COMPETITIVE MARKET - ANTITRUST DIMENSION OF COMPETITION POLICY IN THE EU

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February 2004

YouRec Conference Paper
February 2004

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Abstract

One may ask the question which policy of the European Union is the most important? Legally correct answer is: none. None, because from legal point of view, all policies are equal in term of significance. Practice, however, is not always politically correct.

Keyword : Markets, Competition Policy

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"Competitive market - antitrust dimension of competition policy in the EU".

One may ask the question which policy of the European Union is the most important? Legally correct answer is: none. None, because from legal point of view, all policies are equal in term of significance. Practice, however, is not always politically correct. So, exist some indicators helping to understand the practical impact of some specific policies. According to Phedon Nicolaides' subjective choice, six criteria of significance may be outlined[1]:

1. what came first [CTP**; CP**. CAP]
2. contribution to integration and common market [CCP, **CP**, RP, CAP, EP, MP]
3. where EC spends its money [CAP, RP, R&D]
4. where EC has exclusive competence [CCP, CAP]
5. where EC legislates most frequently [CAP, CCP, **CP**]
6. where EC has largest impact on economy [MP, **CP,** CCP, RP, CAP]

Judging on mentioned above criteria, a list of main policies might be composed of:

1. Common Agricultural Policy
2. Common Competition Policy
3. Common Commercial Policy
4. Regional Policy
5. Monetary Policy

The policy on which this presentation is going to concentrate fulfils four of six criteria and that may be kind of evidence how important this policy is. There is no question that competition is an issue of primary importance in open market economy - it leads to price reduction, innovation, better efficiency and wider choice for consumers. But specifically, EU competition policy differs from others as it is empowered with extra territorial competencies (as it may penalise non-European enterprises), and is enforced directly by the European Commission issuing decisions and directives binding Member States without prior approval of the Council or the European Parliament.

Competition Policy Tasks

Main objective of the EC Competition Policy is to promote process of economic integration to achieve common market by preventing distortions to competition. Policy is aimed to guarantee the unity of internal market through providing equal competition rules and equal business conditions for those operating on the market. As such, policy is addressed to enterprises (both privet and public) and to states.
According to Rome Treaty, competition policy operates in four main fields:

1. elimination of restrictive practices
2. prohibition of abuse dominance and merger control[2]
3. liberalisation of monopolised sectors
4. state aid

[1] Nicolaides P., Seminar on Policies of the European Community, presented in Lodz, 10-11 February 2003.
[2] EC Treaty stipulates only that abusing dominant positions is prohibited. However, in order to prevent the situation when dominant position is achieved through mergers and acquisitions, the Merger Regulation had been adopted; see: Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings and ammedments.

Antitrust dimension of EU competition policy

Overview of main provisions and regulations

Member of the European Commission responsible for competition policy, Mario Monti often repeats that „cartels are cancer in open, modern economy"[3] as contrary to other anticompetitive behaviours are aimed only to eliminate or limit competition. Usually, effects of creating cartels are absolutely negative – cartels mean limited choice for consumers, higher prices, delays in all adjustments and lower innovations efforts.
Antitrust policy of the European Commission is based on art. 81 of Rome Treaty. The article stipulates that "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market" are prohibited. It is necessary to underline that competencies in the field of competition are shared between EC and Member States. European institutions do not act as long as case is affecting single Member State market only. To act at the European level, the central condition of impact on trade between Member States must be fulfilled and if this condition is met, it is sole competence of the European Commission to deal with.

