of merger control, the ECJ decisions on Article 82 concerning the field of abuse of dominance can only cautiously be transferred to the situation of merger control; see *Immenga*, *supra* note 20, art. 2 FKVO, para. 102.

24. Council Regulation 139/2004, *supra* note 18, art. 2(3).

25. *Airtours*, *supra* note 22.

26. *Id.* para. 66.

27. *Id.*

28. Commission Decision 2000/276, 2000 O.J. (L 93) 1, 9 (EC).

29. *Airtours*, *supra* note 22, para. 60.

30. *Id.* para. 62.

31. *Id.* para. 277.

homogeneous character of the goods in the market, is absent here. Nevertheless, economists maintain that a merger in a narrow oligopoly may provide additional room to manoeuvre for the remaining undertakings in the market. In particular, a competitive initiative taken by a tour operator with a very large market share would be unlikely to be matched by its competitors who would be unable to book a sufficient number of hotel rooms and air transport capacity to strike back. Unilateral effects of this kind are said to be unsusceptible of being accounted for by the dominance test. Economists suggest that the SIEC test is more flexible and would allow for a prohibition needed in these cases.³² While this may be true, the economic reasoning underlying the analysis of the *Airtours* case appears questionable. It is based on a very limited time frame of one year and does not take into account the reaction of competitors in subsequent years. It is possible that competitors who have been surprised by the market leader pushing forward in one year will strike back in the following year. If that is true, the need for merger review beyond the dominance test would not appear to be well founded.

Another element of economic analysis that has received increased significance in the framework of the SIEC test is the efficiency defence.³³ The previous Regulation 4064/89 had pointed out, in recitals 4 and 13, that concentrations are apt to increase the competitiveness of European industry, to improve the conditions of growth, to raise the standard of living, and to strengthen the Community's economic and social cohesion. But these goals were related to the fundamental objectives of the Community as laid down in Articles 2 and 130(a) (now 158) EC, while the efficiency gains to be derived from a merger were not explicitly addressed. Those gains could give support to a merger insofar as they contributed to "the development of technical and economic progress."³⁴ But their role was ambivalent since they might also be suited to give additional strength to the merged entity in relation to its competitors.

To the contrary, the Green Paper on the overhaul of the merger control Regulation³⁵ makes reference to efficiency gains only in defence of concentration, as does Regulation 139/2004. While the wording of Article 2(1) has remained unchanged in this respect, recital 29 makes explicit reference to the possibility "that the efficiencies brought about by the concentration counteract the effects on competition, and in particular the potential harm to consumers . . . and that, as a consequence, the concentration would not significantly impede effective competition . . ."³⁶ Thus, efficiency is considered as an element of the restriction of competition, and the guidelines on horizontal mergers published by the Commission³⁷ point equally to the possibility that efficiency gains will offset anticompetitive effects.

32. See Bundeskartellamt, Arbeitskreis Kartellrecht, *Das Untersagungskriterium in der Fusionskontrolle – Marktbeherrschende Stellung versus Substantial Lessening of Competition?*, Konzepte für die Prüfung von Unternehmenszusammenschlüssen 16 (2001).

33. See MESTMÄCKER & SCHWEITZER, *EUROPÄISCHES WETTBEWERBSRECHT* § 25, para. 142 (2d ed. 2004); Zeise, in *HANDBUCH DER FUSIONSKONTROLLE* 358, para. 1282 (Schulte ed., 2005).

34. Council Regulation 4064/89, *supra* note 19, art. 2(1)(b) (EC).

35. *Commission Green Paper on the Review of Council Regulation*, No. 4064/89, COM (2001) 745/6 final (Nov. 12, 2001).

