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Regulation 1/2003: How has this landmark reform worked in practice?

Ailsa Sinclair, Vita Juknevičiute and Ingrid Breit (1)

Introduction

The entry into force of Council Regulation (EC) No 1/2003 on 1 May 2004 ushered in the most comprehensive reform of procedures to enforce Articles 81 and 82 of the EC Treaty since 1962. Regulation 1/2003 modernised the rules which govern the enforcement of Articles 81 and 82, empowering national competition authorities and national courts to apply these provisions in full.

Regulation 1/2003 specifically requires the Commission to prepare a report to the Parliament and Council on its functioning five years after entry into force. The Report was duly adopted by the Commission on 29 April 2009 (2), accompanied by a Staff Working Paper which sets out its findings in more detail. (3)

The preparation of the Report involved a public consultation to obtain input from stakeholders about their experience in practice. The Commission received 45 responses from businesses and business associations, law firms, lawyers’ associations and academia. (4) National competition authorities were closely involved in preparing the Report.

Nature of the Report and main conclusions

The Report takes stock of how modernisation of EU antitrust enforcement rules has worked since 1 May 2004. It reports on experience in all major areas covered by Regulation 1/2003 and evaluates the progress made by introducing new instruments and working methods.

The Report concludes that Regulation (EC) No 1/2003 brought about a landmark change in the way European competition law is enforced. The Regulation has significantly improved the Commission's enforcement of Articles 81 and 82 of the EC Treaty. The Commission has been able to become more proactive, tackling weaknesses in the competitiveness of key sectors of the economy in a focused way. EU competition rules have to a large extent become the ‘law of the land’ for the whole of the EU. Cooperation in the European Competition Network (ECN) has helped ensure the rules are applied coherently. The network is an innovative model of governance for the Commission and Member State authorities to implement Community law.

In some areas, the Report highlights aspects that merit further evaluation, without taking a position on the need to amend existing rules or practice. It will serve as a basis for the Commission to decide whether to propose any further policy initiatives.

Key findings on major aspects of the Regulation

Direct application of Article 81(3) of the EC Treaty

Regulation 1/2003 replaced the centralised notification and authorisation system under Regulation 17 by an enforcement system based on the direct application of Articles 81 and 82 of the EC Treaty in full. Agreements covered by Article 81(1) of the EC Treaty that meet the conditions of Article 81(3) are now directly valid and enforceable, with no prior decision to that effect being required.

The Report finds that the change from a system of notification and administrative authorisation to one of direct application took place remarkably smoothly. Overall, the experience of the Commission, national enforcers, the business and legal community indicated no major difficulties with the direct application of Article 81(3), which has been widely welcomed by stakeholders.

This change reflects a shift in priorities of the Commission, enabling it to focus its resources on areas where it can make a significant contribution to the enforcement of Articles 81 and 82, such as cartels and other serious infringements of the law.

The Report further notes that modernising the antitrust rules entailed a shift in emphasis from individual agreements to general guidance to help numerous undertakings and other enforcers. Notwithstanding new and unresolved issues, the Report underlines that the Commission remains firmly committed to

(1) The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.


(3) For ease of reading, both documents are together referred to as the ‘Report’.

providing individual guidance to companies in accordance with the Notice on informal guidance. (6)

The Commission’s investigative and decision-making powers

Regulation (EC) No 1/2003 clarified and reinforced the Commission’s investigative powers and introduced a new set of decisions, with the aim of improving enforcement. The Report highlights how sector inquiries have become a key investigative tool and have enabled the Commission to identify shortcomings in the competitive process of the gas and electricity, retail banking, business insurance and pharmaceutical sectors. Its new or revised powers of investigation (the power to seal, ask questions about facts or documents during inspections in business premises and to inspect non-business premises) have generally been used to the extent necessary in the cases investigated.

The Report also sets out the Commission’s practice regarding the types of decisions available. During the reporting period, it adopted numerous prohibition decisions in accordance with Article 7 of the Regulation. In this context, the Commission has accepted structural changes as commitments (5) but has not so far used the explicit power to impose structural remedies. The Report underscores the use of Article 9, which for the first time empowered the Commission to make commitments offered by undertakings binding and enforceable upon them. 13 commitment decisions were adopted during the reporting period. Such decisions bring about rapid change in the marketplace.

