An overview of EC Regulation 1/2003 as the new implementing regulation for the rules on competition laid down in Articles 81 and 82 of the EC Treaty

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1. Introduction

This paper provides an overview of the introduction of Regulation 1/2003[1], which replaces Regulation 17/62[2] as the primary instrument for the implementation of Treaty Articles 81 and 82[3] in respect of agreements, decisions and concerted practices. This new regulation is one outcome of the EU competition modernisation[4] programme.

The objectives of this paper are to:

- review Regulation 17/62 as the existing primary instrument for the implementation of the rules of competition;
- summarise DG COMP competition "modernisation" process that resulted in the development of Regulation 1/2003;
- describe Regulation 1/2003 by detailed analysis with reference to changes from Regulation 17/62; and
- examine the commentary on, and the prospective impact of, Regulation 1/2003, with primary reference to the UK.

This paper represents the state of play as of March 2003, soon after adoption of the new regulation in December 2002, but before it has application in May 2004. As a result, the relevance of the material in this paper may change as the regulation begins to affect competition practices and enters use.

2. Overview of the competition environment

Effective competition within the community is considered necessary for an effective market. Articles 81 and 82 of the EC Treaty are expressly concerned with practices that have, or may have, an adverse affect on competition. In particular, Article 81 addresses those practices relating to coordination between entities, whereas Article 82 is concerned with the dominance of entities. Further concern for competition is present in Articles 83 to 89, however this paper is only concerned with Article 81.

Article 81 is constructed as a two-stage filter referred to as a "legal exception system". In the first stage, various types of coordination activities are expressly described as being prohibited according to Article 81(1) where the activity has an anti-competitive effect. In the second stage, various exemptions are available under Article 81(3) for certain activities caught under Article 81(1) where the activities have beneficial results that outweigh their anti-competitive effects.

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[1] Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L001 P001.

[2] Council Regulation (EEC) 17/62 First Regulation implementing Articles 85 and 86 of the Treaty, [1962] OJ P013.

[3] EUROPEAN UNION: CONSOLIDATED VERSIONS OF THE TREATY ON EUROPEAN UNION AND OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY. (online) http://europa.eu.int/eur-lex/en/treaties/dat/EC_consol.html [10 March 2003].

[4] 'Reform of regulation 17: Commission proposal for a new Council regulation', EC DG COMP. (online) http://europa.eu.int/comm/competition/antitrust/others/ [10 March 2003].

Regulation 17/62 was the first procedural regulation adopted by the Commission to implement Article 81. At the time of its adoption, the community was small, and competition law was undeveloped. In this environment, the system of individual notification offered a "hands-on" approach that provided legal certainty where there was otherwise none. The lack of uniformity (or even the presence of) competition law in Member States was a further motivation for adopting a centralised system that ensured consistency and coherency.[5]

In the intervening years, the environment has changed. The size of the community has grown considerably, and what were 6 Member States, will be 25 in 2004. Experience with competition matters has increased substantially, through extensive practice and a large body of decisions made by the Commission or the Courts. Additionally, the individual Member States have evolved their national approaches to competition matters, by bringing them into harmony with the Commission.[6]

To address the changing environment, the Commission began a broad process of modernisation in the 1990s. The primary thrust of this has been to devolve power to, and increase cooperation with, Member State bodies by creating a collaborative competition network.

In terms of implementing Article 81, the modernisation process has required the replacement of Regulation 17/62 with Regulation 1/2003. The new regulation embodies the principles of the new competition environment, and addresses various refinements to the old regulation that had developed through practice. Most significantly, the process of individual notification has been abolished, leaving the community to rely upon general guidance provided by the Commission and the body of experience developed through practice. The new regulation also reigns in the transport sector specific regulations, and displays harmonisation with the "ECMR" (Regulation 4064/89 as amended).[7]

Detailed coverage of the modernisation process including an analysis of the draft Regulation 1/2003 is given in Chapter 7, Section 10 of Whish.[8]

3. Review of Article 81 regime and Regulation 17/62 content

3.1. Authority for enacting regulations addressing Article 81

Article 83 states that "The appropriate regulations or directives to give effect to the principles set out in Articles 81 and 82 shall be laid down by the Council

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[5] Wilhelm v Bundeskartellamt [1969] ECR 1; as reported in s II.4 "Conflicts between EC and domestic law" as part of 'Irish and EU Competition Law', Isolde Goggin, 13 May 2002. (online) [missing] [10 March 2003].

[6] *ibid* s I, where "Ireland in 1991 … introduced prohibitions based on Articles 81 and 82. Spain, Italy, Belgium, Denmark, the Netherlands and the UK have all introduced similar legislation since 1989".

[7] *ibid* s III.1, stating that "In contrast, Article 82 has always been enforced in parallel by the Commission, national courts and national competition authorities".

[8] 'Competition Law', 4th ed, Richard Whish, 2001.

…". Within the European Commission, the implementation of these articles is "managed" by DG COMP.

3.2. Organisation of the various regulations addressing Article 81

Regulation 17/62 was the first, and has been the primary, regulation employed to give effect to Article 81, and to a lesser extent, Article 82. The regulation applies to all sectors of the economy other than transport, which is allowed by Regulation 141/62[9] (exempting transport from application of Regulation 17), and implemented by Regulation 1017/68[10] (road, rail and inland waterways), Regulation 4056/86[11] (maritime transport) and Regulation 3975/87[12] (air transport).

Various procedural detail for Regulation 17/62 is specified in Regulation 3385/94[13] (form, context and other details), Regulation 2843/98[14] (notifications in the transport sector) and Regulation 2842/98[15] (hearing of parties).

Article 82 is implemented through other regulations, such as the "ECMR" (Regulation 4046/89[16] as amended), and not discussed in this paper. It is important to remember that there is some overlap in the application of Articles 81 and 82.

3.3. Primary features of the regulation as legislated

The primary features of the enacted regulation are:

- **Individual negative clearance of EC Article 81(1):** to receive a "comfort letter" indicating that an agreement is not an infringement (Article 2).
- **Individual exemption of EC Article 81(3):** to receive notification from parties for exemption (Article 4) (Article 5); and to make decisions as to applicability (Article 6) (Article 8) (Article 9).
- **Powers of investigation reactively or proactively:** to request information (Article 11); to conduct inquiry into sectors of the economy (Article 12); and to carry out "dawn raids" (Article 14) as is necessary.

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[9] Council Regulation (EEC) 141/62 exempting transport from the application of Council Regulation No 17, [1962] OJ 124 P2751/62.

[10] Council Regulation (EEC) 1017/68 applying rules of competition to transport by rail, road and inland waterway, [1968] OJ L175 P001.

[11] Council Regulation (EEC) 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, [1986] OJ L378 P004.

[12] Council Regulation (EEC) 3975/87 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector, [1987] OJ L374 P001. (as amended)

[13] Commission Regulation (EC) 3385/94 on the form, content and other details of applications and notifications provided for in Council Regulation No 17, [1994] OJ L377 P028.

[14] Council Regulation (EC) 2843/98 on the form, content and other details of applications and notifications provided for in Council Regulations (EEC) No 1017/68, (EEC) No 4056/86 and (EEC) No 3975/87 applying the rules on competition to the transport sector, [1998] OJ L354 P022.

[15] Council Regulation (EC) 2842/98 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty, [1998] OJ L354 P018.

[16] Council Regulation (EEC) 4046/89 on the control of concentrations between undertakings, [1989] OJ L395 P001. (as amended)

- **Powers of enforcement upon infringements:** to terminate (Article 3); apply fines (Article 15); and to impose periodic penalty payments (Article 16) [in appropriate units of account (Article 18)] – subject to review by the ECJ (Article 17).
- **Liaison with member state authorities:** as part of investigations (Article 13); and in its analysis of notifications (Article 10).
- **Care for procedural diligence and due process:** to respect commercial and professional secrecy as part of its activities (Article 20); to take hearings and invite comment and review (Article 19); and to publish decisions (Article 21).

