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Commissioner Mario Monti's achievements in relation to Article 81 of the EC Treaty are deeply impressive. Three are major reforms: the modernization of EC competition law; the introduction of a more economics-based analysis for Article 81 cases; and the fight against cartels. An equally significant achievement is Commissioner Monti's high personal standing, not least because of his independence from lobbying. Despite the pace of his reforms, there are still plenty of challenges for his successor. Reforms of procedures, sanctions, and private enforcement will be required for full modernization. The more economic approach now set out in block exemptions and guidelines must be applied by the European Commission, national authorities, and courts. European leniency programs will need reform, and criminal sanctions for cartels should also be considered at the appropriate time. Commissioner Monti leaves a truly great legacy and an impressive foundation for further development. Following his stewardship, his successor takes over a very powerful, but highly respected, position.

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I. Introduction

Commissioner Mario Monti's achievements are deeply impressive, and he leaves a remarkable legacy. During his five-year mandate as the EC Commissioner responsible for competition policy he led a particularly intensive process of change. Some of the changes were started before he took office and some will continue under the new Commissioner. But his great success was the skillful way in which reforms were developed and secured under his leadership. This paper focuses on Article 81 of the EC Treaty (Article 81). However, reforms affected most of his areas of responsibility and were not restricted to Article 81. And not all of the proposals were universally welcomed when they were first proposed, in fact, far from it.

There are four achievements in relation to Article 81 that are particularly significant. The first three are major reforms: the modernization of EC competition law for Article 81; the introduction of a more economics-based analysis for Article 81 cases; and the fight against cartels. These three reforms were all driven by Commissioner Monti's objective to focus the European Commission on the right priorities in order to deliver more effective enforcement. An equally significant achievement is Commissioner Monti's high personal standing. His independence from political and business lobbying contributed significantly to his high personal standing. The importance of this achievement is clearly not restricted to Commission policy on anticompetitive agreements.

A. NEW REGULATIONS AND NOTICES

The dramatic rate of reform in antitrust legislation since Commissioner Monti took office in October 1999 is clear from the new regulations and notices relating to Article 81 (listed in Table 1). In addition to the new legislation listed in the table, there were legislative reforms in the competition rules for transport, telecommunications, mergers, and state aid.

II. Modernization of EC Competition Law for Article 81

A. THE WHITE PAPER ON MODERNIZATION

The main reason for the modernization of the rules concerning the enforcement of Articles 81 and 82 was to deliver more effective enforcement, particularly given the prospective enlargement of the European Union. *The White Paper on Modernization* (White Paper)[1] had been published in April 1999 by then-EC

1 Commission White Paper on Modernisation of the Rules Implementing Articles [85] and [86] of the EC Treaty, 1999 O.J. (C 132) 1.

Table 1

New regulations and notices relating to Article 81 adopted since October 1999

Date	New Regulation or Notice
December 1999	Block exemption regulation for vertical agreements (effective June 2000)
May 2000	Guidelines on vertical restraints
November 2000	New block exemption regulations for horizontal cooperation agreements
	Guidelines on applicability of Article 81 to horizontal cooperation agreements
January 2001	New Notice on agreements of minor importance
February 2002	Revised leniency policy
July 2002	New block exemption regulation for motor distribution and servicing agreements (effective October 2002)
December 2002	Modernization Regulation 1/2003 (effective May 2004)
February 2003	New block exemption regulation for insurance sector (effective April 2003)
April 2004	New block exemption regulation for technology transfer agreements and guidelines (effective May 2004)
May 2004	The Modernization Package: Regulation 1/2003; new Commission regulation on the conduct of antitrust procedures; and notices on cooperation within the network of competition authorities, on cooperation between the Commission and the national courts, on the application of Article 81(3), on the effect on trade concept, on informal guidance to business, and on the handling of complaints by the Commission.

Source: European Commission, *Competition Rules Applying to Undertakings*, *available at* http://europa.eu.int/comm/competition/antitrust/legislation/.

Competition Commissioner Karel Van Miert. The White Paper provided a basis for discussion on how to meet the twin objectives of releasing the Commission from tasks that did not contribute sufficiently to the efficient enforcement of the competition rules and decentralizing some enforcement to national authorities, thereby bringing decision-making processes closer to citizens. It also proposed that the Commission abandon its monopoly of granting individual exemptions under Article 81(3) and that the notification of agreements for individual exemptions be abolished. The criteria in Article 81(3) would then become directly applicable without prior decision of the Commission.

The Commission received over a hundred written comments from Member States, associations of undertakings, lawyers, and academics on the White Paper.

The European Parliament subsequently organized a public hearing in September 1999 and adopted a generally supportive resolution the following January (the Von Wogau Report). The Social and Economic Committee also adopted a supportive opinion in December 1999. The majority of the responses welcomed the Commission's proposals and agreed that the existing system for enforcing Articles 81 and 82 should be abandoned. But some Member States, business organizations, and lawyers raised serious concerns about both the overall proposal and specific details.[2] The German government, for example, issued a statement[3] setting out its doubts about the proposals, questioning the legality of direct applicability of Article 81(3) and the abolishment of notifications. Among others, the Confederation of British Industry (CBI) strongly criticized the proposed reform,[4] in particular the risk that inconsistency would develop through decentralization of cases to Member States and that there would be increased legal uncertainty for business with the proposed ending of notifications. Historically, business in the United Kingdom had a much stronger culture of notifying agreements to the Commission for exemption under Article 81(3) than did other Member States. The CBI considered the proposed reform unjustified, especially without first making meaningful efforts to remedy defects in the existing system. Indeed, they feared that the White Paper solutions might worsen the problems it sought to remedy, thereby putting European business at a disadvantage compared with competitors in other jurisdictions.

