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The Toll of Private Self-Enforcement

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Revisiting the European Competition Reform:  
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## **Abstract**

The recent European competition law reform abolished the more than 40 year-old notification regime according to which companies routinely notified to the European Commission all kinds of envisaged commercial agreements and cooperative business practices other than mergers and acquisitions (e.g. production and R&D joint ventures, licensing and franchising contracts, marketing and sales agreements, information exchange and other collaborative activities with their competitors). A new system of private self-enforcement of European competition law will come in place, which hinges upon two dimensions: enhanced emphasis is given to private self-assessment and the facilitation of legal actions by private entities before the national and the European courts. The shift towards private enforcement reflects an incremental change of competition control. It represents a case of convergence towards the US competition law enforcement system. This paper puts the two dimensions of private self-enforcement in a context of a broader discursive shift in contemporary European economic governance and argues that the reliance on the 'market intelligence' in spotting anti-competitive practices indicates a regulatory transformation from a clear-cut, formal and supervisory public control towards a more insecure and more laissez-faire market-based solution. Although it remains to be seen what future impacts the reform will cause, the paper somewhat tentatively contends that this is a rather risky endeavor with regard to regulatory stringency as it may stimulate a claimant's culture driven merely by profit motives. The ones to profit from private self-assessment and increased litigations are law companies providing advocacy services to other companies.

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*“It’s like listening to a piece of symphonic music: you hear the main theme over and over again in different ways, so that by the time you leave the concert hall you are humming the tune.”*

John Fingleton, Chairmen of the Irish Competition Authority, at the European Competition Day, 22<sup>nd</sup> October 2004 in Amsterdam.

## **Introduction**

In the US, the most outrageous and ridiculous lawsuits that find their way to US courts are honored by annual Stella Awards, named after Stella Liebeck, the 79-year old woman that in 1992 sued McDonald’s for her burns after she spilled hot coffee on herself and won \$2.9 million. The most frivolous candidate of this year’s award is Mr. Merv Grazinski of Oklahoma City, who set the cruise control at 70 mph in his brand new 32-foot Winnebago motor home. When the car crashed after he got himself a cup of coffee at the back of the vehicle, Mr. Grazinski sued Winnebago for not having warned him in the manual about the consequences of leaving the drivers seat. Meanwhile, the company has included an extra advice on this topic in their manual (*see* for more examples [www.stellaawards.com](http://www.stellaawards.com)).

Although the Stella Awards are a hoax rather than a serious contest, they are symbolic for an excessive culture of litigation that has run out of control - a culture of litigation in which ‘accidents’ hardly exist anymore. One might wonder how the above examples are related to the recent overhaul of European competition law. Although there is no immediate reason to assume that the EU moves towards a comparable claimant’s culture found in the US, the abolishment of the notification procedure that came along with the new competition law enforcement regime of 1 May 2004 raises some concerns that point into that direction.

With the welcoming of the 10 new Member States into the European Union, the European competition regime has undergone a major overhaul, which came in form of a reform package of substantial and procedural changes. One of the changes concerned the system for the enforcement of the competition laws. By the replacement of Regulation 17 with Regulation No. 1/2003 all signs are set towards increased private enforcement of European competition law. The new regulation abolishes the notification system with regard to Article 81 (TEC) according to which companies could have assured by the European Commission that an envisaged deal other than a cross-border merger or an acquisition did not violate European Commission law. Article 81 (TEC) regulates the prohibition of restrictive business practices and cartels, such as anticompetitive agreements between direct competitors (horizontal restraints) and agreements between companies involved in the different stages of the production-, distribution, or marketing process (vertical restraints). Under the new system, commercial agreements between companies above a certain turnover threshold, such as joint ventures, distribution and supplier agreements, licensing and franchising contracts, etc. can no longer be notified to the European Commission, whose approval to a deal used to guarantee immunity from legal prosecution. As far as mergers

and state aid is concerned, the specific notification system remains applicable, which means that the reform only partly abolishes the notification system in competition matters. Yet, the fact that business agreements other than mergers and acquisitions can no longer be notified to the European Commission implies that companies have to assess by themselves whether an agreement infringes with Article 81 (TEC).

Next to the greater emphasis on private self-assessment, the competition reform aims at facilitating legal actions by private entities before the national and the European courts. The European Commission strongly promotes private enforcement of European competition law. It forecasts a positive feedback loop according to which the mere threat of litigations is believed to effect sufficient deterrence and less violation of competition rules. Following a speech given by Mario Monti (2004a), the former Commissioner of Competition, private competition enforcement is believed to catalyze a 'culture of competition' by raising awareness of competitors and consumers on competition law infringements by market players, which ultimately is expected to increase overall welfare gains.

The shift towards increased private litigation reflects an incremental change of competition control. Although competition authorities in Europe have always relied on private complaints, private damage claims at the European courts are very seldom. The European Commission enjoyed a virtual monopoly over European competition law enforcement, while the national competition law enforcement belonged to the exclusive domain of national competition authorities (NCAs). In this vein, the new private enforcement regime is exemplary for an overall tendency of shifting away from supervisory market control to less market intervention by public authorities. Moreover, it illustrates a major step of convergence towards the US system, where 90% of all antitrust cases are private actions, whereas in Europe only 5% of all cases are due to private litigations and 95% are constituted by public enforcement (Kemper 2004: 9).

A broad debate on the implications of the major overhaul of European competition law still has to follow. Although the decision for private competition enforcement has been taken, there are still many legal ambiguities that need to be further clarified. The European Commission intends to issue a Green Paper in the near future in order to consult different stakeholders on the issue of private enforcement in competition law.

The paper elaborates on two sets of questions that arise with the heightened emphasis on corporate self-reliance in the field of European competition law enforcement. First, there is much reason to assume that private self-enforcement represents a case of convergence towards the US enforcement system. Thus, what is converging and how can we interpret the recent steps of convergence towards the US model of increased private enforcement? Second, what are possible consequences of increased private enforcement of competition laws for corporate actors in particular and the wider society more general? What is at stake and who is likely to profit from the new enforcement situation?

The paper is organized as follows: the first section introduces into the technical details of private self-enforcement and embeds the issue into the recent European competition reform

package. Section two examines private enforcement in the light of convergence towards the US model by sketching the major differences of the two systems by means of a comparison. It further explores the possible implications of enhanced private enforcement in the EU. Section three sketches the discourse of enhanced private competition law enforcement, while section four is devoted to those profiting most from enhanced private enforcement, e.g. the legal professions. The concluding section strikes a balance between public and private enforcement.

## **1 The Overhaul of European Competition Law**

The European competition reform effective since 1 May 2004 has been proclaimed as the most important legal and cultural policy revolution in the history of European competition law.<sup>1</sup> It leads to far-reaching changes with regard to the *substance* of European competition law and introduces new *procedural* issues of enforcement, as well as a range of *non-legislative instruments*. The new system of private self-assessment and enhanced private litigation forms part of an integrated package of different reform measures. In order to better understand the private enforcement in competition matters, I will briefly sketch the most fundamental changes of the overhaul.

### **1.1 The 2004 Competition Reform in a Nutshell**

Although the basic provisions of European Competition law remain unchanged, the reform alters the *substance* of the test applied to determine whether a dominant position by company is anti-competitive. A new merger regulation, Regulation No. 139/2004, has been introduced, which replaces the ‘Dominance-test’ with a sort hybrid of the ‘Substantive Lessening of Competition’ (SLC)-test applied in the USA.

