

## THE MODERNIZATION OF EUROPEAN ANTITRUST ENFORCEMENT: THE ECONOMICS OF REGULATORY COMPETITION

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### INTRODUCTION

In today's economy, businesses are increasingly subject to the scrutiny of multiple antitrust regulators. This is a logical consequence of a global economy where business decisions impact several jurisdictions, but it also results from the deliberate assignment of regulatory duties within and between antitrust systems.<sup>1</sup> Regulation 1/2003 of the European Commission ("EC" or "Commission") presents a landmark development in the decentralization of global antitrust enforcement.<sup>2</sup> By increasing the involvement of national courts and national competition authorities,<sup>3</sup> Regulation 1/2003 spreads antitrust powers in Europe throughout the Commission and twenty-four Member States.

Despite the obvious motive of decreasing its workload,<sup>4</sup> the European Commission's move toward decentralization is puzzling. The reform comes at a time when the global consensus on law enforcement is shifting towards

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<sup>1</sup> See generally MAHER M. DABBAH, *THE INTERNALISATION OF ANTITRUST POLICY* (2003).

<sup>2</sup> See Council Regulation 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, 2002 O.J. (L1) 1 [hereinafter Reg. 1/2003]. For an overview of Regulation 1/2003; see generally MODERNISATION OF EUROPEAN COMPETITION LAW: THE COMMISSION'S PROPOSAL FOR A NEW REGULATION IMPLEMENTING ARTICLES 81 AND 82 EC (Jules Stuyck & Hans Gilliams eds., 2002) [hereinafter MODERNISATION OF EUROPEAN COMPETITION LAW].

<sup>3</sup> Reg. 1/2003, *supra* note 2, at 2.

<sup>4</sup> On the Commission's selective enforcement in light of the imperative to lessen the workload, see, e.g., Jo Shaw, *Decentralization and Law Enforcement in EC Competition Law*, 15 *LEGAL STUD.* 128 (1995).

centralization.<sup>5</sup> For instance, recent law enforcement disasters such as the September 11th attack, in which enforcement agencies failed to share crucial information that could have prevented this tragedy, amply demonstrate how supposed cooperation between administrative bodies often turns into competition among these agencies.<sup>6</sup> The lack of communication between enforcement agencies, particularly their failure to exchange vital information, has fueled a widespread belief that competition is not always optimal when it involves complementary units of information.<sup>7</sup>

Historically, antitrust enforcement in the European Union has been more centralized<sup>8</sup> than in the United States, where multiple administrative and judicial bodies operate on the same level. Regulation 1/2003 decentralizes antitrust enforcement by eliminating notice requirements and investing concurrent responsibilities for the application of Article 81(3) in national courts and national competition authorities.<sup>9</sup> The modernization of European antitrust law thus adds a new layer of overlapping intra-jurisdictional competence to the existing multilayer inter-jurisdictional setting confronting multinationals.<sup>10</sup> In this article, we analyze the expected effects of regulatory overlap in European competition law resulting from Regulation 1/2003. We draw upon recently developed economic theories of regulatory

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<sup>5</sup> See text and sources cited *infra* note 6.

<sup>6</sup> In its unanimous final report, the bipartisan 9/11 Commission recommends a historic restructuring of the nation's intelligence agencies. Specifically, the Central Intelligence Agency, Federal Bureau of Investigation, Department of Defense, and National Security Council are criticized for their failures in gathering and sharing intelligence. See Philip Shenon, *Threats and Responses: The Overview; 9/11 Report Calls for a Sweeping Overhaul of Intelligence*, N.Y. TIMES, July 23, 2004, at A1. In the final report, the 9/11 Commission recommends unifying law enforcement by centralizing strategic intelligence and operational planning and aligning intelligence community hierarchy with a new national intelligence director and a National Counterterrorism Center. See THE 9/11 COMMISSION REPORT 399-400 (2004), available at <http://www.gpoaccess.gov/911>. Similarly, the Belgian Government created a unified federal police force after the country was shocked to find that police and justice continually refused to share information that could have resolved and saved lives in a large pedophilia murder case. World News Briefs, *Belgian Parties Agree To Revise Justice System*, N.Y. TIMES, May 25, 1998, at A4. On the Dutroux scandal, see, e.g., Timothy W. Ryback, *Four Girls Abducted, Raped, Murdered. A Country on Trial*, N.Y. TIMES, Feb. 23, 1997, at § 6, 42.

<sup>7</sup> The analogy between these law enforcement disasters is enforced by the fact that European antitrust regulation is shifting further towards the criminalization of antitrust enforcement. On this trend, in the context of business cartels, see CHRISTOPHER HARDING & JULIAN JOSHUA, REGULATING CARTELS IN EUROPE: A STUDY OF LEGAL CONTROL OF CORPORATE DELINQUENCY (2003).

