Articles

Does the European Commission Have Too Much Power Enforcing European Competition Law?

*By Milana S. Karayanidi**

The sublimity of administration consists in knowing the proper degree of power that should be exerted on different occasions.[1]

Abstract

The article critically assesses the role of the Directorate General of the European Commission in executing enforcement of the European Communities Competition Law. The Commission is granted equally unprecedented legal powers to carry out the functions of policy maker, investigator, "judge", "jury", and "executioner". For some, it is accordingly difficult to resist the suggestion that the focus of so many regulatory roles and so much power in the hands of one organization represents a legitimate source of concern. By comparing the European system of antitrust enforcement with that of the United States and examining the historical evolvement of the Commission's role, the article determines whether focus of so much power in the hands of the European Commission forms a legitimate source of concern. It determines whether so much power given to the Commission may interfere with the basic rights of corporate undertakings to carry out their business operations, and how the powers granted to the Commission lead to legally based reasons for anxiety.

A. Introduction

The object of this analysis is to critically assess the role of the European Commission (EC) in the enforcement of European competition law.[2] It holds an unprecedented number of

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[1] CHARLES DE MONTESQUIEU, L'ESPRIT DES LOIS (The Spirit of the Laws) (1748).

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regulatory roles as policy maker, investigator, "jury" and "executioner," and is granted equally unprecedented legal powers to carry out these functions. For some, it is difficult to resist the suggestion that the focus of so many regulatory roles in the hands of one organization can represent a legitimate source of concern.

An example of the negative effects of such a pointed focus of power can be demonstrated by the Communist Party of the Soviet Union (*Kommunisticheskaya Partiya Sovetskogo Soyuza)*, which united legislative and executive powers and controlled the judiciary in the state. Though it proved to work as a system from 1917 till 1991, such a strong concentration of power led to the oppression of the people and failed the test of time. In our case, we must decide whether the focus of so many roles by the EC might be dangerous in a similar regard, disturbing the balance of powers and failing to enforce competition law in an efficient manner.

By comparing the European system of antitrust enforcement with that of the United States and examining the historical evolution of the EC's role, this article will determine whether the focus of power in its hands forms a legitimate source of concern. It will determine whether this authority given to the EC may interfere with the basic rights of corporate undertakings to carry out their business operations, and may give rise to legally based reasons for anxiety.

Using the qualitative method of research, we will conduct this analysis by considering relevant legislation (statutes, international treaties, acts of legislation), case law, scholarly materials (articles, books) and available mass media publications in relation to competition law enforcement in the European Union (EU). We will also use statistical data published by the EC.

B. Too Much Power?

In order to define whether so much power in the hands of one organization constitutes a legitimate source of concern, we will analyze the present role of the EC in detail. We will then see how the system of antitrust law enforcement works in the United States (US) and compare the role of the EC to the role of the United States Federal Trade Commission (USFTC). Finally, we will look at the historical predisposition of the evolution of the EC's role with respect to competition law.

I. Role of the European Commission

The powers of the EC to implement competition law are granted by the European Council by means of relevant legislation, including but not limited to: i) Articles 101, 102 of the

[2] By the "European Commission" (EC) we shall mean the Directorate General of the European Commission responsible for competition policy implementation in the European Union (EU).

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Treaty on the Functioning of the European Union (TFEU)[3] (formerly articles 85 and 86 of the Treaty of Rome, 1957 and Articles 81 and 82 of the Treaty Establishing the European Community (European Community Treaty), 2006 correspondingly); ii) Regulation 17 implementing Articles 85 and 86 of the Treaty of Rome[4]; and iii) Regulation 1/2003.[5]

Article 101 prohibits agreements between two or more firms that restrict competition, subject to some limited exceptions. Article 102 bans abuse of a dominant position in the market. Prior to 2004, the EC possessed an exclusive right to apply Article 101(3) (formerly article 81(1) of the European Community Treaty, 2006), which provides an exemption from Article 101(1). Since 2004, national courts and the national competition authorities (NCAs) have been given the right to apply Article 101(3) (formerly article 81(3) of the European Community Treaty) in accordance with Regulation 1/2003.

In this subsection we will analyze the roles of the EC as policy maker, investigator, jury and executioner to comprehend the scope of authorities it possesses.