On the *procedural* level, the more than forty-year-old Regulation 17 got replaced by a new procedural instrument, Regulation No. 1/2003, which has a profound impact on how competition law will be enforced in the future. Under Regulation 17 competition law enforcement has been subject to the powers of the European Commission only, who has been judge, jury, executor altogether. Article 6 of the new regulation abolishes the highly centralized European competition system and re-allocates enforcement competences. Next to the European Commission’s DG Competition and the European courts in Luxembourg, also national competition authorities (NCAs) and national courts can now fully apply Article 81 (TEC) and 82 (TEC), which govern the fight against cartels and the abuse of dominant positions. This means that under the new system competition law enforcement has become more decentralized. The European institutions loose their exclusive jurisdiction on large cross-border transactions and share antitrust enforcement with their counterparts on the Member State level. National competition law enforcers in turn have to apply European laws in addition to their own national competition laws.<sup>2</sup>

The reform introduces two *non-legislative instruments*: the European Competition Network (ECN) and the Chief Competition Economist: in order to facilitate a uniform application



of European competition law, the new regulation established the European Competition Network (ECN). The network provides an opportunity for close cooperation, information exchange and case allocation between the 26 competition authorities and the European and national courts.<sup>3</sup> The re-allocation of competences in competition enforcement follows the logic that the best-placed authority should handle a competition complaint and conduct the necessary investigation, resembling a *de facto* de-centralization according to the logic of the principle of subsidiarity.<sup>4</sup> Moreover, a post called the Chief Competition Economist has been established - responsible for bringing more checks and balances into the much criticized bastion of Commission power by providing 'independent economic viewpoints' in the enforcement of European competition law with regard to high profile mergers.

The introduction of Regulation No. 1/2003 will most strongly affect Article 81 (TEC) governing the prohibition of anti-competitive agreements as it abolishes the pre-notification system for cooperative business agreements. Yet, the profound impact and the wider implications of this regulatory change tend to be overlooked by many commentators that discuss the competition overhaul (cf. Diaz 2004). In a next section, I will examine this part of the reform package in greater detail.

## **1.2 Private Enforcement in the Light of Regulation No. 1/2003**

The more than 40 year-old notification system spelled out in Regulation 17 will not completely be abolished, but slimmed down considerably. Regulation No. 1/2003 abolishes the notification procedure with regard to Article 81 (TEC) under which companies have routinely notified on a voluntary basis all kinds of agreements and business practices other than mergers and acquisitions in advance to the Commission.<sup>5</sup> To avoid any misunderstandings, the notification system for the enforcement of Article 82 (TEC), e.g. mergers and acquisitions with a Community-dimension, as well as for state aid as spelled out in Article 88 (TEC) and 89 (TEC) remain in place.<sup>6</sup>

Under the old Regulation 17 dating from 6 February 1962 companies could have assured whether they did not violate Article 81 (TEC) by notifying an agreement to the Commission. The Commission gave formal clearance by means of individual or block exemptions. Block exemptions are a sort fast track clearance procedure, which cover whole categories of agreements and sector-specific agreements that are not considered anticompetitive. For example, block exemptions have been granted if a cooperation concerned research and development, standardization and specialization (Cini and McGowan 1998: 98).

Under the new system, the possibility to notify cooperative agreements and receive individual exemption by the European Commission, which automatically granted immunity, has been eliminated. Moreover, the Commission has lost the exclusive competence to apply Article 81(3) on granting block exemptions as national jurisdictions can enforce Article 81 as a whole, including the granting of block exemptions. Yet, a new block exemption scheme has come into place that specifies more clearly the types of agreements that are prohibited (e.g. price fixing and market sharing). It rules that restrictive agreements falling into Article 81(1), which

are not covered by Article 81(3) and Article 82, do not require a 'prior decisions to that effect'. Thus, companies will have to decide on their own whether the criteria for block exemptions stipulated under Article 81(3) can be applied. With any other type of cooperation agreements companies have to assess by themselves whether or not the envisaged commercial agreement restricts competition. Hence, the abolishment of the notification procedure for Article 81 (TEC) puts the responsibility to ensure that a conduct is in accordance with European competition law into the hands of business.

However, private enforcement reaches further than a self-assessment by companies of whether or not an envisaged deal infringes upon European competition law. With the new regulation, the Commission hopes to stimulate a situation in which more private legal actions are brought to the courts. Thus, companies may be freed from the administrative work of prior notifications when making commercial agreements, yet, if they assess the situation wrong they risk to be litigated before the courts. To put it differently, only court decisions can decide whether or not a commercial agreement, such as production joint ventures or other alliances that do not fall under the merger regulation, infringes with European competition law.

Private litigation before the European courts complementary to public enforcement of Article 81 and 82 (TEC) has always been possible, but did not lead to a widely applied practice. This does not mean that private entities were absent in the enforcement of European competition law. On the contrary, any legal or natural person could request the Commission to take action in case of a conduct that seemed anticompetitive. The Commission was obliged to give a reasoned decision if it refused to take action. Private parties could again invoke a judicial review at the Court of First Instance (CFI) in case they were unsatisfied with this decision (Wils 2003: 476). Under the old system, the burden of proof in case of an infringement of competition law has been with the Commission, while companies invoked European competition law overwhelmingly as 'shield' for defending themselves (Wils 2003: 473, 475). Under the new regulation, the Commission hopes to encourage actions by private parties before courts who use Article 81 and 82 as a 'sword' for initiating judicial proceedings (Kemper 2004: 7). So far, Regulation 1/2003 does not specify how to stimulate private actions before the courts, except from article 7 of Regulation No. 1/2003, which lays out the possibility of 'awarding damages to the victims of infringements'. Thus, private parties can claim for financial or injunctive relief for the damages caused to by anticompetitive behavior of another party.

Before elaborating on the wider implications of enhanced private enforcement of European competition, the next section will confront the recent reform with questions of convergence towards the US model of competition control in order to better explain why private enforcement has achieved the contemporary prominence in Europe.

## **2 The New Regulation in the Light of Increased Convergence Towards the US Model?**

Convergence towards the US antitrust system has been heralded by the European Commission

as one of the greatest success stories of EU-US relations. The competition reform package of 2004 represents a case in point. According to James Rill, the former US Deputy Attorney General for Antitrust, the new European competition regime is designed ‘as close as it could get to the US-style without copying the whole caboodle’ (Rill 2003).

Reference to convergence is often made without further delineating the confines of the concept as if it was completely unambiguous. In order to determine what exactly is converging, the concept needs to be clarified. Broadly defined, convergence encompasses the tendency of societies, states, economic systems or, regimes as a whole to develop similarities in structures, processes, or performances over time. More concrete, convergence can refer to growing similarities in the agenda setting of policy goals and common policy problems, which can be indicated as *discursive convergence*, while a gradual narrowing of the legislative content of two or more jurisdictions can be indicated as *substantive convergence*. Convergence can further concern a process that leads to the adoption of similar organizational patterns, procedures, or the use of similar regulatory instruments, which can be indicated as *organizational* or *systemic convergence*, as well as *procedural* or *regulatory convergence*. Finally, convergence may point to the *outcomes*, impacts and consequences of a regulatory implementation (Drezner 2001: 53; Pollit 2001; Bennet 1991: 215-218).

Before addressing the question of convergence to the US model of private enforcement in greater detail, I will work out the more general signs of convergence that have taken place and identify the different types of convergence in order to better understand if and to what extent the EU moves into the US direction of competition law enforcement.

