

## TRANSATLANTIC COUNSELING UNDER MODERNIZATION IN THE EUROPEAN UNION\*

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### INTRODUCTION

By the time this Article is published, the European Commission's "Modernization Regulation"—hailed as the most significant change in European antitrust enforcement in over forty years—will be over a year old, membership in the European Union will have expanded considerably, and the newly decentralized enforcement of competition law will be in full effect. Yet, on the surface, not much change will be apparent. Companies and their counsel will continue to conduct day-to-day business mindful of the antitrust laws and, typically, endeavor to comply with them.

But this relative calm can be deceiving. On May 1, 2004, Regulation 1/2003<sup>1</sup> implemented changes to the enforcement of Article 81 of the EC Treaty ("EC") (prohibiting agreements that restrict competition).<sup>2</sup> Though largely procedural, these changes are likely to have important and lasting substantive effects on the ways companies conduct business and attorneys counsel their clients. The key themes of the changes implemented are decentralization, self-regulation, and deterrence. At least as importantly, the Commission has taken the opportunity to issue guidelines on the application of Article 81(3) EC ("Guidelines")<sup>3</sup> reflecting a more economically based approach to enforcement than was apparent in past practice. Taken together, these changes free the Commission to formulate and pursue a proactive enforcement agenda. But they also oblige companies doing business

**Comment:** Robert – there are issues with the font size of the footnote markers throughout this paper. I'm not entirely sure why. I tried a couple of simple solutions (such as deleting and then re-inserting the footnote) but that didn't cure the problem. If there isn't a macro fix for this, we may have to unfortunately address each footnote individually, setting each to a uniform font size.

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<sup>1</sup> 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, 2003 O.J. (L1) 1 [hereinafter Reg. 1/2003], available at [http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l\\_001/l\\_00120030104en00010025.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_001/l_00120030104en00010025.pdf).

<sup>2</sup> Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community, 2002 O.J. (C325) 64-65.

<sup>3</sup> Communication from the Commission - Notice - Guidelines on the Application of Article 81(3) of the Treaty, 2004 O.J. (C101/08) 97 [hereinafter Guidelines], available at [http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/c\\_101/c\\_10120040427en00970118.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/c_101/c_10120040427en00970118.pdf).

in Europe to conduct the same sort of “self-assessment” of an agreement’s legality that is so familiar to companies in the United States and in many other countries. As Commissioner Monti explained, Regulation 1/2003 will “bring the European enforcement system closer to the U.S. model,”<sup>4</sup> but “will require an important change of culture for market players.”<sup>5</sup>

More than ever, effective antitrust counseling in Europe requires not only a keen understanding of the Commission’s current approach to Article 81 (EC), but also the skills and judgment associated with sound antitrust risk-management. In order to understand the changes that have taken place, Part I of this Article will explain the old regime, in force from 1962 to 2004. Part II will then deal with the new regime, exploring why procedural changes may affect the substantive application of Article 81 EC in positive ways. This paper concludes that these procedural and substantive changes to the enforcement of Article 81 EC present both challenges and opportunities for businesses wishing to enter into novel and beneficial arrangements in the European Union.

## I. THE FORMER REGIME

Article 81(1) EC prohibits agreements affecting trade between Member States that have as their “object or effect” the “prevention, restriction or distortion of competition within the common market.”<sup>6</sup> Agreements “caught” by Article 81(1) EC nonetheless are exempted from prohibition and sanction if they satisfy each of the four efficiency requirements of Article 81(3) EC, namely, that the agreement:

- (1) contributes to improving the production or distribution of goods or services, or the promotion of “technical or economic progress;”
- (2) allows consumers a “fair share” of the resulting benefits;

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<sup>4</sup> Mario Monti, *Antitrust in the U.S. and Europe: A History of Convergence*, Address at the Roundtable of the American Bar Association, (Nov. 14, 2001), available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/01/540&format=HTML&aged=0&language=EN&guiLanguage=en>.

