Regulation 1/2003: a modernised application of EC competition rules

In February 1997, DG Competition started internal works on the reform of Regulation 17. The starting point of these works was a threefold finding: enlargement will take place in the near future, the notification system is no longer an effective tool for enforcing competition rules and the development of Community competition law allows companies to assess themselves the legality of their agreements and practices. It quickly became obvious that a simple improvement of the existing administrative procedures would not suffice to face the upcoming challenges competition law was facing and a profound change was required to ensure an efficient protection of the rules of the Treaty in an enlarged Community.

These considerations led to the publication in April 1999 of the White Paper on modernisation of the rules implementing Articles 81 and 82 of the Treaty. It was followed by an intense public debate in which not only Community institutions but also industry, lawyers and academics took part. The various contributions made were taken into account by the Commission in drafting its formal proposal. That proposal, which has now been adopted without major changes by the Council, will allow an efficient enforcement of the competition rules by focussing the action of the Commission on the serious violations of the rules and by involving more national authorities and courts in the enforcement of Community rules.

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I. Introduction

On 16 December 2002, the Council adopted a new Regulation on the implementation of Articles 81 and 82 EC: Regulation 1/2003 (OJ 2003, L1/1). This Regulation replaces Regulation 17, which for over 40 years determined the application of Articles 81 and 82 EC by the Commission and, to a lesser extent, by the national competition authorities. Because the enforcement system as spelled out in Regulation 17 could jeopardise the effective enforcement of the EC competition rules in an enlarged European Union, it was decided to modernise the system.

Central to this modernisation is the abolition of the Commission's exemption monopoly and the introduction of the legal exception system. The former modification will increase the application of Articles 81 and 82 EC by national competition authorities and by national courts. It will thus contribute to a wider application of EC competition rules. Of course, a system of more enforcers asks for more co-ordination within the system. Therefore, Regulation 1/2003 establishes a network of European competition authorities and it enhances the cooperation between the competition authorities and the national courts. Complementary to this enhanced enforcement, the legal exception system will allow the European competition authorities to focus their action on the most severe infringements of Articles 81 and 82 EC. As a result, not only will Regulation 1/2003 allow for more enforcement of EC competition rules, it will also increase the efficiency of that enforcement. In doing so, Regulation 1/2003 constitutes a necessary contribution to welfare of consumers and the competitiveness of European business.

II. Towards a system of more vigorous enforcement

A. The emergence of a new antitrust culture in the EU

I. The legal exception system: a new environment for enforcers and companies

The central feature of Regulation 1/2003, as set out in its Article 1, is the direct application of Article 81(3). It implies that undertakings are no longer called upon to notify agreements to the Commission with a view to obtaining an exemption decision. Under the new regulation, agreements that fulfil the conditions of Article 81(3) are legally valid and enforceable without the intervention of an administrative decision. Undertakings will be able to invoke the exception rule of Article 81(3) as a defence in proceedings conducted by the Commission, national competition authorities and national courts.

The new system will change the focus of the Commission's enforcement action. The Commis-
sion will in future concentrate on pro-actively investigating serious infringements, following complaints or on its own initiative. The new culture does however not stop at the Commission. It crucially involves undertakings and their legal advisors. The direct application of the exception rule gives them greater responsibility.

Under Regulation 17, the assessment that undertakings carried out of their agreements could focus on the notification process. Under the new system, it must be carried out with a view to ensuring that an agreement or practice complies with the law as such, i.e. demonstrably fulfils the conditions of Article 81(3). In reality, given the well-known problems of the notification system, many undertakings and law firms actually moved to this approach a long time ago. Under the new regulation however, it will be clearly the line to follow for everybody.

Regulation 1/2003 abolishes the function of examining agreements submitted for authorisation. Among the types of decisions taken by the Commission (Articles 7 to 10) there is none to substitute for the exemption decisions of the past. In particular, decisions that make a finding of inapplicability (Article 10) are designed to address the issue of coherent application and can only be taken by the Commission on its own initiative, not on application (see also point B.1.c on this type of decisions). The focus on pro-active enforcement also applies to the Member States’ competition authorities. The basic types of decisions they adopt for the application of Articles 81 and 82 are enumerated in Article 5 of the Regulation. Under this provision, no exemption decisions or decisions with similar effects can be taken by Member States’ competition authorities. An authority may, in a decision closing a file, find that there are no grounds for it to act. This statement will have no binding effect on other public enforcers or on national courts.

2. An adequate level of legal certainty

The abolition of notifications does not entail a loss in legal certainty for companies. This perception is mistaken. By extending validity and enforceability to all agreements that fulfil the conditions of Article 81(3), the new regulation ensures legal certainty for a large number of agreements that remained in a legal limbo under the old system insomuch as only a minuscule number of agreements were covered by a formal exemption decision of the Commission.