3.4. Substantial refinements in the application of the regulation

The substantial refinements in the application of the regulation are:

- **Confidentiality and privilege in handling of information:** protection of correspondence in relation to proceedings with the commission (AM&S[17]); and professional and commercial confidentiality (AKZO[18]).
- **Wider range of remedial actions:** under Article 3, including the ability to apply interim measures [subject to various conditions] (Camera Care[19], La Cinq[20]); and to adopt declaratory decisions (Bloemenveilingen[21]); or effect positive and negative orders (Commercial Solvents[22]).
- **Right of access to Commission files:** a recipient of a statement of objections can access Commission's files [subject to various conditions] (SA Hercules[23], Soda Ash[24]).
- **Limited decentralisation to Member States:** increased co-operation with national courts generally[25] (Delimitis[26]), and in terms of case allocation[27].

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[17] AM and S Europe Ltd v Commission, [1982] 2 CMLR 264; as the leading case establishing the doctrine of privilege – the substantial issues in privilege were addressed.

[18] AKZO Chemie BV v Commission, [1987] 1 CMLR 231; from *supra* n. 8, where "the ECJ held that business secrets must never be divulged".

[19] Camera Care v Commission, [1980] 1 CMLR 334; as the leading case allowing application of interim remedies under Article 3.

[20] La Cinq v Commission, [1992] 4 CMLR 449; which set more precise guidelines about the use of interim measures.

[21] Bloemenveilingen Aalsmeer, [1989] 4 CMLR 500; from *supra* n. 8, where the declaration was made after the infringing activities had ceased, to provide a statement of policy.

[22] Commercial Solvents Co v Commission, [1974] 1 CMLR 309; where the order required resumption of supply to a previous customer.

[23] SA Hercules v Commission, [1992] 4 CMLR 84; from *supra* n. 8, as the first case on the issue.

[24] Solvay v Commission, [1996] 5 CMLR 57; BASF Coatings AG v Commission, [2000] 4 CMLR 33; from *supra* n. 8, as the leading case refining the concept and establishing the idea of "equality of arms".

[25] Commission Notice on Co-operation Between National Courts and the Commission in Applying Articles 85 and 86 of the EC Treaty, [1993] OJ C39.

[26] Delimitis v Henninger Brau AG, [1992] 5 CMLR 210; where the national courts were obliged to reach conclusions not inconsistent with the Commission.

[27] Commission Notice on Co-operation Between the National Competition Authorities and the Commission in Handling Cases Falling Within the Scope of Articles 85 and 86 of the EC Treaty, [1997] OJ C313.

- **Increased scoping and guidance[28]:** the adoption of the de minimis doctrine[29]; construction of block exemptions[30]; various Notices; and refusal to investigate complaints that have no Community interest (Automec 2[31]).

3.5. Issues with the regulation held by key stakeholders

The are various issues with the regulation and its regime - primarily held by the Commission and Business Community.

3.5.1. Concerns of the Commission

The Commission has the following concerns with the regime:

- **The monopoly on Article 81(3) restricts scalability:** as the Commission cannot devolve application of Article 81(3) to Member States.[32] Furthermore, businesses see little point in using national authorities for Article 81(1) when they cannot also request exemption of Article 81(3) at the same time, and even if they did, they could not appeal to national courts on Article 81(3) matters. This is the primary restraint to devolution of enforcement.
- **It is unable to concentrate on serious issues:** as Commission resources are tied up with the notification process, leaving it unable to concentrate on the detection and punishment of serious infringements.[33] This has been mitigated by the implementation of block exemptions, the use of Notices for guidance, and the narrower application of Article 81(1).

3.5.2. Concerns of the Business community

The Business community has the following concerns with the regime:

- **The cost of compliance is too high:** as the broad application of Article 81(1) and the need for individual notification, means that nearly all agreements must be notified to the Commission, involving time and expense. This is not an issue in other jurisdictions (e.g. USA and Australia) where there is no notification and exemption system.
- **There are conflicts of interest in the Commission's approach:** due to a lack of separation of powers between investigative and enforcement roles[34] resulting it being "less open to defences brought forward by the undertakings"[35]. On the one hand, this argument fails because decisions

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[28] 'The Commission White paper on Modernisation of the rules implementing Articles 81 and 82 of the E.C. Treaty', Barry J. Rodger, L.E. Rev. 1999, 24(6), 653-663.

[29] Commission Notice on Agreements of Minor Importance, [1986] OJ C231/2. Revised in 1997 as [1997] OJ C372/13.

[30] *For example,* Commission Regulation on Block Exemption Regulation on Exclusive Distribution, [1984] OJ L173/1.

[31] Automec (No 2), [1992] 5 CMLR 431; from *supra* n. 8, where "the Commission was entitled to conclude that there was not a sufficient Community interest to require it to investigate".

[32] *supra* n. 2, Article 9(1).

[33] *infra* n. 48.

[34] *supra* n. 8, p 232.

[35] 'The case for a reform of Regulation 17/62', Freshfields Bruckhaus Deringer, 2003. (online) http://www.freshfields.com/practice/comptrade/publications/eu-reform17-62/need.asp [10 March 2003].

can be appealed to the ECJ (the ECJ itself has explicitly rejected the argument[36] and shown little mercy in ruling counter to the Commission). However, this could cause procedural "drag" and therefore contribute to higher costs.

- **There is a lack of legal certainty:** as "comfort letters" are not binding (Perfumes[37]) nor published[38], and requests for formal decisions are ineffective due to excessive delays involved[39]. Where decisions have been made, "the large majority … have been challenged by the parties before the European courts"[40], reflecting a lack of trust in the Commission's approach. In contrast, the "ECMR" (Regulation 4064/89 as amended), requires the Commission to issue a formal decision within five months at the latest.
- **The delay for formal decisions is excessive:** as it may take "many years, if not forever, for a decision"[41] and the Commission "is not subjected to any legal time frames with regard to the investigation and the adoption of a decision"[42].

4. Summary of Regulation 17/62 reform ("modernisation")

The Commission's work items relating to the "Reform of regulation 17: Commission proposal for a new Council regulation" are available from the DG COMP website[43] and in the EU Summaries of legislation[44].

4.1. Timeline of events in the modernisation process

The DG COMP modernisation process applies to all areas of competition activity. The following timeline highlights the course of events specifically relating to Regulation 17/62.

Date	Event

[36] Musique Diffusion Francaise SA v Commission, [1983] 3 CMLR 221.

[37] Procurer de la Republique v Bruno Giry and Guerlain SA, [1981] 2 CMLR 99; from *supra* n. 8.

[38] 'Modernisation of the rules implementing EC Competition Law', Kirsty G. Middleton, S.L.T. 1999, 25, 217-221.

[39] *supra* n. 35, adding that "there have even been cases where the parties notified agreements as long as fifteen years ago without ever receiving a clearance decision to date".

[40] *supra* n. 35.

[41] *supra* n. 5, s III.1 "Regulation 17".

[42] *supra* n. 35, adding that "in some cases, the Commission took as long as nine years and three months, seven years and ten months, and six years and six months to take the decision", and as a result undertakings have begun to challenge the decisions using Article 6 of the ECHR, and the CFI accepted the basic argument, but "held that the duration of almost four years could not be considered undue because the duration of each individual state of the proceedings had not been excessively long".

[43] *supra* n. 4.

[44] 'RULES APPLICABLE TO FIRMS: RESTRICTIVE PRACTICES AND ABUSE OF DOMINANT POSITION', EC. (online) http://europa.eu.int/scadplus/leg/en/s12001.htm [10 March 2003].