<sup>5</sup> Mario Monti, *Modernization: What Does the Future Hold?*, Address at the First Annual Conference of the Global Competition Law Institute (June 10, 2004). Although modernization also affects enforcement of Article 82, its impact is less extensive because Regulation 17/62 did not give the Commission exclusive jurisdiction over the application of Article 82. Council Regulation 17/1962 of 6 February 1962, First Regulation Implementing Articles 85 and 86 of the Treaty, 1962 J.O. (13) 204 [hereinafter *Reg. 17/1962*]. (Article 85 is now renumbered as Article 81, and Article 86 is now 82.) No exemption to Article 82 existed and notification did not confer immunity from fines.

<sup>6</sup> Guidelines, *supra* note 3, ¶ 8.

- (3) imposes only restrictions that are “indispensable” to achieving those benefits; and
- (4) does not afford the parties the “possibility of eliminating competition in respect of a substantial part of the products concerned.”

Forty years ago, the Commission adopted Regulation 17/62,<sup>7</sup> which gave the Commission exclusive jurisdiction to determine whether agreements caught by Article 81(1) EC satisfied the efficiency requirements of Article 81(3) EC. Failure to obtain such a determination rendered an agreement unenforceable, and parties were precluded from later asserting that an arrangement was innocuous or pro-competitive, taking into account all factors relevant to the arrangement’s likely pro-competitive effect.<sup>8</sup> Regulation 1/2003 replaces this system.

When Regulation 17/62 was adopted, antitrust principles in Europe were relatively new. The Commission therefore had an interest in centralizing the development of antitrust principles and their enforcement. Accomplishing this objective meant interpreting Article 81(1) EC very broadly to assure hands-on control over large numbers of agreements. The Commission interpreted Article 81(1) EC to catch not only agreements threatening competition but also many that merely restricted the commercial freedom of the parties. This procedural rubric, however, led to a skewed analytical framework.

This procedural bifurcation of Article 81 EC, though useful in the context in which it was created, often contributed to a faulty assessment of whether an agreement was likely to be detrimental to competition. Because agreements caught by Article 81(1) EC were unlawful unless exempted by the Commission under Article 81(3) EC, the adoption of an overly broad interpretation of Article 81(1) EC caused parties to conclude that even competitively neutral agreements were obliged to generate the efficiencies required by Article 81(3) EC. Counsel spent much of their time determining whether an agreement was exempt from filing under a “block exemption” safe-harbor.<sup>9</sup> It was not enough for an agreement to be competitively harmless—it also had to make the market more competitive.

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<sup>7</sup> Reg. 17/1962, *supra* note 5.

<sup>8</sup> Certain categories of agreements did not require notification, including: domestic agreements, vertical agreements, and under certain circumstances, agreements imposing unilateral restrictions on the exercise of industrial property rights, agreements on standards, joint research and development, and manufacturing specialization. Nor did Regulation 17 apply to the transport sector, which was governed by a separate implementing regulation.

<sup>9</sup> A block exemption is a legislative instrument (a Commission Regulation) which on a general basis exempts categories or types of agreements from the prohibition contained in Article 81(1) EC on the basis of an “automatic” application of Article 81(3) EC. In other words, a block exemption is a regulation that assumes that those categories of agreements that meet specified requirements are pro-

Historically, the framework under Regulation 17 also resulted in prior notification of a large number of agreements and an over-burdened Commission.<sup>10</sup> The Commission responded to the deluge by adopting “block exemptions”<sup>11</sup> and by issuing “comfort letters” instead of formal decisions.<sup>12</sup> It nonetheless had to be reactive rather than proactive, devoting its limited resources to reviewing agreements that parties chose to notify rather than implementing any coherent enforcement agenda of its own. However, in more recent years, parties notified<sup>13</sup> far fewer agreements, typically limiting their notifications to agreements involving enough of an investment to make the administrative burden worthwhile to assure the enforceability of the agreements. That is, a favorable Commission decision under Article 81(3) EC gave the parties the comfort of knowing that the agreement could be enforced against the other parties and would not be subject to an enforcement action or imposition of fines.