In February 2000, the UK House of Lords Select Committee on the European Communities published a wide-ranging report[5] on the proposed reform, which they described as "a bold and imaginative initiative." But they were concerned about whether the proposals for close cooperation between Member State and EC authorities and for decentralization were practical. According to their report, "Adoption of the White Paper proposals would be a formidable political challenge and there are many hurdles to overcome if the Commission's proposals are to succeed."

Concerns about the lawfulness of the proposals and the risks of inconsistency and uncertainty for business were raised by others, together with questions about

2 White Paper on Reform of Regulation 17—Summary of the Observations, COM(2000), *at* http://europa.eu.int/comm/competition/antitrust/others/wp_on_modernisation/summary_observations.html.

3 Statement by the Government of the Federal Republic of Germany (Nov. 1999), *at* http://www.bundesregierung.de.

4 Memorandum from the Confederation of British Industry (Sep. 29. 1999), *at* http://www.cbi.org.uk/home.html.

5 Reforming EC Competition Procedures, 4th Report of the House of Lords Select Committee on the European Union, HL Paper 33, Session 1999-2000.

whether the conditions in Article 81(3)[6] could be directly applicable and whether the national courts could handle the enhanced role proposed for them. Most commentators accepted that there should be significant changes in how the competition rules were enforced, but there was far from universal agreement on the best way forward.

Commissioner Monti and Commission officials invested much time and energy in addressing these concerns, either through concessions and refinements in the way in which the reform would be implemented or through seeking to persuade the doubters that their objections were misplaced. Commissioner Monti, for example, addressed the risk of incoherence, the issue of legal certainty and the roles of the courts and national competition authorities in a speech in Bonn at the formal introductory ceremony for Ulf Böge, the new President of the Bundeskartellamt (Germany's Federal Cartel Office) in January 2000. Commissioner Monti emphasized that modernization reform was "[b]uilding on the principle of subsidiarity, which your country supports very much."[7] In a speech to the CBI in London in June later that year, he particularly addressed the risk of inconsistent application of EC law by national authorities and courts and the issue of legal certainty. Both of these were key concerns of the CBI. He thus foreshadowed the issuing of guidelines by the Commission and a system of opinions to provide guidance to companies where there was real doubt over the application of the competition rules.

By June 2000, proposals were well advanced within the Commission, as indicated in a speech by Commissioner Monti in Washington, DC:

> "Many of the comments which we have received since the publication of the White Paper confirm the Commission's view that the current centralised system gives rise to a number of problems: it is costly to industry; it provides little legal certainty; "comfort" letters [the administrative letters by which the Commission disposes of most of the agreements notified to it] are neither binding, nor published. More importantly, the system is no longer an enforcement tool which is as effective as it ought to be: it obliges the Commission to scrutinise in detail a large number of often innocuous

6 If an agreement infringes the prohibition in Article 81(1) against anticompetitive agreements, it will, nevertheless, be valid and enforceable if it satisfies the conditions in Article 81(3). These conditions concern: efficiency gains from the agreement; fair share of the gains to be passed to consumers; indispensability of the restrictions to achieve the gains; and no elimination of competition.

7 European Competition Commissioner Mario Monti, Address at the Formal Introduction Ceremony of the New President of the Bundeskartellamt (Jan. 13, 2000), *available at* http://europa.eu.int/comm/competition/speeches/index_speeches_by_the_commissioner.html.

> notifications, thereby diverting scarce resources from concentrating on other priority enforcement tasks such as the uncovering of cross-border cartels and the investigation of major cross-border mergers, as well as the liberalisation of new sectors and the policing of state aid.…
>
> I am…confident in the ability of the Community's national competition authorities and the Commission all to apply a common set of rules, while seeking to ensure a maximum of consistency and coherence….[We will create] a "network" of competition authorities. This network will provide a forum for discussion of cases and issues of common interest. The network will also ensure that cases are allocated efficiently and that multiple control is avoided.…
>
> I am, at the same time, very conscious of the fact that this reform must take into account the need to ensure the maintenance of an adequate level of legal certainty for market participants."[8]

B. THE MODERNIZATION PACKAGE

By September 2000, the Commission was sufficiently confident about what was both necessary and possible to adopt a proposal for a regulation[9] to implement modernization reform. Commissioner Monti advised the Fordham International Antitrust Law and Policy Conference in October:

> "I consider this to be the most important legislative initiative in Europe in the competition field since the adoption of the Merger Regulation in 1989. It will change radically the way antitrust rules are enforced. It will allow the Commission to focus on the most serious infringements and, in my view, it will greatly facilitate the strengthening of a common competition culture in the EU."[10]

8 Mario Monti, Remarks at A European Competition Policy for Today and Tomorrow Conference (Jun. 26, 2000).

9 Proposal for a Council Regulation on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty and Amending Regulations (EEC) NO. 1017/68, (EEC) NO. 2988/74, (EEC) NO. 4056/86 AND (EEC) NO. 3975/87, COM(2000) 582 final.

10 Mario Monti, *European competition for the 21st century, in* Annual Proceedings on the Twenty-Seventh Annual Fordham Corporate Law Institute on International Antitrust Law & Policy on October 19 and 20, 2000 (2001).