<sup>8</sup> See PAUL B. STEPHAN ET AL., THE LAW AND ECONOMICS OF THE EUROPEAN UNION 840-48 (2003).

<sup>9</sup> Reg. 1/2003, *supra* note 2, art. 3.

<sup>10</sup> The ongoing development and employment of leniency programs on the national and the European federal levels further contributes to an increasingly fragmented cartel policy that encompasses several overlapping jurisdictions. See CHRISTOPHER HARDING & JULIAN JOSHUA, REGULATING CARTELS IN EUROPE: A STUDY OF LEGAL CONTROL OF CORPORATE DELINQUENCY 209-228 (2003).

competition to analyze the effects of delegation of competence in the field of antitrust enforcement.

Part I summarizes some of the main aspects of Regulation 1/2003's regulatory overhaul. Part II employs economic theory to provide a new taxonomy of regulatory competition. Part III applies the economic analysis of regulatory competition to Regulation 1/2003. Part IV concludes with some broader reflections.

## I. THE REGULATORY REVOLUTION OF REGULATION 1/2003

On May 1, 2004, a major reform of EC competition enforcement entered into force.<sup>11</sup> Regulation 1/2003 established a new order for the enforcement of European Competition rules.<sup>12</sup> The crux of this modernization authorizes joint enforcement of competition rules by the Commission's Directorate-General of Competition, national courts, and national antitrust authorities. The rule also abolished the notification system and provided for the direct applicability of Article 81(3) in an attempt to ensure the "continued effective application"<sup>13</sup> of competition rules in an enlarged European Union. The main effect of this reform was the broader application of EC competition rules by Member State courts and competition authorities.

### A. *Removal of Notification*

Prior to Regulation 1/2003, businesses were required, under certain circumstances, to notify the Commission of cartel agreements and practices.<sup>14</sup> The volume of notifications received soon exceeded the Commission's time and allegedly diverted the Commission's resources away from the most serious antitrust infringements.<sup>15</sup> With Regulation 1/2003, the

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<sup>11</sup> On the same day, the European merger control system was also revamped. *See* Commission Regulation 802/2004 of 7 April 2004 Implementing Council Regulation (EC) 139/2004 on the Control of Concentrations Between Undertakings, 2004 O.J. (L 133) 1.

<sup>12</sup> *See* Reg. 1/2003, *supra* note 1, 1-25.

<sup>13</sup> Philip Lowe, *Current Issues of EU Competition Law: The New Competition Enforcement Regime*, 24 NW. J. INT'L L. & BUS. 567, 568 (2004).

<sup>14</sup> For instance, Council Regulation 17/1962, 1962 J.O. (13) 204, art. 4 [hereinafter Reg. 17/62], requires that undertakings notify the Commission of restrictive practices that fall under Article 81 of the European Community ("EC") Treaty, but for which the undertakings seek an exemption from the Commission. *See generally* STEPHAN ET AL., *supra* note 8, at 816-825.

<sup>15</sup> Reg. 1/2003, *supra* note 1, at 1. Under EU competition law, the Commission was obliged to act upon all notifications within a reasonable period. *See* Joined Cases T-213/95 & T-18/96, *Stichting Certificatie Kraanverhuurbedrijf v. Commission*, 1997 E.C.R. II-1739, ¶ 55. To appreciate the Commission's workload, consider that the Commission received 40,000 notifications of agreements in the first

Commission finally made good on its intention to eliminate the notice requirement.<sup>16</sup> In doing so, European competition law moved from a standard presumption of illegality to a default assumption of legality, where the burden of proof rests with either the party alleging a violation or government antitrust authorities.<sup>17</sup> Implicit in this reform is the idea that the meaning and major precedents of European competition law have matured.<sup>18</sup> The elimination of the notice requirement has expanded the role of courts and national competition authorities because, traditionally, notifications to the European Commission delayed or postponed proceedings by national competition authorities and national courts.

### B. *Decentralized Application of Article 81(3)*

Regulation 1/2003 makes Treaty Articles 81 and 82 - regulating cartels and prohibiting abuse of market dominance, respectively - directly applicable in their entirety. The European Commission thus relinquished its de facto exclusive jurisdiction over Treaty Articles 81 and 82. Significantly, this includes the exemption provision in Article 81(3).<sup>19</sup> The Commission's previous exclusive jurisdiction over Article 81(3) enabled it to navigate the deep water of economic analysis and to set out major precedents in such matters as concerted practices,<sup>20</sup> the economic defense against predatory pricing,<sup>21</sup> and other important issues. Although, historically, European

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five years after passing Reg. 17/62.