1. Policy maker

As a policy maker in the field of competition law, the EC implements competition policy in the areas of antitrust, mergers, cartels, liberalization, state aid and international cooperation.

1.1 Antitrust

An example of the EC's competition policy implementation in the area of antitrust can be found in the recent case of *Intel v. European Commission.*[6] Intel breached EU antitrust law by engaging in two types of practices, both of which harmed competition. First, Intel gave wholly or partially hidden rebates to computer manufacturers on condition that the latter buy all, or almost all, their x86 central processing units (CPUs) from Intel. Second, Intel made direct payments to computer manufacturers to halt or delay the launch of specific products containing a competitor's x86 CPUs, and to limit the sales channels available to these products. The EC imposed a fine of 1,060,000,000 Euros on Intel for abuse of dominant position, also ordering it to cease its illegal practices.

[3] Treaty on the Functioning of the European Union, 2008 O.J. (C115) 47 [hereinafter "TFEU"].

[4] Council Regulation 17, 1962 O.J. (13) 204-211 [hereinafter "Regulation 17"].

[5] Council Regulation (EC) 1/2003 of 16 December 2002 [hereinafter "Regulation 1/2003"] on the implementation of the rules on competition laid down in Articles 81 and 82 of the European Community Treaty, 2003 O.J. (L1) 1.

[6] Case T-457/08 R, Intel v. European Commission, 2009 E.C.R. II-12.

1.2 Cartels

As a specific type of antitrust enforcement, the EC imposes heavy fines on companies involved in cartels. Cartels are defined as groups of similar, independent companies that join together to fix prices, limit production or share markets or customers between them. In accordance with statistics published by the EC, fines in the amount of 10,390,701,432 Euros have been imposed on the undertakings involved in cartels during the period from 2007-2011.[7]

1.3 Mergers

The EC examines proposed mergers of businesses whose combined annual turnover exceeds specified thresholds in terms of global and European sales in order to prevent harmful effects of competition. An example of this is the *Sanofi/Synthélabo* case[8] in the pharmaceutical sector. In 1999, Sanofi and Synthélabo notified their proposed concentration pursuant to Article 4 of the Merger Regulation[9] with incorrect data. The EC concluded that the merger could have an adverse impact on competition, limiting the choice of certain drugs available to patients. Moreover, the EC imposed fines on the companies involved for having intentionally or negligently provided incorrect information relating to narcotic active substances.

The EC exercises its powers in relation to the activity of undertakings regardless of place of their incorporation, provided their activity affects competition in the EU. For example, the EC prohibited proposed the merger of US -based corporations. General Electric and Honeywell, because it would have severely reduced competition in the aerospace industry in the EU.[10]

1.4 Liberalization

The EC implements the policy of liberalization in the markets of transport, energy, postal services and telecommunications. The term "liberalization" refers to the Article 3 of the European Community Treaty which reads: "activities of the Community shall include […] g) a system ensuring that competition in the internal market is not distorted." An example of the EC realizing this specific surveillance duty is when it registered a notification from the

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[7] Fines imposed (not adjusted for Court judgments) period 2007-2011, available at: http://ec.europa.eu/competition/cartels/statistics/statistics.pdf (last accessed: 23 June 2011).

[8] Case IV/M.1543, Sanofi/Synthélabo, EC Decision 2000/291/EC, 1999 O.J. (L95) 34.

[9] Council Regulation 4064/89 of 30 December 1989 on the Control of Concentrations Between Undertakings, 1989 O.J. (L395) 1 as amended by Council Regulation 1310/97, 1990 O.J. (L257) 1.

[10] Case COMP/M.2220, General Electric/Honeywell, EC Decision 2001/C 74/04, 2001 O.J. (C74) 6.