## **2.1 Signs of Convergence More Generally**

As outlined above, convergence can be of a discursive nature, or concern more substantive, organizational and procedural or regulatory matters. Yet, regardless of the specific nature, any convergence between the European and the US competition laws and practices needs to be placed in a continuing record of regular and intensive transatlantic cooperation, which dates back to the founding Treaty of Rome of 1957, where due to US influence competition policy has been incorporated as one of its core policy areas. Since then, the European Commission and the two US antitrust authorities, the Antitrust Division of the US Department of Justice (DOJ) and the Federal Trade Commission (FTC), have concluded a range of bilateral contracts, which have amounted to an intensive working relationship with regard to competition cases falling into both jurisdictions.<sup>7</sup> Yet, despite of the strong transatlantic liaison in competition matters, there are still many remaining differences between the two competition regimes.

As far as *substantive* matters are concerned, occasional disputes on the clearance of mergers or dominant positions have brought some substantive deviations to the surface (i.e. the proposed GE-Honeywell merger, the Boeing-McDonnell Douglas merger, and more recently, the dominant position of Microsoft).<sup>8</sup> Opinions diverge with regard of whether one can speak of a fundamentally ideological war on questions of competition control, or whether these differences

amount to different outcomes on a structural basis, in particular as the large and disputed cases confront hundreds of smaller cases in which the transatlantic cooperation has led to the same decisions. Furthermore, as far as substantive matters are concerned, one cannot speak of a process of convergence as the competition laws of the EU have strongly resembled those of the US from the beginning on. For example, the European Article 81 (TEC) on the prohibition of restrictive business practices is in rough lines equivalent to Section 1 of the Sherman Antitrust Act of the US, while Article 82 (TEC) on the prohibition of an abusive behaviour of a dominant position resembles that of Section 2 of the Sherman Antitrust Act. Somewhat ironically, the much younger European competition law goes beyond the scope of the US system, which has competition law on the books since the nineteenth century. The EU competition laws also cover state aid control, while there are no such laws in the US federal context.

With regard to the specific cultural features of how competition questions are addressed and interpreted, one is tempted to conclude that differences have narrowed down substantially, indicating a process of *discursive convergence*. As former Commissioner Mario Monti has expressed it in a speech held at the UCLA Conference on US and EU Antitrust Aspects of Mergers and Acquisitions on 28 February 2004: “The EU and U.S. agree on what competition policy should be all about. We share a common fundamental vision of the role and limitations of public intervention.” (Monti 2004b) Yet, the differences in the ‘cultural’ traits of how competition control is approached have been more pronounced in the past.

Competition law can serve a variety of different goals. They range from the protection of free markets to the protection of small and medium sized business, specific market sectors, regions or national champions, the protection of workers, the environment, or even the protection of democratic freedom and individual autonomy, etc. European competition laws are deeply embedded in the integration project as they were designed to enhance the creation of the single European market. When competition law made its entrance to Treaty of Rome, the Freiburg School, or what has been labeled as the German *ordo-liberal* doctrine, has been predominant in shaping the scope of competition control (cf. Joerges 2001). According to the theoretical core of German *ordo-liberalism*, capitalism needs to be organized. Public market intervention is necessary for the preservation of an open and free economic life. As competition control constitutes a case of public intervention in private market conduct *par excellence*, German *ordo-liberalism* praises it as something intrinsically good. Underlying the spirit of competition control is the assumption that markets are not perfectly self-regulatory, but jeopardized by market failures, constituted by an abuse of excessive market power, collusive agreements between corporate actors, and other restrictive business practice. Competition control provides an instrument to safeguard market players from the anarchy of free competition by curbing private power in open markets. The influence of the German *ordo-liberalism* is reflected by the fact that public market intervention in Europe has had a lot stronger tradition than in the US. European competition control tended to be marked by a greater distrust of bigness, which was due to a concern of the potentially negative influence of concentrated economic power. In contrast, the Chicago School has had a

strong influence on the US antitrust system, where the central focus of competition control is protect free and fair competition by all means (at least within the US territory). According to this paradigm, not market concentration is perceived as a central problem, but collusive agreements such as cartels. Thus, the mere size of a company or the holding of a dominant position should not be a deciding factor to block a commercial agreement or merger. Instead, market efficiency and consumer welfare should be the determining factors when assessing anti-competitive conduct.<sup>9</sup> According to the Chicago School, public market intervention is intrinsically at odds with a free market ideology. As the market regulates itself, structural interventions should be the exception and be restricted to the minimum necessary.

Over the years, there has been heightened influence of the Chicago School in Europe, which is reflected both in terms of *discursive* and *substantive convergence* towards the US system.<sup>10</sup> As far as *substance* is concerned, the EU has moved towards the US position, according to which competition authorities should not intervene if a merger and a monopoly is efficient— ‘even if this is at the expense of competitors and leads to further market concentration’ (Davidow 2002: 495).<sup>11</sup> As a part of the 2004 overhaul, the European test for concentration has been reformulated in a way that it addresses all mergers and cooperative agreements that ‘significantly impede effective competition’, which comes close to the US ‘Substantive Lessening of Competition’ (SLC)-test dating from 1914.<sup>12</sup>

With regard to *discursive convergence*, competition law and enforcement in Europe tends to be increasingly framed in terms of consumer welfare considerations (cf. Fox 2003). As Mario Monti emphasized in a speech on the similarities between the US and EU competition regimes: “We both agree that the ultimate purpose of our respective intervention in the marketplace should be to ensure that consumer welfare is not harmed.” (Monti 2004b) While in the US system, antitrust violations are viewed as tantamount to corporate fraud against consumers, this perspective has only recently made its inroads into anti-trust assessments in Europe. The protection of competitors and occasionally also employment tended to be relatively more determining considerations in the assessment of anticompetitive conduct. Consumer welfare has been declared the predominant task of competition control these days, indicating a gravity shift from protecting competitors to protecting consumer welfare. Consumers tend to be pictured as natural allies of competition authorities. In fact, next to competitors, consumers seem to be the only market players taken into consideration in the verbiage of competition regulators. The interests of employees and of society at large tend not to be politicized. The heightened emphasis given to consumers is manifested by the fact that prices constitute an ever more dominant reference point for determining anti-competitive conduct by companies. Prices should be as low as possible in order to benefit consumers. This implies that companies have to adjust their prices as close as possible to the fixed costs per production unit. The appointment of a Consumer Liaison Officer in December 2003 within the Commission’s DG Competition attests the heightened emphasis on consumer welfare. The task ascribed to this new post is to ensure a permanent dialogue with European consumers and alert consumer groups to competition cases

where their input might be useful.

*The discursive and substantive convergence* indicates a shift in the ideological climate that shapes the contemporary debate on competition law and enforcement practices. It reflects a declining gap between what has come to be known as the Anglo-Saxon free market economy versus the Rhineland model of a regulated market economy, or, following the terminology used by Hall and Soskice, the Liberal Market Economy (LME) model versus the Organized Market Economies (OME) model (cf. Hall and Soskice 2001).

