Regulation 1/2003 and the Modernisation Package fully applicable since 1 May 2004

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A. Overview of the new rules

As from 1st May 2004, the new enforcement system for Articles 81 and 82 of the Treaty is fully applicable. With the entry into application of Regulation 1/2003 ([1]), Regulation 17/62 has been repealed.

The most central feature of the new Regulation is the direct application of Article 81(3) of the Treaty. Under Regulation 1/2003, agreements that fulfil the conditions of Article 81(3) are legally valid and enforceable without the intervention of an administrative decision. The notification and exemption system of Regulation 17 is no longer in force.

Furthermore, the new Regulation represents a great step forward in terms of establishing a level playing field for agreements in the internal market. For the first time in European antitrust history, Article 3 of Regulation 1/2003 obliges Member States' enforcers to apply EC competition law to all cases where trade between Member States may be affected and establishes Article 81 as the single common standard for the assessment of agreements by all enforcers in the European Union.

The new Regulation also paves the way for a greater role of Member States' courts and competition authorities in the enforcement of Articles 81 and 82 and at the same time introduces mechanisms of cooperation between the Commission and these enforcers. In particular, the Commission and the national competition authorities have jointly set up the European Competition Network (ECN) as a platform for close cooperation.

In order to complement Regulation 1/2003 and following extensive consultations, the Commission adopted the 'Modernisation Package' consisting of the new Commission Regulation on details of its antitrust procedures as well as six new Commission notices aimed at providing guidance on a range of aspects that are of particular significance in the new enforcement system. These documents are shortly presented hereafter:

(1) Commission Regulation 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty ([2])

The Commission Regulation contains detailed rules regarding, in particular, the initiation of proceedings, oral statements, complaints, hearings of parties, access to the file and the handling of confidential information in antitrust procedures conducted by the Commission.

(2) Commission Notice on cooperation within the network of competition authorities ([3])

This notice sets out the main pillars of the cooperation between the Commission and the competition authorities of the Member States in the European Competition Network (ECN). The notice sets out the principles for sharing case work between the members of the network. In this respect the notice follows the Joint Statement of the Council and the Commission which was issued on the day when Regulation 1/2003 was adopted. Particular arrangements have been found for the interface between exchanges of information between authorities pursuant to Articles 11(2) and (3) as well as 12 of Regulation 1/2003 and the operation

([1]) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, pages 1-25, Regulation as amended by Regulation (EC) No 411/2004 (OJ L 68 of 6.3.2004, p. 1).

([2]) OJ L 123 of 27.4.2004, pages 18-24.

([3]) OJ C 101 of 27.4.2004, pages 43-53.

of leniency programmes. ([1]) National authorities of the Member States ([2]) have signed a statement in which they declare that they will abide by the principles set out in the Commission Notice.

(3) Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC ([3])

The notice is intended to serve as a practical tool for national judges who apply Articles 81 and 82 in conformity with Regulation 1/2003. It assembles the relevant case law of the Court of Justice, thus clarifying the procedural context in which national judges are operating. Particular attention is given to the situation in which the national court deals with a case in parallel with or subsequent to the Commission. Regulation 1/2003 for the first time establishes a firm legal basis for national judges to ask the Commission for an opinion or for information it holds. In addition, the regulation created the possibility for the Commission to submit written and oral observations to the national courts in the interest of coherent application. The notice spells out the modalities of those co-operation mechanisms.

(4) Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty ([4])

This notice starts by general information on the work-sharing of the different enforcers and invites potential complainants to make an informed choice of the authority where they lodge their complaint (complaint with the Commission, a national court or national competition authority) in the light of the orientations given. The largest part of the notice contains explanations on the Commission's assessment of complaints in the field of antitrust and the procedures applicable. The notice also includes an indicative deadline of four months, within which the Commission endeavours to inform complainants of its intention to conduct a full investigation on a complaint or not.

(5) 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) ([5])

Regulation 1/2003 pursues the objective that the Commission refocus its enforcement action on the detection of serious infringements. The abolition of the notification system is a crucial element in this context. However, it also seems reasonable that in a limited number of cases, where a genuinely novel question concerning Articles 81 or 82 arises, the Commission may, subject to its other enforcement priorities, provide guidance to undertakings in writing (guidance letter). The notice sets out details about this instrument.