For undertakings to verify that their behaviour complies with the applicable legal requirements is the normal practice in many areas of law. In these circumstances, legal certainty does not depend on a certain type of procedure, but on the standards for assessment and the orientation provided by the framework of legislative and/or regulatory texts, interpretative notices, case law and practice. This is the reason why the Commission has, alongside the reform of the implementing regulation, overhauled the totality of block exemptions and produced extensive guidelines on vertical and horizontal restrictions in recent years. It intends to continue putting emphasis on this work (see below for the notices envisaged in the phase until the new Regulation becomes applicable).

Finally, the Commission will remain open to discuss specific cases with the undertakings where appropriate. A limited number of individual cases may present novel or unresolved questions for the application of Articles 81 or 82. The Commission is therefore preparing a Notice which will set out the circumstances under which guidance in the form of written ‘opinions’ could be provided by DG COMP. Such opinions would be published. They could not have any other than a de facto effect on other enforcers.

Issuing opinions is not excluded by Regulation 1/2003, as expressed in Recital 38. It is however clear that the Regulation gives priority to enforcement tasks. The Commission will therefore ensure that the preparation of opinions will only be envisaged where this can be reconciled with its enforcement tasks. To be faithful to the new Regulation, the Commission will have to build a selective practice that limits opinions to such situations where a genuine need for guidance on unresolved questions exists. Undertakings and lawyers can contribute to this by limiting requests to situations that — on critical scrutiny — appear appropriate. By no means should this instrument be mistaken for a substitute of the notifications of the old system.

B. New instruments for an effective enforcement

1. New types of decision

a) Article 7: clarifying the power to impose structural remedies

Article 7, which relates to prohibition decisions, contains two clarifications. First, it makes explicit the Commission’s power to impose any remedy of a behavioural or structural nature, which is proportionate to the infringement and necessary to bring it effectively to an end. In accordance with the principle of proportionality it is made clear that the Commission can only impose a particular remedy,
if no other equally efficient remedy is available. Where several equally efficient remedies are available, it is for the undertaking concerned to make the choice. Secondly, it is made clear that the Commission has the power to adopt decisions, finding that an infringement has been committed in the past, provided that it has a legitimate interest in doing so. Such a legitimate interest may for example exist where there is a risk of repetition of the terminated infringement or where a decision is necessary in order to develop Community competition policy or to ensure its consistent application.

b) Article 9

The new Council Regulation creates a new type of decision: decisions accepting commitments. These decisions should allow the Commission to handle efficiently and swiftly cases where companies offer commitments sufficient to solve the competition problem identified. Commitment decisions would close the Commission's proceedings without making a finding of infringement and without stating the compatibility of the agreements with Article 81 or 82. They would merely make the commitments legally binding on the parties so as to ensure that they will effectively be complied with. Substantial fines and periodic penalties are foreseen by the Regulation in cases where companies are found to be in breach of the commitments. Furthermore, claim for execution of the commitments or damages for their in-execution could be brought by victims before national courts. Commitment decisions would obviously only be appropriate in cases where the Commission does not intend to impose a fine.

c) Article 10: set policy and ensure coherence

Article 10 equips the Commission with the power to adopt decisions finding that an agreement or practice does not infringe Articles 81 or 82. Regulation 1/2003 reserves this power to the sole Commission (see Article 5 for the types of decisions by national competition authorities). Decisions pursuant to Article 10 have the effects laid down in Article 16, i.e. national courts and competition authorities may not adopt decisions that would run counter to a decision of the Commission on the same case. However, the Commission can only take such decisions on its own initiative and where the Community public interest in the application of Articles 81 and 82 so requires.

Article 10 has a specific function in the framework of the new regulation. Decisions pursuant to Article 10 are instruments by which the Commission is able to ensure coherent application, given the effect of these decisions on the other enforcers. However, the Commission does not have to wait that a problem of coherent application arises to use the instrument. It may adopt a decision pursuant to Article 10 with a view to define enforcement policy (see Recital 14 in fine).

The inclusion of the words 'in the application of Articles 81 and 82' clarifies that 'Community public interest' is strictly linked to the public interest of effective and coherent implementation of the competition rules; it cannot be construed as relating to wider 'public policy' goals. Conversely, the adjective 'public' is not without meaning. It must be seen in conjunction with the fact that the Commission adopts Article 10 decisions on its own initiative only. By this, the regulation intends to exclude that a 'private interest' could trigger the adoption of an Article 10 decision. Such decisions are thus not intended to be a replacement for the exemption decisions of the old system or to function as an instrument to 'bless' individual agreements absent any issue of coherent application or policy.