However, it was not until over two years later that the Modernization Regulation[11]—Regulation 1/2003—was formally adopted by the Council of the European Union on December 16, 2002, to come into force on May 1, 2004, the same day as enlargement of the European Union from 15 to 25 Member States. Much of this time was taken up with negotiating the details of the regulation with Member States and with preparing the other parts of the Modernization Package.

BUT HAS MODERNIZATION BEEN "FINALISED" UNDER COMMISSIONER MONTI?

In October 2003, the Commission published six draft notices dealing with the implementation of Regulation 1/2003 and a draft Commission regulation relating to proceedings pursuant to Articles 81 and 82 and invited public comments (Member States had already commented on earlier drafts). Subsequently, the Commission published over fifty sets of comments from business, lawyers, and others on these drafts.[12]

The Commission adopted the final versions of the notices and the procedural regulation[13] on March 30, 2004, and they became enforceable on May 1, 2004. The headline on the press release was "Commission finalises modernisation of the EU antitrust enforcement rules."

But has modernization been "finalised" under Commissioner Monti?

C. FURTHER REFORMS WILL BE NECESSARY

Modernization ensures that when national authorities within the European Union apply national competition law to cases that may affect trade between Member States, they must also apply EC law, and national law may not lead to a different outcome from EC law in Article 81 cases. However, while the same substantive law will be applied in this way in all Member States, the procedures and sanctions remain national ones. Further modernization reforms covering procedures and sanctions will be required. Another area where further reforms are

11 Council Regulation 1/2003 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, 2003 O.J. (L 1) 1.

12 *Contributions received in response to the public consultation on the Modernization Package, at* http://europa.eu.int/comm/competition/antitrust/legislation/procedural_rules/comments/.

13 Commission Regulation 773/04/EC 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; Commission Notice on the Cooperation between the Commission and the Courts of the EU Member States in the Application of Articles 81 and 82, 2004 O.J. (C 101) 54; Commission Notice on the Handling of Complaints by the Commission under Articles 81 and 82, 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; Commission Notice on Guidelines on the Effect on Trade Concept Contained in Articles 81 and 82 of the Treaty, 2004 O.J. (C 101) 81; Commission Notice on Guidelines on the Application of Article 81(3) of the Treaty, 2004 O.J. (C 101) 97.

expected is in the role of national courts. Commissioner Monti is clear that a significant increase in their role in enforcing EC competition law would bring real benefits. Hence, the Commission is currently studying private enforcement in some depth. Proposals for enhancement are likely to follow, as Commissioner Monti indicated in his recent speech at Fiesole.[14] This will be one of the important reform challenges for the new Commissioner.

Should some, at least, of these wider changes have been introduced as part of the Modernization Package? Did Commissioner Monti aim for a sufficiently ambitious first change? Could he have been even more radical? Such questions are, of course, much easier to ask with the benefit of hindsight and with the initial package successfully in place. Or was the package skilfully planned by Commissioner Monti just about as ambitious as was realistically possible? Given the challenges involved in securing support for the first reform, there would have been a real risk that either the necessary agreement could not have been achieved for a more aggressive package or it would not have been implemented in time for enlargement of the European Union. There is another reason for undertaking a major reform in stages in that this gives some opportunity for fine-tuning. Experience in the first few years with Regulation 1/2003 will help to identify what changes in national procedures—and in relation to national courts—are necessary for the most effective European competition regime jointly enforced by the Commission and the national competition authorities. Sanctions may be a more challenging area, particularly given the different views in Member States, currently, as to whether criminal or civil sanctions should be used to deter cartels.

However, there is one area where there may have been a missed opportunity. Leniency programs in Europe are currently a ragged patchwork of some national programs, plus the Commission program. In places, this ragged patchwork is decidedly threadbare. In addition, there is no formal connection between these separate programs. Arguably, this problem could have been resolved as part of the Modernization Package. This problem is discussed further in the section on cartels.

D. CONCLUSION

Commissioner Monti leaves a deeply impressive legacy in modernization, together with a challenging agenda for his successor. If the new Commissioner takes up this challenge as effectively as Commissioner Monti did, with his inheritance from his predecessor Karel Van Miert, consumers and business will benefit greatly.

14 Mario Monti, Private Litigation as a Key Complement to Public Enforcement of Competition Rules and the First Conclusions on the Implementation of the New Merger Regulation, Address at the International Bar Association's 8th Annual Competition Conference (Sep. 17, 2004).

III. A More Economics-Based Analysis for Article 81 Cases

A. A KEY OBJECTIVE

Between 1985 and 1994 Commissioner Monti was Professor of Economics and Director of the Institute of Economics at Bocconi University, Milan. As a distinguished economist, he was able to appreciate the importance of strengthening the economic basis of the Commission's work. Indeed, this was one of his main objectives when he was appointed EC Competition Commissioner, as he reflected in a speech in Washington, DC, in November 2001:

> "One of my main objectives upon taking office two years ago has been to increase the emphasis on sound economics in the application of the EC antitrust rules, in particular to those concerning different types of agreements between companies, a trend that had already been started by my predecessor, Karel Van Miert. The present Commission has devoted a lot of effort to this aim and, in the last two years, we have adopted new legal frameworks for the application of competition rules both to distribution agreements and to co-operation agreements between competitors."[15]

As shown in Table 1, new legal frameworks were adopted for vertical restraints, agreements of minor importance, horizontal cooperation agreements, technology transfer, and the insurance and automobile sectors. In addition, there was new guidance on the application of Article 81(3). All of these enhancements reflected Commissioner Monti's objective to shift from a more formalistic approach to one based on economic principles. These reforms have generally led to greater convergence with U.S. law and practice with its stronger economic foundation.

