

The New Council Regulation (EC) No. 1/2003 on the Implementation of the Rules on Competition

By Felix Müller *

Abstract

The new Council Regulation (EC) No. 1/2003 on the implementation of the rules on competition laid down in Article 81 and 82 of the EC-Treaty, which came into force on 1 May 2004, brings fundamental changes in the application of European competition law. It replaces the Antitrust-Regulation No. 17 which has been in force for more than 40 years. Regulation No. 1/2003 establishes a system of direct applicability of Article 81(3) EC-Treaty, which abandons the requirement of notification as a key element of the old system under Regulation No. 17. Under the new scheme set up by Regulation No. 1/2003 Article 81(3) will be directly applicable. This enables national competition authorities and national courts to apply Article 81 and 82 of the EC-Treaty in their entirety, including paragraph 3 of Article 81. Although the new regulation is to be considered as an important step in strengthening and reinforcing European competition policy, in particular in view of the enlargement of the European Union, the numerous changes involve uncertainties which call for adjustment. The following article gives an overview of the new enforcement system for Articles 81 and 82 of the EC-Treaty, set up by Regulation No. 1/2003.

A. Introduction

The Council of the European Union on 16 December 2002 adopted the new Council Regulation (EC) No. 1/2003 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty Establishing the European Community.¹ The new Council Regulation, which came into effect on 1 May 2004, replaces Council Regulation No. 17 which has been in force for more than 40 years and which was the key to enforcement in Community competition law.² Regulation No. 1/2003

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¹ Council Regulation (EC) on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty Establishing the European Community, No. 1/2003, OJ 2003 (L 1)1.

² Council Regulation No. 17 of 6 February 1962, OJ 13, 21.2.1962, 204/62.

aims at establishing a new system which ensures that competition in the common market is not distorted and which is designed to meet the challenges of an integrated market and a future enlargement of the Community.³ The European Commission also adopted a series of documents which complete the landmark modernisation of the European Union's antitrust enforcement rules and procedures.⁴ The documents came into effect on 1st of May at the same time as the new Council Regulation No. 1/2003.

The following article will briefly outline the major deficiencies of Regulation No. 17. Against this background, the development of the new Regulation (EC) No. 1/2003 will be explored. The focus will then shift to the main changes brought by the new approach to the enforcement of EC competition law.

B. Major Deficiencies of Regulation No. 17 and the Development of the new Council Regulation (EC) No. 1/2003

Regulation No. 17 was adopted and came into force in 1962 and has remained until today without significant modification.⁵ It sets out the rules of procedure for the application of Articles 81 and 82 EC-Treaty. Article 81(1) of the Treaty prohibits, under specific circumstances, all agreements between undertakings, decisions by associations of undertakings, and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. Article 81(2) declares such agreements or decisions to be void. Although caught by paragraph 1, an agreement, decision or concerted practice can gain exemption under Article 81(3). An exemption can be granted on an individual basis, or there can be block exemptions which exempt categories of agreements. Article 82 concerns abuses of dominant positions by one or more undertakings within the common market. The rules

³ Recital 1 to 4 of Regulation No. 1/2003, as in note 1, *supra*.

⁴ Commission Reg. (EC) No. 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ 2004 (L 123) 18, Commission Notice on cooperation within the Network of Competition Authorities (2004/C 101/03), OJ 2004 (C 101/43), 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 (2004/C 101/04), OJ 2004 C 101/54, Commission Notice on the handling of complaints by the Commission under Articles 81 and 83 of the EC Treaty (2004/C 101/05), OJ 2004 C 101/65, Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters) (2004/C 101/06), OJ 2004 C 101/78, Commission Notice – Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (2004/C 101/07), OJ 2004 C 101/81, Commission Notice – Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08), OJ 2004 C 101/97.

⁵ Regulation No. 17 was last amended by Regulation (EC) No. 1216/1999, OJ 1999 L 148/5.

on competition are an essential pillar of the Community, as Articles 3(1)(g), 4(1) and 98 of the EC-Treaty clearly provide.

The specification of competition rules in Regulation No. 17 was founded on a two-pronged approach. First, Regulation No. 17 was based on direct effect of the prohibition rule of Article 81(1) and Article 82. Article 1 of Regulation No. 17 therefore stipulated that agreements, decisions and concerted practices of the kind described in Article 81(1) EC-Treaty and the abuse of a dominant position in the market, within the meaning of Article 82 EC-Treaty, shall be prohibited, no prior decision to that effect being required. Second, Regulation No. 17 rested on prior notification to the Commission of restrictive agreements and practices for exemption under Article 81(3) EC-Treaty.⁶ The power to apply Article 81(3) was granted exclusively to the Commission, thus creating a centralized system of conferring exemptions. Article 9(1) of Regulation No. 17 therefore provided that, subject to review of its decision by the Court of Justice, the Commission shall have sole power to declare Article 81(1) inapplicable pursuant to Article 81(3) of the EC-Treaty. Certainly national courts and authorities could apply Article 81(1) and 82 EC-Treaty under the old system of Regulation No. 17, but they could not grant exemptions under Article 81(3), which was left to the Commission.

This centralized notification system established by Regulation No. 17 was well suited for a Community of six Member States. It enabled the Commission to build up a coherent body of precedent cases, and to ensure that the competition rules were applied consistently throughout the Community.⁷ This system proved useful as long as the interpretation of Article 81 of the EC-Treaty, and in particular of Article 81 paragraph 3, was uncertain. However, the enlargement of the Community has changed the context radically, causing increasing difficulties. Today, the Commission is faced with the serious problem that it does not have the resources to deal with all the agreements notified to it.⁸ Although various block exemptions were enacted⁹ and the Commission frequently fell back on comfort letters as the principal technique for informal settlement,¹⁰ the Commission came under increasing strain. On 1st May 2004, the European Union welcomed 10 new Member States. It would

⁶ See Art. 4, 5, 6 and 9 of Reg. No. 17, as in note 2, *supra*.