The *systemic* or *organizational* differences between the competition authorities in the US and in the EU are fundamental.<sup>13</sup> In Europe, competition authorities tend to enjoy far-reaching discretionary powers to address and administer the prohibition of restrictive business agreements and the abuse of dominant positions. In particular the European Commission's DG Competition finds itself in a powerful and unique position not easily matched by any other competition authority. Moreover, there is no other first pillar policy in which the Commission enjoys similar wide-ranging powers. Article 86 (TEC) gives the Commission the power to act as an investigator, prosecutor, judge, jury and executioner altogether (e.g. the integrated agency model, *see* for more Trebilcock and Iacobucci, 2002). The only judicial check on the Commission are the Court of First Instance (CFI) and the European Court of Justice (ECJ), which companies can appeal to in case of a disagreement with the Commission's decision.<sup>14</sup> In the US, antitrust agencies have far less enforcing powers. Although they can initiate and investigate formal proceedings, all cases of infringements have to be prosecuted in the federal courts. This implies that a deal can only be blocked if the parties involved are sued (e.g. the bifurcated judicial model, *see* for more Trebilcock and Iacobucci, 2002). In contrast, in the EU the Commission can directly stop a merger, impose fines, request modification in the proposal or, it can require the break up of a company by forcing it to sell some of its divisions (Bannerman 2002: 8). Moreover, if the Commission starts the review procedure, review at the Member State level is preempted, whereas in the US a transaction reviewed and cleared by the Justice Department or the FTC may be challenged under federal as well state law.

The examples demonstrate, that there are many signs of convergence towards the US model of competition control. The next section confronts the major features of the two enforcement systems with each other and elaborates in greater detail on the question of convergence in private enforcement.

## **2.2 Convergence Towards An US-Style Litigation Culture?**

Competition law enforcement in Europe has traditionally been the domain of competition authorities. Private enforcement of EU and national competition law has been very limited in Europe. Only in 5% of the cases private actors took the initiative to bring an action to the court.<sup>15</sup> On the contrary, US competition law (the Sherman and the Clayton Act) is overwhelmingly invoked by private parties: more than 90% of all formal antitrust actions are due to private litigations before general civil courts (Kemper 2004: 9; Wils 2003: 477). The percentages of the

distribution between public and private competition laws confirm that the US system favours private actions more than public actions, whereas in the EU the situation is reversed. This raises some important questions first with regard to the reason why private plaintiffs in the US conduct 90% of all competition claims. What does the US have that the EU doesn't?

The 2004 competition reform abolished the notification scheme for commercial agreements between companies meeting a certain turnover threshold not falling into the category of mergers and acquisitions ruled by Article 82 (TEC). In order to better understand the implications of this change and to answer the question of convergence, I will subsequently compare the major features of the enforcement systems in the EU and the US.

Similar to the EU, the US has a notification system in place called the Hart Scott Rodino (HSR) filing dating from 1976.<sup>16</sup> The HSR-filing requires a mandatory notification with both the Federal Trade Commission (FTC) and the Department of Justice (DoJ) for mergers, acquisitions of securities, asset acquisitions and the formation of joint ventures. Similar to the EU, the HSR-filing is obligatory for companies meeting a certain turnover threshold.<sup>17</sup> Yet, the US threshold measure is about 25 times lower than that in the EU, which means that a lot more cases are scrutinized by the US authorities.<sup>18</sup> The large amount of notifications marks a stark contrast to the 9:1 private-public enforcement ratio of the US, as one would expect it to lead directly to more public litigations. A possible explanation lays in the fact, that the chances to slip through the net are higher in the US. In contrast to the European notification regime, the notifying parties in the US are charged for costs of the review process.<sup>19</sup> Moreover, the HSR requires far less information of the notifying parties. The US competition authorities have to collect additional information in order to discover whether or not a deal is problematic. As this provides companies with substantial leverage powers, notifying parties tend to follow a 'file and pray approach', i.e. providing only the most basic facts and hoping that the agencies overlook critical features (cf. Parisi 2000).

The European notification procedure is free of charge and tends to be a lot more onerous. Yet, it is also more structured, more formal, as well as more transparent than its transatlantic counterpart (e.g. Venit and Kolasky 2000: 88; Trebilcock and Iacobucci 2002: 382-383). The review process proceeds in different phases with fixed time deadlines.<sup>20</sup> In return, the notifying parties are entitled to certain procedural rights, such as the right to an oral hearing and to receive copies of all formal decisions. For example, if the Commission wants to enter a new phase of investigations, it has to express its objections to the parties in form of a reasoned decision. This procedure does not only narrow down the scope of issues that are scrutinized by the Commission, but has meanwhile also led to a voluminous body of precedents, which provides some guidance for other notifying parties (Venit and Kolasky 2000: 92). The formality of the notification procedure makes the reviewing procedure highly transparent, but also very work-intensive. In contrast, the US system is much less lucid due to confidentiality provisions in the HSR Act (Venit and Kolasky 2000: 95).<sup>21</sup> Moreover, the US review process is less driven by formal, procedural milestones.<sup>22</sup> The meetings between the authorities and the notifying

parties take place on an entirely informal basis and the US competition authorities do not have to vindicate their objections at any time during the inquiry.

Nonetheless, the comparatively lower degree of formality and transparency does not hold as an explanation for why private antitrust cases exceed those initiated by the US competition authorities. Instead, the mere fact that US competition agencies conduct antitrust investigations for the purpose of litigation, only, serves as an explanation for why only a few cases are ultimately challenged by public authorities before the courts. A large part of the proposed deals are either ‘abandoned or are modified through settlements between the parties and the agencies’ (Venit and Kolasky 2000: 96).<sup>23</sup> Yet, in order to understand the US litigation culture in the field of competition law one needs to understand also the ‘carrots and sticks’ that serve as incentives for private parties to take actions against antitrust infringements. There is a range of elements to distinguish that foster the litigation culture of the US and that are generally not to be found in other systems. First, if a plaintiff is successful in bringing competition infringements to the courts, not only the costs of suing will be recovered (i.e. expert fees and attorney’s fees), but it can also be awarded treble the damage suffered. Even foreign victims outside the US territory may be awarded treble damages.<sup>24</sup> In addition to the damage compensation to victims, the Federal Trade Commission (FTC) may require all the profits made from a monopoly or cartel agreement (Davidow 2002: 495). Moreover, the US enforcement system allows for the imposition of criminal sanctions for anticompetitive conduct in form of imprisonment - a ‘stick’ often applied also to CEOs (both nationals and non-nationals) violating US antitrust law in foreign jurisdictions (Morici 2000: 3; Bannerman 2002: 35). Conversely, a jurisdictional ‘carrot’ is offered by automatic and discretionary leniency schemes, which grant immunity from prosecution to those who first confess to have participated in a cartel or other forms of restrictive business agreements. Like this, ‘carteleers’ and other infringers find themselves in a prisoners dilemma. Furthermore, the US allows for class actions, collective lawsuits on behalf of several plaintiffs, which makes it attractive for individual consumers to initiate legal proceedings against large corporations. Class actions in the US are further stimulated by a widely applied ‘no cure no pay’-practice in form of contingency fees offered by law companies, e.g. the fee paid to professional litigators representing the plaintiffs in court depends on the monetary award obtained. In case of an unsuccessful complaint, the legal service is free of charge. Hence, the system of treble damages, criminal sanctions, a leniency system, class actions, and contingency fees all provide incentives for private plaintiffs to bring an action before the US courts.

Unlike to the US, the EU has no rules that oblige the losing party of a lawsuit to cover the costs of the successful one. However, under the new enforcement system of the EU, private litigants can be compensated for the damage suffered by the anticompetitive behavior of others. Yet, it remains unclear what will be taken as a basis for the calculation of damages (e.g. the damage suffered by a plaintiff or the profits made by the infringer). In fact, linking causation and damage on behalf of the plaintiff is a very demanding - if not impossible – task, in particular because the losses of anticompetitive behavior tend to be very much dispersed rather than



concentrated in one victim. As Wils (2003) has pointed out “[...] damages will be calculated not to the offenders gain or the social loss, but by references to the losses which those plaintiffs who happen to bring claims manage to prove (Wils 2003: 481).

