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# Aufsätze

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## **A Solution to the Problems? Regulation 1/2003 and the modernization of competition procedure**

*On 16th December 2002 the Council adopted Regulation (EC) No. 1/2003 on the implementation of rules on competition laid down in Articles 81 and 82 of the Treaty. This Regulation will not only replace the 40-year-old Regulation 17/62 but constitutes a radical reform of EC competition law enforcement. The purpose of this article is to analyse the basic principles of the new Regulation and the implications for current and future competition proceedings.*

### **I. Introduction**

With the adoption of Regulation 1/2003 (“the Regulation”) the EU Member States agreed to undertake a fundamental reform of the enforcement rules concerning anticompetitive agreements and abuse of a dominant position as prohibited by Articles 81 and 82 EC.<sup>1)</sup> The existing highly centralized system of competition law enforcement provided for by Regulation 17/62 will be replaced by a system of legal exception in which Member States and undertakings take more responsibility for enforcement. Moreover, reform measures include enhanced Commission powers in investigations, allowing officials to search private homes, and increased Commission powers to impose fines.

Not surprisingly, such a radical reform raises a number of questions of interpretation and as to how the new rules will work in practice. After a brief discussion of the legislative history, some of these questions will be examined below. In particular, we will look at what the system of legal exception will mean for the legitimate demands of undertakings for legal certainty, and how the rules on the burden of proof in competition proceedings may affect such proceedings. We will also discuss the relationship between Community and national competition law, and the interaction between national courts and the Community institutions.

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1) Commissioner *Monti* has called the reform of Regulation 17/62 “the most important legislative initiative in the competition field since the 1990 Merger Regulation”; see *Kingston*, [2001] ECLR 340.

## 1. Background

The modernization of EC competition procedures forms an integral part of the currently ongoing general overhaul of EC competition law. This is designed, *inter alia*, to cope with the enlargement of the EU and the internal market to 25 Member States on 1st May 2004 and to strengthen the Commission's position as "competition watchdog" in the enlarged EU. This general reform encompasses not just Articles 81 and 82 EC, but includes all other areas of EC competition law such as merger control and state aid, and covers numerous pieces of secondary legislation as well as non-legislative measures.<sup>2)</sup>

## 2. The need for reform

Regulation 17/62, which is still in force, has two main pillars: the notification procedure for agreements, seeking either a declaration of negative clearance that an agreement does not infringe Article 81 (1) EC, or an exemption decision under Article 81 (3) EC on the one hand, and the procedure for investigating and sanctioning violations of the competition rules such as cartels and abuses of a dominant position (infringement procedure) on the other. The notification procedure results from the implementation of Article 81 EC through a system of prohibition with reservation of exemption by approval, according to which all agreements potentially falling within Article 81 (1) EC must be notified to the Commission for assessment if they are to benefit from a negative clearance or an exemption according to Article 81 (3) EC and, as of the date of notification, from an immunity from fines until a decision of the Commission to the contrary.

The Commission and the European Court of Justice (ECJ) have interpreted the prohibition set out in Article 81 (1) EC very broadly so that a wide spectrum of agreements is caught. Furthermore, the Commission enjoys a monopoly for the application of Article 81 (3) EC, in contrast to Articles 81 (1) and 82 EC that

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2) As regards merger control, the Commission has presented a proposal for a revised European Merger Control Regulation (ECMR) which will replace the current Merger Regulation 4064/89 as from 1st May 2004 and has published best practice guidelines for divestiture commitments in merger cases, draft best practices on the conduct of EC merger control proceedings and draft guidelines on the appraisal of horizontal mergers. Similar notices outlining its approach to the assessment of "vertical" and "conglomerate" mergers will follow. As far as antitrust issues are concerned, a multitude of reform measures have been adopted or have been proposed since 1999, including Commission Regulations on the application of Article 81 EC to various types of agreements and for specific sectors as well as on cartel infringements (known as the Commission's "leniency policy"). As regards state aid rules, the Commission has adopted exemption regulations regarding state aid for employment, training, and state aid to small and medium-sized enterprises as well as a *de minimis* regulation. Moreover, the Commission has announced its intention to "simplify and modernise state aid arrangements" and to review its rules on regional aid. The substantive reforms will be complemented by institutional reforms within DG Competition.

can be enforced in private actions in national courts and can also be applied by national competition authorities (though not all national authorities have the power to apply them).<sup>3)</sup> This has resulted in a low level of private enforcement of competition law rules and in complicated rules of interaction between national proceedings and investigations by the Commission.