Fines

Fines with a sufficient deterrent effect, coupled with an effective leniency programme, constitute a crucially important means for the Commission to combat cartels and other serious infringements. The legal basis for the Commission’s power to impose fines for breaches of substantive competition law under Regulation (EC) No 1/2003 was essentially taken over from Regulation 17. The Report sets out the major developments of the last five years, during which the Commission further honed its fining policy by issuing the 2006 Fining Guidelines. In response to an issue raised during the public consultation, the Report also sets out the case law of the Community Courts concerning the legal basis for fines. (7)

The Regulation introduced more effective penalties for non-compliance with obligations incumbent on undertakings in the context of investigations. The Commission made use of this provision for the first time and imposed a fine of €38 million for breach of a seal. (8)

Application of EC competition law by all enforcers in the EU

Article 3 of Regulation (EC) No 1/2003 regulated the relationship between national competition law and EU competition rules for the first time. It obliges national competition authorities and courts to apply Articles 81 and 82 of the EC Treaty to agreements or conduct that could affect trade between Member States and provides for a single standard of assessment for agreements, concerted practices and decisions by associations of undertakings. Conversely, Member States remain free to enact and maintain stricter national competition laws than Article 82 to prohibit or sanction unilateral conduct. Overall, the Report concludes that Article 3 has led to a very significant increase in the application of Articles 81 and 82, making a single legal standard a reality on a very large scale.

The European Competition Network

Regulation (EC) No 1/2003 gave national competition authorities the key role of ensuring that EU competition rules are applied effectively and consistently, in conjunction with the Commission. The Report concludes that after five years, it is clear that the challenge of boosting enforcement of EU competition rules, while ensuring consistent and coherent application, has been largely met:

• Enforcement of EU competition rules has vastly increased since the entry into force of Regulation (EC) No 1/2003. By the end of March 2009, more than 1000 cases have been pursued by the national competition authorities and the Commission on the basis of the EU competition rules in a wide variety of sectors.
• Work sharing between the enforcers in the network has generally been unproblematic. Five years of experience have confirmed that the flexible and pragmatic arrangements introduced by Regulation (EC) No 1/2003 and the Network Notice work well. Discussions on case allocation have arisen rarely and have been resolved swiftly.


(7) See part 3.5.1. of the Staff Working Paper, referred to in footnote 1 above.

• By the end of the reporting period, the Commission had been informed of more than 300 decisions planned by national competition authorities on the basis of Article 11(4). None of these cases resulted in the Commission initiating proceedings pursuant to Article 11(6) to relieve a national competition authority of its competence for reasons of coherent application. Experience indicates that national competition authorities are generally highly committed to ensuring consistency and efforts undertaken in the ECN have successfully contributed to this aim. Stakeholders are largely satisfied with the results of applying EU competition rules within the ECN.

• The ECN has proven to be a successful forum to discuss general policy issues. The ECN Model Leniency Programme (9) illustrates how the ECN is able to jointly develop a new strategy to address real and perceived deficits in the existing system.

Interaction with national courts

Since the entry into force of Regulation (EC) No 1/2003, national courts have the power to apply both Articles 81 and 82 EC in full. Regulation (EC) No 1/2003 provides national courts with a number of ways to promote coherent application of competition rules. The Report notes that during the reporting period the Commission issued 18 opinions to national courts on questions concerning the application of Articles 81 and 82 of the EC Treaty. Moreover, both the Commission and the national competition authorities have used the power to make observations as amicus curiae under Article 15(3). The Commission decided to submit amicus observations on two occasions during the reporting period when it considered that there was an imminent threat to the coherent application of the EC competition rules.

Areas for further examination

As mentioned, the Report highlights a certain number of aspects which merit further examination without taking a position on the need to amend the existing rules or practice.

Commission’s investigation and enforcement powers

In relation to the Commission’s enforcement powers, the Report identifies certain specific issues for further examination:

• The absence of penalties for misleading or false replies in the context of interviewing legal and natural persons with their consent. Experience has shown that this may be a disincentive to providing correct and complete statements;

• The power to request national competition authorities to carry out inspections on its behalf, as provided for in Article 22(2). This power has been rarely used by the Commission, partly due to a perceived lack of clarity in the legal basis;

• Handling complaints that do not give rise to priority cases remains cumbersome. The Report recommends further work to streamline procedures, in accordance with the case law of the Community Courts;

• Experience with the provision for imposing penalty payments has highlighted that the existing procedure is relatively lengthy and cumbersome and there may be scope for further improvement.

Substantive divergence in the area of unilateral conduct

Under Regulation (EC) No 1/2003, Member States remain free to enact and maintain stricter national competition laws than Article 82 to prohibit or sanction unilateral conduct. The Report finds that a number of Member States have similar provisions, including: national provisions regulating the abuse of economic dependence, ‘superior bargaining power’ or ‘significant influence’; legal provisions concerning resale below cost or at loss; national laws providing for different standards for assessing dominance and stricter national provisions governing the conduct of dominant undertakings. (10) This divergence of standards regarding unilateral conduct was criticised by the business and legal communities, which consider that diverging standards fragment business strategies that are typically formulated on a pan-European or global basis. The Report highlights the issue for further examination.

Procedural divergence

The Report recalls that Regulation (EC) No 1/2003 accommodates a degree of diversity of Member States’ procedures. It also triggered a significant degree of voluntary convergence. Nonetheless, divergences persist in Member States’ enforcement systems on important issues such as fines, criminal penalties, liability in groups of undertakings, liability of associations of undertakings, succession of undertakings, prescription periods and the standard of


(10) See part 4.4. of the Staff Working Paper, referred to in footnote 1 above.