(6) Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty ([6])

The effect on trade concept is a jurisdictional criterion, which determines the reach of Article 81 and 82. It also determines the scope of application of Article 3 Regulation 1/2003. Against this background, Member States' delegations in the Council expressed a strong desire for an interpretative notice on this notion. The notice describes the current case law and does not in any way seek to limit the jurisdictional reach of Articles 81 and 82. The notice sets out a rebuttable presumption that trade between Member States is not capable of being appreciably affected when the aggregate annual Community turnover of the undertakings concerned in the products covered by the agreement does not exceed 40 million Euro and the (aggregate) market share of the parties on any relevant market within the Community affected by the agreement does not exceed 5%.

(7) Guidelines on the application of Article 81(3) of the Treaty ([7])

The power for the courts and competition authorities of the Member States to apply Article 81(3) is one of the main pillars of the modernisation reform. The notice develops a framework for the

([1]) See on this topic the article by Stephen Blake and Dominik Schnichels in this edition, page...
([2]) On 1.5.2004, National Authorities of almost all the Member States have signed the statement.
([3]) OJ C 101 of 27.4.2004, pages 54-64.
([4]) OJ C 101 of 27.4.2004, pages 65-77.
([5]) OJ C 101 of 27.4.2004, pages 78-80.
([6]) OJ C 101 of 27.4.2004, pages 81-96.
([7]) OJ C 101 of 27.4.2004, pages 97-118.

application of Article 81(3) and provides guidance on the application of each of the four cumulative conditions contained in this Treaty provision. For example, the notice lists various types of efficiencies that may constitute objective economic benefits within the meaning of the first condition. It also explains the notion of consumers and the requirement that they must receive a fair share of the efficiency gains resulting from the agreement. The Guidelines build on and further develop the economic approach that was introduced in the guidelines on vertical restraints and horizontal cooperation agreements ([1]). The anti-competitive aspects of the agreement are analysed under Article 81(1) and the pro-competitive elements are analysed and balanced against the anti-competitive elements under Article 81(3).

B. Frequently Asked Questions on the new enforcement system

1) On the Network of competition authorities

How is the work sharing between the Commission and the national competition authorities organised in the network?

The system of Regulation 1/2003 is a system of parallel competences in which all enforcers have the power to apply Articles 81 and 82. In that system, several authorities may be in a position to act against a given infringement, on their own or in parallel. This is important as under the new Regulation, the competition authorities cooperating in the network are expected to focus their action on the most serious infringements of the competition rules, which are often secret and difficult to detect.

If one authority that would in principle be well placed to deal with such a case is temporarily not able to do so (for instance because it has no more resources available), it is in the interest of effective enforcement that another well placed authority can step in. In a more rigid system, the victims of the infringement could do nothing but wait for the first authority to recruit and train new staff or otherwise increase its capacity.

Is it 'the Network' that takes decisions on case allocation?

No. The Network provides the framework for efficient work sharing between the European competition authorities through mutual information about new cases, the possibility to exchange information and grant assistance. The Network as such does however not take any decisions on the division of work between the enforcers. Nor do the Commission or the national competition authorities take decisions 'referring' cases from one to another. The individual Network members start, conduct and possibly close a procedure under their own responsibility, on the basis of Regulation 1/2003, in particular its Article 13, or on the basis of their respective procedural rules.

Does that mean that any authority can deal with any case — could for instance the Finnish competition authority seize itself with an infringement that happens in Greece?

Whilst there are no hard rules for the division of case work — for good reasons — the network notice clarifies that an authority is well placed to deal with a case if three conditions are fulfilled: (1) the behaviour of the parties has substantial effects for the territory in which the authority is based, (2) the authority can effectively gather all relevant information and (3) the authority can effectively bring the infringement to an end. In other words, there needs to be a material link between the infringement and the territory of a Member State for that Member State's competition authority to be well placed.

From a practical point of view this means that in the example given the Finnish authority would not seize itself with an infringement that happens in Greece, as there are already no effects in the Finnish market, not to mention the difficulty of gathering the relevant information and bringing the infringement to an end. On the other hand, if an infringement concerned for instance a shipping line between Italy and Greece, the Greek as well as the Italian competition authority might be well placed to deal with the case, depending on the circumstances.