<sup>16</sup> On the debate over directly applicable exceptions versus centralized authorization, see Giuliano Marengo, *Does a Legal Exception System Require an Amendment of the Treaty?*, in EUROPEAN COMPETITION ANNUAL 2000: THE MODERNIZATION OF EC ANTITRUST POLICY 145, 145-184 (Claus-Dieter Ehlerman & Isabela Atanasiu eds., 2001). See also Rein Wesseling, *The Commission White Paper on Modernisation of E.C. Antitrust Law: Unspoken Consequences and Incomplete Treatment of Alternative Options*, 20 (8) EUR. COMPETITION L. REV. 420 (1999).

<sup>17</sup> See Reg. 1/2003, *supra* note 2, at 2. However, even before Regulation 1/2003, the Commission's regular use of block exemptions created a de facto shift towards a presumption of legality with regard to many types of agreements. See, e.g., Commission Notice on Exclusive Dealing Contracts with Commercial Agents, 1962 J.O. (139) 2921, available at [http://europa.eu.int/comm/competition/antitrust/legislation/edc\\_en.html](http://europa.eu.int/comm/competition/antitrust/legislation/edc_en.html).

<sup>18</sup> See, e.g., Commission Notice - Guidelines on Vertical Restraints, 2000 O.J. (C 291) 1; Commission Notice - Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements, 2001 O.J. (C 3) 2. For a historical justification of the centralized notification and authorization system, see WOUTER P.J. WILS, THE OPTIMAL ENFORCEMENT OF EC ANTITRUST LAW, Ch. 5, Section 6.2. (2002) (explaining that cartel prohibitions were revolutionary at the time of adoption of Treaty Articles 81 and 82).

<sup>19</sup> Reg. 1/2003, *supra* note 2, art. 3.

<sup>20</sup> Joined Cases 89, 104, 114, 116-17, 125-29/85, *Re Wood Pulp Cartel: A Ahlstrom Osakeyhtio v. Commission*, 1998 E.C.R. 5193.

<sup>21</sup> Case 27/76, *United Brands v. Commission*, 1978 E.C.R. 207.

competition law has struggled to accommodate a rule of reason analysis under Article 81(1),<sup>22</sup> Article 81(3) has traditionally provided a platform to weigh the economic effects of cartel agreements. Now, Regulation 1/2003 will induce decentralized application of the exemption provision, which goes against the classic argument that national courts lack the expertise and resources to evaluate sophisticated economic arguments in antitrust matters.<sup>23</sup> The Commission appears to believe that most major precedents in Article 81(3) jurisprudence have already been announced, such that domestic courts will no longer be hindered by the complexity of a full-blown examination of economic issues in competition cases. Furthermore, the revitalization of the national competition authorities<sup>24</sup> - active in some Member States while dormant in others - should provide assistance to competition law enforcement at the Member State level.

### C. *Antitrust Cooperation*

Anticipating the dangers of fragmented application of competition rules, the EC released a Modernization Package,<sup>25</sup> which provides a number of coordination and cooperation mechanisms for national courts, national competition authorities, and the Commission.<sup>26</sup> To ensure coherent application of competition rules, the Commission will lead enforcement efforts by concentrating on severe infringements, landmark cases,<sup>27</sup> and infringements

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<sup>22</sup> See, e.g., Valentine Korah, *The Rise and Fall of Provisional Validity—The Need for a Rule of Reason in EEC Antitrust*, 3 NW. J. INT'L L. & BUS. 320 (1981).

<sup>23</sup> See generally John D. Cooke, *The Reform of Competition Law Enforcement—Will it Work?*, in THE MODERNISATION OF EU COMPETITION LAW ENFORCEMENT IN THE EUROPEAN UNION: FIDE 2004 NATIONAL REPORTS 33-36 (Dermot Cahill ed., 2004).

<sup>24</sup> Reg. 1/2003, *supra* note 2, art. 5; see generally Commission Notice on Cooperation Within the Network of Competition Authorities, 2004 O. J. (C 101) 43.

<sup>25</sup> The “Modernization Package” consists of the following implementing regulation and six accompanying notices: Commission Regulation 773/2004 of 7 April 2004 Relating to the Conduct of Proceedings by the Commission Pursuant to Articles 81 and 82 of the EC Treaty, 2004 O.J. (L 123) 18; Commission Notice on Cooperation Within the Network of Competition Authorities, 2004 O.J. (C 101) 43 [hereinafter Cooperation Within the Network]; Commission Notice on the Co-operation Between the Commission and the Courts of the EU Member States in the Application of Articles 81 and 82 EC, 2004 O.J. (C 101) 54; Commission Notice on the Handling of Complaints by the Commission Under Articles 81 and 82 of the EC Treaty 2004 O.J. (C 101) 65; Commission Notice on Informal Guidance Relating to Novel Questions Concerning Articles 81 and 82 of the EC Treaty that Arise in Individual Cases (Guidance Letters), 2004 O.J. (C 101) 78 [hereinafter Guidance Letters]; Commission Notice - Guidelines on the Effect on Trade Concept Contained in Articles 81 and 82 of the Treaty, 2004 O.J. (C 101) 81; Communication from the Commission - Notice - Guidelines on the Application of Article 81(3) of the Treaty, 2004 O.J. (C 101) 97.