⁷ See IP/04/441, Brussels, 30 March 2004.

⁸ See recitals 1 to 4 of Regulation No. 1/2003, as in note 1, *supra*.

⁹ e.g. Reg. 2658/2000, OJ 2000 L 304/3, Regulation 2659/00, OJ 2000 L 304/7, Regulation 2790/99, OJ 1999 L 336/21, Regulation 240/96, OJ 1996 L 31/2, Regulation 4087/88, OJ 1988 L 359/46.

¹⁰ D. Stevens, *The „Comfort Letter“: Old Problems, New Developments*, ECLR 1994, 81, R. Whish, *Competition Law*, in BUTTERWORTHS, 4TH ED. 217 (2001) 217.

not be possible to maintain a centralized notification system with prior authorisation by the Commission in a Community which now counts 25 Member States. The great quantities of notified cases that do not pose a real threat to competition within the common market prevent the Commission from detecting and punishing serious infringements and thus, also from ensuring effective supervision.

In order to prepare Community competition law for the challenges of the changed context and the forthcoming enlargement of the European Union, in 1999 the Commission initiated the reform process by adopting a "White Paper on modernisation of the rules implementing Articles 81 and 82 of the EC-Treaty"¹¹ which culminated in the adoption of the new Council Regulation (EC) No. 1/2003.¹² The Commission in the White Paper emphasized that the system under Regulation No. 17 presented two major deficiencies. First, the Commission pointed out that the system no longer ensured the effective protection of competition and that the Commission's monopoly on the application of Article 81(3) was a significant obstacle to the effective application of the rules by national competition authorities and courts.¹³ Moreover, the Commission underlined that it could not alone bear the responsibility for enforcing the competition rules throughout the Community and that the notification system no longer constituted an effective tool for the protection of competition. This system, the Commission ascertained, only rarely revealed cases that pose a real threat to competition and that the notification system according to Regulation No. 17 prevented the Commission's resources from being used

¹¹ White Paper on Modernization of the Rules Implementing Articles 85 and 86 of the EC Treaty, Commission Programme 99/27, OJ 1999 C 132/1.

¹² There is a voluminous literature on the White Paper, which contains all shades of opinion. J. Nazerali and D. Cowan, *Modernising the Enforcement of EU Competition Rules – Can the Commission Claim to be Preaching to the Converted?*, ECLR 1999, 442, R. Wesseling, *The Commission White Paper on Modernisation of EC Antitrust Law: Unspoken Consequences and Incomplete Treatment of Alternative Options*, ECLR 1999, 420, C.-D. Ehlermann, *The Modernization of EC Antitrust Policy: A Legal and Cultural Revolution*, 37 CMLRev. 537 (2000), A. Schaub, *Modernisation of EC Competition Law: Reform of Regulation No. 17*, in B. HAWK (ED.), FORDHAM UNIVERSITY 2000 at chapter 10.. I. Forrester, *Modernisation of EC Competition Law*, *id.* at ..., chapter 12, M. Siragusa, *A Critical Review of the White Paper on the Reform of the EC Competition Law Enforcement Rules*, *id.* at chapter 15, R. Wish and B. Suffin, *Community Competition Law: Notification and Exemption – Goodbye to All That*, in D. HAYTON (ED.), LAW'S FUTURE(S): BRITISH LEGAL DEVELOPMENTS IN THE 21ST CENTURY, chapter 8 (Hart, 2000), D. Gerber, *Modernising European Competition Law: A Developmental Perspective*, ECLR 2001, 122, S. Kingston, *A New Division of Responsibilities in the Proposed Regulation to Modernise the Rules Implementing Articles 81 and 82 EC? A Warning Call*, ECLR 2001, 340, M. Monti, *European Competition Law for the 21st Century*, in B. HAWK (ED.), FORDHAM UNIVERSITY, 2001, chapter 15, W. Wils, *The Modernisation of the Enforcement of Articles 81 and 82 EC: A Legal and Economic Analysis of the Commission's Proposal for a New Council Regulation Replacing Regulation No. 17*, *id.* at chapter 18.

¹³ White Paper, *supra* at note 11, 11.

for detection and punishment of serious infringements.¹⁴ Moreover, the centralised scheme set up by Regulation No. 17 no longer secured a balance between the need to ensure effective supervision, on one hand, and to simplify administration to the greatest possible extent, on the other hand.¹⁵

The second deficiency of the regime detected by the Commission was that it imposed an excessive burden on industry by increasing compliance costs and preventing companies from enforcing their agreements without notifying them to the Commission even if they fulfilled the conditions of Article 81(3).¹⁶ The Commission stated that the requirement of notification was particularly detrimental to small and medium-sized enterprises for whom the cost of notification could constitute a competitive disadvantage compared with larger firms and in the absence of notification could cause difficulties in enforcing their agreements.

Consequently, the Commission came to the conclusion that the system of Regulation No. 17 should be replaced by a directly applicable system in which the competition authorities and courts of the Member States have the power to apply not only Article 81(1) and Article 82 of the EC-Treaty,¹⁷ which have direct applicability by virtue of the case-law of the Court of Justice of the European Communities, but also Article 81(3) of the Treaty. The Commission therefore explored various options for reform and proposed the adoption of a fundamentally different enforcement system,¹⁸ which culminated in the new Council Regulation No. 1/2003.

C. Characteristics of the new Council Regulation (EC) No. 1/2003

The new Council Regulation (EC) No. 1/2003, which applies from 1 May 2004, brings fundamental changes in the application of European competition law.¹⁹ First,

¹⁴ The Commission emphasized that it was extremely rare that notifications lead to prohibition decisions. In more than 35 years of application of Regulation No. 17 there have been only 9 decisions in which a notified agreement was prohibited without a complaint having been lodged against it, *see* White Paper, *supra* at note 11, 20.