What shall be understood under "agreements distorting competition"? Such agreements can be defined as any kind of (not necessarily formalised) agreement between two or more entities operating on the market, which entails behaviour limiting/ distorting competition. Some of these agreements are unconditionally prohibited, among other:

- agreements fixing prices (directly or indirectly)
- agreements on sales conditions (distribution agreements)
- agreements isolating market segments
- agreements on production and delivery quotas
- agreements on investments
- market-sharing agreements
- discrimination of other trading partners
- collective boycotting
- voluntary restrains (agreements not to engaged in some markets or certain types of competitive behaviours)

All agreements may be divided into two separate categories: vertical and horizontal.
Vertical agreements are such kind of agreements or concerted practices entered into between two or more companies each of which operates at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services[4]. Typically, to these restrains belong distributive agreements.
The table below presents some most prevalent types of agreements, its essence and potential negative impact on competition[5]:

[3] European Union Competition Policy. XXXI Report on competition policy 2001, European Commission Directorate-General for Competition, Brussels 2002, s.3
[4] Commission notice of 13 October 2000: Guidelines on vertical restraints [COM(2000/C 291/01). Official Journal C 291, 13.10.2000].
[5] The table has been prepared on the basis of Guidelines on vertical restrains, ibidem.

Type of agreement	How does it work?	Potential negative impact on competition
single branding	Oblige or motivate the buyer purchase practically all his requirements on a particular market from only one supplier (that he will not buy and resell or incorporate competing goods or services).	- foreclosure of the market - facilitation of collusion between suppliers in cases of cumulative use - a loss of in-store inter-brand competition.
exclusive distribution	Supplier agrees to sell his products only to one distributor for resale in a particular territory. At the same time, the distributor is usually limited in his active selling into other exclusively allocated territories.	- reduced intra-brand competition - market partitioning - facilitates price discrimination. - Facilitates collusion
recommended and maximum resale process	Recommendation of resale prices to a reseller or requirement the reseller to respect a maximum resale price.	- may work as a focal point for the resellers and might be followed by most or all of them - facilitates collusion between suppliers.
exclusive customer allocation	the supplier agrees to sell his products only to one distributor for resale to a particular class of customer (the distributor is usually limited in his active selling into other exclusively allocated classes of customer)	- reduced intra-brand competition and market - partitioning (facilitate price discrimination) - facilitate collusion
selective distribution	restrict the number of authorised distributors and the possibilities of resale (restriction of the number of dealers depends on selection criteria linked in the first place to the nature of the product; the restriction on resale is a restriction on any sales to non-authorised distributors, leaving only appointed dealers and final customers as possible buyers. Almost always used to distribute branded final products.	- reduction in intra-brand competition - foreclosure of a certain type or types of distributor - facilitation of collusion between suppliers or buyers.
Franchising	contains licences of intellectual property rights relating in particular to trade marks or signs and know-how for the use and distribution of goods or services (the franchiser usually provides the franchisee during the life of the agreement with commercial or technical assistance). Franchise agreements usually contain a combination of different vertical restraints concerning the products being distributed, in particular selective distribution and/or non-compete and/or exclusive distribution or weaker forms thereof.	
exclusive supply	there is only one buyer inside the Community to which the supplier may sell a particular final product (often referred to as industrial supply).	- foreclosure of other buyers.
tying	supplier makes the sale of one product conditional upon the purchase of another distinct product from the supplier.	- may constitute an abuse of a dominant position - may be incompatible with the competition rules.

Contrary, horizontal agreements are those concluded by entities operating at the same level of the production or distribution chain. Under some circumstances may distort competition. Its essence and potential negative effect on competition is presented in the following table[6]:

[6] The table has been prepared on the basis of Commission notice of 6 January 2001: Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements. [Official Journal C3 of 06.01.2001]