Does the system not create a risk of forum shopping by complainants?

Forum shopping by complainants is by nature limited: a complainant has always an interest to bring its case before the authority which is in a position to deal effectively with the case. If there are several well placed authorities, it might create a kind of competition between them: this is not a problem and might even contribute to a better enforcement of the competition rules.

([1]) See Commission Notice on Guidelines on vertical restraints, OJ 2000 C 291, page 1, and Commission Notice on Guidelines on the application of Article 81 of the Treaty to horizontal cooperation agreements, OJ 2001 C 3, page 2.

Naturally, it needs to be ensured that there is no duplication of work. The information mechanisms in the European Competition Network allow its members to detect parallel investigations. If thus a complaint is lodged with the Commission and a national authority, only one of these authorities will deal with the case. Regulation 1/2003 makes express provision for the rejection of complaints on the ground that another authority is dealing or has already dealt with a case.

How will the authorities ensure that the confidentiality of information exchanged within the Network be protected?

Under Regulation 1/2003 all competition authorities are bound by a common standard of professional secrecy that ensures protection of business secrets and other confidential information. Whilst the authorities are entitled to exchange information amongst themselves, they must protect the legitimate interests of the market operators concerned.

It is important to note that the same strict standard already applied under the old enforcement system, where the competition authorities of the Member States were fully informed about the cases dealt with by the Commission, including business secrets and other confidential information. Similarly, the Commission had the power to obtain all types of information from the Member States. This system never created any substantial problems. The new Regulation introduces the additional possibility of exchanging information between national competition authorities. Also this information comes under the common standard of professional secrecy.

In practice, the transmission of confidential information between authorities will take place on the basis of encrypted mail or other secure ways of transmission.

Why can competition authorities exchange information amongst themselves and why can they even use the information under certain circumstances as evidence in their cases?

The new system represents a great step forward in terms of establishing a level playing field for agreements in the internal market. In particular it ensures that the EC competition rules apply to all cases affecting trade between Member States. Moreover, it introduces a single standard for assessing agreements.

It is difficult to see why, for the application of this common legal standard to cases which by their very nature have cross-border implications (otherwise they do not fall within the reach of EC competition law), the cooperation between the competition authorities in the internal market should be obstructed by traditional rules prohibiting for instance the exchange of information with 'foreign' administrations.

The procedural rules of the Member States are different. Is there not a risk that the exchange of information and use by another authority would deprive an undertaking of its rights of defence?

Of course information to be used in evidence must be legally obtained by the authority that collects it and it can only be exchanged respecting the safeguards established by the Regulation. However, the mere fact that there are differences in the procedural rules of the Member States should not prevent the exchange for the purpose of applying the common rules on competition. Procedural rules of all Member States and at Community level respect high standards of protection of the rights of defence under the control of independent courts. They are thus mutually compatible and Regulation 1/2003 takes a clear stance that the remaining divergences should not stand in the way of closer cooperation between authorities in the internal market.

How can companies that have applied for leniency with one authority be sure that the information provided by them will not be used by other authorities to start proceedings against them?

Leniency applicants are well protected against investigations from other authorities. The Notice on cooperation within the Network of competition authorities foresees that information exchanged within the Network on newly opened cases will not be used by other members of the Network to start their own proceedings. National competition authorities have agreed to abide by this principle (see above footnote 5).

Moreover information submitted by leniency applicants and information collected by the authority on the basis of the application will not be passed on to any other authority without the consent of the applicant except in two situations:

- Where the applicant has also applied for leniency in the same case before the receiving authority;

- Where the receiving authority commits not to use the information transmitted or any information gathered after the date of transmission to impose sanctions on the leniency applicant or on its staff.

How will national competition authorities be bound by the principles set out in the Commission notice?

The national competition authorities are normally not bound by a Commission Notice which only creates legitimate expectations as far as the Commission is concerned. However, with regard to the Notice on the cooperation within the Network of competition authorities, the vast majority of Member States' competition authorities have signed a declaration that they will abide by the principles set out in the Notice. The mutual information in the Network is organised in such a way that only those authorities who have committed to these principles receive information on leniency cases. In order to obtain detailed information contained in a leniency application, the receiving authority will have to sign a declaration that it will not use the information transmitted or any other information gathered thereafter to impose sanctions on the leniency applicant.