B. NEW CHIEF ECONOMIST

The increasing focus on economic analysis has been reinforced by the creation of the new position of Chief Economist. When Professor Lars-Hendrik Röller's appointment was announced in July 2003, Commissioner Monti said, "The appointment of a Chief Economist forms an integral part of my commitment to

15 Mario Monti, Antitrust in the U.S. and Europe: A History of Convergence, Address before the American Bar Association (Nov. 14, 2001).

strengthen further the economic underpinnings of our competition analysis."[16] Röller is assisted by a team of approximately ten specialized economists. His appointment was warmly welcomed, but expectations of his impact are high.

C. VERTICAL RESTRAINTS

The more economics-and-effects-based approach was first reflected in the new policy on vertical restraints. The Commission's May 24, 2000, press release, which announced the approval of the Guidelines on Vertical Restraints,[17] stated that the "Guidelines and Block Exemption Regulation together form the basis for a more economic and less regulatory competition policy towards 'vertical agreements.'" The new block exemption[18] mainly concerned industrial supply agreements, exclusive and selective distribution agreements, franchising agreements, and single branding agreements. Thus, the reform covered a key area of competition policy. In order to concentrate on those vertical agreements that pose a real threat to competition, the Commission recognized the need to analyze market structure and to assess the economic impact of agreements. Market power was central to this assessment. In relation to vertical distribution agreements, this meant that, unless parties engaged in defined hard-core restrictions such as price-fixing or market sharing, the Commission would have no concerns about distribution agreements between companies with a market share of less than 30 percent.

In order to concentrate on those vertical agreements that pose a real threat to competition, the Commission recognized the need to analyze market structure and to assess the economic impact of agreements.

D. HORIZONTAL COOPERATION AGREEMENTS

A similar economic approach was introduced for horizontal cooperation agreements in the November 2000 new block exemption regulations on research and development and specialization agreements, and the guidelines on the applicability of Article 81 to horizontal cooperation agreements.[19] This was the first of the economic regulations that came fully within Commissioner Monti's man-

16 Press Release IP/03/1027, European Commission, Commission appoints Chief Competition Economist (Jul. 16, 2003), *available at* http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/03/1027.

17 Commission Notice on Guidelines on Vertical Restraints, 2000 O.J. (C 291) 1.

18 Commission Regulation 2790/99/EC on the Application of Article 81(3) of the Treaty to Categories of Vertical Agreements and Concerted Practices, 1999 O.J. (L 336) 21.

19 Commission Regulation 2658/00/EC on the Application of Article 81(3) of the Treaty to Categories of Specialisation Agreements, 2000 O.J. (L 304) 3; Commission Regulation 2659/00/EC on the Application of Article 81(3) of the Treaty to Categories of Research and Development Agreements, 2000 O.J. (L 304) 7; Commission Notice on Guidelines on the Applicability of Article 81 to Horizontal Cooperation Agreements, 2001 O.J. (C 3) 2.

date. Commissioner Monti recognized that agreements between competitors to produce a specific component or conduct joint research have an increasingly important role to play in helping companies respond to changes in the marketplace. Thus, the aim of his reform was to minimize regulatory burden and to focus Commission resources on cases where companies have market power that they can use to harm competition.

The new block exemptions replaced the previous system of specifically exempted white-list clauses with a general exemption of all conditions under which undertakings pursue research and development and specialization agreements. The move away from the former clause-based approach gives greater contractual freedom to the parties of such agreements and removes the straight-jacket imposed by the former regulations.[20] As with the other new economics-based regulations, there are market share thresholds that must be satisfied to benefit from the block exemption: 20 percent for all the parties combined for specialization agreements and 25 percent for research and development agreements. In common with other regulations, agreements need to be assessed individually beyond the thresholds. They are not automatically prohibited under Article 81(1). "Hard-core" restrictions—such as price-fixing, output limitation, or allocation of markets or customers—generally remain prohibited, irrespective of the parties' market power.

The guidelines complemented the new regulations. Additionally, these guidelines are applicable to research and development and production agreements not covered by the block exemptions, as well as to certain other types of competitor collaboration such as joint purchasing or joint commercialization. The guidelines set out a common analytical framework for assessing horizontal cooperation agreements.

E. DE MINIMIS NOTICE

The first new economic notice issued under Commissioner Monti was that on agreements of minor importance (de minimis Notice).[21] It was adopted in January 2001 and had four key features. The de minimis thresholds (above which the Notice does not apply) were raised to 10 percent market share for agreements between competitors and 15 percent for agreements between non-competitors, compared with the previous 5 percent and 10 percent respectively. The Notice introduced a new de minimis threshold of 5 percent for markets where networks of agreements can produce a cumulative anticompetitive effect. The previous Notice excluded markets where "competition is restricted by the cumulative effects of parallel networks of similar agreements established by several manufac-

20 This approach followed that in the vertical restraints block exemption which was developed during former EC Competition Commissioner Karel Van Miert's mandate.

21 Commission Notice on Agreements of Minor Importance, 2001 O.J. (C 368) 13.

turers or dealers." The new Notice contained the same list of hard-core restrictions as in the new vertical and horizontal block exemption regulations. It also stated that agreements between small and medium-sized enterprises are rarely capable of appreciably affecting trade between Member States and, hence, would generally fall outside the scope of Article 81(1).