<sup>26</sup> See sources cited *supra*, at note 25.

<sup>27</sup> See Cooperation Within the Network, *supra* note 25, at 44-45.

that affect more than three member states.<sup>28</sup> The supervisory role of the Commission is expressed by the provision directing national competition authorities to inform the Commission prior to or immediately following the first formal act of investigation.<sup>29</sup> To facilitate cooperation, the Modernization Package creates information exchanges among national competition authorities<sup>30</sup> and institutes a competition network that meets at regular intervals to discuss competition enforcement strategy.<sup>31</sup> At all times, the Commission retains the right to intervene,<sup>32</sup> and national competition authorities are automatically relieved of their jurisdiction whenever the Commission initiates its own proceedings.<sup>33</sup>

## II. THE ECONOMICS OF REGULATORY COMPETITION: A NEW TAXONOMY

In this part, we draw upon economic theory to provide an integrated model of regulatory competition that can be applied to antitrust rules.<sup>34</sup> The taxonomy of the various modalities of regulation provides a useful framework for analyzing the reform of competition enforcement in Europe. We shall apply this taxonomy to the discussion of antitrust reform in Part III.

### A. *Positive Versus Negative Regulation*

Regulatory activity usually occurs in two forms. Regulation is positive when a regulator can act to permit a certain activity that is otherwise not allowed. When a firm wishes to partake in a certain activity, it must obtain permission from the regulator. This includes, for instance, the issuance of

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<sup>28</sup> *Id.* ¶ 14.

<sup>29</sup> Reg. 1/2003, *supra* note 2, art. 11; Cooperation Within the Network, *supra* note 25, ¶ 45. The interaction is two-way. Likewise, the Commission informs the national competition authorities of the documents it has collected in its investigate process. *See, e.g.*, Reg. 1/2003, *supra* note 2, at 4.

<sup>30</sup> Reg. 1/2003, *supra* note 2, at 4. The particulars are contained in the Commission Notice on Cooperation within the Network of Competition Authorities. *See* Cooperation Within the Network, *supra* note 25.

<sup>31</sup> *See* Reg. 1/2003, *supra* note 2, at 4. The declaration of intention reads as follows: “The Commission and the competition authorities of the Member States should form together a network of public authorities applying the Community competition rules in close cooperation. For that purpose it is necessary to set up arrangements for information and consultation. Further modalities for the cooperation within the network will be laid down and revised by the Commission, in close cooperation with the Member States.” *Id.*

<sup>32</sup> Cooperation Within the Network, *supra* note 25, ¶¶ 50-57.

<sup>33</sup> Reg. 1/2003, *supra* note 2, ¶ 17.

<sup>34</sup> *See generally* Francesco Parisi et al., Two Dimensions of Regulatory Competition (George Mason Law & Economics Working Paper No. 03-01, 2004), *available at* <http://www.gmu.edu/departments/law/faculty/papers/docs/03-01.pdf>.

permits or licenses by a regulator. In these cases, there is a presumptive general prohibition against an activity that can be overcome through the regulator's positive action. In contrast, regulation is negative when a regulator can act to prohibit an otherwise permissible activity. Examples include issuing prohibitory rules or inserting a "black list" in regulatory guidelines.

Under normal circumstances, the absence of restriction equals permission, while the absence of permission equals prohibition. Thus, for example, failing to permit an activity is equivalent to prohibiting it. Recent models in economic theory demonstrate, however, that when we account for the existence of multiple regulatory bodies, positive versus negative actions lead to different overall outcomes.<sup>35</sup> As we will see in Part III, Regulation 1/2003's abandonment of notice requirements and decentralization of exemption jurisdiction are not neutral procedural moves. Such institutional changes are likely to affect the direction of substantive competition law.

#### B. *Concurrent Versus Alternative Competence in Antitrust*

Within a single antitrust agency, a firm simply acquires regulatory input (positive or negative) from the designated agency. But when multiple antitrust agencies are involved, an individual might be required to secure multiple regulatory inputs or might be able to choose among alternative regulatory inputs. In multi-agency settings we can further distinguish between concurrent and alternative antitrust competences. With concurrent competences, the action of *all* competent antitrust agencies is necessary to bring about their collective action, whereas with alternative competences the action of just one antitrust agency is sufficient to give effect to its activity.