National Telecommunications and Post European Commission (EETT) of Greece, which was related to call terminations on the public telephone network (Telecoms S.A.), provided at fixed locations. The EC examined the notification and commented pursuant to the Article 7(3) of the Framework Directive,[11] and advised the need for a coherent European approach to regulate wholesale termination rates.[12]

1.5 State Aid

The EC has established a worldwide unique system of rules under which state aid is monitored and assessed in the EU. State aid is, in this case defined as subsidies granted to selective companies by EU members. When such companies receive government support, they obtain an advantage over competitors, which unless justified by reasons of economic development, is prohibited. Therefore, the EC watches over the compliance of state aid with EU rules. In particular, it has played a key role in ensuring that the rules are fully respected in the recession. As reported by Mr. Philip Lowe, Director General for Competition, in relation to intersection of the credit crunch and state aid "there have been a number of urgent banking cases (in 2008). We have ensured that the rules are applied fairly, with an eye to the wider issues at stake."[13]

1.6 International Cooperation

The EC cooperates with various international organizations, networks and groups of countries concerning competition policy and enforcement, including the International Competition Network (ICN), the Organization for Economic Cooperation and Development (OECD) and the World Trade Organization (WTO).

2. Investigator

In order to implement competition policy as discussed above, the EC enjoys a number of investigative powers. The rules of legal privilege of investigation, as conducted by the EC, are established by the European Court of Justice (ECJ) in *AM&S.*[14] The legal basis for this

[11] Directive 2002/21/EC of the European Parliament and of the Council, 2002 O.J. (L108) 33 on a Common Regulatory Framework for Electronic Communications Networks and Services (hereinafter "Framework Directive").

[12] *See* Case EL/2008/0754, SG-Greffe D/201150 (2008).

[13] *See* the special edition of the following newsletter: European Commission, *Ensuring fair play,* COMPETITION POLICY NEWSLETTER 1, 3 (2008).

[14] Case 155/79, Australian Mining & Smelting Europe v. European Commission, 1982 E.C.R. 1575.

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procedural step is the EC Regulation 773/2004[15] and Article 11(6) of Regulation 1/2003. Regulation 773/2004 contains *inter alia* (among other things), the initial proceedings and investigations by the EC, as well as the handing of complaints and exercise of the power to be heard.[16] Article 11(6) of Regulation 1/2003 provides for the EC to initiate proceedings in case of breach of European competition laws. Moreover, Article 21 of Regulation 1/2003 empowers the EC to order inspections in places other than the undertaking's own premises (non-business premises). This includes, in particular, the private homes, cars or property of management or staff members. There must be a "reasonable suspicion" that "books or other records related to the business and to the subject matter of the inspection," which could be relevant in establishing a serious violation of the EU competition rules, are being kept there.

Prior to May 2004, under Regulation 17, the EC's investigative powers were essentially of two types: the power to adopt decisions requesting information, and the power to inspect (usually unannounced) the premises of an undertaking, check its books and records, and to take copies of materials relevant to the investigation. Under certain procedural conditions, the EC can also impose penalties to ensure compliance with these orders, and request the assistance of national authorities when carrying out inspections.[17] Since 1 May 2004, national courts and NCAs are also empowered to fully apply the provisions of the European Community Treaty in order to ensure that competition is not distorted or restricted.

In accordance with information gathered during the interviews with EC inspectors by Eric Gippini-Fournier and presented to the *Federation Internationale des Echecs* (World Chess Federation) between 2004 and 2007, the EC issued 27 inspection decisions in cartel cases, and undertook a few additional inspections in the framework of sector inquiries and other antitrust cases.[18]

3. "Jury" and "Executioner"

The EC can make decisions requiring undertakings to seize activity infringing Articles 101/102. The legal basis for this power is constituted by Article 7 of Regulation 1/2003.

[15] Council Regulation 773/2004, 2004 O.J. (L123) 18 relating to the conduct of proceedings by the EC pursuant to Articles 81 and 82 of the European Community Treaty, *supra* note 5.

[16] Felix Müller, *The New Council Regulation (EC) No 1/2003 on the Implementation of the Rules on Competition (II/II),* 5 GERMAN LAW JOURNAL 721, 737 (2004).

[17] *See* Regulation 17, *supra* note 4, art. 14.

[18] Eric Gippini-Fournier, *Community Report FIDE 2008*, SOCIAL SCIENCE RESEARCH NETWORK (SSRN) 1, 59, available at: http://ssrn.com/abstract=1139776 (last accessed: 23 June 2011.)