With regard to criminal sanctions, there is no harmonized system of penalizing anticompetitive behaviour. There are some Member States that impose criminal sanctions on individuals for the violation of competition laws, such as imprisonments or fines.<sup>25</sup> The heterogeneity of sanctioning anticompetitive behaviour causes a range of anomalies under the new system of shared enforcement competences. For example, the European Commission and the European Courts have no power to impose criminal sanctions, which creates a situation that infringers in small cases may end up in prison in certain Member States, whereas equally guilty managers of the big, pan-European and extra-European competition cases investigated by the Commission face no individual or criminal sanctions. This imbalance may create a situation of legal uncertainty in which litigants shop around among the different EU jurisdictions. The visibility of these discriminations is likely to increase in a EU where 25 Member States have to apply the same EU competition law next to their national laws. As a consequence, the harmonization of (criminal) sanctions in the field of competition law enforcement is likely to be a topic of discussion in the longer-term. At the moment, some member states consider moving towards a system of criminal prosecutions in order to spare shareholders from the fines imposed on companies. However, to date there is no Member State in which CEOs can be dismissed within a civil action (Waelbroeck *et al.* 2004: 1-3). Likewise to the US, the EU has introduced a leniency scheme in 1996, which after a renewal in 2002 is designed to guarantee full immunity to participants of a cartel that cooperate with the Commission. Yet, here again, not all Member States handle leniency programs, which may lead to adverse effects.

As far as class actions are concerned, the picture is similar to that of criminal sanctions and leniency programs. Class actions in form of collective standings before the courts comparable to those possible in the US system are not an option in most of the Member States, although many are currently considering to introduce them.<sup>26</sup> However, the contemporary legal situation makes it unlikely that consumers can have overcharges refunded in the near future. Moreover, private plaintiffs, such as consumers or small and medium sized companies, are faced with high administrative costs to organize collective claims and the financial risks involved in bringing an action to the courts. Although fierce competition between law companies may lead to an increased application of the ‘no cure no pay’-practice in form of contingency fees, yet, it remains questionable whether this is to advantage of the victims. In case of a successful litigation it is very likely that professional litigators will cash a large part of the compensation awarded to victims of anticompetitive behavior. The US experience with contingency fees is illustrative in this respect. As Davidow (2002) has remarked: “It is frequently alleged that class action recoveries for antitrust or other US torts benefit lawyers more than victims.” (Davidow 2002: 496). In addition, private plaintiffs face an even bigger obstacle as far as the collection of evidence is concerned. To make private actions attractive, the standards for the burden of proof

may need be relaxed, or then, the burden of proof may need to be reversed so that the defendants will have to prove that their conduct is not anti-competitive. Hence, stimulating private legal actions in competition matters may have far-reaching consequences for the legal systems in place. For example, Canada has recently undergone a shift towards more private litigation. Since the introduction of class actions private enforcement has expanded very rapidly, whereas public enforcement is declining. Although Canada does not have a system of treble damages or loser-pay cost rules similar to the US, the Canadian competition authority considers further legislative changes that stimulate a greater use of private enforcement (cf. Rowley 2002).

The example of Canada illustrates that the EU is not the only competition regime that is currently converging towards the US private enforcement system. The next section elaborates on the question why the EU has set the goal of increased private self-enforcement in competition control. It does so by sketching the discourse that sets the parameters for how competition enforcement should be organized.

### **3 Sketching the Discourse of Enhanced Private Competition Law Enforcement**

The European Commission is optimistic that enhanced private enforcement creates sufficient deterrence and a stronger incentive for companies to ensure that their business agreements are not anti-competitive. It depicts the low percentage of private enforcement in Europe as lagging behind the US system and portrays the situation as a severe ‘underdevelopment’, which should be rectified (Waelbroeck *et al.* 2004: 1-29). Yet, while the US avenue of private enforcement is portrayed as a key to substantial improvements in competition control, somewhat ironically US practitioners tend to have much critique on their system. They warn about the possibility of an excessive claimant’s culture in the field of antitrust. According to an US judge: ‘the influence of the private action on the development of antitrust doctrine has been on the whole a pernicious one’ (cited in Wils 2003: 486). Venit and Kolasky (2000) come to a similar conclusion when arguing that “[...] there seems to be a growing consensus among U.S.-based practitioners who handled merger in both jurisdictions that the EU merger clearance process has some advantages over the U.S. system [...]” (Venit and Kolasky 2000: 80-81). Moreover, following Davidow (2002) who argues that even though US authorities have put much effort in making the European competition laws converge towards the US model, these efforts have never been directed at promoting the US system of private antitrust enforcement (Davidow 2002: 493).

The European Commission celebrates the abolishment of Regulation 17 as a milestone in terms of efficiency considerations. It argues that the notification procedure has been a timely and costly administrative procedure, not only for the Commission, but also for companies involved. This line of argument reflects an overall tendency of how competition control is framed. Not only anticompetitive conduct of market players is perceived as a hindrance to effective competition, but competition authorities themselves are increasingly depicted as costly and inefficient administrative distortions to what is termed free and fair competition (cf. Crampton and Facey 2002). The abolishment of the notification regime for cooperative business

agreements provides a case in point in which the rationale of a regulatory framework has been questioned. For example, Mario Monti describes the notification procedure as unnecessary burden on competition and compares to parking a car in a town: “Working through a pile of mostly innocuous notifications may have made sense 40 years ago: it simply does not make sense now. Any citizen must know whether he/she can park his/her car in the centre of the town. He or she shouldn’t have to go to the police station to check first. [...] (t)he Commission’s role, as an antitrust enforcer, is not to give comfort.” (Monti 2004c) The car-allegory reflects a shifting away from supervisory market control to less market intervention and enhanced private authority in competition law enforcement. It accentuates a strong belief in the self-correcting market-mechanisms.

Another recurring argument of the European Commission is that the abolition of the notification system frees resources for the detection of cartels, price-fixing and other harmful agreements on a global level, a field that has become the utmost priority of the European Commission. The Commission has repeatedly complained about an unbearable workload that resulted from the intensification of economic transnationalization of the past decades (i.e. the increase of cross-border trade and market interdependences, the ICT-revolution and the resulting increased mobility of investors based in different parts of the world). In particular the 1990s witnessed an accelerated pace of cross-border merger activity and acquisitions - generally indicated as the fifth merger wave in history, as well as an substantive increase of joint ventures, cooperative arrangements, distribution/supplier agreements, licensing and franchising contracts.<sup>27</sup> The Commission feared that the workload would further increase with the enlargement of the Union to 25 Member States. It appears that a restructuring towards enhanced private enforcement provides a *deus ex machina* to bear with a mass of cases on the Commission’s desks. Yet, the logjam of work and the shortcoming of staff resources are a highly controversial argument for increased private enforcement. Following Wils (2003) it is of general interest that all cases are prosecuted. Antitrust enforcement ‘always has a cost’. It all depends on ‘how much value society attaches to the avoidance of antitrust violations’ (Wils 2003: 485).

The central importance attached to consumers is also reverberated in the discussion on private enforcement. Mario Monti highlighted in his speech on European Competition Day on 29th April 2004 in Dublin that ‘consumers can play an increased role in extended system of private enforcement in Europe and I would like to see them play it’ (Monti 2004d). The European Commission believes that once a system of damage relief is introduced, private parties will go much further in bringing actions to the courts than competition authorities (cf. Monti 2004a). Yet, to create a real incentive for private actors to police themselves may require introducing a high level of damage awards to successful plaintiffs. However, high damage awards in turn are likely to create a situation in which profit motives are the driving force for litigation. In order to further clarify this argument, the next section draws the attention to the interests at stake in a system of enhanced privatization of competition law enforcement.