F. TECHNOLOGY TRANSFER AGREEMENTS

The relationship between the policies on intellectual property rights and competition is, arguably, the most challenging policy area in Article 81—as it is in other developed competition regimes. (In 2003, the U.S. federal competition agencies held hearings on "Competition and Intellectual Property Law and Policy in the Knowledge-based Economy.") It was the same question of balance that underlay the Commission's economic approach to the new block exemption regulation and guidelines for technology transfer.[22] As Commissioner Monti said in a speech early last year on technology transfer agreements:

> "In many cases having an IPR will not automatically imply having market power as sufficient competing technologies may exist. Licensing, also when it contains competition restrictions on licensee or licensor, will therefore mostly be pro-competitive as it allows the integration of complementary assets, allows for more rapid entry, helps disseminating the technology and to provide a reward for what was usually a risky investment. However, licensing agreements may also sometimes be used to restrict competition, in particular in those cases where one or the other party enjoys market power. It is therefore important in such cases to protect competition."[23]

The Commission review process had started in December 2001 when it adopted a mid-term review report on the application of the Technology Transfer Block Exemption. Most of 2002 was spent consulting stakeholders on the review report. Drafts of a new block exemption and guidelines received a positive response from most Member States when the drafts were discussed with them in September 2002. Extensive comments were made during public consultations,

22 Commission Regulation 772/04/EC on the Application of Article 81(3) of the Treaty to Categories of Technology Transfer Agreements, 2004 O.J. (L 123) 11; Commission Notice on Guidelines on the Application of Article 81 to Technology Transfer Agreements, 2004 O.J. (C 101) 2.

23 Mario Monti, The New EU Policy on Technology Transfer Agreements, Address at Ecole des Mines (Jan. 16, 2004).

which commenced the following month. There was a general welcome for the more economic and flexible approach but critical comments on a number of important aspects of the proposals. Changes adopted by the Commission went a considerable way towards meeting these criticisms, but not those about the use and level of the market share thresholds. However, some would say that this was the main point of criticism.

The new regulation differs significantly from its predecessor, under which exemption depended on whether the agreement contained certain terms, and applied, for the most part, irrespective of the parties' competitive relationship, their market shares, and the agreement's actual market effect. As with the other economics-based block exemptions, there are market share thresholds above which the regulation does not apply: 20 percent of the affected relevant technology and product market for the combined shares of parties that are competitors and 30 percent each for agreements between non-competitors. The 20 percent threshold is in line with that in the U.S. guidelines for the licensing of intellectual property. The previous EC block exemption divided clauses in agreements into four categories: exempt, white, black, and grey clauses. The list of clauses was long and detailed. The new block exemption has three categories: exempt, hard-core, and excluded. The treatment of competitors is more stringent than for non-competitors. Hence, the list of hard-core and excluded restrictions is different for competitors to those for non-competitors.

While business and lawyers welcomed the greater flexibility of the new block exemption, there were real concerns about the difficulty of applying market share thresholds. This is particularly challenging where markets involve fast-moving technology. In cutting-edge technology, market shares may change rapidly, possibly requiring regular reassessments to confirm whether an agreement still satisfies the relevant threshold. In general, however, no better way of determining market power has so far been developed that does not involve an assessment of market share, together with entry conditions and other relevant factors such as buyer power.

G. THE NOTICE ON THE APPLICATION OF ARTICLE 81(3)

Within the Modernization Package, the Notice on the application of Article 81(3)[24] well reflects Commissioner Monti's objective of a more economic approach with narrower, more clearly focused circumstances in which Article 81(1) applies. It also has a correspondingly narrower approach to those instances when agreements can benefit from the Article 81(3) conditions. In terms of the basic principles for assessing agreements under Article 81(1), the central importance of market power is clear, as reflected in paragraph 25:

24 Commission Notice on Guidelines of the Application of Article 81(3) of the Treaty, *supra* note 13.

> "Negative effects on competition within the relevant market are likely to occur when the parties individually or jointly have or obtain some degree of market power and the agreement contributes to the creation, maintenance or strengthening of that market power or allows the parties to exploit such market power. Market power is the ability to maintain prices above competitive levels for a significant period of time or to maintain output in terms of product quantities, product quality and variety or innovation below competitive levels for a significant period of time. In markets with high fixed costs undertakings must price significantly above their marginal costs of production in order to ensure a competitive return on their investment. The fact that undertakings price above their marginal costs is therefore not in itself a sign that competition in the market is not functioning well and that undertakings have market power that allows them to price above the competitive level. It is when competitive constraints are insufficient to maintain prices and output at competitive levels that undertakings have market power within the meaning of Article 81(1)."[25]

H. WHERE NEXT?

These important developments, together with a much more vigorous anti-cartel policy, have created "a European policy approach towards agreements between firms that is more economics-based in terms of its priorities, processes and substantive case analysis."[26] Now that Commissioner Monti's main objective of establishing a sound economic basis has been impressively achieved for Article 81, it needs to be extended to Article 82 of the EC Treaty (Article 82). But that is a matter for another paper—and for the new Commissioner. An equally important responsibility for the new Commissioner will be to ensure that the Commission and all the national authorities and courts use this new economic basis in their Article 81 analyses.

25 Commission Notice on Guidelines of the Application of Article 81(3) of the Treaty, *supra* note 13.

26 Chairman John Vickers of the Office of Fair Trading, Address to the 31st Conference of the European Association for Research in Industrial Economics (Sep. 3, 2004), *available at* http://www.oft.gov.uk/News/Speeches+and+articles/2004/spe03-04.htm.