22 October 1998	DG COMP speech on “EC Competition System – Proposals for Reform” outlines the overall approach to modernisation of all competition law.
28 April 1999	DG COMP publish “White paper on modernisation of the rules implementing articles 85 and 86 of the EC treaty”, and request for comments period started.
22 September 1999	EUROPARL public hearing undertaken.
30 September 1999	DG COMP request for comments period closed.
8 December 1999	S&E COMMITTEE adopt opinion.
18 January 2000	EUROPARL adopt resolution (VON WOGAU report).
29 February 2000	DG COMP publish “Summary of observations”, which “presents the main arguments put forward” (based upon 14 member state, and 104 third-party positions).
27 September 2000	DG COMP publish “Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty”.
9-10 November 2000	EUROPARL + DG COMP host ‘Conference on "The Reform of European Competition Law"’.
16 December 2002	European Council adopt “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”.
4 January 2003	EC Regulation 1/2003 published.
1 May 2004	EC Regulation 1/2003 has application.

4.2. Outline of the driving forces in modernisation announced

In a speech titled “EC Competition System – Proposals for Reform”[45], a very broad overview of the reform efforts for all facets of competition activity was outlined.

The **three basic reasons for modernisation** were identified as:

- The ongoing changes in the environment in which EC competition law operates, with no further detail.
- The prospect of accession of new Member States causes (a) enormous economic gap between old and new Member States, (b) expansion in a competition system designed for a smaller Community.

[45] ‘EC Competition System – Proposals for Reform. Dr. Alexander Schaub, 25th Annual Conference: International Antitrust Law & Policy’, Fordham Corporate Law Institute, New York, 22 October 1998. (online) http://europa.eu.int/comm/competition/speeches/text/sp1998_059_en.pdf [10 March 2003].

- The enforcement of competition principles has become more effective in most of the Member States, such as their application of EC competition law.

The **three basic orientations of the reform efforts** were described as:

- "The Commission has to concentrate on the essentials", by
  - following "the notions of subsidiary and proportionality";
  - involving "decentralised application of the EC competition rules, but without jeopardising coherence";
  - finding "adequate devices … to free the Commission from unnecessary notifications" so that it can pursue a "more pro-active approach"; and
  - employing "less *a priori* and more *a posteriori* control".
- "The reformed system must ensure more efficient enforcement", in terms of procedures, decision-makers applying the rules, and networks between these decision-makers.
- "The reformed system must guarantee a coherent application of the rules and a reasonable level of legal certainty for the benefit of economic operators", involving one set of substantive rules, guidelines in the interpretation of those rules, and centralised judicial review.

4.3. Initial white paper on modernisation published

The "White paper on modernisation of the rules implementing articles 85 and 86 of the EC Treaty" was published on 28 April 1999.[46] This is a detailed and early stage document. Important elements in the process are revealed from the subject and summary of the paper, which are reproduced here.

Subject of Proposal
The subject of the proposal is the reform of the implementing regulations for Articles 81 and 82 of the EC Treaty, i.e. Regulation No 17 and the corresponding transport regulations. It is proposed to create a new enforcement system referred to as a "directly applicable exception system". In such a system, both the prohibition rule set out in Article 81(1) and the exception rule contained in Article 81(3) can be directly applied by not only the Commission but also national courts and national competition authorities. Agreements are legal or void depending on whether they satisfy the conditions of Article 81(3). No authorisation decision is required for enforcing agreements complying with Article 81 as a whole. This is already the existing enforcement system for Article 82 of the EC Treaty.

Executive Summary
1. In the field of competition law applicable to undertakings, the EC Treaty sets out general rules applicable to restrictive practices (Article 85) and abuses of dominant position (Article 86). The Treaty

[46] 'WHITE PAPER ON THE MODERNISATION OF THE RULES IMPLEMENTING ARTICLES 85 AND 86 OF THE EC TREATY, COMMISSION PROGRAMME No 99/027', EC DG COMP, Brussels, 28 April 1999. (online) http://europa.eu.int/comm/competition/antitrust/wp_modern_en.pdf [10 March 2003].

empowers the Council to give effect to these provisions (Article 87).

2. In 1962, the Council adopted Regulation 17, the first Regulation implementing Articles 85 and 86. This Regulation laid down the system of supervision and enforcement procedures, which the Commission has applied for over 35 years without any significant change.
3. Regulation 17 created a system based on direct applicability of the prohibition rule of Article 85 (1) and prior notification of restrictive practices for exemption under Article 85 (3). While the Commission, national courts and national authorities can all apply Article 85(1), the power to grant exemptions under Article 85(3) was granted exclusively to the Commission. Regulation 17 thus established a centralised authorisation system for all restrictive practices requiring exemption.
4. This centralised authorisation system was necessary and proved very effective for the establishment of a "culture of competition" in Europe. It should not be forgotten that in the early years competition policy was not widely known in many parts of the Community. At the time when the interpretation of Article 85 (3) was still uncertain and when the Community's primary objective was the integration of national markets, centralised enforcement of the EC competition rules by the Commission was the only appropriate system. It enabled the Commission to establish the uniform application of Article 85 throughout the EC and to promote market integration by preventing companies from recreating barriers which Member States themselves had gradually eliminated. It created a body of rules which is now accepted by all Member States and by industry as fundamental for the proper functioning of the internal market. The importance of competition policy today is borne out by the fact that each Member State now has a national competition authority to enforce both national and (where empowered to do so) Community competition law.
5. However, this system, which has worked so well, is no longer appropriate for the Community of today with 15 Member States, 11 languages and over 350 million inhabitants. The reasons for this are to be found in the Regulation 17 system itself and in external factors relating to the development of the Community.
6. As to the reasons inherent in the Regulation 17 system, the centralised authorisation system based on prior notification and the Commission's exemption monopoly has led companies to notify large numbers of restrictive practices to Brussels. Since national competition authorities and courts have no power to apply Article 85 (3), companies have used this centralised authorisation system not only to get legal security but also to block private action before national courts and national competition authorities. This has undermined efforts to promote decentralised application of EC competition rules. As a result, the rigorous enforcement of competition law has suffered and efforts to decentralise the implementation of Community law have been thwarted. In an ever

more integrated Community market, this lack of rigorous enforcement and the failure to apply one common set of rules harms the interests of European industry.

7. The development of the Community since 1962 has been extraordinary. The Community of 6 Member States has become a Union of 15 and is likely to become even larger as applicant countries join. The internal market with all its imperfections is a reality and Economic and Monetary Union is under way.
8. The role of the Commission in this new environment has changed. At the beginning the focus of its activity was on establishing rules on restrictive practices interfering directly with the goal of market integration. As law and policy have been clarified, the burden of enforcement can now be shared more equitably with national courts and authorities, which have the advantage of proximity to citizens and the problems they face. The Commission has now come to concentrate more on ensuring effective competition by detecting and stopping cross-border cartels and maintaining competitive market structures. It has also risen to the challenges of merger control, liberalisation of hitherto monopolised markets and international cooperation.
9. The Commission can cope with all these developments only by focussing its attention on the most important cases and on those fields of activity where it can operate more efficiently than national bodies. To this end it has already adopted various measures such as the “de minimis” Notice for agreements of minor importance and block exemption regulations.
10. However, these measures are not sufficient to meet the new challenges outlined above. It is no longer possible to maintain a centralised enforcement system requiring a decision by the Commission for restrictive practices which fulfil the conditions of Article 85 (3). To make such an authorisation system work in the Community of today and tomorrow would require enormous resources and impose heavy costs on companies. It is essential to adapt the system so as to relieve companies from unnecessary bureaucracy, to allow the Commission to become more active in the pursuit of serious competition infringements and to increase and stimulate enforcement at national level. Our Community requires a more efficient and simpler system of control.
11. In the White Paper, the Commission discusses several options for reform. It proposes a system which meets the objectives of rigorous enforcement of competition law, effective decentralisation, simplification of procedures and uniform application of law and policy development throughout the EU.
12. The proposed reform involves the abolition of the notification and exemption system and its replacement by a Council Regulation which would render the exemption rule of Article 85 (3) directly applicable without prior decision by the Commission. Article 85 as a whole would be applied by the Commission, national competition authorities and national courts, as is already the case for Articles

85(1) and 86.