Type of agreement	How does it work?	Potential negative impact on market
production agreements	• joint production agreements (the parties agree to produce certain products jointly); • (unilateral or reciprocal) specialisation agreements (parties agree to cease production of a product and to purchase it form the other party); • Subcontracting agreements (one party entrusts the production of a product to another). In case when subcontracting agreements take place between competitors than is covered by guidelines on horizontal restrains	
purchasing agreements	It can be carried out by: • a jointly controlled company, • a company in which many firms hold a small stake, • a contractual arrangement or by an even looser form of co-operation.	Usually, when taken by SME are procompetitive, however, joint purchasing may involve both horizontal and vertical agreements, in which case an assessment should be carried out according both to guidelines on vertical and horizontal restraints.
commercialisation agreements	involves co-operation between competitors on selling, distributing or promoting their products.	If it determines all commercial aspects may have restrictive effects on competition.
agreements on standards	defines technical or quality requirements with which products, production processes or production methods must comply.	May be used to restrict competition
environmental agreements	Agreements conducted to reduce pollution, as defined in environmental law, or to achieve environmental objectives.	May be used to conceal anti-competitive practices, the competition rules apply.
Research and Development agreements	agreements on R&D in different forms: • outsourcing of certain R&D activities, • the joint improvement of existing technologies • cooperation on the research, development and marketing of completely new products.	May have restrictive effects on: • prices, • output, • innovation, • variety or quality of products.

In general, agreements mentioned in both tables, under some conditions may have restrictive and distorting effects on competition and therefore, in case when it affects trade between Member States, are prohibited. However, in some situations such agreements may also entail positive market effects and if that take place, the provisions of paragraph 1 of art. 81 may be declared as inapplicable. Paragraph 3 of the same article encounter 4 conditions, which have to be met in order to receive exemption from agreement prohibitions. These conditions are cumulative in its character therefore have to be fulfilled simultaneously and are following:

1. contribution to production or distribution of goods;
2. promotion of technical or economical progress;
3. fair share of benefits to consumers;
4. limited extends of restriction on competition.

In order to receive exemption, either block or individual one, notification and authorisation of the European Commission is required. To system of authorisation is centralised, so in order to improve its efficiency, the European Commission prepared notice defining and helping to asset which agreements may benefit from the block exemption[7] as well, as notice on minor importance, which defined what kind of agreements do not infringe the art. 81.(1) in appreciable manner.

In the principle, there are certain restrictions to which block exemption and "de minimis" are never applicable, mainly[8]:

1. resale price maintenance;
2. restrictions concerning the territory into which or the customers to whom the buyer may sell;
3. limits on outputs and sales.

Indispensable condition for exemption to be granted is satisfactory assumption, that potential costs resulting from limited competition will be outweighed by benefits. In case when loses are greater then benefits, the European Commission share with Member States a right to withdraw exemption

According to Regulation 2790/99, all agreements shall be defined in the term of duration not exceeding 5 years (agreement may be renewed for another precisely defined period). Vertical agreement is covered by BER if the total market share of contracting parties does not exceed 30% of the relevant market (both, in terms of product and territory). There are also additional conditions, which must be met:

- an agreement is entered into between an association of undertakings and its members or between an association and its suppliers, with total annual turnover not exceeding EUR 50 million;
- an agreement containing provisions which relate to intellectual property rights, provided that those provisions do not constitute the primary object of such agreements and are indispensable to the use, sale or resale of goods;
- an agreement is entered into between competing undertakings and the supplier is a manufacturer/distributor of goods or services while the buyer is a distributor that does not produce competing goods or services, provided that the buyer's total annual turnover does not exceed EUR 100 million.

Agreements in some specific sectors (like motor vehicle distribution and servicing agreements, maritime and air transport, insurance's sector) are covered by separate regulations.
When it comes to horizontal agreements, the block exemptions cover agreements on Research and Development and specialisation agreements.
Agreements on R&D are assessed to fulfil criteria of art. 81(3) and are covered by block exemption when:

- are not aimed to restrict the freedom of the participating undertakings to carry out research and development independently or in co-operation with third parties in a field

[7] Commission Regulation (EC) No 2790/1999of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices; and Regulation (EC) No 2658/2000 on the application of Article 81(3) of the Treaty to categories of specialization agreements ; Regulation (EC) No 2659/2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements
[8] Regulation (EC) No 2790/1999, point 10.

unconnected with that to which the research and development relates or, after its completion, in the field to which it relates or in a connected field;

- participants' total market share does not exceed 25% (including also agreements foreseeing joint distribution of jointly developed products)
- duration of agreements:
    - in agreements between non-competitors the exemption applies as long as duration of R&D; and shall continue for 7 years in case of jointly exploited results;
    - in agreements between competitors exemption is applicable under the same conditions as long as their total market share does not exceed 25%.