## II. MODERNIZATION REGULATION AND THE NEW REGIME

All of this changes under modernization. Notifications are abolished and agreements now are lawful unless and until proven otherwise. Regulation 1/2003 converts the system from one of centralized control under which agreements are prohibited unless expressly permitted, to one under which parties decide for themselves in the first instance whether to proceed with the arrangement without the Commission’s blessing. At the same time, the Commission has relinquished its sole jurisdiction to apply Article 81(3)

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competitive. *See, e.g.*, Council Regulation 2790/1999 of 22 December 1999 on the Application of Article 81(3) of the Treaty to Categories of Vertical Agreements and Concerted Practices, 1999 O.J. (L 336) 21 [hereinafter Reg. 2790/1999].

<sup>10</sup> As explained in the Commission’s White Paper on Modernization: “The ex ante control mechanism inherent in the authorization system set up by Regulation No. 17 resulted in undertakings systematically notifying their restrictive practices to the Commission which, with limited administrative resources, was very soon faced with the impossibility of dealing by formal decision with the thousands of cases submitted.” EUROPEAN COMMISSION, WHITE PAPER ON MODERNIZATION OF THE RULES IMPLEMENTING ARTICLES 85 AND 86 OF THE EC TREATY, ¶ 24 (1999) (Commission Programme No. 99/027) [hereinafter WHITE PAPER], available at [http://www.europa.eu.int/comm/competition/antitrust/wp\\_modern\\_en.pdf](http://www.europa.eu.int/comm/competition/antitrust/wp_modern_en.pdf).

<sup>11</sup> *See, e.g.*, Reg. 2790/1999, *supra* note 9; *see also* Commission Regulation 1400/2002 of 31 July 2002 on the Application of Article 81(3) of the Treaty to Categories of Vertical Agreements and Concerted Practices in the Motor Vehicle Sector, 2002 O.J. (L 203) 30.

<sup>12</sup> A comfort letter was a communication from the Commission containing a statement that said the notified agreement did not infringe Article 81(1) EC.

<sup>13</sup> A notification consisted in filing an agreement before the Commission in order to obtain a decision (or a comfort letter) stating that the agreement was not in breach of Article 81(1) EC. Reg. 17/1962, *supra* note 5, arts. 4-6.

EC. Instead, national competition authorities and courts are required to apply EC competition rules in their entirety.

Along with decentralization come strengthened enforcement powers for the Commission. Regulation 1/2003 continues a trend towards increasing the Commission's capabilities, which includes the creation of a dedicated cartel unit and the adoption of a comprehensive leniency program during the past few years.<sup>14</sup> Though still weaker than the criminal investigation and enforcement powers possessed by antitrust authorities in the United States, Regulation 1/2003 adds the following to the Commission's investigatory arsenal:

- \* It authorizes the Commission to conduct unannounced inspections (known as "dawn raids") in private homes (under the standards necessary to obtain a court order from a national court);<sup>15</sup>
- \* It gives the Commission the power to seal company premises, files, and offices to ensure the integrity of documentary evidence, and to impose fines if seals are broken;<sup>16</sup>
- \* It gives the Commission the power to ask questions during inspections of business premises;<sup>17</sup>
- \* It provides for fines for non-compliance with inspections, up to 1% of the company's worldwide turnover and, in the case of periodic fines, up to 5% of the average turnover;<sup>18</sup> and
- \* It empowers the Commission to impose structural or behavioral remedies.<sup>19</sup>

In both legal and business circles, modernization has inspired understandable concern that application of Article 81 EC will become more uncertain as parties lose the ability to obtain the Commission's prior approval. The law will now be enforced in some twenty-five Member States, each with its own procedure and experience. To be sure, parties must now rely on their own competitive assessment and advice of counsel when deciding whether to enter into agreements. Antitrust enforcement authorities and courts in a significant number of countries may second-guess the parties' internal assessment that an agreement falls outside Article 81(1) or within Article 81(3) EC. In short, parties now will act at their peril.