#### **4 All to the Benefit of the Legal Professions?**

The delegation of competition law enforcement to private actors means that companies have to administer and test themselves whether or not they abide the law. As not many companies possess their own in-house expertise in competition matters, the private enforcement is to the benefit of a whole market sector selling legal services. In particular the top-ranking law companies with a high degree of specialized expertise and technical know-how in the field of competition law are likely to profit from the new situation. Large law companies tend to be organized as integrated networks of individual partner agencies in different regions of the world (Kolasky 2000: 153) (i.e. PricewaterhouseCoopers, Deloitte and Touche, Ashurst, Arthur Anderson, KPMG Ernest and Young, Baker&McKenzie, Freshfields Bruckhaus Deringer, and many more). With member firms organized in different countries, the spectrum of expertise is not only concentrated in domestic antitrust laws and practices, but also in fields of multi-jurisdictional issues relating to cross-border transactions. The comparative advantage is constituted by the fact that national advisors and litigators are not only familiar with a particular national legal system, but also licensed in that system.<sup>28</sup>

With the introduction of increased private self-enforcement, the demand for legal services becomes ever more versatile. Enhanced private enforcement stimulates the demand for private litigation lawyers defending or accusing companies in lawsuits. Although litigation culture creates profit for law companies, their job is to avoid litigation (Trebilcock and Iacobucci 2002: 369-370). Companies have a strong incentive to resolve conflicts without tiresome litigation processes due to the high costs and the negative publicity that come along with it. Thus, in addition to litigation support, private enforcement creates an even greater demand for practical legal advice on how to minimize antitrust risks and how to deal with competitors. As a consequence of private self-assessment with respect to Article 81 (TEC), law companies will get more opportunities to assist their clients in making commercial agreements and to offer tailor-made compliance programs in which they counsel their clients on the antitrust implications of their business transactions.<sup>29</sup> Moreover, more and more law companies also offer targeted lobbying activities at the European institutions and the national regulatory institutions.<sup>30</sup>

The new enforcement system is not to the advantage of corporate actors in first instance. In fact, they are likely to be adversely affected since they risk standing in courts more often as defendants rather than plaintiffs. As companies have a stake in avoiding financial and criminal sanctions, in particular large companies may tend to simply buy off the plaintiffs before the case is even brought to the courts. For example, the Microsoft case had originally five plaintiffs yet, due to accommodation payments, the Commission is currently the only remaining claimant. From the perspective of companies, the abolishment of the notification system for cooperative agreements creates a regime that is less predictable given the lack of judicial precedents. Case law on the issue of cooperative agreements, sanctioning and the award of damage to victims still has to come. Prior to the reform, companies could rely on the Commission's comfort letters – a legal security for companies to proceed with an agreement, or they could apply for

individual exemption, which guaranteed immunity from legal prosecution. The new regime deprives companies from this legal assurance. Thus, early jurisprudence may require its share of victims until the legal situation is clarified. The European Commission rejects this argument. Following Mario Monti, 'after 40 years of experience the application of European competition law should be sufficiently clear to business' (Monti 2004c).

Enhanced private litigation in competition affairs provides an avenue for consumer organizations, as well as labour unions and more diffuse interests such as society at large to intervene in cooperative agreements or mergers that are likely to have a negative impact on their position. However, they may face considerable constraints to bring an action to the courts. For a successful handling of complaints both plaintiffs and accused depend on the information provided by law companies, making them dependent on legal services. The costs of these services, as well as the costs of the whole litigation process may be unaffordable for certain potential plaintiffs, in particular individual consumers and small and medium sized companies. Moreover, as not all law companies handle an impartiality code of case acceptance, access to legal justice may be difficult for certain victims. Hence, the legal expertise accumulated in law firms creates a vast asymmetry of knowledge, which makes victims of anticompetitive conduct vulnerable to poor quality and inadequate advice. Currently there is an overall tendency in Europe to liberalize these professions and allow para-legal professionals to offer the same services in order to increase inter-professional competition.<sup>31</sup> In particular the end of price and entry fixing systems is argued to benefit the consumers who enjoy a greater choice between suppliers of legal services. Opponents, on the contrary, warn that lax or no control of professional services may be to the disadvantage of a wider public interest and lead to distorting situations (cf. Bergh 2004).

Given the high interest of law companies in the future development of competition law enforcement, the high-level involvement of national and international bar associations in the competition policy-making process should not surprise. The interaction of competition authorities and individual law companies, as well as bar associations is often stimulated from both sides. Both competition authorities and law companies share a high turnover of staff. The 'competition brain drain' is likely to be directed towards the private sector, where salaries tend to be higher. Yet, the European Commission often actively seeks advice of the interest groups representing legal professions that deal with competition law, such as the Council of the Bars and Law Societies of the European Union (CCBE), the European Company Lawyers Association (ECLA), the different national bar associations and the International Bar Association (IBA).<sup>32</sup> For example, at the 8<sup>th</sup> Annual Conference of the IBA in Fiesole, Italy, 17 September 2004, Commissioner Mario Monti asked for suggestions of the IBA on how to improve the legal framework that allows for private enforcement of competition rules (cf. Monti 2004a). Similarly, the law company Ashurst has conducted a comparative study on behalf of the European Commission's DG Competition. The study identifies the major judicial obstacles in EU Member States and suggests national reforms to facilitate private enforcement

of competition law (cf. Waelbroeck *et al.* 2004).

Hence, views, ideas and practical experience from both public and private competition law practitioners are regularly exchanged at conferences, workshops or other more informal meetings. As John Fingleton, Chairmen of the Irish Competition Authority has pointed out at the 2004 European Competition Day in Amsterdam: “It’s like listening to a piece of symphonic music: you hear the main theme over and over again in different ways, so that by the time you leave the concert hall you are humming the tune.”

### **Conclusions: Striking the Balance Between Public and Private Enforcement**

The abolishment of the notification system with regard to Article 81 (TEC) introduces a situation in which companies cannot rely anymore on the Commission’s approval, but will have to undergo a self-assessment in order to ensure that a commercial agreement does not amount to anticompetitive behavior. The new enforcement regime puts more responsibility on private actors to carefully analyze the markets in which they operate before they engage in an agreement with a competitor, while freeing competition authorities from this task. In case companies assess the situation wrong, they run the chance to be challenged before the courts. Similar to the US system where 90% of all antitrust cases are private actions, under new system affected parties such as competitors, supplier and distributor companies, as well as individual consumers and employees should feel encouraged to bring infringements of competition law to the national and European courts.

The paper has embedded the recent changes in European competition law enforcement in the context of convergence between the US and EU competition control. Signs of substantive, procedural and discursive convergence are many. A comparison between the major features of the two enforcement systems reveals that the EU is moving closer towards the US in competition enforcement. The shift towards a system of increased private actions is an example hereof. The reliance on the market intelligence in spotting anticompetitive conduct reflects a broader trend towards less market intervention by public authorities.

Shifting the burden of competition law enforcement to the private sector has many drawbacks. The paper has identified a range of problems that hinge on increased private self-enforcement. There is much reason to assume that the abolishment of the notification procedure creates a situation of legal uncertainty among companies. Analyzing anticompetitive conduct is not an exact science with immanent guidelines of what accounts as an infringement and what not. On the contrary, there is always a subjective and speculative element in judging anti-competitive behavior. Moreover, markets are very dynamic, which leads to novel situations without precedents.