Exemption to specialisation agreements (unilateral or reciprocal and agreements on joint production) may be granted in case when participants total market share do not exceed 20%
In any case, Commission keeps its right to withdraw granted exemption if positive results do not outweigh the negative impact of particular agreements on competition.

'De minimis' doctrine

Practical experience resulting form examination of many agreements and assessments of its impact on competitiveness at the European market had lead to conclusion that some agreements did not exert appreciable effect on trade between Member States. Therefore, the European Commission had adopted "Notice on agreements of minor importance[9]" that states conditions under which agreements do not infringe Community law. According to the lately established thresholds, agreements of minor importance are:

1. if the aggregate market share held by the parties to the agreement does not exceed 10% in case of agreements between competitors;
2. if the aggregate market share held by the parties to the agreement does not exceed 15% in case of agreements between non-competitors[10].

Sometimes it is difficult, however, to classify whether agreement is taken between competitors or not. In such cases the 10% threshold is applicable. There are also situations when at specific market parallel networks of agreements already operate and have similar effects on the market. To that, the market share threshold is reduced to 5%.
In general, agreements taken between SME are 'de minimis'.
Of course, in the principle, hardcore restrictions (i.e. prices fixing and market sharing) are not covered by "de minimis' doctrine.

Latest development in antitrust policy.

Since late 90this the European Commission has been announcing a need for competition policy reform. The centralised system, subsequent enlargements and large number of cases had put large administrative burden on the Commission, resulting in serious overload in DG Competition. Having in mind forthcoming enlargement expanding the EU up to 25 Member States it seemed to be an important task to deal.

[9] Commission Notice on agreements of minor importance, Official journal of the European Communities, C 368, 22.12.2001.
[10] In comparison to previous Notice on agreements of minor importance of 1997, thresholds have been increased relatively for 5%.

The new leniency notice.

Fighting cartels is for competition a question of primary importance and the main Commission's task in antitrust policy. Usually, cartels have heavy damaging effect on market and are particularly difficult to identify due to its secret character. Learning form United States experience, an opportunity to receive immunity from fines had been introduced as a new policy instrument in 1996. As well as in America, European practice in leniency policy proved to be very effective. In first six years of its operation (1996-2002) leniency was requested in 16 separate cases with 3 companies benefiting from full immunity. As Francois Arbault and Franciso Peiro state "the total amount of the fines imposed in all of these 16 cases is EUR 2 240 million. As to the 'value' of the overall reductions of fines granted, they represent almost EUR 1 400 million. This corresponds to an average reduction per case of approximately 38%, showing that the leniency policy provides tangible benefits to those companies that choose to co-operate with the Commission[11].

Regardless how effective leniency policy was, a kind of legal uncertainty existed in relation to granting immunity or fines reduction. Therefore, the European Commission worked out more precise rules for granting immunity which have been adopted in Commission Notice on immunity from fines and reduction of fines in cartel cases[12].

According to this new notice, the immunity from fine (reduction of fine) may be granted to the first member of the cartel informing the Commission of an undetected cartel by providing sufficient information, which allow to launch inspection. It is also applicable in situation, when the first cartel's member provide decisive evidence that enables the Commission to establish an infringement, when the Commission already detected cartel's existence but information it posses are not of such quality to establish an infringement. Full immunity may be granted exclusively to one cartel member. Subsequent applications may apply for fines reduction.

The following level of reduction an undertaking will benefit from in case of co-operation, relative to the fine which would otherwise have been imposed:

1. first undertaking→ a reduction of 30-50%;
2. second undertaking → a reduction of 20-30%;
3. subsequent undertakings → a reduction of up to 20%.