IV. The Fight Against Cartels

A. DRAMATIC INCREASE IN CARTEL DECISIONS AND FINES

In the four years from 2000 to 2003[27] the Commission took 26 cartel decisions with fines totalling EUR 3,330 million, compared with 8 decisions (EUR 552 million) in the previous four years, 1996 to 1999, and 11 decisions (EUR 393 million) from 1992 to 1995, as shown in Table 2.[28]

Table 2

Total (rounded) cartel fines and decisions over four year periods

Four year periods	Cartel fines, €m	No. of cartel decisions
1988-91	60	4
1992-95	393	11
1996-99	552	8
2000-03	3330	26

Source: *See* Guersent, *infra* note 31; European Commission, *Antitrust Cases*, *available at* http://europa.eu.int/comm/competition/antitrust/cases/.

Is this approximately sevenfold increase in decisions and fines between the four-year periods of 1996-1999 and 2000-2003 due to the strong emphasis that Commissioner Monti has given to cartel work? Yes, to a significant degree in that he developed and strengthened the changes made by his predecessor. While (as would be expected) the annual statistics do not show quite such consistent growth, the overall scale of increase is clear, as can be seen in Table 3.

27 2004 has not been included in this comparison as in recent years cartel decisions have generally been issued late in the calendar year.

28 While the cartel decisions are normally appealed to the EC courts, they have generally been substantially upheld by the courts, in some cases with some reduction in fines.

Table 3

Total (rounded) cartel fines and decisions per year

Year	Cartel fines, €m	No. of cartel decisions
1986	76	3
1987	-	-
1988	51	2
1989	8	1
1990	1	1
1991	-	-
1992	45	4
1993	-	-
1994	336	6
1995	12	1
1996	1	1
1997	-	-
1998	445	5
1999	106	2
2000	136	2
2001	1,839	10
2002	950	9
2003	405	5
2004*	245	4

*As of October 31, 2004

Source: *See* Guersent, *infra* note 31; European Commission, *Antitrust Cases*, *available at* http://europa.eu.int/comm/competition/antitrust/cases/.

Part of the growth in fines is due to the implementation of the 1998 guidelines on fines that led to a considerable increase in the level of fines imposed by the Commission. But the growth also reflects the Commission's policy to increase deterrence, as Commissioner Monti explained in a 2002 speech in Brussels:

> "[The high cartel fines in 2001] show that the Commission has a policy of stepping up its activity against cartels, and at the same time increasing the level of fines in order to achieve a genuine dissuasive effect on firms. The pur-

> pose of substantial fines of this kind is to ensure that firms have an incentive to avoid joining any kind of unlawful agreement or concerted practice."[29]

In his first speech as EC Commissioner for competition policy, Commissioner Monti was clear that the fight against cartels was a priority for him. During this speech, he said, "The formation of cartels is indeed one of the most damaging practices for the consumer...[high fines are] a clear indication of the Commission's determination in fighting vigorously these anti-competitive practices."[30]

B. WHAT CAUSED THE INCREASE?

What factors caused this very substantial growth in cartel decisions? There were three—all initiated by Commissioner Karel Van Miert, but very much built on by Commissioner Monti—modernization, the Leniency Program, and the creation of a cartel unit.[31] These three factors are important, but a competition authority cannot deliver such impressive results without the best leadership at the top. Thus, Commissioner Monti's clear leadership and strong support for the fight against cartels were critical to the success of the cartel work during his mandate.

1. Modernization

As discussed above, Commissioner Monti's role was central to the successful implementation of modernization reform. A key aim of the reform was to enable the Commission to focus on seriously damaging anticompetitive behavior, such as that of cartels, instead of spending its time processing notifications of largely benign agreements. This new approach started to influence the priorities of the Commission while modernization was being developed, and greater benefits should be seen over coming years.

2. Leniency Notice

The second key measure was the adoption, in 1996, of the Leniency Notice and the implementation of the Leniency Program since then. This has been the most significant in terms of actual impact so far. For the first time, the Commission introduced the granting of immunity and/or reduction of fines into its investiga-

29 Mario Monti, The Fight Against Cartels, Remarks to the Economic and Monetary Affairs Committee (Sep. 11, 2002).

30 Mario Monti, Strengthening the European Economy through Competition Policy, Address to the Institute for International Monetary Affairs (Oct. 29, 1999).

31 Olivier Guersent, *The fight against secret horizontal agreement in the EC Competition Policy, in* Annual Proceedings on the Thirtieth Annual Fordham Corporate Law Institute on International Antitrust Law & Policy on October 23 and 24, 2003 (2004).

tive tools. The 1996 Notice was a considerable success. As of October 31, 2004, the Commission had taken 28 formal decisions in cartel cases in which companies cooperated under the 1996 Notice, as shown in Table 4. Almost all of these decisions occurred during Commissioner Monti's mandate.

Table 4

Impact of the 1996 Leniency Notice

Year	No. of cartel decisions where one or more undertaking received leniency
1998	4
1999	1
2000	1
2001	8
2002	8
2003	4
2004*	2

*As of October 31, 2004

Source: *See* Guersent, *supra* note 31; European Commission, *Antitrust Cases*, *available at* http://europa.eu.int/comm/competition/antitrust/cases/.