2. New powers of investigation backed up by more deterrent fines

In order to ensure an efficient enforcement of competition rules, it was also necessary to adapt the Commission's investigative powers. The new regulation improves slightly on the current powers without however increasing them substantially. Three new aspects are worth being mentioned.

Firstly, the officials authorised by the Commission will be empowered to seal premises for the period and to the extent necessary for the inspection. This will improve the effectiveness of the inspections, in particular when they are being carried out during several days.

Secondly, the power to ask oral questions during an inspection has been dislinked from documents: the limit will be the scope of the investigation as defined in the decision or in the mandate. This remains subject to the case-law of the Community Courts relating to non-self-incrimination (see e.g. Cases 374/87 Orkem and T-112/98 Mannesmann-röhren Werke).

Thirdly, the officials authorised by the Commission will be empowered to enter non-business premises when there is a reasonable suspicion that books and other records relevant for the inspection are being kept there. This power will be exercised only where the suspected violation is serious and will be exercised under the control of national courts. Both for inspections at business and at non-business premises, the case-law of the Court of Justice in the recent Roquette Frère case (C-94/00) has been codified in the Regulation.
In order to make sure that these inspection powers can be carried out effectively, sanctions for breaches of these rules by the investigated companies have been increased up to 1% of their total turnover for fines and up to 5% of their average daily turnover for periodic penalties.

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In the new system, the Commission will remain an enforcer. The new Regulation does by no means withdraw the Commission from the enforcement field. On the contrary, it gives the Community institution more effective tools to carry out the function it has been entrusted with by the Treaty, i.e. ensuring that the principles of Articles 81 and 82 are respected and that private impediment to the movement of goods and services do not replace State barriers. This in itself would however not have been sufficient to maintain a high level of protection of competition in an enlarged Community. It was essential to also involve more national authorities and courts in the application of Community competition rules.

III. Towards more decentralised application of Community law

A. More application of EC law and more level playing field for companies

One of the main concerns expressed during the reform process by the European Parliament, which was echoed by industry, was the risk that the abolition of the Commission’s monopoly over Article 81(3) would lead to re-nationalisation of Community competition policy. It was in order to counter this risk and to ensure that the reform would lead to real application of Community competition law at national level that the Commission proposed in Article 3 to regulate the relationship between Community competition law and national competition law. Article 3 as adopted by the Council imposes two fundamental obligations on the courts and competition authorities of the Member States.

First, Article 3(1) imposes an obligation to also apply Articles 81 and 82 where national competition law is applied to agreements and abusive practices which may affect trade between Member States. This means that whenever an agreement or practice is subject to Articles 81 and 82, national competition law cannot be applied on a stand-alone basis. This obligation ensures that cases are argued from the outset on the basis of Community law and that the various mechanisms of the network are effectively applied, including the various mechanism that aim at ensuring consistent application. In this regard it is particularly important to take note of the relationship between Article 3 and Article 11(6) according to which the competence of national competition authorities to apply Articles 81 and 82 is withdrawn when the Commission opens proceedings in the same case. In that case the national competition authorities can no longer comply with their obligation under Article 3(1) to apply Community competition law, which means that any case based on national law must also be closed. The only exception is where the application of stricter national competition law is not excluded. This question is covered by the second fundamental obligation of Article 3.

Article 3(2) oblige the competition authorities and courts of the Member States not to prohibit under national competition law agreements, decisions of associations of undertakings and concerted practices, which may affect trade between Member States, but which are not prohibited by Community competition law. Accordingly, an agreement, which is legal under Article 81 and 82, cannot be prohibited by national competition law. This convergence rule, which extends the current primacy rule developed by the Court of Justice in *Walt Wilhelm* to the non-prohibition side of Article 81(1), creates a level playing field for agreements throughout the internal market. Member States, on the other hand, are free to apply stricter national competition laws to unilateral conduct engaged in by undertakings. The Council did not accept to extend the convergence rule into this area. It follows that in this field national law, which is stricter than Article 82, can be applied on a stand-alone basis.

Finally, it should be noted that Article 3 does not in any way limit the scope of application of the fundamental principle of primacy of Community law. Agreements and practices that are prohibited by Articles 81 and 82 cannot be blessed by national law.

B. More involvement of national authorities and courts

1. Involvement of national authorities: the network

In an enlarged Community, it was also essential to involve national public enforcers in the application of the rules. This is what the Council regulation has done by empowering national competition authorities to apply Article 81 as a whole and Article 82. Public enforcement is therefore not only entrusted to the Commission but also to
twenty-five competition authorities. In order to facilitate co-operation, a network has been set up: the ECN — European Competition Network.