Contrary to the previous Leniency Notice of 1996, full immunity may be also granted even to companies playing decisive role in illegal cartel's activity. Nevertheless, company applying for immunity must continuously and fully co-operates with the European Commission, put an infringement to the end and not to play any active role in further cartels operations[13].

Such formulated Leniency Notice tends to evoke a snowball effect: as soon as some applicants take an opportunity to apply for immunity and the Commission starts investigation in denounced cartels, other cartel's members seek for reduction of fines and sometimes provide the Commission with evidence in other product areas[14].

The new mechanism adopted in leniency policy is so called "hypothetical application". This two-stage procedure tends to encourage potential applicants to act by creating greater reassurance. According to point 13(b) of the Notice, potential applicant may initially present

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[11] Arbault F., Peiro F., The Commission's new notice on immunity and reduction of fines in cartel cases: building on success, "Competition Policy Newsletter", No 2, 2002, p. 16.

[12] The notice had been published in Official Journal of the European Communities, C 45, 19.02.2002.

[13] European Union Competition Policy. XXXII Report on competition policy, 2003, p. 18.

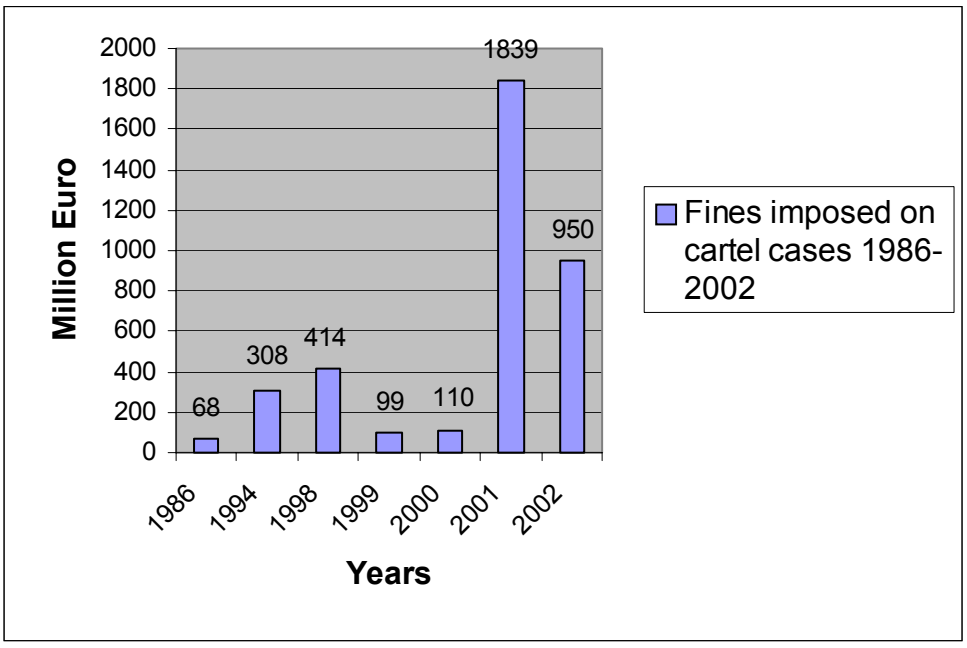
[14] Van Barlingen B., The European Commission's 2002 Leniency Notice after one year of operation, "Competition Policy Newsletter", No 2, 2003, p. 16.

possessed evidence in hypothetical terms (must present a descriptive list of the evidence it proposes to disclose at a later agreed date). This list should accurately reflect the nature and content of the evidence, whilst safeguarding the hypothetical nature of its disclosure. When such hypothetical evidence is submitted to the Commission, it examines whether it meets all requirements to receive conditional decision on immunity. To ensure accurate Commission's assessment on possessed evidence, the list and description must be as much detailed as possible. In second stage, when applicant decides to formally apply for immunity, the Commission verifies if delivered evidence corresponds to the description made in the list, and then grant the undertaking conditional immunity from fines in writing.