36. Council Regulation 139/2004, *supra* note 18, recital 29.

37. Commission Notice: Guidelines, *supra* note 16.

There are two major objections to the new approach. In the first place, the very measurement of efficiency gains by a state authority appears to contradict the model of the market economy. This model departs from the basic assumption that market actors—whether individuals or undertakings—determine their own economic preferences individually and in a subjective way. There is no rational way of convincing an individual that the purchase of a Rolls Royce has to be preferred to that of a Skoda. It is not possible to find objective criteria that cause people to spend their money on large apartments instead of luxury cars. These individual preferences may be explained by psychological and cultural factors, or by specific needs and inclinations of the single market actors. But the market process has to accept these preferences as a point of departure, i.e., for the exchange of goods and services and the formation of prices. As a consequence, efficiency gains can only be determined on the basis of individual decisions to pay a certain price for goods or services. Efficiency is the aggregate of the increase of satisfaction felt by market actors as a result of the market process. In this respect, it is not sufficient to take into account the satisfaction of the undertakings involved in a merger; the satisfaction of third parties and consumers has to be considered as well. How can a state authority assess all these individual appreciations of a merger? Since the individual appreciation would usually depend on the prediction of the effect of a merger in the future, prognostic capacities of which nobody can boast would be required.

A second objection relates to the alleged offsetting of the anticompetitive and efficiency effects of a merger. This would require a kind of quantification of both effects which is, in fact, insinuated in the Commission's guidelines on horizontal mergers. But such quantification would unnecessarily limit the analysis. It would focus on the merger's effect on prices, predicting efficiency gains if prices decrease, and prevailing anticompetitive effects if prices increase. It risks excluding the structural effects of the merger that would usually last for a much longer period than the immediate effect on prices. It should not be forgotten, however, that the review of mergers was introduced precisely for those structural effects which are reflected by the dominance test.

To sum up, the more economic approach as applied by Regulation 139/2004 to the review of mergers raises many questions. It appears doubtful whether the amendment helps to protect competition, and its impact on the legal certainty required for merger operations is equally doubtful.³⁸ It is safe to assume, however, that the bar specializing in competition law will acquire additional business.

III. PRIVATE ENFORCEMENT

A further element of the modernization of EC competition law may be a shift towards private enforcement. Private enforcement has always been contemplated as a shield against private claims as far as the function of Article 81 is concerned.³⁹ In fact, claims arising from anticompetitive agreements have always been countered by defendants invoking the nullity of the contract under Article 81(2) EC. The recent debate focuses on the offensive use of Articles 81 and 82 as a "sword" in the hands of the victims of anticompetitive behaviour. It is well-known that private claims for

38. See also Christiansen, *supra* note 15.

39. See, e.g., K. Schmidt, *supra* note 20, art. 85, para. 38.

compensation of the losses suffered from cartels and monopolistic abuses play a significant role in the enforcement of U.S. antitrust law, where the plaintiff is entitled to three times the amount of his loss.⁴⁰ In Europe, such claims have not been recognized until recently in Community law. While Member States would usually provide for a cause of action for damages resulting from the violation of Articles 81 and 82 EC in their municipal laws, no Member State is as generous to the plaintiff as U.S. law.

As early as 1999, when presenting the proposal for the later Regulation 1/2003, the Commission pointed out that the “proposal aims at promoting private enforcement through national courts.”⁴¹ In fact, the direct applicability of Article 81(3) allows national courts to give judgement on actions for compensation based upon the violation of Article 81 EC without staying proceedings, until the Commission decides upon a possible exemption under Article 81(3) EC. But at that stage there was no cause of action under Community law for such claims. This changed in September 2001, when the European Court of Justice handed down its opinion in *Courage v. Crehan*.⁴² The Court pointed out that the practical effect of the prohibition of restrictive agreements in Article 81(1) “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.”⁴³ In the Court’s view, “actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.”⁴⁴ However, “in the absence of Community rules governing the matter” the Court referred such claims to the domestic legal systems of the single Member States.⁴⁵

The explicit reference to the lack of Community rules was immediately understood by the Commission. It placed an order for a comprehensive comparative survey with the international law firm Ashurst; the report was published on the website of the Directorate General Competition in 2004.⁴⁶ Thereafter, it convened an expert group consisting of five judges and scholars to give advice on the various issues raised by private enforcement.⁴⁷ The resulting Green Paper on the matter was published in December 2005.⁴⁸

40. Clayton Act, ch. 323, § 4, 38 Stat. 730 (1914) (current version at 15 U.S.C. § 15(a) (2006)).

41. *Commission Proposal for a Council Regulation on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty ("Regulation implementing Articles 81 and 82 of the Treaty")*, at 6, COM (2000) 582 final (Sept. 27, 2000).