¹⁵ White Paper, *supra* at note 11,19.

¹⁶ White Paper, *supra* at note 11,29.

¹⁷ White Paper, *supra* at note 11,22.

¹⁸ Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No. 1017/68, (EEC) No. 2988/74, (EEC) No. 4056/86 and (EEC) No. 3975/87, COM 582 final (2000).

¹⁹ J. S. Venit, *Brave New World: The Modernization and Decentralization of Enforcement Under Articles 81 and 82 of the EC Treaty*, 40 CMLRev 545 (2003).

Article 81(3) of the EC-Treaty becomes directly applicable, enabling national competition authorities and national courts to apply Article 81 and 82 of the EC-Treaty in their entirety, including paragraph 3 of Article 81. Second, the powers of investigation for the Commission have been increased. Finally, the new Council Regulation establishes a new mechanism of cooperation between the Commission and the competition authorities of the Member States.

I. Direct Applicability of Article 81(3) EC-Treaty

The most fundamental change brought by the new Regulation No. 1/2003 is the switch to a directly applicable exception system. The direct applicability of Article 81(3) EC-Treaty is established by Article 1 of Regulation No. 1/2003. According to this provision, agreements, decisions and concerted practices caught by Article 81(1) of the EC-Treaty which do not satisfy the conditions of Article 81(3) shall be prohibited, no prior decision to that effect being required. On the other hand, all agreements, decisions and concerted practices that fall under Article 81(1) which satisfy the conditions of Article 81(3) shall not be prohibited, no prior decision to that effect being required. To this end, the concept of direct applicability means that competition authorities and courts of the Member States are empowered to apply Article 81(3) of the Treaty directly.

1. Decentralised Application of the Competition Rules

Article 5 of the Regulation No. 1/2003 therefore states that the competition authorities of the Member States shall have the power to apply Article 81 and 82 of the Treaty in individual cases.²⁰ National courts shall also have the power to apply Articles 81 and 82 of the Treaty, as Article 6 of Regulation No. 1/2003 provides.

²⁰ However, it was controversial whether there is a legal basis in the Treaty to establish direct and therefore decentralised application of Article 81(3) EC-Treaty. The legal basis for the Regulation No. 1/2003 is Article 83 of the EC-Treaty. This provision empowers the Council to lay down the appropriate regulations or directives to give effect to the principles set out in Articles 81 and 82. In a non-exhaustive list, Article 83(2) enumerates elements that should in particular be covered by implementing rules created on this basis. The old Regulation No. 17 endowed the Commission with exclusive power to apply Article 81(3) in the framework of an administrative procedure having as its object an authorisation decision. However, the legal basis in Article 83 is not limited to the application of Articles 81 and 82 by specific decision-makers. Article 83 is rather suitable for direct application which can be carried out by other authorities than the Commission. While leaving a certain margin of appreciation as to its interpretation, Article 81(3) does not imply discretionary powers that could only be exercised by an administrative body. A limited margin of appreciation does not make a Treaty provision unsuitable for direct application. On balance, it might be said that Article 83 EC-Treaty is a sufficient legal basis to establish direct applicability of Article 81(3) EC-Treaty by means of adopting a Regulation such as No. 1/2003. See C.-D.-Ehlermann, *The Modernization of EC Antitrust Policy: A Legal and Cultural Revolution*, (2000) 37 CMLRev. 537, P. Craig/G. de Búrca, *EU Law*, OXFORD UNIVERSITY PRESS, 3RD ED., 1063 (2002).

Although Article 5 of Regulation No. 1/2003 says that the competition authorities of the Member States shall have the power to apply Article 81 and 82 of the Treaty in individual cases, the Commission may, where the Community public interest to the application of Articles 81 and 82 so requests,²¹ by decision find that Article 81 of the Treaty is not applicable to an agreement, a decision by an association of undertakings or a concerted practice, either because the conditions of Article 81(1) of the Treaty are not fulfilled, or because the conditions of Article 81(3) are satisfied.²² According to Article 11(6) of Regulation No. 1/2003, the initiation by the Commission of proceedings for the adoption of a decision shall relieve the national competition authorities of their competence to apply Articles 81 and 82 of the Treaty.²³ In exceptional cases, where the public interest of the Community so requires, it may also be expedient for the Commission to adopt a decision of a declaratory nature finding that the prohibition in Article 81 or 82 does not apply, with a view to clarifying the law and ensuring its consistent application throughout the Community, in particular with regard to new types of agreements or practices that have not been settled in the existing case-law and administrative practice.²⁴

2. *The Ending of the Notification and Authorisation System*

According to Article 1 of Regulation No. 1/2003, agreements, decisions or practices that are caught by Article 81(1) EC-Treaty and do neither satisfy the conditions of Article 81(3) nor fall under the scope of a block exemption shall be prohibited, no prior decision to that effect being required. Agreements, decisions and practices caught by Article 81(1) which satisfy the conditions of paragraph 3 shall not be prohibited, no prior administrative decision to that effect being required. This new approach removes the centralised notification and authorisation system set up by Regulation No. 17. Under the centralised scheme agreements, decisions and concerted practices had to be notified to the Commission in order to gain exemption.

The new system of direct applicability in which the competition authorities and courts of the Member States have the power to apply not only Articles 81(1) and 82 but also Article 81(3) of the EC-Treaty has as a consequence that in future it is no longer the Commission but the affected undertakings themselves which must scrutinize whether their agreements, decisions or concerted practices satisfy the conditions of Article 81(3) and gain exemption or not. In other words, agreements, deci-

²¹ G. Monti, *Article 81 EC and Public Policy*, 39 CMLRev. 1058 (2002).