	<i>Alternative (Substitutes)</i>	<i>Concurrent (Complements)</i>
<i>Positive</i>	<i>Any regulator can permit</i>	<i>Every regulator should permit</i>
<i>Negative</i>	<i>Any regulator can prohibit</i>	<i>Every regulator should prohibit</i>

Figure 1. Four Dimensions of Regulation

<sup>35</sup> Parisi et al., *supra* note 34; see also Norbert Schulz et al., *Fragmentation in Property: Towards a General Model*, 159 J. INSTITUTIONAL & THEORETICAL ECON. 594-613 (2002).

In Figure 1, we map both dimensions together. The italic font indicates the allocation of regulatory competence: alternative versus concurrent. The bold font indicates the content of the action: positive versus negative.

### C. *Allocation of Antitrust Competence and Regulatory Externalities*

The relevance of this taxonomy becomes clear when we consider the interaction between both dimensions, taking into account externalities in the antitrust regulatory process. Differing allocations of antitrust competence are important due to the existence of positive and negative regulatory externalities.<sup>36</sup>

#### 1. Positive Externalities in Antitrust Regulation and Enforcement

Positive externalities in antitrust regulation and enforcement occur in (a) concurrent and positive regulatory action, and (b) concurrent and negative regulatory action. With concurrent and positive action, the activity of one antitrust regulator increases the value and the exploitable rent of the other. For instance, a merger with global impact requires the approval of antitrust authorities in the United States and the European Union.<sup>37</sup> The clearance of the merger by the U.S. Department of Justice creates a positive externality by increasing the value of the second approval of the European Commission.

A positive externality also occurs when the antitrust regulatory activity is concurrent and negative. For example, suppose the national competition authorities of France and Germany are pursuing a restrictive practice in their territories and the action of one is not sufficient to bring the entire infringement to an end or to sanction it adequately. In these circumstances, the completion of tasks by the French agency will effect a positive externality by increasing the exploitable rents to the German agency.

The important point to note is that where externalities arise, an individual antitrust agency does not take into account the effect of its conduct on other regulatory bodies. Thus, positive externalities will be underprovided because the party that produces the externality only accounts for the effect of its action on itself.<sup>38</sup>

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<sup>36</sup> See Parisi et al., *supra* note 34.

<sup>37</sup> See Thomas B. Leary, A Comment on Merger Enforcement in the United States and in the European Union, Remarks Before the Transatlantic Business Dialogue Principals Meeting (Oct. 11, 2001), at <http://www.ftc.gov/speeches/leary/tabd010111.htm>.

<sup>38</sup> Ronald Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 144 (1960).

## 2. Negative Externalities in Antitrust Regulation and Enforcement

Negative externalities in antitrust regulation and enforcement occur in an institutional setting where competences are (a) alternative and positive, and (b) alternative and negative. With alternative and positive regulatory action, the action of one antitrust agency reduces the value and exploitable rent of another agency. This occurs when two antitrust agencies have the power to grant licenses to operate a business and firms need permission from only one of the antitrust authorities. For example, if a firm receives a fine reduction from the French national competition authority, this dissipates the value of a subsequent leniency fine reduction by the Belgian national competition authority.<sup>39</sup>

When regulatory activity is alternative and negative, a first regulatory restriction creates a negative externality by making a second restriction irrelevant, since a second prohibition can add no further loss. For instance, when several competition authorities are investigating the same agreement or practice, a conviction by one national competition authority will lead the national competition authorities in other Member States to discontinue their proceedings since a second prohibition cannot add any further loss. When negative externalities are involved, activities tend to be overprovided because the party that exerts the externality does not account for the negative effect of his behavior on others.

## 3. Competition in Antitrust Regulation and Enforcement

Contrasting the four different scenarios, we obtain the following effects:

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<sup>39</sup> Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, 2002 O.J. (C 45) 3; *see also* Cooperation Within the Network, *supra* note 25, ¶¶ 37-42.

	<i>Alternative Competence (Substitutes)</i>	<i>Unified Com- petence</i>	<i>Concurrent Competence (Complements)</i>
<i>Positive Competence</i>	Over-Permitted	maximizing level X*	Under- Permitted
<i>Negative Competence</i>	Over-Restricted	maximizing level X*	Under- Restricted

Figure 2. Allocation of Antitrust Regulatory Power

Applied to the antitrust setting, our model suggests that the choice of positive versus negative regulatory instruments implies different outcomes for antitrust law. Because of regulatory externalities, splitting competences leads to inefficiency compared to action by a single agency.<sup>40</sup> If single-body decision-making is not feasible—an assumption driving Regulation 1/2003—the positive power of a court (to grant an exemption) is not the flip side of its negative power (finding of infringement).<sup>41</sup> Negative externalities involving exemptions lead to a greater number of exemptions and thus a more lenient and permissive antitrust regime. Negative externalities involving findings of infringement lead to a higher degree of convictions, creating a more stringent antitrust enforcement system.