42. Case C-453/99, *Courage Ltd. v. Crehan*, 2001 E.C.R. I-6297.

43. *Id.* para. 26.

44. *Id.* para. 27.

45. *Id.* para. 29.

46. Denis Waelbroeck, Donald Slater, & Gil 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.

47. The members of the group were Professor Walter van Gerven (Belgium), a former Advocate General of the Court of Justice as chairman, and Jürgen Basedow, the author of the present article, Sir Christopher Bellamy (United Kingdom), President of the British Competition Appeals Tribunal, Carole Champalaune (France), judge at the French Supreme Court, and Professor Robert Mok (Netherlands).

48. *Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules*, *supra* note 3. For an appraisal of the Green Paper see PRIVATE ENFORCEMENT OF EC COMPETITION LAW (Basedow ed. 2007).

It follows that the law in this field has not developed as far as it has regarding decentralization and the more economic approach. It is therefore too early to go into details. But it is worth raising some questions that might help foster understanding for the considerable difficulties of private enforcement. Given the coexistence of Articles 81 and 82 on the one side and national competition law on the other, the Commission must clarify the relation between Community and national law. Accordingly, it will have to decide whether the approximation of national laws or the creation of a uniform liability regime is appropriate. Since Community law will be somehow embedded in national private law, it will be important to know which national law should supplement a Community instrument. This issue of private international law will have to be answered in view of the proposal for a Rome II Regulation⁴⁹ on the law applicable to non-contractual obligations, which will be adopted and promulgated shortly.

A further basic issue relates to the type of claim that is to be granted to the victims of a cartel: Should the undertakings involved in anticompetitive behaviour be put under an obligation to make restitution of the rent earned from the cartel, as a kind of unjust enrichment? Or should the victims be entitled to claim damages for compensation of their losses? The most important question that arises in this context deals with the so called passing-on defence of the cartel members.⁵⁰ If the victims have not suffered any loss because they were able to pass the higher input prices on to their customers, should this exclude their claims? In that case it would be up to the clients on the downstream market, and perhaps eventually the consumers, to claim compensation from the undertakings involved in anticompetitive practices. Since the losses dissipate as the goods are traded downstream, they get smaller and smaller and experience shows that the final consumers do not have sufficient incentive to file an action for compensation. If the plea of the European Court of Justice for full effectiveness of Article 81 is to be taken seriously, the law must therefore allow for some kind of aggregation of small claims in a class action or other type of group action. Other issues would relate to the alleviation of proof, to the interest owed by the cartel members on the compensation, and to additional incentives which potential plaintiffs would need in order to bring action, i.e., eventually to the recognition of double or treble damages.

It is my impression that the European Commission is pushing forward impatiently in this field, as it has done in the other fields mentioned before. The Green Paper is based on thorough research into the antecedents of comparative and Community law. But it is uncertain whether all the concepts and options are well thought-out. Here, as in the other fields, a certain trend of Community policy

49. *Commission Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations (Rome II)*, COM (2003) 427 final (Jul. 22, 2003); *Commission Amended Proposal for a European Parliament and Council Regulation on the Law Applicable to Non-Contractual Obligations ("Rome II")*, COM (2006) 83 final (Feb. 21, 2006). For an appraisal of the 2003 proposal in general, see, von Hein, *Die Kodifikation des europäischen Internationalen Deliktsrechts - Zur geplanten EU-Verordnung über das auf außervertragliche Schuldverhältnisse anzuwendende Recht*, 102 ZVGLRWISS 528 (2003); for background specifically on private enforcement of EC competition law, see Hamburg Group for Private International Law, *Comments on the European Commission's Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations*, 67 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 1 (2003); see also Bulst, *Internationale Zuständigkeit, anwendbares Recht und Schadensberechnung im Kartelldeliktsrecht*, EWS 2004, 403 (408). At the time of reading the proofs of this article a compromise on Rome II has been reached and the promulgation of the instrument is imminent.

50. See, e.g., Roth, in 3 FRANKFURTER KOMMENTAR ZUM KARTELLRECHT § 33, para. 143.

becomes visible: one that gives greater weight to setting a new policy afloat than to a thorough investigation into its consequences. The Community should avoid the premature implementation of another unfinished concept. It is now up to the European public to subject the Green Paper to close scrutiny.