²² See Art. 10 of Reg. No. 1/2003, *supra* at note 1.

²³ See also recital 17 of Reg. No. 1/2003, *supra* at note 1.

²⁴ See recital 14 of Reg. No. 1/2003, *supra* at note 1.

sions and concerted practices of the kind described in Article 81(1) of the Treaty must no longer be notified to the Commission in order to gain exemption under Article 81(3). Provided that such agreements, decisions or concerted practices satisfy Article 81(3)'s conditions, they are not prohibited. Put differently, they are valid and enforceable, no prior decision by the commission or any other national competition authority being required.

Under the new directly applicable exception system the undertakings are freed from the obligation to notify, and their position is strengthened, since they can seek the enforcement of their restrictive practices in the courts, as they are now able to plead that their restrictive practices are covered by Article 81(3) of the Treaty. On the other hand, Regulation No. 1/2003 necessitates undertakings to make their own assessment of the compatibility of their restrictive practices with Article 81(3), in the light of the legislation in force and the case-law. This will certainly lighten the administrative burden weighing on undertakings, but it will also require them to take on added responsibility. The Commission takes the view that undertakings are generally well placed to assess the legality of their actions in such a way as to enable them to take an informed decision on whether to go ahead with an agreement or practice and in what form.²⁵

The Commission underlined that undertakings are close to the facts and have at their disposal the framework of block exemption Regulations, case law and case practice as well as extensive guidance in Commission guidelines and notices, in particular the recently adopted "Modernisation Package."²⁶ The notification requirement under the old system had a positive aspect though, as the Commission could not impose fines with respect to acts taking place after notification to the Commission and before its decision in application of Article 81(3) of the Treaty, provided they fell within the limits of the activity described in the notification.²⁷ Because the Commission was strained by the number of agreements, decisions and concerted practices notified to it, undertakings could easily seek protection by means of notifying each and every act to the Commission since they could not be

²⁵ Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters) (2004/C 101/06), OJ 2004 C 101/78, point 3.

²⁶ The Commission adopted seven documents which complement Regulation No. 1/2003. The entire exercise is commonly referred to as the "Modernisation Package". The latter comprises the documents listed *supra* at note 4.

²⁷ See Art. 15(5) of Reg No. 17. The Commission has made only exceptional use of Article 15(6) of Regulation No. 17, which empowers the Commission to withdraw notifying undertakings' immunity from fines.

fined from the point of notification to the point of decision by the Commission. A disadvantage to this approach, however, was that an agreement caught by Article 81(1) of the EC-Treaty was automatically void according to Article 81(2) and therefore unenforceable to the point of an exemption pursuant to Article 81(3).

The new concept of direct applicability of Article 81(3) EC-Treaty puts an end to this possibility of seeking protection as notification is no longer required. Article 5 of Regulation No. 1/2003 enables the competition authorities of the Member States to impose fines, periodic penalty payments or any other penalty provided for in their national law. Furthermore, the Commission may by decision impose on undertakings and associations of undertakings fines or periodic penalty payments, according to Articles 23 and 24 of Regulation No. 1/2003.²⁸

One might therefore claim that the withdrawal of the notification requirement and the protection of undertakings of being fined violates the principle of legal certainty.²⁹ Instead of relying on the protection of being fined from the point of notification, undertakings under the new Regulation No. 1/2003 will individually be responsible in assessing their restrictive business transactions to verify whether they are in compliance with the Community competition law. But this shift in responsibility does not give rise to a violation of undertakings' legal certainty. The new Regulation rather establishes an adequate level of legal certainty for companies and reduces bureaucracy. Under the old system of Regulation No. 17 an agreement, decision or concerted practice caught by Article 81(1) of the Treaty could become valid, and accordingly enforceable before a civil court, only if it was notified to the Commission and exempted by it.³⁰ Article 1(2) of Regulation No. 1/2003 provides that agreements and decisions caught by Article 81(1) of the EC-Treaty which satisfy the conditions of Article 81(3) shall not be prohibited, no prior decision to that effect being required. Put differently, agreements, decisions and practices that fall under Article 81(1) of the Treaty but meet the conditions of Article 81(3) are valid and enforceable. This means that undertakings can now rely on civil enforceability which is an improvement on legal certainty. Moreover, it can be added that there is no presumption that restrictive practices are void under Article 81 of the Treaty. The prohibition laid down in Article 81(1) is applicable only when the conditions of prohibition are fulfilled. In this regard, Article 2 of Regulation No.

²⁸ However, the powers conferred on the Commission by Art. 23 and 24 shall be subject to limitation periods for the imposition of fines, as Article 25 of the Regulation No. 1/2003 provides.

²⁹ W. P.J. Wils, *The Principle of Ne Bis in Idem in EC Antitrust Enforcement: A Legal and Economic Analysis*, 26 *WORLD COMPETITION* 2, 131 (2003).

³⁰ In practice, most notified cases are closed by a non-binding administrative letter from the Commission, the so-called comfort letter.

1/2003 regulates the burden of proof as follows: the burden of proving an infringement of Article 81(1) or of Article 82 of the Treaty shall rest on the party or the authority alleging the infringement. On the other hand, the undertaking or association of undertakings claiming the benefit of Article 81(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled.

After being implemented for 40 years, the conditions of Article 81(1) and Article 81(3) have been largely clarified by case-law and decision-making practice and are known to undertakings. Beyond that, a wide range of agreements, decisions and concerted practices is already covered by block exemptions.³¹ The Commission intends to adopt block exemptions with an even wider scope of application which cover the vast majority of agreements, and in particular those concluded by small and medium-sized undertakings. Undertakings' task to ascertain themselves that their behaviour is legal and comports with the Community competition law is also facilitated by a Commission Notice which contains guidelines clarifying the application of the rules.³² The guidelines set out the Commission's interpretation of the conditions for exception contained in Article 81(3) of the EC-Treaty. The Commission thereby provides guidance on how it will apply Article 81 in individual cases. Although not binding on them, the guidelines also intend to give guidance to the courts and authorities of the Member States in their application of Article 81(1) and 81(3) of the Treaty. The guidelines adopted by the Commission establish an analytical framework for the application of Article 81(3) with the purpose to develop a methodology for the homogeneous application of this Treaty provision.