The European Commission guarantees confidentiality to applying companies, however, when a second immunity application is made in the same matter, it is obliged to inform (without revealing the identity) subsequent applicant that another request for immunity had already been submitted.

First results of improved leniency policy are already visible. Since 12 Feb 2002 till the end of 2003, 30 applications had been submitted (which is more than twice as much in comparison to 6-years long period when the previous Leniency Notice of 96 was in force)[15]. In this number 20 requests for immunity were submitted out of which 15 positive decision on granting immunity have been taken.

The following figure presents the amount of fines imposed on companies operating in cartels.



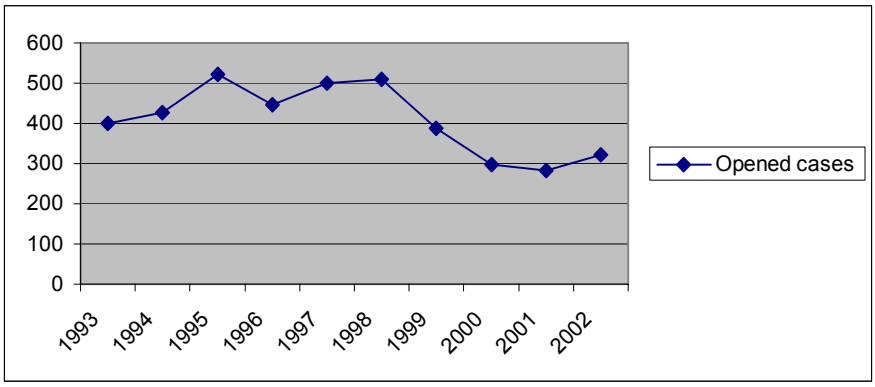
Without any doubt, the year 2001 shall be procmlaimed as the record, both in terms of detected cartels (10 infringments) and amount of imposed fines (1.839 billion EURO), with the highest ever fine imposed in the history of competition policy on Vitamins Cartel, counting 855 million EURO.

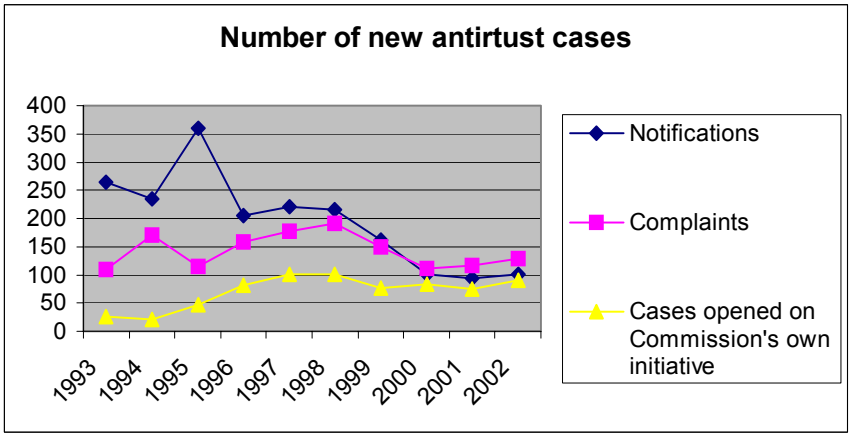
[15] Data presented by DG Competition at European Union websites: http://europa.eu.int/comm/competition/citizen/cartel_stats.html

Regulation 1/2003

For 40 years Regulation 17/62 on implementing antitrust provisions of the Rome Treaty had been in force. In the time of its operation, the regulation remained mainly unchanged. However, due to changing circumstances, centralised system established by this Regulation has to be novelised.

Figures below present number of new antitrust cases opened in years 1993-2002[16]. Even if counting only newly opened cases, it is clearly visible that the DG Competition of European Commission has to tackle huge work.