Following from a comparison with the US system of private litigation in competition matters, further legislative reforms might follow in Europe. At the moment there are many barriers for plaintiffs to bring an action to the courts. Corporate and individual actors do not have comparable investigative powers to that of competition authorities, who enjoy a privileged

access to collect the necessary evidence. Due to confidentiality reasons companies cannot access market information of their competitors, which makes it very difficult for private entities first to discover an anti-competitive action of a competitor and to collect the necessary evidence to assess competition law infringements. Evidence collection is in particular a demanding task if the respective competitor(s) operate on a transnational basis.

The aim of enhanced private litigation is likely to bring about a system of damage payments awarded to victims of anticompetitive conduct. However, assessing a plausible basis for calculating the damages suffered by a claimant is an arduous task in the competition context. The reliance of increased private self-enforcement may have as a consequence that private actions are driven by motives of a monetary nature, which fundamentally diverge from the general interest of society, in particular as the losses of anticompetitive behavior tend to be very dispersed rather than concentrated in one victim. Although the losses of consumers should not be extrapolated to losses suffered by the wider society, consumers are likely to be the ones least aware of competition law violations, or then financially and organizationally not be able to provide the necessary evidence and bring an action to the courts. Hence, even though consumers tend to be increasingly at the center of attention in competition law enforcement, private enforcement risks being mere lip service to this group.

Although it remains to be seen what future impacts the reform will cause, the paper somewhat tentatively contends that this is a rather risky endeavor with regard to regulatory stringency as it may stimulate a claimant's culture driven merely by profit motives. The ones to profit from private self-assessment and increased litigations are law companies providing advocacy services to companies.

## Notes

<sup>1</sup> EU competition laws rest on three pillars: the prohibition of anticompetitive agreements, the so-called anti-trust or cartel policy (Article 81), the prohibition of the abusive of a dominant position, the so-called merger and acquisition control (Article 82) and state aid control (Article 87). The main areas covered by these areas are: the abuse of dominance by a company, the imposition of trade barriers, company agreements, joint-ventures and strategic alliances, mergers and take-overs, national and regional state aid.

<sup>2</sup> There is no harmonized competition law in the EU, nor do all Member States have the same scope of competition laws on their books. National competition law is applied alongside European laws. Until the 1950s competition law regimes in the European countries were absent. They only gradually emerged – though with varying effectiveness. Each Member State enforces different norms and practices with different levels of stringency. For example, the Netherlands had its merger control system introduced in the mid-1990s.

<sup>3</sup> The ECN is established in a field where accomplishing a fully-fledged *de facto* harmonization is not an option, since this would severely intrude on the Member State's autonomy. Yet, intensified intra-EU cooperation in competition matters may ultimately work as a convergence catalyst without a *de facto* harmonization of substantive law – a sort of harmonization through the backdoor as the ECN provides a means to 'exert normative force' (Gerber 2002: 13) and policy learning. Through cooperation and the exchange of so-called 'best practices', the competition culture among the national enforcers is hoped to converge. Whether this will ultimately be achieved in the future remains to be seen.

<sup>4</sup> In the preparatory stages of the reform, there has also the term of re-nationalization been applied. Yet, re-nationalization implies that a field that previously has been the entire sphere of Community competence is given back into the hands of Member States. A closer look raises considerable doubts whether re-nationalization is the correct label as European competition enforcement is not given back into the hands of Member States. European competition laws have always been truly 'European' as Member States had their own competition laws alongside European laws.

<sup>5</sup> The rather dull name 'Regulation No. 1/2003' has been given by the Danish presidency in 2003, under which it also has been enacted. For transitional reasons, it became fully applicable as part of the competition law reform in May 2004. As a part of the transitional period, national judges have received training in the application of European competition laws.

<sup>6</sup> Regulation No. 1/2003 is applicable to deals between companies with a combined, worldwide turnover of at least €5 billion or more than €250 million each in sales in Europe continue to have to be notified in advance to the Commission and its 150 person *Merger Task Force* (unless they each realize more than 2/3 of their European turnover in one and the same country). This means that turnover thresholds decide whether or not a merger or acquisition has a Community dimension and whether it is the Commission's task to check it. The scope of investigations is though not limited to cases within the EU, but it includes also larger deals of global companies with a non-Community dimension, including non-EU firms. The most striking high profile case outside the EU is currently that of the software giant Microsoft.

<sup>7</sup> The first contract, called *Bilateral Cooperation Agreement* dates back to 1991. It got subsequently refined in additional agreements signed in 1998 and 1999, i.e. the formal and binding *Positive Comity Agreement (PCA)* and the non-binding *Administrative Arrangements on Attendance (AAA)* (cf. Damro 2001).

<sup>8</sup> One is tempted to conclude that the US enforcement of competition law has become a lot laxer over the past few years. Since the presidency of Georg W. Bush, the US-competition policy has taken a more *laissez-faire* character, which can be observed in the a lot softer remedies than that once seemed possible concerning the Microsoft case.

<sup>9</sup> Other prominent theoretical schools of thought that address competition questions are the Harvard School and the Austrian School. The Harvard School puts the center of gravity to the protection of small business and pluralism of independent market agents, distribution equity, consumer sovereignty optimal factor allocation, technological progress and the decentralization of power. The emphasis of Austrian school (or 'Schumpeterian approaches') is on the freedom of competition and the advantages thereof (Budzinski 2002: 10-11; cf. Hildebrand 2002; cf. Budzinski 2003).

<sup>10</sup> Although commentators increasingly tend to talk of an era of Post-Chicago School and argue that a European School of Competition Law (e.g. the 'extended structure-conduct-performance framework') has gained ground, the efficiency and consumer aspects of the Chicago School remain central. The Chicago School is strongly behavioral and focuses foremost on a 'survival of the fittest'-logic (Hildebrand 2002: 3-4).

<sup>11</sup> The efficiency question tends to be interpreted differently by the two competition authorities. Although efficiency considerations can be a sufficient reason to clear a merger, efficiency considerations have tended not to be determining in Europe. On the contrary, as Venet and Kolasky (2000) state, the argument that a merger create a more efficient company "[...] is itself reason for challenging the transaction" (Venet and Kolasky 2000: 85). The line of argument lies in the fact that efficiency may be a sign of dominance. Yet, efficiency concerns are the driving force of most transnational mergers in the 1990s, which has made the Commission move closer to the efficiency



argument.

<sup>12</sup> The old European 'Dominance' test stated that 'a concentration, which creates or strengthens a dominant position, as result of which effective competition would be significantly impeded in the common market or a substantial part of it, shall be declared incompatible with the common market'. According to this definition, European merger review has overwhelmingly focused on tackling single-firm dominance resulting from a merger, rather than naturally grown dominant positions. The rewording allows the European competition authorities to challenge all types of dominant positions, including oligopoly or naturally grown dominant positions – all cases for which the Commission previously lacked the competence. The US SLC-test found its major support with the DG COMP, the British, the Irish and the Swedish competition authorities, which have already adopted the SLC in their national regimes. The German, Dutch, Italian and Luxembourg competition authorities, on the contrary, have strongly opposed the introduction of the SLC-test. They accused the Commission of 'toying' with legal concepts and of risking more legal uncertainty. As a result of the tensions, a compromise version has been set up, a sort hybrid between the SLC and the Dominance-test (European Voice, 20.11.2003).