The new system will be a system of parallel competences. Unlike in the merger field where the Member States are exclusively competent below a given threshold and the Commission alone can deal with cases above that threshold, Regulation 1/2003 does not preclude the Commission from dealing with any case affecting trade between Member States. This is a requirement set out by the Treaty as interpreted by the settled case law of the Member States. This is a requirement set out by the Treaty as interpreted by the settled case law of the Court of justice (see e.g. case C-344/98 Masterfoods). It will do so to enforce the rules efficiently where needed but also to develop Community competition policy and to ensure its consistent application throughout the Community.

National authorities can take up any case provided that they are able to collect the evidence necessary, to bring the infringement effectively to an end and to sanction it in an appropriate way. Indications which will be given on case allocation in the future Commission notice on the functioning of the network will therefore be indicative and not legally binding. This flexibility is needed in order to ensure that competition infringements are prosecuted efficiently.

The Council Regulation also creates mechanisms of mutual information and consultation so as to ensure a consistent application of Community rules. In last instance, if there is a persistent disagreement on the allocation of a given case or the adequate outcome of a certain procedure, the Commission may open proceedings with the effects of relieving national authorities from their competence to apply Community law in that particular case (Article 11(6)). This mechanism should however be applied exceptionally, where no other satisfactory solution can be found.

Finally, the Council Regulation creates the basis for an increased horizontal co-operation between national authorities: it empowers them to exchange and use in evidence information collected but also to conduct investigations on behalf of one-another for the application of Articles 81 and 82.

2. Involvement of national courts

Although the Court of Justice established the direct effect of Articles 81(1) and 82 EC already a long time ago, national courts are seldom seen to apply those provisions. Part of the explanation of this limited application of EC competition rules by national courts lies in the exclusive power for the Commission to apply Article 81(3) EC. Indeed, any private action before a national court may be paralysed by a notification by the defending undertaking of its agreement to the Commission. Because of the binding effect of the latter’s decision on all national authorities, the national court would have to suspend the proceedings pending before it until the Commission has taken its decision.

Of course, this can only be part of the explanation, because subsequent to the Commission’s decision, one could start a complementary proceeding before a national judge in order to obtain damages for the infringement of EC competition rules, something a competition authority cannot grant. And still, this type of private enforcement remains limited. It was not the ambition of Regulation 1/2003 to tackle all issues which could remedy the limited private enforcement. However, it is believed that the abolition of the Commission's exemption monopoly and the confirmation that national courts are empowered to apply Articles 81 and 82 EC, constitute a first necessary step to improve the private enforcement of EC competition rules.

In order to assist the national courts in the application of EC competition rules, Regulation 1/2003 confirms the existing forms of co-operation between the courts and the Commission as they follow from Article 10 EC. The national court may thus ask the Commission for its support in the application of Articles 81 and 82 EC (see also the Commission’s notice of 1993 on co-operation with national courts). In addition, the Regulation also provides for the possibility both for national competition authorities and for the Commission to assist national courts as amicus curiae. To that end, the competition authorities may submit written and — with the permission of the court — oral submissions to the court on the case pending before it. This type of active assistance to national courts will undoubtedly contribute to the full and coherent application of EC competition rules. The codification of the Masterfoods case-law in Regulation 1/2003 constitutes a guarantee for coherent application of EC competition rules as it prevents national courts from taking a decision which would run counter to a Commission decision in the same case and it imposes on national courts a duty to avoid taking a decision which would conflict with a decision the Commission intends to take.

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The Council Regulation will promote the application of one single set of rules throughout the Community by the Commission, national judges acting as ‘Community judges’ and national competition authorities embodied in a network of
close co-operation. It brings thereby Community law closer to the citizen and will contribute to strengthening a common competition culture in the Union.

IV. Conclusion

Regulation 1/2003 takes a firm step in the direction of stronger and more efficient enforcement of EC competition rules. The multi-faced co-operation between the Commission, the national competition authorities and the national courts will ensure that the new enforcement system produces also coherent enforcement. It is such coherence that can establish a solid legal environment in which European business can function adequately.

Regulation 1/2003 is a central, but only a first phase in the modernisation process. Before the Regulation will become applicable on 1 May 2004, European business will have to prepare itself for the new environment, Member States have to set in place all necessary instruments in order to be able to effectively apply the new Regulation and the Commission has to adopt the appropriate implementing measures and a number of supporting notices. And even that will not complete modernisation, because modernisation is more than just rules. Modernisation establishes a new partnership amongst public enforcers and between those enforcers, industry and consumers. Modernisation is thus a common responsibility for the years to come.