13. This reform would allow the Commission to refocus its activities on the most serious infringements of Community law in cases with a Community interest. It would pave the way for decentralised application of the EC competition rules by national authorities and courts and eliminate unnecessary bureaucracy and compliance costs for industry. It would also stimulate the application of the EC competition rules by national authorities.
14. In the new system, the Commission would keep a leading role in determining EC competition policy. It would continue to adopt Regulations and Notices setting out the principal rules of interpretation of Articles 85 and 86. The Commission would also continue to adopt prohibition decisions and positive decisions to set out guidance for the implementation of these provisions. It is also envisaged that production joint ventures involving sizeable investments would not be included in the new system, but submitted instead to the procedural rules of the Community merger regulation.
15. In this system of concurrent jurisdiction of the Commission, national authorities and national courts, it would be necessary to maintain certain measures enabling the Commission to ensure coherent application of the rules throughout the Community. In particular, it is proposed that the Commission maintain the power to remove a case from the jurisdiction of national competition authorities and to deal with a case itself if there is a risk of divergent policy. There should also be a clear obligation for national courts to avoid conflicts with Commission decisions. Additional measures are explained in the White Paper.
16. The Commission invites the Member States, all other institutions and interested parties to submit comments on the White Paper by 30.09.1999 to the address on the last page.

4.4. Submissions received, interpreted and published

Interested parties were invited to submit comments by 30 September 1999.

The European Parliament organised a public hearing on 22 September 1999, and adopted a resolution on 18 January 2000 (the VON WOGAU Report). The Social and Economic Committee adopted an opinion on 8 December 1999.

On 25 February 2000, the Commission had received,

- submissions from 14 Member States;
- 104 formal position papers from third parties including submissions from EFTA countries, ESA and competition authorities from Estonia, Hungary and the Czech Republic; and
- numerous papers that it had collected from conferences.

The “Summary of observations” was published by DG COMP on 29 February 2000.[47] This presented “the main arguments put forward” according to the following categories:

- Options other than the legal exception system
- Compatibility of the legal exception system with the treaty
- Abolition of the authorisation and notification system
- Decentralisation to national courts
- Decentralisation to national authorities: functioning of the network
- Investigative powers of the commission & rights of defense
- Impact on national laws & systems
- Specific rules

4.5. Proposal for new regulation published

The “Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty” was published on 27 September 2000.[48] It describes in detail:

- the background to its development;
- the characteristics of the new regulation;
- an article by article description of the regulation; and
- the text of the proposed regulation itself.

This was accompanied by a press release “Competition: Commission proposes regulation that extensively amends system for implementing Articles 81 and 82 of the Treaty”.[49]

4.6. Conference on the new regulation held

A ‘Conference on "The Reform of European Competition Law"’ was held by the European Parliament and the European Commission on 9-10 November 2000.[50] It was stated that

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[47] ‘WHITE PAPER on REFORM OF REGULATION 17: Summary of the observations’, EC DG COMP, 29 February 2000. (online) http://europa.eu.int/comm/competition/antitrust/others/wp_on_modernisation/summary_observations.pdf [10 March 2003].

[48] ‘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 (“Regulation implementing Articles 81 and 82 of the Treaty”)’, EC DG COMP, Brussels, 27 September 2000. (online) http://europa.eu.int/comm/competition/antitrust/others/modernisation/comm_2000_582/en.pdf [10 March 2003].

[49] ‘Competition: Commission proposes regulation that extensively amends system for implementing Articles 81 and 82 of the Treaty. European Commission’, EC, Brussels, 27 September 2000. (online) http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.getfile=gf&doc=IP/00/1064|0|AGED&lg=EN&type=PDF [10 March 2003].

[50] ‘Conference on "The Reform of European Competition Law", Freiburg, 9 and 10 November 2000’, EC DG COMP. (online) http://europa.eu.int/comm/competition/conferences/2000/freiburg [10 March 2003].

"The aim of this conference was to bring together a wide range of interested parties and authorities to discuss the reform proposal of the Commission which will grant national courts and national competition authorities the full power to apply Articles 81 and 82 in addition to the enforcement of these rules by the Commission."

Speeches were given in three sessions,

- Efficient protection of competition in an enlarged Community through association of national competition authorities and national courts;
- Coherent application of EC competition law in a system of parallel competencies; and
- Legal certainly in a system of parallel competencies.

4.7. Approval and publication of the new regulation

On 16 December 2002, the European Council adopted the regulation as:

"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"

as published in the Official Journal on 4 January 2003.[51]

The regulation will be applicable from 1 May 2004, which is the date of accession of new Member States into the European Union.

5. Description of Regulation 1/2003 content as the new Article 81 regime

5.1. Organisation of the regulation

Regulation 1/2003 contains 38 recitals and 11 chapters with a total of 45 articles (10 of which are transitional provisions). It expressly repeals existing procedural instruments of Regulation 17/62 and Regulation 141/62. It substantially replaces, but does not repeal, the transport sector regulations of Regulation 1017/68 (road, rail and inland waterways), Regulation 4056/86 (maritime transport) and Regulation 3975/87 (air transport). It makes minor amendments to other related regulations.

5.2. Primary features of the regulation

The key features of Regulation 1/2003 are:

- **Fundamental principles:** for application of Articles 81 and 82 (Article 1); the burden of proof (Article 2); and the relationship between Community and Member State Competition law (Article 3).
- **Powers of enforcement between community and national levels:** as applied by the Commission (Article 4); competition authorities in Member States (Article 5); and the national courts (Article 6).

[51] Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L001 P001.

- **Powers to make decisions regarding infringements:** to terminate (Article 7); to apply interim measures (Article 8); or to accept commitments (Article 9); or to determine inapplicability (Article 10);
- **Process of cooperation between community and national levels:** as part of making decisions (Article 11); exchanging information (Article 12), and suspending or terminating conflicting proceedings (Article 13), including the use of an Advisory Committee (Article 14) that has a review function. The Commission can assist national courts (Article 15) as part of ensuring uniform application of the Community law (Article 16).
- **Powers of investigations reactively or proactively:** to conduct inquiry into sectors of the economy (Article 17); request information (Article 18); take statements (Article 19); and to carry out "dawn raids" on commercial (Article 20) and other (Article 21) premises, as necessary.
- **Powers to impose penalties subject to limitations:** which may consist of fines (Article 23); or periodic penalty payments (Article 24) – subject to limitations on the imposition (Article 25) and enforcement (Article 26) of these penalties, including provisions for interruption, and ability for review by the ECJ (Article 31).
- **Powers to withdraw the benefit of Article 81(3) exemption:** when certain aspects of an agreement are incompatible (Article 29).
- **Care for procedural diligence and due process:** to take hearings and invite comment and review (Article 27); to respect commercial and professional secrecy (Article 28), and publish decisions (Article 30).

The regulation was adopted on 16 December 2002, published on 4 January 2003, and has application from 1 May 2004.

5.3. Detailed analysis of the regulation

Each of the 11 chapters and 45 articles will be dealt with individually.

5.3.1. CHAPTER I - PRINCIPLES

This chapter provides a precise and unambiguous statement of the key principles that underscore the regulation and its application.

***Article 1* – Application of Articles 81 and 82 of the Treaty** : specifies the default application of Article 81 such that agreements, decisions and concerted practices caught by Article 81(1), are either prohibited or not prohibited according to whether they satisfy Article 81(3). The applicability of Article 82 to abuse of a dominant position is also indicated as an ancillary concern.

***Article 2* – Burden of proof** : in an alleged infringement of Articles 81 and 82, the burden of proof lies with the party making the allegation, and for parties claiming benefit of Article 81(3), the burden of proof rests the party claiming the benefit.