In addition to prohibition decisions, Article 10(1) of Regulation 1/2003 states that in cases where it is in the Community public interest to do so the Commission can adopt decisions finding that no infringement has been committed. This will permit the Commission to set out its position in a landmark case so as to clarify the law for all companies that find themselves in similar situations.³³ The Commission recently adopted a Notice in which it sets out the conditions under which it may issue guidance letters regarding novel, unresolved or genuinely new questions for the application of Articles 81 and 82 of the EC-Treaty.³⁴ The Commission will therefore re-

³¹ A complete list embracing all block exemption regulations, notices and guidelines is available on the website of the Directorate General for Competition of the European Commission: <http://europa.eu.int/comm/competition/antitrust/legislation/>.

³² Commission Notice – Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08), OJ 2004 C 101/97.

³³ See recital 14 of Reg. No. 1/2003, as in note 1 above.

³⁴ Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters) (2004/C 101/06), OJ 2004 C 101/78.

main open to discuss specific cases with the undertakings where appropriate. The Commission is therefore in a position to react to new developments and changing market conditions. However, any such system of issuing guidance letters must not lead to undertakings being entitled to obtain such letter, as this would reintroduce a kind of notification system which is to be abolished by the new Regulation No. 1/2003.

3. *Relationship between Articles 81 and 82 EC-Treaty and National Competition Law*

Article 83(2)(e) of the EC-Treaty authorizes the Council to determine the relationship between national laws and the provisions contained in Articles 81 and 82 of the Treaty. The relationship between Articles 81 and 82 and national competition law is laid down in Article 3 of Regulation No. 1/2003. It stipulates in paragraph 1 that where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81(1) of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Article 81 of the Treaty to such agreements, decisions and concerted practices. The same applies to Article 82 of the Treaty. Article 3(2) of Regulation No. 1/2003 provides that the application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty, or which fulfil the conditions of Article 81(3) of the Treaty or which are covered by a Regulation for the application of Article 81(3) of the Treaty.

To this end, Article 3 of Regulation No. 1/2003 is an expression of the principle of primacy of Community law over national law and of its effectiveness (*effet utile*).³⁵ Any agreement, decision or concerted practice which affects trade between Member States but which does not restrict competition within the meaning of Article 81(1) or which fulfils the conditions of Article 81(3) or which is covered by a block exemption may not be prohibited by national authorities by means of applying national competition law. Otherwise, the supremacy of Community law and its effectiveness would be undermined. However, Member States shall not under Regulation No. 1/2003 be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.³⁶ Additionally, Article 3(3) of Regulation No. 1/2003 provides that paragraphs 1 and 2, without prejudice to general principles and other provisions of

³⁵ P. Craig/G. de Búrca, *EU Law*, OXFORD UNIVERSITY PRESS, 3rd ed., 237, 75 (2002).

³⁶ Article 3(2) of Regulation 1/2003, *supra* at note 1..

Community law, do not preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles 81 and 82 of the Treaty.³⁷

The relationship between Articles 81 and 82 of the Treaty and the national competition law is also described in recital 8 of the Regulation: In order to ensure the effective enforcement of the Community competition rules and the proper functioning of the cooperation mechanisms contained in Regulation No. 1/2003, it is necessary to oblige the competition authorities and courts of the Member States to also apply Articles 81 and 82 of the Treaty where they apply national competition law to agreements and practices which may affect trade between Member States. It is essential to provide that the application of national competition laws to agreements, decisions or concerted practices may not lead to the prohibition of such acts if they are not also prohibited under Community law.³⁸ The Commission adopted Notices covering guidelines on the effect on trade concept contained in Article 81 and 82 of the EC-Treaty and guidelines on the application of Article 81(3) of the Treaty.³⁹ The guidelines set out the principles developed by the Community Courts in relation to the interpretation of the effect on trade concept of Article 81 and 82 and the application of Article 81(1) and (3) of the Treaty. They further spell out a rule indicating when agreements are in general unlikely to be capable of appreciably affecting trade between Member States. The guidelines are neither intended to be exhaustive nor to be binding on courts and authorities of the Member States in their application of Articles 81 and 82 of the EC-Treaty. The aim rather is to set out the methodology for the application of the effect on trade concept and to provide guidance on its application in frequently occurring situations.⁴⁰

³⁷ Also see recital 9 of Reg. No. 1/2003, *supra* at note 1.

³⁸ However, this does not mean that Member States are precluded from adopting and applying on their territory stricter national competition laws which prohibit or impose sanctions on unilateral conduct engaged in by undertakings. These stricter national laws may include provisions which prohibit or impose sanctions on abusive behaviour toward economically dependent undertakings. Additionally, Reg. No. 1/2003 does not apply to national laws which impose criminal sanctions on natural persons except to the extent that such sanctions are the means whereby competition rules applying to undertakings are enforced.

³⁹ Commission Notice - Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (2004/C 101/07), OJ 2004 C 101/81, Commission Notice - Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08), OJ 2004 C 101/97.

⁴⁰ The guidelines are without prejudice to the interpretation of Article 81 and 82 which may be given by the Court of Justice and the Court of First Instance, as point 5 of the Notice clearly provides, Commission Notice - Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (2004/C 101/07), OJ 2004 C 101/81.