Technically however, the decisions adopted by the EC do not affect the power of courts and competition authorities of the Member States to apply Articles 101/102.[19]

The EC has the right to intervene with national trials through *amicus curiae* (friend of the court) observation according to Article 15(3) of Regulation 1/2003. It also has the right to submit written and oral observations to the courts of Member States with regards to competition cases.[20] The *amicus curiae* intervention is non-binding advice given to the court. However, the decisions of the EC can be challenged at the European Court of Justice (ECJ), allowing it to release administrative acts that are reviewed by the judiciary.

Pursuant to Articles 23 and 24 of Regulation 1/2003, the EC is also entitled to execute penalties on undertakings and related associations, if the latter are found in breach of European competition rules, subject to time limitations. For instance, in 2007 the EC imposed fines totaling 183,651,000 Euros on BP, Repsol, Cepsa, Nynäs and Galp for participating in a cartel for bitumen in Spain which was in violation of the European Community Treaty's ban on restrictive business practices. Between 1991 and 2002, these companies shared the market for bitumen (a natural viscous mixture of hydrocarbons used for road construction) and coordinated bitumen prices. BP was the first company that came forward with information about the cartel under the EC's 2002 Leniency Notice,[21] and subsequently received immunity from fines.[22]

II. Antitrust Enforcement in the US

Now, having analyzed the EC's scope of authorities, it is time to compare its role to that of the USFTC, its analogous organization in the US. The comparison will help us to assess whether the powers allocated to the EC exceed the reasonable range of delegation, and whether this phenomenon constitutes a legitimate source of concern.

In the US, antitrust law is enforced collectively by the Department of Justice Antitrust Division, the Federal Trade Commission Bureau of Competition (Trade Commission), and the state Attorney General (AG). The Antitrust Division is headed by the AG and "holds the

[19] *See* Regulation 1/2003, *supra* note 5, art. 22.

[20] The way the EC exercises this power is set out in the European Council Notice 2004/C 101/04, 2004 O.J. (C 101) 54 on the co-operation between the EC and the courts of the EU Member States in the application of Articles 81 and 82 of the European Community Treaty, *supra* note 5.

[21] EC Notice of 12 February 2002 on Immunity from Fines and Reduction of Fines in Cartel Cases, 2002 O.J. (C45) 3-5.

[22] Case COMP/38710, Bitumen Spain, Summary of Commission Decision 2009/C 321/ 08, 2007 O.J. (C 321) 15-17.

sole power to prosecute criminal antitrust violations and all federal antitrust actions in several sectors, including banking, telecommunications, and rail and air transportation."[23]

The Trade Commission is primarily responsible for enforcing the Federal Trade Commission Act 1914 which, *inter alia*, embraces the antitrust provisions of the Sherman Act 1890, the Clayton Act 1914, and the Robinson-Patman Act 1936.

The Trade Commission is also empowered to prevent persons, partnerships, or corporations (with certain exceptions) from using unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.[24] The Trade Commission is entitled to issue complaints and schedule hearings in case it believes that undertakings are engaged in unfair competition, and if it is decided at a hearing that the method of competition or practice in question is prohibited, the Trade Commission can order the termination of the method or activity. Alternatively, it may also refer the found evidence for criminal proceedings. If the undertaking fails to comply with the order to cease such activity, it can be held liable to pay a civil penalty of not more than 10,000 US dollars to the government.

The Trade Commission has the power to investigate persons, partnerships and corporations with regards to antitrust related activity. It has 10 regional offices throughout the US, which are authorized to initiate and conduct litigation.

Alongside with the Department of Justice and the Trade Commission, the federal courts (Federal District courts, twelve Circuit Courts of Appeals, and the US Supreme Court) play an important part in federal antitrust law, as "they have an exclusive jurisdiction to adjudicate claims"[25] under federal antitrust laws.

Antitrust enforcement in the US is different from that in EU due to the comparative disposition of powers among the Federal Trade Commission, Department of Justice and state antitrust authorities In the EU however, the power is centralized in the hands of the EC, with some of its authorities delegated to various Member States' competition authorities and national courts.

Obviously, the scope of powers delegated to the EC in the EU to implement European competition law is considerably grander than that held by the Trade Commission in the US. The question arises as to why the EC contains so much power. In order to understand this, we will examine the historical predisposition of the concentration of power within the EC.