***Article 3* – Relationship between Articles 81 and 82 of the Treaty and national competition laws** : relevant Member State bodies may apply Articles 81 and 82, and although they may apply stricter laws on their own territory (which may differ in format or objective to Articles 81 and 82), they can only do so to the extent that it does not impact upon the application of

Article 81 to those that affect trade between Member States. However, this provision does not apply to the application of national merger control laws.

5.3.2. CHAPTER II - POWERS

This chapter is concerned with the powers of authorities and bodies responsible for applying Articles 81 and 82, including the Commission, the Member State Competition authorities and the Member State courts.

Article 4 **– Powers of the Commission** : the Commission has the power to apply Articles 81 and 82.

Article 5 **– Powers of the competition authorities of the Member States** : the Competition authorities of Member States can apply Articles 81 and 82 only in individual cases, and they can act upon initiative or complaint to take no action, or decisions (a) requiring that an infringement be brought to an end, (b) ordering interim measures, (c) accepting commitments, (d) imposing fines, periodic penalty payments or any other penalty provided for in their national law.

Article 6 **– Powers of the national courts** : national courts can apply Articles 81 and 82, without any specific constraints.

5.3.3. CHAPTER III - COMMISSION DECISIONS

The Commission, according to the powers stated in Chapter II, can take decisions regarding agreements, decisions or concerted practices as they occur with respect to Articles 81 and 82. This chapter describes the four possible types of decisions, including a finding of inapplicability.

Article 7 **– Finding and termination of infringement** : allows the Commission to apply structural or behaviour remedies as necessary to bring infringement to end, resulting from its own initiative or a complaint, but the latter is only allowed by those with legitimate interest.

Article 8 **– Interim measures** : allows the Commission to order interim measures as is necessary and appropriate, where a serious and prima facie finding exists.

Article 9 **– Commitments** : upon commitments from undertakings concerned, the Commission may make commitments binding and take no further action, but can reopen proceedings if conditions change or issues are found with the original circumstances.

Article 10 **– Finding of inapplicability** : the Commission may, on its own initiative, and as a result of public interest, find inapplicability due to either Article 81(1) or 81(3), and even Article 82.

5.3.4. CHAPTER IV - COOPERATION

This chapter specifies the nature of cooperation between the Commission and Member State authorities, other than for the purposes of investigation, which is addressed in Chapter V. This is very long chapter.

***Article 11* – Cooperation between the Commission and the competition authorities of the Member States** : a general indication that Community competition rules should be applied in close cooperation, with the duty of Commission to provide documentation about its activities to authorities, and allowance for authorities to request documents from the Commission. Upon commencement of formal investigation, the authority must inform the Commission, and optionally other authorities. Information must also be provided to the Commission from an authority prior to a decision, or related action, being taken: the Commission may request all documentation relating to the decision. Authorities may consult the Commission on cases. A course of action by the Commission will relieve the competence of the authority on the same matter, although consultation with the authority is required where the matter is already being acted upon.

***Article 12* – Exchange of information** : allows the Commission and authorities to provide one another with evidence, but only in exclusive conditions relating to the circumstances under which the evidence was collected, or for application of national competition law. There are concerns about the ability to impose sanctions using this information.

***Article 13* – Suspension or termination of proceedings** : if an issue has already been dealt with, or is subject to proceedings by an authority (or the Commission), then other authorities (or the Commission) can suspend or reject complaints relating to the same issue.

***Article 14* – Advisory Committee** : the Commission must consult the committee prior to taking a decision, where the committee is composed of representatives of the authorities, and possibly additional competent persons, or replacements. The consultation takes place according to time limits, and includes the draft decision and relevant documents, and the committee will deliver a written opinion on the draft decision – this opinion may be "reasoned", and will be attached to the draft decision, and may be published. This consultation may be a written procedure, however an authority may request a meeting, if so desired. The committee may discuss general issues of Community competition law, but cannot issue opinions on cases dealt by authorities.

***Article 15* – Cooperation with national courts** : national courts may request information or opinions from the Commission (and provide necessary documents in doing so), and national court judgements relating to Articles 81 and 82 will be provided to the Commission. To ensure coherency, the Commission may submit observations to national courts. The authorities may also submit observations to national courts on issues relating to the application of Articles 81 and 82.

***Article 16* – Uniform application of Community competition law** : to ensure coherency, national courts cannot rule differently to existing or contemplated Commission decisions, which may require a stay of proceedings in the national court. Also, the authorities cannot take decisions counter to the Commission.

5.3.5. CHAPTER V - POWERS OF INVESTIGATION

For effective enforcement of Articles 81 and 82, the Commission must be able to carry out various forms of investigation, including those of its own initiative. This chapter outlines the scope of those investigations, and the actions allowed by the Commission.

Article 17 **– Investigations into sectors of the economy and into types of agreements** : based on prima facie evidence of lack of competition, the Commission may conduct inquiry and in doing so may request information and carry out inspections, in particular it may request all agreements, decisions and concerted practices; and it may publish a report.

Article 18 **– Requests for information** : the Commission may request information, according to due process including the use of applicable penalties, in simple cases, and in the case of decisions. Responses may be provided by lawyers acting on behalf of clients, but liability remains with clients. All requests will be communicated to the relevant Member State authority. Member States and authorities shall also provide Commission with information.

Article 19 **– Power to take statements** : the Commission may interview consenting parties to collect information as part of investigation. The relevant Member State authority will be informed about the interview, and its officials may assist those conducting interview.

Article 20 **– The Commission's powers of inspection** : the Commission can carry out inspections to perform duties (all, not just investigation), and are empowered to,

- enter premises;
- examine books and other records;
- take or obtain copies or extracts from such books or records;
- to seal the premises as necessary for the inspection;
- ask representatives of undertakings/etc for explanations on facts or documents and record the answers;

while following due process (incl. written authorisations), and penalties for incomplete production of books/records, or incorrect/misleading answers to questions. The relevant Member State authority will be given notice prior to the inspection, and inspections also apply when ordered by decision, for which the Commission must the consult the authority, and the decision can be reviewed by ECJ. For cooperation, assistance by officials and other persons of Member State authorities is allowed, as necessary, including enforcement authority such as police, if the inspection is opposed, or is likely to be opposed in some way. Authorisation from a Member State judicial authority may be necessary, and there are concerns for diligence and proportionality in doing this, but a limitation preventing the Member State bodies from questioning the necessity of the inspection: this can only be carried out by ECJ.

Article 21 **– Inspection of other premises** : largely equivalent to Article 20, this provision allows, where reasonable suspicion exists, for other premises to be inspected, if taken by decision, where justified and after consultation with the relevant Member State authority. Authorisation from a Member State judicial authority is necessary, and there are concerns for diligence and proportionality in doing this, but a limitation preventing the Member State

bodies from questioning the necessity of the inspection: this can only be carried out by ECJ.

***Article 22* – Investigations by competition authorities of Member States** : a Member State authority may carry out inspections or fact finding measures under its national law to assist another Member State authority to determine infringement under Articles 81 and 82. Member State authorities will undertake inspections upon request by Commission, and may be assisted by persons from the Commission.

5.3.6. CHAPTER VI - PENALTIES

Penalties may be applied for various purposes related to enforcing Articles 81 and 82 according to this regulation. These penalties are quantified in terms of the turnover of the parties.

***Article 23* – Fines** : the Commission may apply fines as a result of a failure to comply in investigations under Articles 17, 18 and 20; limited to 1% of total turnover of the preceding business year. The Commission may apply fines as a result of infringement of Articles 81 and 82 or decisions relevant thereto; limited to 10% of total turnover of the preceding business year. There are considerations for fixing the amount of the fine, and ensuring that the Commission is able to collect of the fine, and that fines are not considered criminal sanctions.