Having in mind forthcoming enlargement of the EU and foreseeing that number of cases will definitely increase, new Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty has been adopted[17]. The Regulation will come into force on 1st May 2004 which is the day of enlargement for another 10 Central and Eastern European Countries.

According to this new Regulation, application of art. 81(3) and resulting from a system of authorisation of agreements which so far was hold solely by European Commission competence had been changed into a directly applicable exemption system. There is no longer need to notify and receive an authorisation of the European Commission for exemption. If party or authority is alleging an infringement, it should also proof existence of thereof. On the

[16] Statistical data come from XXVIII and XXXII Reports on Competition Policy.
[17] Official Journal of the European Communities, L 1/1, 04.01.2003.

other hand, it will be companies entering into agreements task eventually proof, that agreement fulfils conditions stipulated in art. 81(3).

Under the new Regulation a system of parallel competencies is introduced. Within this system either European Commission and national courts and competition authorities are sharing power to apply Community law. Therefore, there is a need to provide uniformed frameworks for implementation competition rules. Art. 11 of Regulation states that the Commission and competition authorities of Member States shall apply the Community competition rules in close co-operation. To ensure that, the Commission and national competition authorities (NCA) are obliged to transmit copies of most important documents and decisions. What's more, when acting under art. 81 and 82, NCA should inform the Commission and provide Commission with summary of cases and proposed course of action before adopting a formal decision. Whenever NCA are deciding on agreements which are already the subject of Commission's decision, national courts are under obligation to avoid taking decisions which could run counter those envisaged by the Commission. Whenever NCA decided on cases on restrictive practices and dominant position and if it affects trade between Member States, they are obliged to apply Community law. What's more, an agreement, which is legal under art.81, cannot be prohibited by national law.

Advisory Committee on Restrictive Practices and Dominant Position will play an important role for providing forum for consultation, exchange of opinion and information. The Committee may discus individual cases or matters of general interest and serve NCA with guidance and opinions.

Member States (national courts and competition authorities) have power to apply art. 81 and 82 in individual cases when acting on their own initiative or on a complaint and they may take following decisions:

1. requiring that an infringement be brought to an end;
2. ordering interim measures;
3. accepting commitments;
4. imposing fines, periodic penalty payments or any other penalty provided in their national law.

European Commission handles similar competencies. When it is acting on it's own initiative or on complain it may request for bringing an infringement to an end and impose any behavioural or structural remedy necessary to achieve that aim. In case when European Commission at early stage of investigation states that some particular infringement may cause irreparable damage to competition, Commission may order (for a specified period that may be renewed) interim measures. Remedy must be, however, imposed in accordance with the principle of proportionality. If several equally efficient remedies are available, than decision on which shall be applied is up to undertaking choice[18].

Decision accepting commitments are new instrument introduced by reported Regulation. It gives undertakings an opportunity to propose commitments sufficient to solve identified competition problems without finding infringement. Once commitments have been offered and accepted by the Commission, it is binding for undertakings[19].

[18] Gauer C., Dalheimer D., Kjolbye L., De Smijter E., Regulation 1/2003: a modernised application of EC competition rules, Competition Policy Newsletter, 1/2003, p. 5.
[19] Ibidem.

When Commission is acting on it's own initiative, NCA are relieved of their competence art. 81 and 82. In case when NCA are already working on case, the European Commission may initiate proceedings after consultation with national authorities only.

Fighting cartels

When trade between Member States is affected by hardcore restrictions, like price fixing or market sharing, the Commission is empowered to take any step necessary to investigate if infringement takes place. Similarly to the previous solutions, the new Regulation put three instruments for Commission's disposal:

1. requests for information;
2. power to take statements (to interview any legal or natural person who consents to be interviewed for the purpose of collecting information relating to the subject of investigation);
3. inspections.

Power to conduct inspections includes:

- entry to any premises, land and means of transport
- right to examine the books and other records related to the business;
- obtaining in any form copies of or extracts from such books or records;
- to seal any business premises and books or records for the period and to the extent necessary for the inspection;
- request for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers.