However, lawyers and some competition authorities raised concerns over the lack of certainty and transparency of the 1996 policy. It also appeared to be difficult for a leniency applicant to obtain complete immunity (i.e. no fine at all)—in marked contrast to the very successful program run by the U.S. Department of Justice (DOJ). Immunity was granted in less than half of the 28 EC decisions and in none of these before 2001. Since then, immunity has been granted in an increasing proportion of leniency cases, reaching 75 percent of the cartel decisions in 2003 where leniency was granted. In the first ten months of 2004, immunity was granted in both of the two cartel decisions that involved leniency. It was Commissioner Monti who introduced a revised Leniency Notice in 2002[32] that increased the rewards for a successful applicant and strengthened the certainty and transparency of the program. The Commission drew on its experience with

32 Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, 2002 O.J. (C 45) 3.

its earlier program and, in particular, on that of the DOJ in order to develop its new Notice. Commissioner Monti explained the need for the revised policy in his 2002 speech on the Commission's fight against cartels:

> "Experience showed that the [1996] scheme could be improved in a number of respects. The main changes as compared with the previous arrangements are that firms that cooperate after the investigation begins can now still qualify for full immunity, and that the Commission will indicate rapidly and in writing whether or not the firm can expect to secure full immunity on the basis of its contribution to the Commission's enquiries. Under the new scheme, therefore, it is easier to secure full immunity, and the applicant enjoys greater legal security.
>
> This new tool is very promising. Since 14 February last, when the new Notice was published in the *Official Journal*, some 10 fresh requests for total immunity have been submitted to the Commission. That this should have happened in a mere five months is quite unprecedented."[33]

3. The Cartel Unit

A dedicated cartel unit, central to the overall process of enhancing the Commission's efficiency in its fight against cartels, was created in 1998. This new unit, which started with 11 case handlers, brought together in one place the existing Commission skills in investigating cartels. With Commissioner Monti's emphasis on fighting cartels, the unit grew every year from 2000 onwards, and the number of officials engaged solely in the investigation of cartel cases doubled in the three years to 2002. Towards the end of that year a second cartel unit was created, representing a substantial increase in resources. In addition, an improved management model, mandatory timetables, and effective computer support systems were introduced in 2002. Case teams were reorganized so that two case handlers were in charge of only one case at a time. As a result, the time taken for a cartel investigation was reduced to less than three years. The success of the new approach—with its skills and expertise in investigation—is now being spread more widely in the Competition Directorate through decentralizing the cartel units. But the Commission will need to ensure that decentralization does not dilute the focus on cartel investigations.

33 Monti, The Fight Against Cartels, *supra* note 29.

C. COULD EVEN MORE HAVE BEEN ACHIEVED?

The great success of cartel investigations under Commissioner Monti is clear from the statistics. But would it have been possible to achieve even more? Or would it have been impossible—even with the power of hindsight? Two issues are particularly pertinent:

- Should the modernization reforms have extended to national leniency programs?
- What about criminal sanctions for hard-core cartels?

1. Should the Modernization Reforms Have Extended to National Leniency Programs?

Some have commented—forcefully at times—that the current arrangements for handling the Commission and national leniency programs under modernization are likely to deter leniency applicants. Are these concerns valid? What changes should be made to strengthen the effectiveness of leniency under modernization by improving predictability and certainty for applicants?

> If leniency applications are discouraged by uncertainty under the new modernization regime, urgent action will be required by the new Commissioner.

The main concerns stem from the fact that those Member States with a leniency program operate it separately from each other's and from the Commission's. Hence, the grant of immunity under one national program has no effect under other national programs or the Commission program, even though the same cartel is concerned. Only the Commission can grant leniency that applies throughout the European Union—and that leniency is not relevant if Member States, rather than the Commission, subsequently investigate the cartel case. Whether leniency can be obtained depends on which authority or authorities take the case, whether they each have a leniency program, and whether the applicant is first to apply to all of those investigating the case. It could be argued that modernization has not, in fact, changed the Commission's position in relation to national leniency programs. However, there is an expectation that the new European Competition Network (ECN), a joint effort of the Commission and Member States,[34] should deliver more collaborative arrangements in relation to leniency, as it will do for other aspects of investigations. This is particularly so in a system where cases and information can be passed (with safeguards) within the ECN.

While eight of the 25 Member States of the enlarged European Union do not currently have leniency programs,[35] more programs are being introduced. The

34 Commission Notice on Cooperation within the Network of Competition Authorities, 2004 O.J. (C 101) 43.

35 European Commission, *Authorities in EU Member States which operate a leniency program, at* http://europa.eu.int/comm/competition/antitrust/legislation/authorities_with_leniency_programme.pdf.

current leniency programs operated by national competition authorities differ to some extent. It is clearly desirable that all programs—existing and new ones—be as similar as possible. That the programs be similar is particularly important in terms of the conditions to be satisfied, and is also desirable for the degree of leniency granted. It would have been desirable if Regulation 1/2003 had also provided a legal basis for leniency programs for Member States. Although most leniency programs are based on administrative practice rather than on formal legal powers, such a power in the regulation would have provided useful backing for Member States seeking to introduce programs—particularly those facing objections to such programs. Better still would have been a provision in the regulation for a single, comprehensive EU program operated jointly by all ECN members, including the Commission. However, that would almost certainly have been too big a step to take at the same time as the other modernization changes given the number of Member States without a leniency program then, and especially when the modernization reform was first launched.

If, in fact, leniency applications are discouraged by uncertainty under the new modernization regime, urgent action will be required by the new Commissioner.