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<sup>14</sup> See Commission Notice of 19 February 2002 on Immunity from Fines and Reduction of Fines in Cartel Cases, 2002 O.J. (C 45) 3.

<sup>15</sup> Reg. 1/2003, *supra* note 1, art. 21.

<sup>16</sup> *Id.* arts. 20(2)(d), 23 (1)(e).

<sup>17</sup> *Id.* arts. 20(2)(e), 23(1)(d).

<sup>18</sup> *Id.* arts. 23(1), 24.

<sup>19</sup> *Id.* art. 7(1).

But these changes are just as likely to have significant benefits for businesses wishing to enter into novel, and ultimately pro-competitive, arrangements. The elimination of administrative review and assessment may well cause the Commission to conduct an even more rigorous analysis and require more exacting proof when initiating an investigation of an arrangement in which parties already have invested substantial resources. At the same time, decentralized enforcement will allow for greater contributions by national courts and authorities to the law's development. A diversity of ideas arising from the law's application to individual cases can result in a more logical development of Article 81 EC principles throughout the European Union.

A. *The Commission's Interpretation of Article 81 EC*

Eliminating the procedural bifurcation of Articles 81(1) and 81(3) can allow for a more nuanced application of the principles of each, as the full Article 81 EC analysis now is conducted by a single regulatory or judicial authority in a single proceeding. The Commission's White Paper aptly described the division of 81(1) and 81(3) as "artificial" and "counter to the integral nature of Article 85 [now Article 81], which requires economic analysis of the overall impact of restrictive practices."<sup>20</sup> The new Regulation eliminates this artificial separation.

A clear understanding of the Commission's current approach to Article 81 EC is a prerequisite to any effective "self-assessment." As part of its "Modernization Package," the Commission issued detailed Guidelines on the application of Article 81(3) EC. Though styled as addressing the application of Article 81(3) EC, the Guidelines are equally informative on Article 81(1) EC. They continue the Commission's movement away from its historically overbroad interpretation towards "a more economic approach to the application of [Article 81(1) EC], which will limit the scope of its application to undertakings with a certain degree of market power."<sup>21</sup>

The Guidelines place stringent boundaries around Article 81(1) EC, abandoning the focus on a party's economic freedom and making clear that only agreements likely to materially threaten competition fall within its grip. As a logical consequence of the tightening of Article 81(1) EC, the Guidelines firmly establish that agreements appearing to threaten competition must meet more vigorous standards to be exempted under Article 81(3).

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<sup>20</sup> See WHITE PAPER, *supra* note 10, ¶ 49.

<sup>21</sup> *Id.* ¶ 78.

## 1. Article 81(1) EC

The Guidelines' approach to Article 81(1) will look very familiar to U.S. practitioners. The Article 81(1) EC prohibition applies only to an agreement that "restrict[s] actual or potential competition that would have existed without the agreement[.]"<sup>22</sup>

Following established Community law, the Guidelines distinguish between agreements that have as their "object" the restriction of competition, and those likely to have an anti-competitive "effect."<sup>23</sup> The former are analogous to per se unlawful agreements in the United States, and include price fixing, market sharing, and other output restricting arrangements.<sup>24</sup> For these agreements, it is "unnecessary for the purposes of applying Article 81(1) to demonstrate any actual effects on the market."<sup>25</sup> They are automatically caught by Article 81(1) EC, and are prohibited except in the unlikely event that they meet the requirements of Article 81(3) EC.<sup>26</sup>

Agreements restrictive in "effect" must injure "actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a reasonable degree of probability."<sup>27</sup> This assessment now rests on industrial economic principles, requiring an examination of:

- (1) The nature of the agreement;
- (2) An appropriate definition of the relevant product and geographic markets;
- (3) An assessment of the market positions of the parties and their competitors (i.e., their market shares and competitive proximity);
- (4) The existence of potential competitors;
- (5) The level of entry barriers;
- (6) Buyers' ability to protect themselves;
- (7) The market's characteristics; and
- (8) All other factors bearing on the likelihood of anti-competitive effects.<sup>28</sup>

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<sup>22</sup> Guidelines, *supra* note 3, ¶ 18(1).