Contrary to the Reg. 17/62, in the field of inspections Commission's power has been increased. In case of serious violation of competition law, Reg. 1/2003 empowers Commission with competence to enter also private premises, land and means of transport if reasonable suspicion exists that some important proofs may be hidden there. Such inspection, however, may not be executed without prior authorisation from national judicial authority in given Member State.
Member States'NCA may conduct inspections exclusively at their own territory, in accordance with national law.

The European Commission and NCA would be powerless if having no instrument to punish infringements. Therefore, similarly to previous rules, power to impose fines and periodic penalty payments has been given competition authorities.
Fines not exceeding 1% of the total turnover may be imposed on undertaking in case of non-co-operative behaviour (like providing incomplete, incorrect or misleading information). Fines not exceeding 10% of the total turnover (for each participant) may be imposed on undertaking in a case undertakings infringe art. 81-82 or contravene a decision ordering interim measures, eventually fail to comply with a commitment made binding.
The Commission has also power to impose periodic penalty payments not exceeding 5% of the average daily turnover in case when participants of prohibited agreement did not:

- put infringement into an end;
- comply with a decision ordering interim measures;
- comply with a commitment made binding
- supply complete and correct information which it has requested.

The Commission and NCA acting at their own territory may withdraw granted under Regulation exemption in case they find that particular agreements are not compatible with art. 81(3).

As it was already mentioned, the Regulation would came into force on 1st May 2004. At present, it is difficult to foresee precisely what effects it will exert on competition policy. On th one hand, it may lead to limiting biurocracy and lower costs (as system of notifications imposed financial burden on business). On the other hand, however, in relation to some aspects, it may cause also greater legal uncertainty.

According to Peter Goldsmith and Christoph Lanz "under a decentralised application system of the EC antitrust rules, uncertainties in the interpretation of law would bear the danger that decision-making bodies, located in different Member States with different judicial traditions and with differing understanding of and emphasis on competition policy, might decide similar cases in dissimilar ways"[20]. This uncertainty might be strengthened by the fact, that some documents issued by the European Commission are rather informative in their character, then legally binding. For example, although 'de minimis' notice provided that agreements in which undertakings' relevant market share was lower than 5% are not prohibited, in several cases, however, that criteria was disregarded (like in ECJ ruling of 1983, in case Pioneer vs. Commission, where the market share was defined at 3.18%)[21]. It is therefore potentially possible situation, when "no one will know for certain whether their agreements are truly compatible with the EC rules of competition until someone complains or takes them to court and loses the case"[22].

As some observers have voived, in regard to the system of parallel competencies, there is a risk, that undertakings will seek for proceeding its case before the national court which they preceive to be the most liberal. It might lead to the situation, when in the Community the least strict rules will be applied[23]. Phedon Nicolaides underlines also that uniform application of Community law depends not only on courts and competition authorities, but also on lawyers and academics. In decentralised system it may be difficult to keep up to date as it is not clearly specified how these groups (of lawyers and academics) can maintian access to decisions and rullings acrose Member States[24].

Obviously, there is no doubt that reform of competition policy is necessary. Do positive effects outweigh potential legal uncertainty in business environment? Time will give an answer to this question but it seems that establishing properly operating system of European Competition Network will be of primary importance. Making efforts to provide greater legal certainty and greater decentralisation shall ensure positive and accurate development of competition rules in enlarged Community.

[20] Goldsmith P.I.B., Lanz C., Maybe Definitely – Definitely Maybe? EC Competition Law – Is the Time Ripe for Freform?, Eipascope, 2/2001, p. 17.
[21] Ibidem, p. 18.
[22] Nicolaides P., Reform of EC Competition Policy: A Significant But Risky Project, Eipascope, 2/2002, p. 18.
[23] Ibidem, p. 19.
[24] Ibidem, p.20.