II. Cooperation between the Commission and the Member States

The decentralised system set up by the new Regulation No. 1/2003 requires coordination and close cooperation between the involved authorities. Chapter IV of Regulation No. 1/2003 therefore provides detailed provisions regarding the cooperation between the Commission and the competition authorities and courts of the Member States, on one hand, and the cooperation between the competition authorities of the Member States among each other on the other hand.

1. Cooperation within the Network of Competition Authorities

The Commission adopted a Commission Notice on cooperation within the network of competition authorities which complements Chapter IV of Regulation No. 1/2003.⁴¹ The Notice reflects a new quality of close cooperation between public enforcers in the European Union. It provides guidance, *inter alia*, on the work-sharing between the public enforcers, the mutual information about pending cases at different stages of the procedure and the exchange of information.

The system of cooperation is laid down in Articles 11 to 16 of the Regulation No. 1/2003. Regulation No. 1/2003 creates a system of parallel competences in which the Commission and the Member States' competition authorities can apply Article 81 and 82 of the EC-Treaty. Together the national competition authorities and the Commission form a network of public authorities. They act in the public interest and cooperate closely in order to protect competition. The network is a forum for discussion and cooperation in the application and enforcement of EC competition policy. It is called *European Competition Network (ECN)*.⁴² The ECN should ensure both an efficient division of work and an effective and consistent application of EC competition rules. The Commission Notice on cooperation within the ECN presents the details of the system. Limits of space preclude a detailed analysis of these provisions. Suffice it to say that the Commission and national competition authorities shall apply the Community competition rules in close cooperation, as Article 11(1) of Regulation No. 1/2003 provides. On balance, it may be said that the national competition authorities shall, when acting under Articles 81 and 82 of the Treaty, inform the Commission in writing before or without delay after commencing the

⁴¹ Commission Notice on cooperation within the Network of Competition Authorities (2004/C 101/03), OJ 2004 C 101/43.

⁴² Commission Notice on cooperation within the Network of Competition Authorities (2004/C 101/03), point 1, OJ 2004 C 101/43.

first formal investigative measure.⁴³ Articles 11(4) and 12 of Regulation No. 1/2003 provide that competition authorities of the Member States may also exchange between themselves information necessary for the assessment of a case that they are dealing with under Articles 81 and 82 of the Treaty.⁴⁴ Article 14 of Regulation No. 1/2003 contains provisions regarding an Advisory Committee which shall be consulted by the Commission.⁴⁵ The role and the functioning of the Advisory Committee is laid down in the Commission notice on cooperation within the ECN.⁴⁶ It is important to understand that Regulation No. 1/2003 does not regulate the work-sharing between the Commission and the Member States' competition authorities but leaves the division of case work to the cooperation of the Commission and the Member States' authorities inside the ECN.⁴⁷ The Regulation pursues the objective of ensuring effective enforcement of Articles 81 and 82 of the EC-Treaty through a flexible division of case work between the public enforcers in the Community.⁴⁸ The Commission announced to concentrate its enforcement resources on the most serious infringements and to handle cases in relation to which the Commission should act with a view to define Community competition policy and to ensure coherent application of Articles 81 and 82 of the EC-Treaty.⁴⁹

2. *Cooperation between the Commission and the courts of the EU Member States*

The cooperation with national courts is laid down in Article 15 of Regulation No. 1/2003. Additionally, the Commission adopted a Notice on the cooperation be-

⁴³ See Article 11(3) of Reg. No. 1/2003, *supra* at note 1. This information may also be made available to the competition authorities of the other Member States.

⁴⁴ Recital 16 of Reg. No. 1/2003, *supra* at note 1, states that notwithstanding any national provision to the contrary, the exchange of information and the use of such information in evidence should be allowed between the members of the network even where the information is confidential.

⁴⁵ Also see recitals 19 and 20 of Reg. No. 1/2003, *supra* at note 1.

⁴⁶ According to point 58 of the Commission notice, the Advisory Committee is the forum where experts from the various competition authorities discuss individual cases and general issues of Community competition law. Commission Notice on cooperation within the Network of Competition Authorities (2004/C 101/03), OJ 2004 C 101/43.

⁴⁷ However, the Commission Notice on cooperation within the Network of Competition Authorities (2004/C 101/03), OJ 2004 C 101/43 provides orientations for the work sharing between the Commission and the Member States' competition authorities.

⁴⁸ Commission Notice on the handling of complaints by the Commission under Art. 81 and 83 of the EC Treaty (2004/C 101/05), OJ 2004 C 101/65, (para. 20).

⁴⁹ Commission Notice on the handling of complaints by the Commission under Art. 81 and 83 of the EC Treaty (2004/C 101/05), OJ 2004 C 101/65, (para. 11).

tween the Commission and the courts of the EU Member States in the application of Article 81 and 82 of the EC-Treaty.⁵⁰ As prescribed in Article 15(1) of Regulation No. 1/2003, courts of the Member States may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the Community competition rules. Where the coherent application of Articles 81 and 82 of the EC-Treaty so requires, the Commission, acting on its own initiative, may submit written observations to courts of the Member States.⁵¹ With the permission of the court in question, the Commission may also make oral observations. Article 16 of Regulation No. 1/2003, titled "Uniform application of Community competition law", provides that when national courts rule on agreements, decisions or practices under Article 81 or 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. National courts must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated. To that effect, the national court may assess whether it is necessary to stay its proceedings. This obligation is, however, without prejudice to the rights and obligations under Article 234 of the EC-Treaty. Furthermore, Article 15(2) of Regulation No. 1/2003 stipulates that when national competition authorities rule on agreements, decisions or practices under Article 81 or 82 which are already the subject of a Commission decision, they cannot take decisions which would run counter to the decision adopted by the Commission.