<sup>23</sup> *Id.* ¶¶ 19-20.

<sup>24</sup> *Id.* ¶ 21. These are labeled as "hard core" in other Commission Guidelines, or as "black listed" in Commission Block exemption regulations. *Id.* ¶ 23.

<sup>25</sup> Guidelines, *supra* note 3, ¶ 21.

<sup>26</sup> *See id.* ¶ 46.

<sup>27</sup> *Id.* ¶ 24.

<sup>28</sup> *See id.* ¶¶ 24-27. For a detailed description of the Commission's approach to market definition, see Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law, 1997 O.J. (C 372) 5.

Unlike in the United States, assessing whether an agreement is restrictive in “effect” under Article 81(1) EC does not permit a weighing of pro-competitive and anti-competitive effects. That assessment is left to Article 81(3) EC. As the Commission explained in its White Paper on Modernization, “if more systematic use were made under Article 85(1) [now Article 81(1)] of an analysis of the pro- and anti-competitive aspects of a restrictive agreement, Article 85(3) [now Article 81(3)] would be cast aside, whereas any such change could be made only through revision of the Treaty.”<sup>29</sup> This distinction, however, is unlikely to make a difference as a practical matter. While compartmentalizing the efficiencies analysis under Article 81(3) EC served as a screening device under the old regime, it is unlikely to change the overall outcome of a competitive assessment today.

The Guidelines reaffirm that Article 81(1) EC protects both inter-brand and intra-brand competition.<sup>30</sup> As in the United States, vertical agreements deemed anti-competitive “by object” include minimum resale price maintenance.<sup>31</sup> Unlike in the United States, such agreements also include national territorial restrictions,<sup>32</sup> at least if those restrictions also prohibit “passive sales”—a prohibition thought to further the goal of economic integration of the European Union.

Agreements that are not anti-competitive “by object” and that affect only intra-brand competition are often likely to be justified under Article 81(3) EC, at least if there exists adequate inter-brand competition to encourage output and protect consumers. In this regard, the Guidelines observe that Article 81(1) EC does not apply to arrangements affecting only intra-brand competition when they are “objectively necessary” to the distribution arrangement, such as when needed to allow a distributor to penetrate a new market.<sup>33</sup>

Finally, the Guidelines confirm that restraints ancillary to agreements that fall outside the scope of Article 81(1) EC are equally outside Article 81(1)’s scope, so long as the ancillary restraint is “directly related and necessary to the implementation of [the] main non-restrictive transaction and proportionate to it.”<sup>34</sup> Although this test is similar to the standards for ancillary restraints in the United States, there is a potentially important differ-

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<sup>29</sup> See WHITE PAPER, *supra* note 10, ¶ 57.

<sup>30</sup> Guidelines, *supra* note 3, ¶ 17.

<sup>31</sup> *Id.* ¶¶ 23, 46.

<sup>32</sup> See, e.g., Reg. 2790/1999, *supra* note 9, art. 4.

<sup>33</sup> Guidelines, *supra* note 3, ¶ 18(2). The approach is consistent with the Commission’s Guidelines on Vertical Restraints. See Commission Notice - Guidelines on Vertical Restraints, 2000 O.J. (C 291) 1, ¶ 6 (“For most vertical restraints, competition concerns can only arise if there is insufficient inter-brand competition, i.e., if there is some degree of market power at the level of the supplier or the buyer or at both levels.”).