The study of the equilibrium level of antitrust regulation and enforcement should be further carried out in light of the potential for mutual scrutiny and checks-and-balances induced by the alternative regimes. The allocation of antitrust authority and the choice of instrument, in fact, also lead to different results with respect to possible regulatory or enforcement errors. When allocating negative (alternative) regulatory competences, antitrust regulation is more likely to condemn business practices that are effi-

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<sup>40</sup> For a formal exposition of this effect, see Jonathan Klick & Francesco Parisi, *Intra-Jurisdictional Tax Competition* (George Mason Law & Economics Working Paper No. 03-16, 2004), available at <http://www.gmu.edu/departments/law/faculty/papers/docs/03-16.pdf>. On the other hand, regulatory competition may carry monitoring benefits in the fact that different agencies' performances provide information to the legislator. See Yoshiro Miwa & Mark J. Ramseyer, *Toward a Theory of Jurisdictional Competition: The Case of the Japanese FTC* (Harvard Law and Economics Discussion Paper No. 482, 2004), available at <http://ssrn.com/abstract=615565>. Similarly, the competition between national antitrust authorities might keep the European Commission vigilant.

<sup>41</sup> Klick & Parisi, *supra* note 40.

cient and beneficial to consumers (type I errors or false positives). When allocating positive (alternative) competences, regulators are more likely to wrongly excuse anti-competitive conduct (type II errors or false negatives).

With this understanding in place, we are ready to analyze the probable effects of Regulation 1/2003.

### III. RETHINKING REGULATORY COMPETITION IN EUROPE

#### A. *Externalities in a Decentralized Exemptions Policy*

Regulation 1/2003 moves the Article 81(3) exemptions process from a system of central authorization<sup>42</sup> toward a system of multiple positive (alternative) authorities. As explained in the preceding part, alternative positive regulatory action creates negative externalities. The action of one anti-trust enforcer reduces the value and exploitable rent of the other agency. In the context of exemptions, an exemption by one court dissipates the value of a second exemption by courts in other Member States. These negative externalities will be overprovided because the first court does not account for the effect of its decision on other courts. Thus, the direct applicability of the exemption provision of Regulation 1/2003 is likely to increase the overall amount of exemptions.

#### B. *Selective Litigation and Forum Shopping*

Although the European Commission retains some residual authority to correct major discrepancies,<sup>43</sup> the parallel execution of competition law<sup>44</sup> will most likely produce greater non-uniformity in the enforcement of European competition law. Compounding this problem, the reform removes the notice requirement; thus, plaintiffs are left with the exclusive decision to file and select the forum. Plaintiffs will most likely file infringement

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<sup>42</sup> See generally Reg. 17/62, *supra* note 14.

<sup>43</sup> See Cooperation Within the Network, *supra* note 25, ¶ 43. (national competition authorities must respect decisions which are already the subject of a Commission decision). See generally Reg. 1/2003, *supra* note 2, at 1-25.

<sup>44</sup> The Commission Notice on Cooperation Within the Network of Competition Authorities expressly provides for parallel action by two or three national competition authorities “when an agreement or practice has substantial effects on competition mainly in their domestic markets and the action of only one NCA would not be sufficient” to terminate and sanction the infringement adequately. Cooperation Within the Network, *supra* note 25, ¶ 12.

claims in jurisdictions that have a reputation as strict enforcers.<sup>45</sup> Such forum-shopping is asymmetric because defendants have no comparable ability to influence the choice of jurisdiction.<sup>46</sup> This will bring more cases into more exacting jurisdictions.<sup>47</sup> Thus, to the extent that there is a non-uniform application of Article 81 across national competition authorities and national courts,<sup>48</sup> this creates incentives for selective litigation of antitrust cases, leading to overall stricter levels of competition enforcement.<sup>49</sup>

### C. *Enforcement by Multiple National Competition Authorities*

When regulatory activity is alternative and negative, such as when Member States' courts make findings of infringements, a first regulatory restriction makes the second restriction irrelevant, since a second prohibition can add no further loss. Regulation 1/2003 induces this type of negative regulatory externality because revitalized national competition authorities will add a parallel competition enforcement layer. Because infringement findings increase with the number of involved parties, Regulation 1/2003 can be expected to increase total negative externalities.