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[23] Barry Hawk & Laraine Laudati, *Antitrust Federalism in the United States and Decentralization of Competition Law Enforcement in the European Union: a Comparison,* 20 FORDHAM INTERNATIONAL LAW JOURNAL 18, 24 (1996).

[24] US Code, Title 15 s. 45, art. a(2)(2007).

[25] *See* Hawk & Laudati, *supra* note 23, at 26.

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III. Historical Predispositions of European Commission's Role

It was Regulation 17 that first prescribed all major powers of the EC granted by the European Council in 1962. One might presume that it must have been beneficial to certain members of the Council to give so much power to the EC. In order to clarify this point, we need to research the structure of the EC as it was in 1962.

Usually, the members of the European Council consist of the Member States' heads of the state or government, plus the President of the European Commission (non-voting). In 1962, the countries which had signed the Council of Europe Statute were: Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, the United Kingdom, Greece, Turkey, Iceland, the Federal Republic of Germany, Austria and Cyprus.

At that time, the Prime Minister of Great Britain was Harold Macmillan, a Conservative party representative. During his term in office, the idea of free trade was introduced by Great Britain and supported by the Benelux countries of Belgium, the Netherlands and Luxembourg, which were all highly interested in developing trade with Great Britain. In 1960, seven of the European Community's founding members (United Kingdom, Denmark, Norway, Sweden, Austria, Switzerland and Portugal) signed the Stockholm Convention, creating the European Free Trade Association (EFTA).

France, together with other five member states, saw the economic and political risks of free trade. The economic element included the possibility that in the absence of a common tariff, the more protectionist countries would have a greater benefit than the liberal ones. The political side was that if free trade succeeded, the idea of the European Federation would be restricted.

Therefore, Europe was divided into six and seven in terms of trade at that time.[26] Great Britain was on one side of the camp, while France and Germany led the other. These were the historical circumstances in Europe when Regulation 17 granted the majority of powers to the EC related to competition. It appears that the "proponents" of the European Federation "outweighed" the free trade "advocates" by assigning centralized power to the EC, allowing it to apply unified competition law throughout Europe. Given that the Presidency of the European Council at that time (January-June 1962) belonged to France, it seems that such a scenario was the most probable.

However, there could have been other explanations as to why Regulation 17 gave so much power to EC with respect to competition law. According to Gerber, two conceptions of competition law dominated in Europe at that time. The German interpretation viewed competition as a juridical matter, where legal analysis had to define decision-making.

[26] Raquel Valls, *Origine et évolution du Conseil de l'Europe* (Origin and Development of the Council of Europe), EUROPEAN NAVIGATOR, available at: http://www.ena.lu/origine_evolution_conseil_europe-01-13962 (last accessed: 23 June 2011.)

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Other member states, including France, saw competition as a "political" matter. With the exception of Germany, most states did not place much importance on competition law implementation at the national level. When the Council adopted Regulation 17, it did not possess much experience with competition matters, and assumed that competition law would not play a very important role in the European Community, similar to its role at national levels. Thus, the Council

> [W]as willing to allow the EC to play a major role in shaping the competition law system, and the EC seized the opportunity…. Regulation 17 created a competition law system in which the enforcement and policy-making prerogatives were centered in the EC, and the role of national legal systems was marginalized.[27]

We have witnessed that the EC has been granted powers as a policy maker, investigator, jury and executioner since 1962. It is difficult to determine why exactly such a concentration of power has occurred. What is certain is that it has definitely led to certain problems and work overloads. The accession of ten new Member States from Central and Eastern Europe in 2004 coincided with the decentralization of power pursuant to the Council Regulation 1/2003, which entered into effect on 1 May 2004.

IV. Modernization in 2004

In accordance with Regulation 1/2003, national courts and national competition authorities have gained the right to apply Article 81(3) directly, whenever "the compatibility of an agreement with Article 81 arises or to categories of agreements by way of block exemption."[28] Also, after 2004 companies have been required to do a self-assessment of whether an agreement that restricts competition might benefit from this exemption.