<sup>34</sup> Guidelines, *supra* note 3, ¶ 29.

ence. In the United States, a restraint that otherwise would be *per se* unlawful, but which is directly related and necessary to an otherwise pro-competitive main arrangement, remains subject to a rule of reason assessment. The Guidelines, in contrast, state that such a restraint falls entirely outside the scope of Article 81(1) EC,<sup>35</sup> precluding further analysis.

Though the overall framework set forth in the Guidelines is similar to that in the United States, it must be applied in a distinctly European context, which can easily yield different results. For example, relevant geographic markets in Europe may be narrowed by differences in language or due to remaining regulatory barriers between countries. Certain entry barriers may be higher in Europe than in the United States. In short, as in the United States, proper application of the analytic framework in Europe is highly fact specific, and those facts may well differ between continents.

## 2. Article 81(3) EC

The Guidelines present one of the most comprehensive discourses on efficiencies by any antitrust authority. Given that Article 81(3) applies only to agreements already found to threaten competition within the meaning of Article 81(1) EC, the Guidelines set forth relatively stringent requirements for exempting such agreements under Article 81(3) EC.

That said, in Europe, the newly integrated procedure allows for new applications of the concepts embodied in Article 81(3) EC, even if the parties do not prove each element necessary for exemption. For example, a company's legitimate business objectives ought certainly to be relevant when assessing whether an agreement is likely to harm competition under Article 81(1) EC. Demonstration of substantial efficiencies will be helpful in that assessment, even if the proof falls short of the stringent requirements articulated in the Guidelines. On a more practical but equally important level, a credible showing of substantial efficiencies ought to cause an enforcement agency to demand greater proof that an agreement actually falls within Article 81(1) EC, lest it risk depriving customers of the very benefits that the antitrust laws were intended to protect.

In the final analysis, the "artificial" separation of Articles 81(1) and 81(3) will continue to erode. But the principles of Article 81(3) EC remain important to the integrated analysis of an agreement's likely competitive

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<sup>35</sup> As the Guidelines explain: "If an agreement in its main parts, for instance a distribution agreement or a joint venture, does not have as its object or effect the restriction of competition, then restrictions, which are directly related to and necessary for the implementation of that transaction, also fall outside Article 81(1)." *Id.* ¶ 29; *see also id.* ¶ 30 ("The application of the ancillary restraint concept does not involve any weighing of pro-competitive and anti-competitive effects. Such balancing is reserved for Article 81(3).").

effect, and the Guidelines present a helpful discussion of those principles. The Guidelines discuss each of Article 81(3)'s four conditions in turn.<sup>36</sup>

a. *Improving Production or Distribution*

The first requirement of Article 81(3) EC is that the restrictive agreement must generate cost savings or otherwise improve production or distribution, or “contribute to promoting technical or economic progress[.]”<sup>37</sup> As in the United States, the Guidelines make clear that parties will have to “substantiate” the efficiencies with “verifiable” data allowing for “a sufficient degree of certainty that the efficiencies have materialised or are likely to materialise.”<sup>38</sup>

The Guidelines do not limit qualifying efficiencies to certain types of cost savings, other than to exclude savings generated from the exercise of market power. Acceptable efficiencies can result from such diverse sources as technological advances, integration of existing assets, complementing strengths to reduce production costs, and improvements in economies of scale or scope. However, the Guidelines observe that marginal cost savings are more likely than other cost savings to meet the requirement, discussed below, that consumers receive a “fair share” of the benefits.

b. *Indispensability of the Restriction*

As in the United States, an agreement that restricts competition under Article 81(1) EC must be “necessary” to achieving the promised efficiencies.<sup>39</sup> Those efficiencies must be specific to the agreement, which in turn must be the least restrictive means of achieving them.<sup>40</sup> On the other hand, the Commission will not require parties to disprove the availability of purely “hypothetical or theoretical alternatives.”<sup>41</sup> The parties instead should be in a position to explain why seemingly obvious alternatives were either not practicable or not as effective in generating the efficiencies. “The Commission will not second guess the business judgment of the parties. It will only intervene where it is reasonably clear that there are realistic and attainable alternatives.”<sup>42</sup>

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<sup>36</sup> See generally Guidelines, *supra* note 3, ¶ 34.