### D. *Institutional Design: Correcting Regulators' Incentives*

The nature of the regulatory body determines what type of allocation will result in over- and under-enforcement of antitrust laws. If regulators are primarily rent-seeking, the model provides insight into what structure

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<sup>45</sup> See Francesco Parisi & Kimberly Moore, *Rethinking Forum Shopping in Cyberspace*, 77 CHIKENT L. REV. 1325 (2002) (modeling the strategic interaction between plaintiffs and defendants in the context of cyberspace).

<sup>46</sup> See *id.* The problem is exacerbated because, in the case of transnational infringements, national biases by national competition authorities also work unidirectionally towards stricter enforcements. That is, under the current rules, national competition authorities could be excessively aggressive toward foreign undertakings but not more lenient towards domestic undertakings because, in the case of refusals to prosecute domestic undertakings, complainants still have the option to bring their complaint before the Commission, national courts, or national competition authorities of another Member State.

<sup>47</sup> Similarly, where judges have varying ideologies, case selection might provide a possible explanation for the expansion of the domain of legal remedies and causes of action in torts over time. See Vincy Fon & Francesco Parisi, *Litigation and the Evolution of Legal Remedies: A Dynamic Model*, 116 PUB. CHOICE 419 (2003); Vincy Fon, Francesco Parisi & Ben Depoorter, *Litigation, Judicial Path-Dependence, and Legal Change*, EUR. J. L. & ECON. (forthcoming), available at <http://www.law.gmu.edu/faculty/papers/docs/02-26.pdf>.

<sup>48</sup> On the unpredictability and imperfections of antitrust decision-making by courts, see Frank H. Easterbrook, *Allocating Antitrust Decisionmaking Tasks*, 76 GEO. L. J. 305, 306 (1987).

<sup>49</sup> This effect is amplified by the freedom of Member States to impose stricter national rules of competition regulation, including criminal sanctions. See Reg. 1/2003, *supra* note 2, at 2.

will temper the (ab)use of their power: positive regulatory action should be assigned with alternative regulatory competence, and negative regulatory action should be assigned with concurrent regulatory competence. Both conditions will induce lower levels of regulatory action (taking a single-body regulator as the benchmark).

In contrast, if we assume that regulators shirk their duties and lack the proper incentives to engage in effective regulatory action, negative regulatory action should be assigned with alternative regulatory competence, and positive regulatory action should be assigned with concurrent regulatory competence. These two conditions will encourage higher levels of regulatory activity (again taking a single-body regulator as the benchmark).

#### E. *Replicating the Flaws of the United States Model*

Multiplication of veto powers is a problem for conducting business, especially in dynamic industries with high rates of innovation.<sup>50</sup> In many respects, Regulation 1/2003's reform of EC competition enforcement recalls federal competition issues in United States law.<sup>51</sup> The European Union has previously avoided the pitfalls of the U.S. antitrust system,<sup>52</sup> in which there are "dozens of institutions that can say 'no' but not one that can say 'yes.'"<sup>53</sup> Traditionally, the Commission provided some legal certainty through comfort letters and informal decisions upon notification. These decisions are comparable to the U.S. Commission of Internal Revenue's private revenue rulings or to the Securities and Exchange Commission's "no action" letters.<sup>54</sup> Although the European Commission's informal decisions provided somewhat shaky legal protection against domestic action, at least they bound the enforcer—unlike the U.S. system.<sup>55</sup> In this regard, the

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<sup>50</sup> Judge Posner refers to the tendency of antitrust litigation to create multiple lawsuits out of a single dispute as a "cluster-bomb effect." RICHARD A. POSNER, *ANTITRUST LAW* 279 (2d ed. 2001). The main results, according to Posner, are lengthened lawsuits, complicated settlement, magnified uncertainty engendered by the litigation, and increased litigation costs. *See id.* at 279-80.

<sup>51</sup> *See generally* Richard Posner, Keynote Address at American Enterprise Institute for Public Policy Research, Symposium, The New Antitrust Paradox: Policy Proliferation in the Global Economy (Apr. 21, 2003), available at <http://www.techlawjournal.com/atr/20000914posner.asp>.

<sup>52</sup> *See, e.g.*, Thomas, C. Arthur, *The Unsatisfactory Application of the Antitrust Statutes of the United States by the Federal Courts*, in *MODERNISATION OF EUROPEAN COMPETITION LAW*, *supra* note 2, at 61-77.

<sup>53</sup> Frank H. Easterbrook, *Monopolization: Past, Present, Future*, 61 *ANTITRUST L. J.* 99, 109 (1992).

<sup>54</sup> *Id.* at 110.