III. Powers of Investigation for the Commission

Because experience in the last decades has shown that notifications do not bring all serious violations of the competition rules to the attention of the Commission, the new system of Regulation No. 1/2003 takes a completely different approach. Under the centralised system of Regulation No. 17 the handling of a large number of notifications prevented the Commission from focusing on the detection and the punishment of the most serious restrictions such as cartels, foreclosure of the market and abuses of dominant positions. The abolition of the notification and authorisation system will allow the Commission to focus on complaints and proceedings of its own initiative that lead to prohibition decisions. Because the detection of infringements of the competition rules is growing ever more difficult and, in order to guarantee the protection of competition, the Commission's powers of investigation had to be supplemented and increased.⁵²

⁵⁰ Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Art. 81 and 82 EC (2004/C 101/04), OJ 2004 C 101/54.

⁵¹ Art. 15(3) of Reg. No. 1/2003, *supra* at note 1.

⁵² Recital 25 of Reg. No. 1/2003, *supra* at note 1.

The powers of investigation of the Commission are laid down in chapter V of Regulation No. 1/2003. Very briefly, three main changes of the system under Regulation No. 17 can be found.⁵³ First, the rules governing the obtaining of judicial orders at national level in order to overcome any opposition on the part of an undertaking to an inspection is now codified in Article 20 paragraphs 7 and 8 as well as in Article 21(3). These provisions clarify the intervention of national judges in accordance with the limits established by the Court of Justice. Second, the experience of the national competition authorities and the Commission has shown that incriminating documents are ever more frequently kept and discovered in private homes.⁵⁴ Therefore, Article 21(1) of Regulation No. 1/2003 empowers the Commission, subject to judicial authorisation, to search private homes if professional documents are likely to be kept there.

Article 21(1) states that if a reasonable suspicion exists that books or other records related to the business and to the subject-matter of the inspection, which may be relevant to prove a serious violation of Article 81 or Article 82 of the Treaty, are being kept in any other premises, land and means of transport, including the homes of directors, managers and other members of staff of the undertakings and associations of undertakings concerned, the Commission can by decision order an inspection to be conducted in such other premises, land and means of transport. However, a decision adopted pursuant to Article 21(1) cannot be executed without prior authorisation from the national judicial authority of the Member State concerned, as Article 21(3) of Regulation provides. Moreover, Article 20(2) endows the officials and other accompanying persons authorised by the Commission with the power to, among others, seal any business premises and books or records for the period and to the extent necessary for the inspection and to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers. Third, fines for breach of procedural rules and the periodic penalty payments were strongly increased by Articles 23 and 24 of Regulation No. 1/2003 in order to compel compliance with the new Regulation.⁵⁵

⁵³ The Commission's powers of investigation under Reg. No. 17 are covered by Art. 11, 12 and 14 of Reg. No. 17.

⁵⁴ See recital 26 of Reg. No. 1/2003, *supra* at note 1.

⁵⁵ W. P.J. Wils, *supra* at note 29.26 WORLD COMPETITION 2, 131 (2003), underlines the importance of the 'ne bis in idem' principle in the context of the EU network of competition authorities set up under Reg. No. 1/2003. Wils concludes that the principle will have the effect of inducing effective coordination between the European Commission and the competition authorities of the Member States as well as harmonization of their laws and policies on fines and leniency.

Having regard to Article 33 of Regulation No. 1/2003, the Commission adopted the Commission Regulation (EC) No. 773/2004 relating to the conduct of proceedings by the Commissions pursuant to Articles 81 and 82 of the EC-Treaty.⁵⁶ The Commission Regulation contains detailed rules on a series of important aspects of the Commission's procedures, *inter alia*, the initiation of proceedings according to Chapter III of Regulation (EC) No. 1/2003,⁵⁷ investigations by the Commission according to Chapter V of Regulation (EC) No. 1/2003,⁵⁸ handling of complaints according to Article 7 of Regulation (EC) No. 1/2003⁵⁹ and exercise of the right to be heard.⁶⁰

IV. Block Exemptions

In the field of Community competition law, companies' task of assessing their behaviour is facilitated by block exemptions which clarify and simplify the application of the rules. Regulations such as (EEC) No. 19/65/EEC,⁶¹ (EEC) No. 2821/71,⁶² (EEC) No. 3976/87,⁶³ (EEC) No. 1534/91,⁶⁴ or (EEC) No. 479/92⁶⁵ empower the Commission to apply Article 81(3) of the EC-Treaty by Regulation to certain categories of agreements, decisions by associations of undertakings and concerted prac-

⁵⁶ Commission Reg. (EC) No. 773/2004 relating to the conduct of proceedings by the Commission pursuant to Art. 81 and 82 of the EC Treaty, OJ 2004 L 123/18.

⁵⁷ Chapter II of Commission Reg. (EC) No. 773/2004, *supra* at note 56.

⁵⁸ Chapter III of Commission Reg. (EC) No. 773/2004, *supra* at note 56.

⁵⁹ Chapter IV of Commission Reg. (EC) No. 773/2004, *supra* at note 56. Also see Commission Notice on the handling of complaints by the Commission under Art. 81 and 82 of the EC Treaty (2004/C 101/05), OJ 2004 C 101/65.

⁶⁰ Chapter V of Commission Reg. (EC) No. 773/2004, as footnote 56 above.

⁶¹ Council Reg. on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices, No. 19/65/EEC, OJ 36, 6.3.1965, 533.

⁶² Council Reg. on the application of Art. 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices, (EEC) No. 2821/71, OJ 1971 L 285/46.

⁶³ Council Reg. on the application of Art. 81(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector, (EEC) No. 3976/87, OJ 1987 L 374/9.

⁶⁴ Council Reg. on the application of Art. 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector, (EEC) No. 1534/91, OJ 1991 L 143/1.