In this respect it should also be noted that the competition authorities that operate leniency programmes have a clear interest not to undermine the functioning of their programmes by circulating the leniency information without appropriate guarantees for their leniency applicant.

2) On direct application of Article 81(3)

Do the Guidelines on the application of the exception rule of Article 81(3) not impose too heavy burdens on undertakings?

The Guidelines strike a reasonable and necessary balance between on the one hand the application of the prohibition rule of Article 81(1) and on the other hand the exception rule of Article 81(3). It is important to keep in mind that in recent years the application of the prohibition rule of Article 81(1) has been re-thought considerably. As stated in the Guidelines, for Article 81(1) to apply the agreement must produce negative effects on the market by allowing the parties to obtain, maintain or strengthen market power. In the absence of hard-core restrictions, Article 81(1) only applies where the parties have a sufficient degree of market power to produce a negative impact on the market. This means that Article 81(1) only applies when the competitive process and consumers are likely to suffer.

In such circumstances it is necessary to follow an equally strict approach under Article 81(3). Article 81(3) should only apply when the restrictive agreement is reasonably necessary to produce efficiencies that compensate consumers for the likely negative effects of the restrictions. For the restrictions to be acceptable firms should produce real evidence to that effect. It is not sufficient that they make unsubstantiated assertions. The *quid pro quo* is that plaintiffs and enforcers have to make a real case under Article 81(1). Both elements are contained in the Guidelines which thereby create a balance between Article 81(1) and Article 81(3) based on sound economic principles.

Are European judges equipped to apply Articles 81 and 82 and Article 81(3) in particular?

Judges understand and decide on a large range of complex matters. Moreover, in particular in civil litigation, courts to a large extent rely on the submissions of the parties. In competition cases, the lawyers representing the parties will be able to explain the economic rationale of both Article 81(1) and 81(3). They can base themselves on the guidance available from the Commission, including but not limited to the Guidelines for the application of Article 81(3). Furthermore, in addition to the possibility of referring preliminary questions to the European Court of Justice, Regulation 1/2003 gives national courts the right to ask for information or for an opinion from the Commission in case they should encounter a question on which they would like to receive such additional input. Apart from this, the Commission also grants financial support to training programmes for national judges.

Will it still be possible to obtain an exemption decision or a comfort letter from the Commission after 1 May 2004?

No. Under the new Regulation, a party before a national court or national competition authority that wants to invoke Article 81(3) does not need a Commission statement to do so. The agreement, decision or conduct in question must be found legal if the party can show that it fulfils the conditions set out in Article 81(3).

Against this background, there is no place any more in the new system neither for exemption decisions nor for their informal replacement, 'comfort letters'. Accordingly, after 1 May 2004, there will be neither formal exemption decisions nor

new comfort letters, nor will existing ones be prolonged.

3) On transitional questions

What about existing exemption decisions and comfort letters?

As a transitional rule, Regulation 1/2003 provides that existing exemption decisions remain in force until their expiry. However, the Regulation also maintains the legal mechanism by which the Commission may withdraw an exemption if the facts change fundamentally and the exemption is no longer merited.

Comfort letters issued before 1 May 2004 may remain useful for undertakings or associations of undertakings as a starting point for the assessment of their legal situation under Articles 81 and 82 EC, taking account of the extent to which factual or legal circumstances relevant for their case may have evolved in the meantime. National courts, when assessing a case under Articles 81 or 82 EC, could still take a comfort letter into account. This is for the national court in question to decide.

What about pending complaints and on-going investigations?

As a general rule, these procedures continue under the provisions of the new Regulation 1/2003 as from 1 May 2004. The Regulation provides that the procedural steps concluded before 1 May 2004 under the old law remain valid.

What about pending notifications?

The transitional provisions in Regulation 1/2003 provide that notifications still pending on 1 May 2004 lapse as from that date.

The Regulation also provides that Commission proceedings started under the old regime can continue under the new Regulation. For pending cases based on a notification, this implies that the Commission may either close the file following the lapsing of the notification. It may however also consider that a case should be further investigated. In that case, it continues the file as an ex officio investigation. The orientation will depend on the circumstances of the individual case, the gravity of any competition problem involved and the Commission's enforcement priorities.