In fact, the situation is as follows— national courts may apply the above stated articles, but only if a case falls within their jurisdiction, something that constantly appears to be an issue of argument. Unfortunately, some lawyers believe that there is a risk of inadequate application of competition laws by the courts due to their incompetence. In this regard, we agree with Eric Gippini-Fournier who argues that European competition law "at any rate is

[27] David Gerber, *The Transformation of European Community Competition Law?,* 35 HARVARD INTERNATIONAL LAW JOURNAL 98, 105-6 (1994), citing Ian Forrester & Christopher Norall, *The Laicization of Community Laws: Self-Help and the Rule of Reason: How Competition Law Is and Could Be Applied*, 21 COMMON MARKETING LAW REVIEW 11, 13 (1984).

[28] BRENDA SUFRIN & ALISON JONES, EC COMPETITION LAW 206 (2008).

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not intrinsically more complex than other highly technical areas of law which judges are called to apply on a daily basis."[29]

The NCAs that have the power to apply Articles 101 and 102[30] do not have the legal basis to do so in some Member States. For example, the European Commission for the Protection of Competition (CPC) of Cyprus took the view in a 2006 decision that it lacked the power to apply Articles 101 and 102 because national law made no provision to this effect, and the CPC had not been designated as a "competition authority" pursuant to Article 35 of Regulation 1/2003. Consequently, its decision was based exclusively on national competition law.[31]

Moreover, some authors believe that modernization did not change the situation much on a practical level. According to Riley:

> During modernization in 2004 the EC has only orchestrated a political masterstroke. It has given the impression of radical reform to the Member States by abolishing the notification procedure and offered decentralization provisions largely based on the existing and under-used National Competition Authorities and National Courts Notices, which in no way undermine its central role in the development of EC competition policy or enforcement of European competition law.[32]

So, notwithstanding the modernization of the EC's powers in 2004, the urge for further decentralization is still found in many scholarly sources.

C. Who is Concerned and Why?

We have discussed the historical predispositions of the EC's role and briefly covered its modernization in 2004. After all, it still possesses investigative, policy making, *amicus curiae* and executive powers when it comes to competition law enforcement in the EU. Theoretical and practical concerns are expressed below, with regards to the *status quo* (present state of affairs).

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[29] *See* Gippini-Fournier, *supra* note 18, at 124.

[30] *See* Regulation 1/2003, art. 5.

[31] *See* Gippini-Fournier, *supra* note 18, at 102.

[32] Alan Riley, *EC Antitrust Modernization: The European Commission does very nicely – thank you! Part 1: Regulation 1 and the notification burden*, 24 EUROPEAN COMPETITION LAW REVIEW 604 (2003).

I. Theoretical Concern

A concentration of power upsets its balance, as introduced by Montesquieu. Though this theory relates to governmental policy, it may be successfully applied to the business world as well. For example, Thomas Christiansen is concerned that "the EC's need to be accountable simultaneously to the Member States and to 'the citizens' (multiple accountability) and its dual function of providing executive government and public administration (politicized bureaucracy) for the European polity"[33] creates conflict in its performance. The EC is said to combine "features of four organizational ideal-types." This creates a mixed role for the EC, which disturbs the balance of power and risks a failure of the enforcement of competition law in an efficient manner.

II. Practical Concern

Practically, such concentration bothers companies conducting business in the territory of the EU, US, national courts and competition authorities, and finally, in the EC itself.

1. Businesses

From the vantage point of businesses, the multiple roles of the EC create the risk of limiting their right to conduct business in the manner of free trade. The power of the EC to appear uninvited, conduct investigations, issue verdicts and impose fines comes close to that of the Communist Party, with the difference that the latter also included mass persecutions. The companies wish to be protected from an authoritative view of their activity, without the necessity to dispute their rights in court, implying undesirable additional expenses.

2. European Commission

Prior to 2004, the EC itself stood for modernization and decentralization, "leading the drive" to enact modernization proposals.[34] Obviously, economic and political reasons have prompted the EC to give away the power to exclusively apply Article 101(3). It is natural that slowly, but surely, the EC realizes that sole execution of European competition law is a wealth of work alone. The EU has expanded grandly since its creation, and consequently, so have the number of cases considered by the EC. In order to critically assess this particular aspect of concern, we will analyze the work load of the EC in 2007.