⁶⁵ Council Reg. on the application of Art. 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies, (EEC) No. 479/92, OJ 1992 L 55/3.

tices.⁶⁶ All existing block exemption Regulations remain in force and agreements covered by block exemption Regulations are legally valid and enforceable even if they are restrictive of competition within the meaning of Article 81(1) of the EC-Treaty.⁶⁷ Such agreements can only be prohibited for the future and only upon formal withdrawal of the block exemption by the Commission or a national competition authority. Block exempted agreements cannot be held invalid by national courts in the context of private litigation.⁶⁸ In the areas defined by such Regulations, the Commission has adopted and may continue to adopt block exemption Regulations by which it declares Article 81(1) of the Treaty inapplicable to categories of agreements, decisions and concerted practices.⁶⁹ If, in an individual case, the agreement is caught by Article 81(1) and the conditions of Article 81(3) are not fulfilled the block exemption may be withdrawn. According to Article 29(1) of Regulation No. 1/2003 the Commission is empowered to withdraw the benefit of a block exemption when it finds that in a particular case an agreement covered by a block exemption Regulation has certain effects which are incompatible with Article 81(3) of the EC-Treaty. Pursuant to Article 29(2) of Regulation No. 1/2003 a competition authority of a Member State may also withdraw the benefit of a block exemption Regulation in respect of its territory or part of its territory, if this territory has all the characteristics of a distinct geographic market. In the case of withdrawal it is for the competition authorities concerned to demonstrate that the agreement infringes Article 81(1) and that it does not fulfil the conditions of article 81(3) of the EC-Treaty.

V. Review by the Court of Justice

Article 31 of Regulation No. 1/2003 states that the Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed. This is consistent with the requirements of Article 229 of the EC-Treaty according to which Regulations adopted jointly by the European Parliament and the Council, and by the Council, pursuant to the provisions of the EC-Treaty, may give the Court of Justice unlimited jurisdiction with regard to the

⁶⁶ A complete list embracing all block exemption regulations, notices and guidelines is available on the website of the Directorate General for Competition of the European Commission: <http://europa.eu.int/comm/competition/antitrust/legislation/>.

⁶⁷ Commission Notice – Guidelines on the application of Art. 81(3) of the Treaty (2004/C 101/08), OJ 2004 C 101/97, point 2.

⁶⁸ Commission Notice – Guidelines on the application of Art. 81(3) of the Treaty (2004/C 101/08), OJ 2004 C 101/97, point 37.

⁶⁹ See recital 10 of Reg. No. 1/2003, *supra* at note 1.

penalties provided for in such regulations. Although not explicitly set forth in Article 31 of Regulation No. 1/2003, this provision also endows the Court of First Instance with unlimited jurisdiction to review the above mentioned decisions as Articles 220 and 225 of the EC-Treaty in the consolidated version of the Treaty of Nice confer upon the Court of First Instance the jurisdiction to hear and determine at first instance actions or proceedings referred to in Article 230.⁷⁰ Moreover, national courts can, under specific circumstances set out in Article 234 of the EC-Treaty, stay a pending proceeding involving questions of Community competition law and request the Court of Justice to give a ruling thereon, if the national court considers that a decision on the question is necessary to enable it to give judgement. Finally, undertakings can take legal action against decisions of national competition authorities and national courts according to the law of the respective Member State. Another point worth mentioning is that recital 37 of Regulation No. 1/2003 expressly provides that the Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.⁷¹ Accordingly, Regulation No. 1/2003 should be interpreted and applied with respect to those rights and principles.

D. Conclusions

The new Council Regulation (EC) No. 1/2003 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty Establishing the European Community brings fundamental changes in the observance of Community competition law. The shift towards a direct applicability of Article 81(3) is a first and important step in strengthening and reinforcing a system ensuring that competition in the internal market is not distorted. In particular in view of the enlargement of the European Union the new Regulation is highly appropriate. However, the numerous changes involve uncertainties which call for adjustment. In order to lighten the burden which the new system imposes on undertakings and to take away remaining uncertainties, the Commission made good its announcement to facilitate undertakings' task of assessing their behaviour by block exemptions, Commission Notices and guidelines clarifying the application of the new rules.⁷² On balance, Regu-

⁷⁰ Art. 230(4) of the EC-Treaty provides that any natural or legal person may, under the conditions set out in paragraph 2, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or decision addressed to another person, is of direct and individual concern to the former.

⁷¹ Charter of Fundamental Rights of the European Union, OJ 2000 C 364/01.

⁷² Commission Reg. (EC) No. 773/2004 relating to the conduct of proceedings by the Commission pursuant to Art. 81 and 82 of the EC Treaty, OJ 2004 L 123/18, Commission Notice on cooperation within the Network of Competition Authorities (2004/C 101/03), OJ 2004 C 101/43, Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Art. 81

lation No. 1/2003 enables the Commission to use its resources for detection and punishment of serious infringements. This might help to remove inefficiencies and welfare losses in the common market caused by prohibited agreements, decisions or concerted practices which have remained undetected under the system of Regulation No. 17.

and 82 EC (2004/C 101/04), OJ 2004 C 101/54, Commission Notice on the handling of complaints by the Commission under Art. 81 and 83 of the EC Treaty (2004/C 101/05), OJ 2004 C 101/65, Commission Notice on informal guidance relating to novel questions concerning Art. 81 and 82 of the EC Treaty that arise in individual cases (guidance letters) (2004/C 101/06), OJ 2004 C 101/78, Commission Notice – Guidelines on the effect on trade concept contained in Art. 81 and 82 of the Treaty (2004/C 101/07), OJ 2004 C 101/81, Commission Notice – Guidelines on the application of Art. 81(3) of the Treaty (2004/C 101/08), OJ 2004 C 101/97.

Regarding block exemption regulations and guidelines see the list available on the website of the Directorate General for Competition of the European Commission: <http://europa.eu.int/comm/competition/antitrust/legislation>.