2. What about Criminal Sanctions for Hard-Core Cartels?

At this point, only a few European countries have criminal sanctions (including custodial sentences) for cartel behavior; these countries include Austria, Estonia, France, Germany, Ireland, Norway, and the United Kingdom. Even in this group of countries, cartels have generally been pursued by competition authorities using civil powers. Outside Europe, at least ten other countries have criminal sanctions. Only the United States and Canada have imprisoned individuals for cartel conduct in recent years.[36]

Experience in the United States is that a criminal regime is a powerful deterrent to cartels and an equally powerful incentive to apply for leniency. In a lecture at King's College London in February 2004, then-Deputy Assistant Attorney General James Griffin of the U.S. Department of Justice Antitrust Division illustrated this point with two anecdotes:

> "Senior Executive: 'As long as you are only talking about money, the company can take care of me—but once you begin talking about taking away my liberty, there is nothing the company can do for me'"

and,

36 Mark Jephcott & Thomas Lübbig, Law of Cartels (2003), at 333.

> "In 25 years of prosecuting individuals engaged in cartels, I have never had one lawyer for an executive I was prosecuting tell me that his client would spend a few extra days in jail for a reduction in the recommended fine."

The UK government is similarly convinced that fines alone are not a sufficient deterrent to cartel activity. Hence, the Enterprise Act 2002—which came into force in June 2003—introduced criminal sanctions for hard-core cartels. The government outlined reasons for these powers in a report in 2001:

> "For most forms of anti-competitive behaviour, large fines against companies act as an effective deterrent. But for cartels there is good evidence that the current level of fines is not enough [because they need to be set at a level which is greater than the expected gains from participating in a cartel and taking into account the probability of being caught].
>
> One option would be to increase the maximum level of fines significantly—perhaps six to ten times the existing maximum fines [of 30 per cent of UK turnover]. The Government does not believe that fines at this level would be proportionate….
>
> The Government's recent peer review of competition policy asked competition experts for their views on the increased deterrence of criminal penalties. In the UK, 83% of those questioned believed that the introduction of criminal penalties against individuals who engage in cartels would improve our regime."[37]

A similar conclusion was reached by Wouter Wils, of the European Commission Legal Service, for similar reasons. In a paper[38] in which he expressed his views—not the official views of the Commission—Wils considered whether effective enforcement of Articles 81 and 82 requires not only fines on undertakings but also individual penalties, in particular imprisonment. He wrote, "The

37 Department of Trade and Industry, A World Class Competition Regime, Cm 5233 (Jul. 2001).

38 Wouter Wils, *Does the effective enforcement of Articles 81 and 82 EC require not only fines on undertakings but also individual penalties, in particular imprisonment?, in* European Competition Law Annual 2001: Effective Private Enforcement Of EC Antitrust Law 411-452 (C.-D. Ehlermann ed., Hart Publishing 2003).

introduction of prison sanctions for the individuals responsible for their undertakings' antitrust violations would appear to be the only way generally to achieve effective deterrence of price cartels and other antitrust violations of comparable profitability and ease of concealment."

Another factor that illustrates the effect of criminal powers is the extent to which international cartels are first uncovered through amnesty applications to the DOJ. In these cases, it is the threat of criminal sanctions that drives executives to go first to the DOJ—and only later to the European Commission and other relevant authorities. Without the U.S. criminal sanctions and active enforcement record, how many of these cases would be revealed by leniency applications to the European Commission? It is, of course, impossible to answer this question, but I suspect the answer might well be few.

If criminal sanctions do provide far more effective deterrence, why has Commissioner Monti apparently not considered introducing such sanctions as part of the fight against cartels? Should such powers be considered now? One obvious answer is the fact that only six out of 25 Member States have such powers in their national law and these have not yet been used on their own for any custodial sentences. Also, the European Commission does not currently have criminal powers in any area. At this time, it seems unlikely that there would be the necessary support within the European Union for such a change. But if the United Kingdom or another Member State demonstrates effective use of its powers and increases deterrence significantly as a result, the Commission should consider criminal powers seriously.

V. Independence from Political and Business Lobbying

The EC Commissioner responsible for competition policy is one of the most powerful Commissioners because of the significance of the decisions on cases and policy. While decisions on major cases are taken by the College of Commissioners, it is the EC Competition Commissioner's view that is crucial. In addition, the Commissioner has considerable individual decision-making power, even if he or she chooses to liaise regularly with his or her colleagues. Unsurprisingly, therefore, there is much potential pressure from lobbying by national governments and business. Independence from lobbying does not, of course, mean that the Commissioner should not hear views. Such meetings may be essential to learn firsthand about issues; they can also be important to the diplomatic handling of decisions within a clear competition framework.

Having operated in a strictly professional manner, Commissioner Monti is very clearly regarded as having maintained scrupulous independence from lobbying throughout his mandate. For example, he was not swayed by the lobbying of a U.S. President regarding the *General Electric/Honeywell* merger or, apparently, by

the French President regarding the *Schneider/Legrand* merger. It is this independence that has commanded considerable respect from national competition authorities, lawyers, and business. This level of respect is critical to the standing of the EC Competition Commissioner, whether the cases and/or policy at issue concern Article 81, Article 82, mergers, or state aid.

Commissioner Monti also maintained a very dignified approach in the face of heavy—and, arguably, one-sided—press criticism of some decisions, none of which concerned Article 81. His measured handling of these situations has endowed the role of the EC Competition Commissioner with much dignity. His successor takes over a very powerful, but highly-respected, position. The new Commissioner will do well to pass it on in at least as good shape.

VI. Conclusion

Has Commissioner Monti achieved his objective of focusing the Commission on the right priorities in order to deliver more effective enforcement? Yes. There are, however, plenty of challenges for his successor, not least to maintain the impetus of his reforms. Commissioner Monti leaves a truly great legacy in Article 81 policy. ◀