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[33] Thomas Christiansen, *Tensions of European Governance: Politicized Bureaucracy and Multiple Accountability of the European Commission,* 4 JOURNAL OF EUROPEAN PUBLIC POLICY 73 (1997).

[34] David Gerber, *Modernizing European Competition law: A Developmental Perspective*, 22 EUROPEAN COMPETITION LAW REVIEW 121, 125 (2001).

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First of all, it is necessary to mention that the competition department of the EC, or the Directorate General for Competition, headed by Philip Lowe, is subdivided into 7 directorates, each of which is headed by a Director. The staff of the Directorate General consists of 420 "functionnaires," 50 percent of who are professionals (mainly lawyers and economists). About half of these work on antitrust matters, and other half state aid issues. There are 25 additional professionals who deal with secondment (detachment of persons from the competition authorities of the EU for temporary assignment to the EC). Finally, there are also rapporteurs who work for the Directorate General.[35]

As an example of the work volume for these 420 people, we will look how many cases the EC decided upon according to the statistics published in the Annual Report of the European Commission for the year 2007:

- Antitrust cases - 5 final decisions, 41 undertakings fined;[36]
- Merger cases – 402;[37]
- State Aid - 777 notified cases and 629 final decisions;[38]
- Liberalization and International Cooperation - negotiations with the Korean Fair Trade European Commission, Free Trade Agreement in India, and leadership of the International Competition Network (ICN).[39]

The aforementioned figures demonstrate the work surplus of the EC. As a matter of fact, the number of cases investigated and decided by the EC increases every year. The negative consequence of such work overload is the accumulation of notifications and undecided cases. The procedural time frames also increase. Overall, this leads to the inefficient implementation of the roles delegated to the EC. Hence, such concentration of power affects its efficient functioning. Therefore, "to decrease its unwieldy workload,"[40] the EC needs to further delegate its power to other institutions, such as NCAs and national courts.

Although the NCAs and national courts recently gained full authority to apply the Articles 101 and 102, there are still procedural problems in adjudicating the claims and application of European competition law. The partial submission of power by the EC in 2004 had a positive decentralization effect; however, the EC's role still prevails.

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[35] *See* Hawk & Laudati, *supra* note 23, at 31.

[36] Commission of the European Communities, *Annex to the Report from the Commission: Report on Competition Policy 2007* (final) 368 COM (2008).

[37] *Id*. at 5.

[38] *Id*. at 6.

[39] *Id.* at 22.

[40] *See* Hawk & Laudati, *supra* note 23, at 36.

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D. Conclusion

We have assessed the role of the EC in the creation and implementation of European competition law. We have determined that the focus of too much power in the hands of one organization can indeed create legitimate concerns for several parties on a number of levels.

We have analyzed the present role of the EC in detail, and determined that it is the driving force in the enforcement of competition law in the EU. The EC implements competition policy in the areas of antitrust, mergers, cartels, liberalization, state aid and international cooperation. It also enjoys a number of investigative powers (e.g. inspection in business and non-business premises, written requests for information, etc). Further, it is empowered to order undertakings to cease activity breaching Articles 101 and 102 of the TFEU, and to impose fines in such regard. Finally, it has the right to observe court proceedings related to competition, given its *amicus curiae* status.

We have briefly considered antitrust enforcement in the US, and compared the size of powers delegated to the USFTC in antitrust matters to the scope of EC's authorities in relation to European competition law. The brief comparison has been enough to demonstrate that the powers given to the latter greatly surpass those given to the Trade Commission.

We have also examined the historical predisposition of the concentration of power in the EC and explained the reasons for its modernization in 2004. Finally, we have witnessed that notwithstanding the latter, the former still provokes certain work overloads and problems. We have considered relevant scholarly sources connected with the role of the EC and have derived our conclusions that the focus of so much power in the hands of the EC constitutes the legitimate source of concern for several parties.

However, the scale of such concern depends upon which particular party one belongs to. This is because the interests pursued define one's position. The main motives behind the interest to decentralize the EC's power are: work overload of the EC, a mix in its political role, inefficiency in the implementation of competition law and the countering of free trade. In order to restore the balance of powers and limit the legitimate concerns described above, the decentralization of the EC's power in the future will be inevitable.

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