<sup>37</sup> *Id.* ¶ 34(a).

<sup>38</sup> *Id.* ¶ 56.

<sup>39</sup> See *id.* ¶ 34(c).

<sup>40</sup> *Id.* ¶ 75.

<sup>41</sup> *Id.*

<sup>42</sup> Guidelines, *supra* note 3, ¶ 75.

The Guidelines acknowledge that greater restrictions may be necessary to give parties an incentive to invest in ventures whose success is highly uncertain.<sup>43</sup> They also recognize that certain restrictions may be indispensable to aligning the incentives of the parties and to ensuring that they concentrate their efforts on the venture's success.<sup>44</sup> Less helpful, however, is the Guidelines' repeated admonishment that a restriction's validity will last only as long as the restriction is necessary.<sup>45</sup> This requirement, though similar to the agencies' stated approach in the United States, potentially poses the practical problem of continued monitoring of each restraint's necessity.

c. *Fair Share to Consumers*

Efficiencies generated by an agreement caught by Article 81(1) EC must be passed on to consumers to obtain exemption under Article 81(3) EC.<sup>46</sup> However, the Guidelines make clear that the consumer benefit need only be substantial enough to neutralize the arrangement's anti-competitive threat. Agreements are not required to make markets more competitive than they would be absent the agreement. The "net effect" of the agreement must "at least be neutral."<sup>47</sup> At the same time, the Guidelines acknowledge that calculating a consumer "pass-on" rate with precision is often difficult and is not required.<sup>48</sup>

This is not to say that a degree of anti-competitive effect will be tolerated so long as it is "outweighed" by efficiencies. Rather, the efficiencies must neutralize and eliminate the perceived threat to competition, by giving, for example, the parties a greater incentive to compete on price instead of coordinating with their less efficient rivals. As in the United States, the most common way of showing that efficiencies are likely to be passed on for purposes of Article 81(3) EC is to show that the parties will remain under competitive pressure to do so.<sup>49</sup>

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<sup>43</sup> See *id.* ¶ 80.

<sup>44</sup> *Id.*

<sup>45</sup> See *id.* ¶ 81 ("In some cases a restriction may be indispensable only for a certain period of time, in which case the exception of Article 81(3) only applies during that period.")

<sup>46</sup> See *id.* ¶ 34(b).

<sup>47</sup> *Id.* ¶ 85.

<sup>48</sup> Guidelines, *supra* note 3, ¶ 94.

<sup>49</sup> As the Guidelines explain, "[u]ndertakings that are not subject to effective competitive constraints—such as for instance dominant firms—have less incentive to maintain or build on the efficiencies." *Id.* ¶ 92. Also as in the United States, the Guidelines do not allow for a "trade-off" in efficiencies between markets, unless those markets involve the same consumers. *Id.*

d. *No Eliminating Competition*

An agreement “must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.”<sup>50</sup> On one hand, this requirement is meant to ensure that claimed efficiencies do not take precedence over the competitive process and firms are not permitted to become dominant: “Whether competition is being eliminated within the meaning of the last condition of Article 81(3) depends on the degree of competition existing prior to the agreement and on the impact of the restrictive agreement on competition . . . .”<sup>51</sup> On the other hand, it is not clear that this requirement materially adds anything to the requirement that efficiencies must be passed on to customers.