<sup>13</sup> Trebilcock and Iacobucci (2002) identify three categories of different models of competition law institutions: the bifurcated judicial model, the bifurcated agency model, and the integrated agency model. The bifurcated judicial type includes specialized investigative and enforcement authorities that bring formal complaints before the courts. Likewise, in the bifurcated agency model formal complaints are brought before separate, specialized adjudicative agencies. Contrariwise, in the integrated agency model a single specialised agency does all investigative, enforcement and adjudicative activities. In reality, these features of these models can appear in different combinations (cf. Trebilcock and Iacobucci 2002).

<sup>14</sup> There are no specialized courts on competition law providing judicial checks on the Commission's decisions and procedures. Yet, after years of experience, the CFI is slowly transforming into a specialized competition court.

<sup>15</sup> The somewhat tentative statistics of damage claims in the EU reveal the following picture: there have been around 60 judged cases in which damage payments have been awarded to victims of anticompetitive conducts, of which 12 concerned EC competition law, 32 national law and 6 both (Waelbroeck *et al.* 2004: 1-1).

<sup>16</sup> As a proper comparison between HSR and the European notification system would extend the scope of this paper, I will concentrate only on the most crucial differences.

<sup>17</sup> The HSR has been reformed in April 2002. The reform introduced that even companies located outside the US acquiring the stock of another foreign firm - yet with substantial exports (more than US \$50 million) to the US has to comply to HSR (Davidow 2002: 497). Moreover, the reform raised the notifying threshold, which was deemed necessary as the US agencies reviewed virtually all transactions since 1976 due to the nominal fixation of the \$15 million acquisition threshold. With inflationary corrections the amount would equal \$125 million transaction in 2000 (Venit and Kolasky 2000: 90). Under the new rules, a transaction is judged if one parties has sales or assets of at least US\$ 100 million and the other at least US\$ 10 million.

<sup>18</sup> In fiscal year 1998, the U.S. agencies received 4,728 notifications, 28 percent more than the previous year and three times the number of filings received in 1991 (Parisi 2000).

<sup>19</sup> In 2000 over US\$ 100 million was collected under the HSR Act, in 2001 US\$ 86.3 million. The revenues are then split between the two competition agencies. There has been a debate on whether the Commission should launch a charge for the notification work with a baseline fee of €30,000 adjustable to the size and complexity of the merger in order to increase the resources available to the DG Competition (Bannerman, 2002: 11). So far no decisions have been taken into this direction.

<sup>20</sup> Under the new system, notifying parties have to meet the deadline of 25 working days before an agreement leading to a concentration has been signed. In the old system, the deadline was seven days. Violations to the period or reluctance to notification can lead to the imposition of fines. In the new system more flexibility is introduced. If the deadline is hard to meet, the deadline extended with another 10 working days. Deadlines have not caused many problems in the past as most of the notifications have been preceded by informal triangular contacts, which were not subject to a legal deadline (Venit and Kolasky 2000: 94). After phase 1, an in-depth inquiry phase of 90 working days starts, which again can be extended to another 15-20 working days.

<sup>21</sup> For example, the pre-merger notifications may not be publicized. The EU Merger Control Regulation, on the contrary, requires publishing the notification in the Official Journal, which provides a chance for third parties to react and reconcile with the proposed merger.

<sup>22</sup> In the US notification procedure, the reviewing agencies are also subject to a time deadline. They have to finish the review within a short period of 20 days. As this is hard to comply with, competition agencies tend to stretch the time of investigation by issuing a second request for information. The unwarranted expenses resulting from such delays are described by Venit and Kolasky (2000) as 'unnecessarily broad and burdensome as it can take many months, produce hundreds of boxes of documents, which remain mainly unread' (Venit and Kolasky 2000: 94).

<sup>23</sup> For example, between 1993 and 1998, US courts have issued fewer than twenty published decisions on substantive merger issues, whereas the US Supreme Court has not decided a substantive merger case since 1975 (Venit and

Kolasky 2000: 96).

<sup>24</sup> Following Section 16 of the Clayton Act ‘any person, firm, corporation, or association has the right to sue for and have injunctive relief against threatened loss or damage by violation of the antitrust laws’.

<sup>25</sup> For example, in Germany, United Kingdom, Denmark, Greece, Spain, France, Ireland, Luxembourg and Austria, also individuals can be fined, and some of them (Germany, Austria, France, Ireland, Luxembourg) employ criminal sanctions, such as imprisonment – although they are seldom enforced (Gauer 2002: 11). Moreover, some member states grant immunity to those that are first to admit their anti-competitive activities (Bannerman 2002: 35-36).

<sup>26</sup> For example, in Sweden a system of ‘opt in’ class actions has been introduced in order to allow plaintiffs stepping into a litigation procedure that has already started. However, the ‘opt in’ possibility is reserved to parties of a contractual relationship with the infringing party, only. Also Germany has included a range of measures that facilitate private actions into its 7<sup>th</sup> amendment of competition law, the 7. GWB- Novelle, while the Dutch competition authority is currently reviewing on how to improve private enforcement (cf. Waelbroeck *et al.* 2004).

<sup>27</sup> The fifth merger wave stands out, as increasingly also companies with similar size merge, including successful global players, whereas the past big merger waves were characterized by larger companies ‘eating’ smaller ones. The four other merger waves identified in the literature range from 1897 to 1904, from 1916 or 1920 to 1929, from 1956 to 1973 (or then from 1965 to 1969) and from 1984 to 1989 (cf. Carroll 2002; Kleinert and Klodt 2002; Gaughan 2002).

<sup>28</sup> Law companies do not only employ lawyers but also increasingly tend to employ economists. As the European Commission has more and more moved towards a economic based approach in the investigation of anticompetitive conduct, sophisticated methods for market definitions and microeconomic analyses of market power have become ever more important, raising the demand for economic expertise.

<sup>29</sup> Law companies also advise companies on their rights in case of dawn raid investigations by a competition authority or advice on leniency applications. As companies may tend to fully exploit the range of legal mobility provided by market regulations, compliance and dawn raid programs can also entail advocacy on how to avoid the detection of anticompetitive behavior by competition authorities, and how to destroy evidence of a collusive agreement - which would make law companies partners in crime.

<sup>30</sup> The range of products offered by law companies entails advocacy with respect to the different stages in the clearance of mergers and acquisitions, joint ventures, access to markets, the compatibility of settlements that may cause horizontal and vertical restraints, discriminatory and predatory pricing, monopolization or the abuse of a dominant position, cartel allegations, state aid, patent/intellectual property matters, public procurement, consumer protection issues, etc.

<sup>31</sup> Private legal professions have long been excluded from free market competition. To date, the control of the legal profession in Europe is governed by the Member States. Depending on the Member State, these professions are more or less independent from governmental supervision and more or less publicly regulated. In a number of Member States professional associations (e.g. bar associations) with statutory powers regulate the conduct of these professions in order to protect the profession’s reputation. They set the conditions of entry, the minimum and maximum tariffs, restrict the scope of activity, regulate the education and the freedom of establishment, etc., making them a sort cartel-like institution with a monopoly position (Herrman 2004; Jenny 2004).

<sup>32</sup> The CCBE encompasses member bars and law societies of the EU and the European Economic Area (EEA) has been established in 1988. It is officially recognized by the EU Commission as a representative organization of about 700,000 European lawyers, and enjoys consultative status (*see* for more <http://www.ccbe.org>). ECLA is the confederation of national associations of company lawyers in Europe created in 1983 (*see* for more: <http://www.ecla.org>).

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