***Article 24* – Periodic penalty payments** : these compulsion orders can relate to infringement of Articles 81 and 82, or a decision, or failure to comply with investigation; limited to 5% of average daily turnover in the preceding business year per day.

5.3.7. CHAPTER VII - LIMITATION PERIODS

The penalties specified in Chapter VI are subject to limitation periods described in this chapter.

***Article 25* – Limitation periods for the imposition of penalties** : specified as three years for issues relating to Chapter V (investigations and requests for information), and five years for all other infringements, where the time period will begin on the day of cessation of the infringement. The period is "interrupted" as a result of various procedural actions taken by the Commission or court proceedings relating to the decision, with interruption applying to all parties to the infringement, and causing time to start running afresh. After double the limitation period, without the Commission having applied penalty, the limitation period expires entirely.

***Article 26* – Limitation period for the enforcement of penalties** : specified as five years commencing on the day of the decision becoming final, but can be interrupted by actions relating to variation or enforcement, causing time to start running afresh. The time period can be suspended to allow for payment or court proceedings relating to the decision.

5.3.8. CHAPTER VIII - HEARINGS AND PROFESSIONAL SECRECY

This chapter is concerned with ensuring diligence and due process in the application of the regulation. The Commission has the power (in Chapter X) to augment these with secondary Regulations, which has been the practice under Regulation 17/62.

Article 27 **– Hearing of the parties, complainants and others** : prior to taking a decision, the parties concerned must be given opportunity to be heard on the matters of objection, with rights respected, including access to file other than correspondence between the Commission and/or authorities. Other parties with sufficient interest in the matter may also be heard, upon their application, or by request from the authorities. Prior to adopting a decision, a summary of the case may be published to allow for third party review and submissions.

Article 28 **– Professional secrecy** : this provision ensures that without prejudice to various issues, the material collected in investigations (Chapter V) will be used for the purpose for which it was acquired, and will not be otherwise disclosed.

5.3.9. CHAPTER IX - EXEMPTION REGULATIONS

The Commission can withdraw the Article 81(3) exemption according to the provisions in this chapter.

Article 29 **– Withdrawal in individual cases** : acting on its own initiative or on a complaint, the Commission can withdraw the benefit of an exemption regulation when there are certain effects incompatible with Article 81(3). A relevant Member State authority may also withdraw the benefit in respect of its territory for similar reasons.

5.3.10. CHAPTER X - GENERAL PROVISIONS

This chapter addresses a number of general administrative issues in the applicability or use of the regulation.

Article 30 **– Publication of decisions** : there is a requirement for the Commission to publish the decisions that it takes, and include various detail about the decision while considering commercial confidentiality.

Article 31 **– Review by the Court of Justice** : the ECJ has unlimited jurisdiction to review decisions where a Chapter VI penalty was imposed, and the ECJ may alter penalty.

Article 32 **– Exclusions** : specific exclusion of matters concerned with international tramp vessels (as specified in Regulation 4056/86), maritime transport service (as specified in Regulation 4056/86), and extra-community air transport.

Article 33 **– Implementing provisions** : allowance for further measures that can be taken to apply the regulation, with regard to (a) complaints procedures (Article 7), (b) cooperation procedures (Article 11), and (c) hearings (Article 27). These measures can only be adopted having been published and reviewed by affected parties.

5.3.11. CHAPTER XI - TRANSITIONAL, AMENDING AND FINAL PROVISIONS

This chapter is concerned with various issues relating to the adoption of this regulation, including changes to, and applicability of, existing regulations, and various preconditions that must be met for this regulation to have effect.

Article 34 **– Transitional provisions** : on the date of application, notifications under EC Regulation 17/62 will lapse, but existing procedural steps will continue to have effect.

Article 35 **– Designation of competition authorities of Member States** : member states must designate a responsible Competition authority, which may include courts, and powers and functions may be allocated in different ways; although there are express rules about the applicability of Article 11(6) and Article 5, where Commission action can relieve the competence of the Member State authorities in certain circumstances.

Article 36 **– Amendment of Regulation (EEC) No 1017/68** : previously concerned with road, rail and inland waterways, some provisions are altered, and a substantial number are repealed in favour of this regulation.

Article 37 **– Amendment of Regulation (EEC) No 2988/74** : amended to ensure that it does not apply to measures take under this regulation.

Article 38 **– Amendment of Regulation (EEC) No 4056/86** : previously concerned with maritime transport, some previsions are altered, and a substantial number are repealed in favour of this regulation.

Article 39 **– Amendment of Regulation (EEC) No 3975/87** : previously concerned with air transport, a substantial number of provisions are repealed in favour of this regulation.

Article 40 **– Amendment of Regulations No 19/65/EEC, (EEC) No 2821/71 and (EEC) No 1534/91** : minor removal of references to this regulation.

Article 41 **– Amendment of Regulation (EEC) No 3976/87** : minor removal of references to this regulation.

Article 42 **– Amendment of Regulation (EEC) No 479/92** : minor removal of references to this regulation.

Article 43 **– Repeal of Regulations No 17 and No 141** : repeal of Regulation 17/62, but the Commission reserves the right to apply Article 8(3) that allows for altering of its decision in light of changed circumstances.

Article 44 **– Report on the application of the present Regulation** : this regulation is to be reviewed after five years of its date of application, to assess whether revision is needed. There is indication of need for particular focus on Article 11(6) and Article 17.

Article 45 **– Entry into force** : this regulation (a) shall enter into force as of 20 days after publication in OJ, (b) shall apply from 1 May 2004; and (c) shall be binding and directly applicable in all member states.

5.4. Comparative relationship of the regulation with Regulation 17/62

The following matrix illustrates the relationship between Articles of Regulation 17/62 and Regulation 1/2003. The substantial changes are obvious:

- increased conceptual integrity.;
- codification of case law refinements to procedure;
- harmonisation with "ECMR" (Regulation 4064/89 as amended);
- reduced effect of transport sector specific regulations;
- removal of individual exemption and notification; and
- increased devolution and cooperation with Member States.

Regulation 17/62	**Regulation 1/2003**
Article 1 – Basic provision	Article 1 – Application of Articles 81 and 82 of the Treaty Article 2 – Burden of proof Article 3 – Relationship between Articles 81 and 82 of the Treaty and national competition laws
Article 2 – Negative clearance	*n/a [individual negative clearance of Article 81(1) has been removed]*
Article 3 – Termination of infringements	Article 7 – Finding and termination of infringement Article 8 – Interim measures Article 9 – Commitments Article 10 – Finding of inapplicability
Article 4 – Notification of new agreements, decisions and practices	*n/a [individual exemption of Article 81(3) has been removed]*
Article 5 – Notification of existing agreements, decisions and practices	*n/a [individual exemption of Article 81(3) has been removed]*
Article 6 – Decisions pursuant to Article 85(3)	*n/a [individual exemption of Article 81(3) has been removed]*
Article 7 – Special provisions for existing agreements, decisions and practices	*n/a [individual exemption of Article 81(3) has been removed]*
Article 8 – Duration and revocation of decisions under Article 85(3)	*n/a [individual exemption of Article 81(3) has been removed]*
n/a [individual exemption was used to provide a priori declaration]	Article 29 – Withdrawal in individual cases
Article 9 – Powers	Article 4 – Powers of the Commission Article 5 – Powers of the competition authorities of the Member States Article 6 – Powers of the national courts
Article 10 – Liaison with the authorities of the Member States	Article 11 – Cooperation between the Commission and the competition authorities of the