B. *Thriving in Uncertainty and Looking Ahead*

Though helpful in clarifying and providing analytic rigor to the application of Article 81 EC, the Guidelines will hardly eliminate the uncertainty inherent in abandoning prior notifications and decentralizing enforcement among twenty-five Member States. The stakes associated with antitrust counseling are now higher, as it now involves a greater degree of risk management and a balancing of promised benefits against the potential for troublesome regulatory or judicial proceedings.

Unfortunately, antitrust practitioners in the European Union cannot look to the U.S. experience to find an easy path through the morass of decentralized, ex post enforcement and inconsistent precedent. The U.S. experience suggests that modernization will indeed present real challenges in Europe. It may also, however, present real opportunities for companies desiring to enter into well-tailored and novel arrangements that promote their commercial interests. Properly counseled, companies need not allow uncertainty to discourage them from entering into beneficial arrangements. Uncertainty can be minimized; risks can be identified and often reduced. Business decisions can be made that strike a proper balance between the burdens of a possible enforcement action with the benefits of a successful venture. Though it cannot entirely be eliminated, uncertainty need not limit a company’s choices to the extremes of paralysis or recklessness. Counseling in Europe will take on many of the same features as in the United States, as advisors obtain a full picture of each proposed arrangement and an understanding of its business objectives. Counsel in Europe will be confronted with proposed arrangements that, on their face, appear highly prob-

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<sup>50</sup> Guidelines, *supra* note 3, ¶ 34(d).

<sup>51</sup> *Id.* ¶ 107.

lematic (and notifiable under the old regime), only to learn upon further analysis that the business objective is pro-competitive and output enhancing. Fully understanding the client's actual objectives will significantly improve the chances of finding a way to achieve them.

Counseling may also require an even greater assessment of the pertinent facts and their relevance to the Commission's current approach to Article 81 EC. A detailed understanding of the competitive landscape in which the parties operate and in which their agreement will function will be as indispensable to giving sound antitrust advice in Europe as it is in the United States. At the same time, the extent of factual investigation should be proportional to the business issue at hand.

But knowing the facts and law, of course, will not eliminate uncertainty in the new regime. The client may not be aware of many pertinent facts. Inartfully worded documents may be buried in either party's files. Even in the best of circumstances, national authorities, though bound by Article 81 EC, may depart from the Commission's view expressed in the Guidelines. Predicting with precision how each decision-maker with jurisdiction might respond to any set of complex antitrust issues may not be possible in all cases. In short, risk will remain and will need to be managed.

Few companies can afford to forgo competitive initiatives based on the mere chance that an antitrust enforcer might come to a different conclusion than its legal counsel, let alone on the chance that a private party might choose to launch a frivolous challenge before the enforcers or in the national courts. The fact that would-be challengers will bear the burden and cost of proving that an arrangement is unlawful provides some comfort. But understanding whether an arrangement is likely to give customers or competitors an incentive to complain is a key component to any risk assessment, whether in the United States or Europe. Counsel in Europe will play an increasingly important role in helping to minimize these practical risks, not only by marshalling strong factual, legal, and economic arguments, but also by helping to restructure a proposed arrangement when possible and necessary to reduce risk, or by adding other safeguards to ensure both the fact and appearance of continued competition.

The U.S. experience suggests that decentralized antitrust enforcement can breed more than mere uncertainty; it can also breed the sort of debate and experimentation that facilitates a rational growth and development of competition law. Antitrust counselors in Europe not only will study that growth and advise their clients accordingly, but inevitably will also influence the law's direction, at first with their advice to the business community and then by defending that advice when necessary in various enforcement fora.

In the final analysis, modernization encourages competition law authorities and courts to apply competition rules in a more rational way. Historically, antitrust enforcement policy as expressed in guidelines, speeches and business review letters is considerably more aggressive than actual enforcement decisions. Viewed in this light, regulatory certainty, though helpful and sometimes comforting, is not costless. The goal in the European Union will be to make companies the ultimate beneficiaries of the new system, free to pursue pro-competitive arrangements and armed with the confidence that comes from sound antitrust counsel.