<sup>55</sup> For a concise description of the U.S. antitrust laws and operating authorities, see Barry A. Pupkin & Ian R. McPhie, *United States of America*, in *DEALING WITH DOMINANCE* 287-308 (Nauta Dutilh ed., 2004).

elimination of the notice requirement creates the risk of increased overall uncertainty.<sup>56</sup>

#### F. *The Unbearable Lightness of Democracy in Antitrust Enforcement*

The analysis set out here is subject to a disclaimer in that the two dimensions of regulatory competition collapse into one when the different regulatory bodies act as one. To some extent the distortions described above can be minimized through close coordination in the European Competition Network.<sup>57</sup> A similar opportunity for unified action is through the Advisory Committee on Restrictive Practices and Dominant Positions, which is composed of representatives of national competition authorities. Regulation 17 installed this body as a forum to discuss cases that are being handled by Member States' national competition authorities.<sup>58</sup>

Nonetheless, these rules and provisions of coordination do not amount to much more than mere declarations of intention. Commission commitment decisions do not bind national courts and national competition authorities.<sup>59</sup> Commission Guidelines are likewise not legally binding. While national competition authorities may suspend a proceeding when another national competition authority is dealing with a case, they have "no obligation to do so."<sup>60</sup> The case allocation provisions are merely indicative criteria,<sup>61</sup> and, as always, Member States remain free to impose more stringent competition rules and penalties. As such, Regulation 1/2003 and the reform package set no strict binding rules that mandate coordination among national competition authorities. Although the Commission continues to lead the way,<sup>62</sup> one cannot escape the impression that Regulation 1/2003 fosters conditions for political democracy to seep into antitrust enforcement. Na-

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<sup>56</sup> The Commission hopes to address this issue through the use of informal guidance letters. However, in all but exceptional circumstances, the Commission does not formally guarantee that such letters will be provided upon request. See Guidance Letters, *supra* note 25, ¶¶ 5, 7-8.

<sup>57</sup> See Cooperation Within the Network, *supra* note 25.

<sup>58</sup> Reg. 17/62, *supra* note 14.

<sup>59</sup> Reg. 1/2003, *supra* note 2, at 5.

<sup>60</sup> See Reg. 1/2003, *supra* note 2, art. 13; Cooperation Within the Network, *supra* note 25, ¶¶ 20-22.

<sup>61</sup> Philip Lowe, *Current Issues of EU Competition Law: The New Competition Enforcement Regime*, 24 NW. J. INT'L L. & BUS. 567, 573 (2004).

<sup>62</sup> In a few instances, the Commission retains exclusive jurisdiction of an infringement claim. Particularly when (1) the targeted agreement or practice affects competition in cross-border markets covering more than three member states, and (2) cases where the Commission is "particularly well placed" to handle a case (because of a link with other Community provisions, novel competition issues, or developing issues of competition law). See Cooperation Within the Network, *supra* note 25, ¶¶ 14-15. These provisions should limit the most severe aberrations of a fragmented EU competition law.

tional competition authorities are allowed to pursue domestic sensitivities,<sup>63</sup> and hierarchical modes of governance are replaced with voluntary cooperation and coordination.<sup>64</sup>

The manner in which Regulation 1/2003's vision of "coordination" plays out in practice will determine the extent of the effects described in this Article. One must take into consideration the full range of regulatory competition effects when developing an informal working order among the multiple European competition regulators. The "multiplication of interpreters"<sup>65</sup> could significantly increase the risks and costs of businesses. Because these heightened costs translate into higher end-prices for consumers, careless implementation of Regulation 1/2003 might defeat the very purpose of antitrust law.

#### CONCLUSION

The European Commission's Modernization Package has altered EU antitrust regulation from a system of unitary positive regulatory action to a system of multiple negative regulatory actions. By removing notice requirements and installing a system of parallel powers with a directly applicable exemption system, Regulation 1/2003 tips the balance of European Union antitrust enforcement towards twenty-four national courts and national competition authorities.

Our model foresees a number of qualitative adjustments resulting from this reform. On one hand, the direct applicability of the exemption provision should increase the overall amount of exemptions. On the other hand, a decentralized system permits private litigants' forum shopping, and parallel enforcement by multiple national competition authorities will drive up the number of infringement findings. Although the precise direction of substantive competition law is unclear, the overall effect is higher levels of regulatory activity. This entails not only greater administrative costs but also suggests increased transaction costs for doing business in the post-Regulation 1/2003 European Union. Faced with several parallel layers and strategic competitor litigants, businesses are likely to incur higher expenses for legal counsel and litigation.

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<sup>63</sup> *But see* WOUTER P.J. WILS, TOPIC 2: EUROPEAN COMPETITION LAW AND POLICY: THE REFORM OF COMPETITION LAW ENFORCEMENT—WILL IT WORK? ¶ 22 (Community Report, FIDE DUBLIN 33, 2004) (concluding that there is little room for political discretion in the application of competition law).

<sup>64</sup> *See supra* Part I.C.

<sup>65</sup> *See* Easterbrook, *supra* note 53, at 110.