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On May 1, 2004, the EU not only welcomed ten new Member States from Central and Eastern Europe, but also paved the way to private enforcement of competition law. Especially in light of this enlargement, the old system of Regulation No 17/62, based on an administrative control of agreements, became infeasible. Commissioner Monti regarded the new Council Regulation 1/2003, which entered into force on the so-called “e-day,” i.e. enlargement day, as the most radical competition policy reform since the 1950s—which is why there was talk about the “c-day” or “competition day” as well.

The need to modernize EC competition law was first officially expressed in the White Paper published by the Commission of the European Communities in 1999. The process led to the new proposed legislation, Council Regulation 1/2003, which has been in force since May 1, 2004. The European Commission also adopted a series of documents, which completed the landmark modernization of the European Union’s antitrust enforcement rules and procedures. The entire exercise is commonly referred to

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as the "Modernization Package."¹ This package consists of the Commission Regulation and six Notices, which provide further clarification on aspects of the new antitrust rules.²

The above legislation effectively decentralized competition law by making Article 81(3) EC directly applicable in the Member States and thus abolished the *ex ante* notification system. Accordingly, it would be the national courts' and national competition authorities' obligation to enforce Art 81 and 82 EC in their entirety, which would lead to more private actions being brought for breach of EC competition law than before.

These radical reforms paved the way for a new environment in competition law. National competition authorities ("NCAs") and courts were expected to become much more involved in the enforcement of rules, and private entities would be required to self-assess their conduct more than ever before.

The basic aim of the Regulation 1/2003 was to promote and safeguard a decentralized network characterized by transparency, uniformity, and consistency in the application of competition law. A European network based on the cooperation between NCAs and the Commission on the one hand and the mutual exchange of information on the other would support this aim. This approach was expected to bring together different legal systems all over Europe, which would pursue the same goal, namely the efficient application of European competition law and the protection of both undertakings and consumers.

¹Commission finalises modernisation of the EU antitrust enforcement rules', <http://europa.eu>

²MODERNISATION OF EC ANTITRUST ENFORCEMENT RULES COUNCIL REGULATION (EC) NO 1/2003 AND THE MODERNISATION PACKAGE, European Commission Directorate-General for Competition, <http://europa.eu>

Under the heading of modernization of EC competition law the European Commission adopted its *Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings* on December 3, 2008. The Guidance comes almost three years after the Commission published its Article 82 EC Discussion Paper and presents the Commission's priorities in applying Article 82 to exclusionary conduct by dominant undertakings outlining an economic and effects-based approach to the application of Article 82. The economic and effects-based approach set out in the Guidance reflects the Commission practice in recent Article 82 cases, such as the ones against Microsoft and Wanadoo.³

The Guidance was apparently issued in an effort to provide greater clarity and predictability on the analysis of Article 82, and also to codify the past and current case law. Furthermore, the Guidance would presumably increase legal certainty and transparency in the enforcement of Article 82, while also assisting National Courts in interpreting and applying it.

It may be true that the Commission's goals are noble in principle, but there are many concerns as to whether the Guidance in question will solve the problem of heterogeneity between the NCAs and the Commission's approach to Art. 82 cases or if the Guidance will end up intensifying it. In particular, although the document provides useful guidance on what the Commission's priorities are likely to be, the Communication makes it clear that this is not intended to constitute a statement of law, but it is without

³*The European Commission's enforcement priorities as regards exclusionary abuses of dominance—current thinking*, Neelie Kroes, www.ibanet.org

prejudice to the interpretation of Article 82 by the European Court of Justice and the Court of First Instance.

Namely, the Commission Guidance is merely intended to indicate the principles that shall guide the Commission when setting its priorities, which practically means that both the Community and National Courts will continue to consider the existing and future case law as binding, without necessarily being limited by what the Commission defines as its priorities. Therefore, even if the latest Guidance Paper turns out to influence the NCAs, it is quite probable that these authorities will not abstain from the formalistic—and rather safe—approach and continue to follow the existing case law. Consequently, we are likely to face the paradox of two different authorities, namely NCAs and the European Commission, enforcing Article 82 in dissimilar ways.

In view of the above, one could argue that the present Communication, instead of facilitating the application of Article 82 and promoting its uniform application by NCAs, could make the application of Article 82 more complicated than before and bring back the arguments against the decentralized enforcement of Community Competition Law.

A main argument against decentralization was that it could lead to legal uncertainty, inconsistency, and conflicting priorities among enforcers, as enforcement by different courts and authorities can involve different approaches. Under a decentralized application system of EC competition rules, any uncertainty in the interpretation of law necessarily entails the peril that decision-making bodies, located in different Member States with different judicial traditions, interpretations, and prioritization of competition

policy, might decide on similar cases in dissimilar ways⁴.

Doubts have also been expressed as to whether National Courts have the capacity and necessary expertise to rule on competition law cases, which necessarily involve the evaluation, assessment, and scrutiny of complex economic issues. These concerns arise from the fact that competition rules are very technical and complicated in nature and that National Courts are relatively inexperienced in dealing with relevant cases.

In view of the above, one could argue that the Guidance not only leaves many deficiencies of the decentralized enforcement of competition rules unsolved, but also that the Commission does not seem to have a specific program or clear view as to how it will achieve the goals of the Modernization Package. Although the Guidance attempts to clarify Commission's future plan as to the enforcement of Article 82, it fails to provide a practical common guide which National Courts and NCAs could adopt. On the contrary, the Commission decides to follow a rather isolated approach (effects-based approach), presumably disregarding the fact that there is a significant number of judgments of the European Court of Justice, which are formalistic for the most part, rather than effects-based. Therefore, NCAs and National Courts are expected to be quite reluctant to follow the Guidance if they conflict with existing case law.

Furthermore, the choice of the Commission to publish a document that does not carry the force of law demonstrates the Commission's difficulty to provide a homogeneous Competition Policy model which can be adopted and followed by all

⁴*Maybe Definitely—Definitely Maybe? EC Competition Law—Is the Time Ripe for Reform?* Peter I.B. Goldschmidt and Christoph Lanz, <http://www.eipa.nl>

Member States, thereby indirectly acknowledging the disagreements that still exist between Member States and the Commission over vital matters.

While recognizing the need for a general reform of the implementation of EC competition rules, it would appear that the type of reform proposed by the Commission through its Guidance does not seem to solve the problems. The European enlargement set new standards and posed major challenges for the European institutions and all Member States. Consequently, the Commission's efforts should focus on the promotion of cooperation among Member States in order to achieve legal certainty, rather than taking the risk of causing further confusion, discrepancies, and dissimilarities in the application of Competition law by Member States in the new enlarged European environment.

Legal certainty and a common approach by NCAs and the Commission are prerequisites for the implementation of the Commission's objectives to decentralize the application of EC Competition Law. These goals could be better fulfilled by adopting clear Guidelines, hand-in-hand with binding and consistent legislation that will ensure uniformity and coherence— not by attempting to reform hard law (case-law) through soft law (Guidance).