	Member States Article 12 – Exchange of information Article 13 – Suspension or termination of proceedings Article 14 – Advisory Committee Article 15 – Cooperation with national courts Article 16 – Uniform application of Community competition law Article 35 – Designation of competition authorities of Member States
Article 11 – Requests for information	Article 18 – Requests for information
Article 12 – Inquiry into sectors of the economy	Article 17 – Investigations into sectors of the economy and into types of agreements
Article 13 – Investigation by the authorities of the Member States	Article 22 – Investigations by competition authorities of Member States
Article 14 – Investigating powers of the Commission	Article 19 – Power to take statements Article 20 – The Commission's powers of inspection Article 21 – Inspection of other premises
Article 15 – Fines	Article 23 – Fines Article 25 – Limitation periods for the imposition of penalties Article 26 – Limitation period for the enforcement of penalties
Article 16 – Periodic penalty payments	Article 24 – Periodic penalty payments
Article 17 – Review by the Court of Justice	Article 31 – Review by the Court of Justice
Article 18 – Unit of account	*n/a [fines are specified as percentages]*
Article 19 – Hearing of the parties and of third persons	Article 27 – Hearing of the parties, complainants and others
Article 20 – Professional secrecy	Article 28 – Professional secrecy
Article 21 – Publication of decisions	Article 30 – Publication of decisions
Article 22 – Special provisions	*n/a [individual exemption of Article 81(3) has been removed]*
Article 23 – Transitional provisions	Article 34 – Transitional provisions

applicable to decisions of authorities of the Member States	
Article 24 – Implementing provisions	Article 33 – Implementing provisions
n/a [implicit exclusion due to the existence of Regulation 141/62]	Article 32 – Exclusions
n/a [there were no previous regulations]	Article 36 – Amendment of Regulation (EEC) No 1017/68 Article 37 – Amendment of Regulation (EEC) No 2988/74 Article 38 – Amendment of Regulation (EEC) No 4056/86 Article 39 – Amendment of Regulation (EEC) No 3975/87 Article 40 – Amendment of Regulations No 19/65/EEC, (EEC) No 2821/71 and (EEC) No 1534/91 Article 41 – Amendment of Regulation (EEC) No 3976/87 Article 42 – Amendment of Regulation (EEC) No 479/92 Article 43 – Repeal of Regulations No 17 and No 141
n/a [there was no review process]	Article 44 – Report on the application of the present Regulation
n/a [there was no specific Article]	Article 45 – Entry into force

5.5. Observations to be made from the regulation

The following observations can be made from the regulation:

- The structure of the regulation bears similarity to the "ECMR" (Regulation 4064/89 as amended) suggesting Commission's desire to harmonise process.
- The Article 19 provision on "Power to take statements" may have limited impact, as there are no specific obligations to comply, nor any applicable penalties. The Courts may refine this in practice, especially with regard to human rights considerations.
- The Article 14 provision covering "Advisory Committee on Restrictive Practices and Dominant Positions" is a more mature form of the Regulation 17/62 provision in Article 10 relating to the "Advisory Committee on Restrictive Practices and Monopolies". It is instructive to examine Regulation 4064/89 provision in Article 19 on the "Advisory Committee on concentrations".
- Increased transparency is provided for the opinion given by the Advisory Committee under Article 14, although the Committee retains discretion over whether to publish, and cannot be compelled.

- It is made clear in various provisions (Article 1, Article 4) that this regulation can apply to both Articles 81 and 82, even though the regulation is generally concerned with Article 81.
- The fines in Article 23 are now entirely calculated on a percentage basis, rather than involving absolute values, hence the removal of consideration for "unit of account". Limitation periods are now included.

6. Examination of Regulation 1/2003 issues, comments and impacts

There has been a lukewarm reaction to the new regulation and its regime. All significant concerns tend to relate to transitional issues resulting from the devolution of enforcement to Member States.

6.1. Summary of the concerns

The primary concerns with regulation and its regime are:

- **The variability of national implementations:** as a result of differences in the per se application of Competition law, and the more general differences in procedural rules and legal systems. This may lead to "forum shopping". The regulation does provide numerous mechanisms to counter this, but there is an inevitable period of transition with increased uncertainty.
- **The uncertain meaning of the "effect on trade":** as a general lack of uncertainty about which jurisdiction is applicable for a matter. This is substantially addressed by cooperation procedures in the regulation, and the Commission's pending guidelines to cover this topic and to address case allocation.[52] These guidelines will likely reflect the "ECMR", and existing case law, by defining a concept of "Community dimension" for Article 81.
- **The inexperience of national courts, and even national competition authorities:** as consideration of EC competition matters is not a honed practice, especially for Member States that are to enter the community and have little or no history of competition law let alone harmonisation with Community approaches. Training will be required.
- **The possibility of re-nationalisation of competition policy:** which may occur if Member States retain existing national practices, and do not move towards the coherent competition network envisaged by the Commission.

6.2. Perspective of the European Courts

Ehlermann & Atanasiu consider the impact of modernisation on the ECJ and the CFI.[53] They expect an increase in the number of:

- "actions for the annulment of and appeals against Commission decisions based on Articles 81 and 82"; and

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[52] 'The Commission's Draft "New Regulation 17"', Bourgeois & Humpe, E.C.L.R. 2002 23(2) 43-51.

[53] 'The Modernisation of E.C. Antitrust Law: Consequences for the Future Role and Function of the E.C. Courts', Ehlermann & Atanasiu, E.C.L.R. 2002 23(2) 73-80.

- "requests for preliminary rulings coming from national courts reviewing NCA actions or decisions in the application of Articles 81 and 82".

It is their opinion that there is no need to alter the existing architecture of the EC Court system, but perhaps the CFI should have "the primary responsibility for preliminary rulings concerning the interpretation of Articles 81 and 82". They dismiss the need for "specialised chambers" at the CFI on competition matters. As a result of this, the ECJ would only become involved on specific requests from the CFI, or to hear appeals against CFI rulings.

6.3. Perspective of the Business community

Linklaters

Linklaters memorandum on the adoption of the regulation describes the key aspects of the new systems and highlights various issues – specifically those that apply to their main category of customers: businesses.[54] These issues include the following:

- The Commission continues to have the jurisdiction to grant block exemptions, subject to Council approval, as the Member States (through the EU Council of Ministers) refused to grant the Commission a blanket power to do so.
- Although there is "no strict criteria for allocating cases between the NCAs[55] or between the Commission and NCAs … a proposed joint declaration by the Council and the Commission will set down guidelines for the operation of the ECN[56], including case allocation". This may involve a test including "where more than three Member States are substantially affected" amongst other considerations.
- There are concerns about Article 3, including the risk that "NCAs and national courts will have a natural preference for their own legal systems and may be disinclined to apply EU law".
- The "ability to impose structural remedies is by far the most radical of the European Commission's new decision-making powers and has been the subject of much criticism in the business community".
- Various matters are unresolved, specifically "the businesses' rights regarding access to documents in national proceedings; case allocation; Commission interventions in national litigation; the exchange of documents between the Commission and national competition authorities; or the interplay between the cartel leniency policies of Member States and the Commission".
- That "the abolition of the notification system … in favour of a decentralised system of self-assessment is likely to lead to:
  - a risk of inconsistent application of competition law enforcement across the EU;

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[54] 'EU Competition Modernisation agreed', Linklaters, December 2002. (online) http://www.linklaters.com/pdfs/publications/EUCompModernisation_memo.pdf [10 March 2003].

[55] National Competition Authorties.

[56] European Competition Network.

- an increase in national litigation and legal uncertainty as to how national courts will apply Article 81(3);
- a gradual decline in central guidance as the Commission will have fewer opportunities of non-contentious contact with business;
- an increase in references for preliminary rules from national courts to the European courts;
- an increase in cooperation between the Commission, NCAs and national courts, which businesses will need to counterbalance; and
- the need for candidate countries to implement the new system immediately on acceding to the EU".

British Music Rights

The British Music Rights submission on the modernisation suggested that the Commission should retain an "open door for consultation and guidance to industries".[57] BMR are concerned about jurisdictional "forum shopping by challengers" should there be inconsistent application of Article 85(3) in Member States. They prefer to see in-house lawyers covered by legal professional privilege, reflecting the situation in the US where "employed lawyers do enjoy privilege for their written communications".

6.4. Perspective of the Member States

6.4.1. Generally

Jones examines the "variations in national procedural rules" in terms of "Fines and other sanctions" and "Legal professional privilege and self-incrimination" for all Member States.[58] Despite the level of harmonisation on Competition matters per se, there remain significant differences as a result of overall differences in the specific nature of each national legal system.

Mavroidis & Neven observe that with the new decentralised framework, "Member States will have little incentive to take into account in its decision the interests of other Member States", leading to a "disintegrating effect".[59] They suggest the need for a "'positive comity' obligation" and that a "formal procedure for co-ordination between different institutions should be laid down (as is in the US)". However, the principle of mutual recognition works in other areas of Community law.[60]

It is to be remembered that the Commission had previously begun down the path of cooperation with Member State bodies.[61]

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[57] 'Issues and opinions: Modernisation of the Rules implementing Articles 81 and 82', British Music Rights, 27th October 1999. (online) http://www.bmr.org/html/submissions/submission11.html [10 March 2003].

[58] 'Regulation 17: The Impact of the Current Application of Articles 81 and 82 by National Competition Authorities on the European Commission's Proposals for Reform', Jones, E.C.L.R. 201 22(10) 405-415.

[59] 'The Modernisation of EU competition policy: Making the network operate', Mavroidis & Neven, July 2000. (online) http://www.hec.unil.ch/deep/Textes/00.17.pdf [10 March 2003].

[60] *supra* n. 52.

[61] *See supra* n. 25 & n. 27.

6.4.2. Ireland

Goggin assesses the Irish and EU systems, with specific reference to the modernisation of both, and detailed consideration of various issues in the "shared" application of Competition law.[62]

"Article [3] has been debated at length by the Council Working Group, and by Ministers, and a number of concerns have emerged"[63], including:

- that "by obliging national competition authorities to make a choice between national law and Community law, the exclusivity rule would expose national procedures to legal challenges"; and
- "the proposal would hinder competition authorities from pursuing cases arising in their own territory that Community law might not be intended or equipped to deal with".

Ireland also has concerns about "the difficulty of establishing whether a particular agreement or practice 'may affect trade' between, say, Ireland and another Member State". Also, "as Ireland has criminal sanctions available to counter breaches of its competition law, and Community Law does not, the primacy of Community Law could lead to less deterrence in cases of cross-border breaches of the competition rules". Fortunately "efforts are continuing … to find mutually acceptable solutions to these difficulties".[64]

Otherwise, Ireland's Competition Act 2002 "takes account of … the proposed modernisation of EU competition law".

6.4.3. United Kingdom

The Competition Act 1998[65] is already aligned to the structure of Community Law[66], and expressly requires that competition questions are "dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community"[67]. It is unclear of the specific revisions required for the Act to comply with the new regulation[68], although some provisions are obvious candidates[69].

Department of Trade and Industry

The DTI says that "Overall, the Government welcomes the Commission's proposals" for "EU Modernisation".[70] The decentralisation "will allow OFT to handle more cases which affect inter-state trade and impact on the UK", leaving "cases with truly pan-European implications … to be handled by the European Commission". Further rhetoric states that "greater consistency for

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[62] *Supra* n. 5.

[63] *ibid*, s IV.4 "Preliminary views of the Irish Competition Authority".

[64] This may reflect the provision in Article 23(5) of the adopted regulation.

[65] Competition Act 1998 (1998, C. 41).

[66] *ibid,* Specifically in terms of Chapter I and Chapter II prohibitions which reflect EC Articles 81 and 82.

[67] *ibid*, Section 60(1).

[68] *supra* n. 38.

[69] *ibid,* such as Section 10 where agreements with Community exemptions do not need to be notified to the OFT.

[70] 'DTI Competition Policy: A World Class Competition Regime', DTI. (online) http://www.dti.gov.uk/cp/whitepaper/523305.htm [10 March 2003].

businesses operating in the Single Market" and reduced "costs of operating in multiple jurisdictions" would occur as a result of uniformity of competition law across the community. To support this, domestic laws will need to be modified, specifically to allow OFT the power to apply Articles 81 and 82 directly, although, there would be no "hold up [to] desirable reform [of] the [UK] competition regime until the modernisation proposals are finalised".

The DTI's earlier, and detailed, response to the Commission's White paper[71] reasoned through many issues. It had concerns with the possible inconsistency of application of the law across community and national bodies, and jurisdictional "forum shopping".

Office of Fair Trading

The OFT indicate that they are already "Working together", and that "secondments of personnel [between OFT and other Member States] have been increasing in number and frequency".[72] It also has numerous established links and information sharing agreements with the Commission, and in general it "welcomes the modernisation proposals – and the prospect of greater consistency across Europe".

Practitioners

Middleton describes how removing the Commission's exclusively of application of Article 81(3) allows the courts to see Article 81 as a "unitary norm" comparable to the "rule of reason" approach.[73] In practice, "rule of reason" approach to Article 81(1) was already apparent in European Court decisions[74], and further moves down this path result in Article 81(3) being "cast aside"[75]. It is suggested that in "Uniform application of the Community competition rules", "the problem for the Commission would be in deciding when to intervene" in national proceedings to maintain consistency in the application of the law.

For the UK, "aggrieved third parties, directly affected by restrictive practices, will be able to obtain damages more easily since Article 81 in its entirety would be directly applicable", and this is possible through "national courts in all member states where an infringement of Community competition law is alleged".

There is some concern about the burden on national courts. Ruttley asks "how can one judge, or a panel of judges, be expected to perform the complex legal and economic analysis to determine whether an agreement is compatible with EC competition law? Many judges freely admit to their lack of competence in economic matters: one leading judge (Mr Justice Laddie) stated to the House of Lords enquiry that it is 'wholly inappropriate frankly for (European economic

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[71] 'Reform of the EC competition regime: United Kingdom's response to the European Commission's White Paper on modernisation of the rules applying Articles 81 and 82', DTI, October 1999. (online) http://www.dti.gov.uk/ccp/topics2/pdf2/ecreformuk.pdf [10 March 2003].

[72] 'A new Europe: Co-operation key to enforcing EC competition law', OFT. (online) http://www.oft.gov.uk/NR/rdonlyres/eunvl2nomdkxmnzcpky5kmdf4oru2cpkbq4adyie4i4pz5bu5ldicemdshsdmgmzd5dsbvehkfe5ag3igxm33otb2zh/ft32-europe.pdf [10 March 2003].

[73] *supra* n. 38.

[74] Nungesser KG v Commission, [1983] 1 CMLR 278.

[75] *supra* n. 38.

issues) to be dealt with by judges'."[76] There are other suggestions that "training for the judiciary will also need to be provided"[77]. The DTI White paper response[78] deliberates on the same matter, suggesting that "the national courts are already empowered to take decisions on A 81(1) and A 82", so "judges already have to weigh technical evidence, including that relating to economic effects", concluding that "the UK , therefore, sees no problem in principle with the courts in the UK applying A81 as a whole", but reserving the need for further consideration of training needs.

Kingston echoes concerns about Member States "distinct antipathy to 'Euro-arguments'", especially in the English courts.[79] She suggests that there are a "high variety of rules on evidence", such as "the English rules on discovery, [which] are famously complicated and wide-ranging, while in many civil law systems no such rules of discovery exist at all". Similar arguments are put forward regarding national differences in "the availability of interim remedies".

7. References

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- 'Competition Law', 4th ed, Richard Whish, 2001.

[76] 'Brussels – A sea change in competition law', Philippe Ruttley, Lloyd's List, 15 January 2003.

[77] *supra* n. 38.

[78] *supra* n. 70.

[79] 'A "new division of responsibilities" in the proposed regulation to modernise the rules implementing Articles 81 and 82 E.C.? A warning call', Kingston, E.C.L.R. 2001 22(8) 340-350.