Due to the administrative burden caused by an approval system requiring many contractual arrangements to be notified, for a long time the Commission has been unable to cope satisfactorily with the volume of notifications. As a consequence, undertakings have had to suffer lengthy delays before obtaining the negative clearance or exemption decision they require, and the Commission has been unable to produce sufficient numbers of individual decisions. To compensate for this shortcoming, the practice of issuing “comfort letters” was introduced, which, for a number of reasons, has never been a sufficient substitute for adopting a formal decision.<sup>4)</sup> In particular, this situation engenders a significant lack of legal certainty. Moreover, the sheer volume of notifications has led to claims by the Commission that it has been hampered in taking a proactive stance in investigating cartels and other serious competition law infringements.<sup>5)</sup>

The infringement procedure suffers from the fact that the Commission takes the role of investigator, prosecutor and judge in the same proceeding. Critics have questioned for some time whether such a combination of roles allows the full and proper observance of fundamental procedural rights, such as the right to a fair hearing and the principle of *in dubio pro reo* in Commission investigations.<sup>6)</sup> Until a few years ago, Commission decisions imposing fines have rarely been accepted by the undertakings concerned and have been usually appealed. In fact, only a limited number of decisions were upheld in their entirety by the courts.<sup>7)</sup> This changed with the adoption of the leniency policy by the Commission in 1996.<sup>8)</sup> As a result of undertakings cooperating with the Commission with a view to obtaining a reduction in fines, the opportunities for the Commission to present hard evidence that alleged infringements actually took place improved and the acceptance of the resulting decisions by the undertakings, in

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3) See e.g. ECJ, Case 13/61 [1962] ECR 97 – *De Geus v. Bosch*; ECJ, Case C-234/89 [1991] ECR I-935 – *Delimitis v. Henninger Bräu AG*, annotated in EWiR 1991, 371 (*Paulusch*); *Weiß*, in: Calliess/Ruffert (Hrsg.), *Kommentar zu EU/EG*, 2. Aufl., 2002, Art. 81 EG para. 30; *Schwarz*, *EU-Kommentar*, 2000, Art. 81 para. 1.

4) *Montag*, [1999] 22 *Fordham International Law Journal* 819 at 827.

5) *Schaub/Dohms*, *WuW* 1999, 1055.

6) *Montag*, [1996] 8 *ECLR* 428, at 429.

7) *Montag*, [1996] 8 *ECLR* 428, at 432.

8) Commission notice on the non-imposition of fines in cartel cases, 18th July 1996 O.J. C 207/4, which has been replaced by the Commission notice on immunity from fines and reduction of fines in cartel cases, 19th February 2002 O.J. C 45/3.

particular those which cooperated with the Commission, has increased. However, the fundamental problems associated with the multitude of roles the Commission has to play in an infringement proceeding remain unsolved.

Since its adoption in 1962, Regulation 17/62 has remained almost unchanged, which is a tribute to the quality of its original drafting. However, because of its apparent shortcomings which have become more obvious with a growing EU and the integration of the internal market, there have been numerous calls for reform for some years,<sup>9)</sup> which, together with the need to prepare for enlargement, contributed to the adoption of Regulation 1/2003.

### 3. The new Regulation

The adoption of Regulation 1/2003 represents the conclusion of an intense debate which was launched in April 1999 with the publishing of the "White Paper".<sup>10)</sup> In response to the comments on the White Paper which the Commission received from all Member States and over one hundred interested third parties,<sup>11)</sup> the Commission released a proposal for a new Regulation on 27th September 2000.<sup>12)</sup> This received the majority vote in the first reading of the European Parliament and was subsequently adopted by the Council in December 2002.

The Regulation entered into force on 24th January 2003, 20 days after its publication in the Official Journal.<sup>13)</sup> However, pursuant to Article 45 of the Regulation, it will not apply until 1st May 2004. This period of more than 15 months between the Regulation's entry into force and its application is designed to give Member States the time required to implement the Regulation and to take the necessary measures to empower their respective competition authorities to apply Articles 81 and 82 EC (Article 35 (1) Regulation 1/2003). It also gives the Commission time to adopt the necessary additional implementing provisions (Article 33 Regulation 1/2003).

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9) See e.g. *Schaub/Dohms*, WuW 1999, 1055; *Montag*, [1999] 22 Fordham International Law Journal 819; *Montag*, [1996] 8 ECLR 429; also White Paper on Modernisation of the rules implementing Articles 85 and 86 of the EC Treaty, Commission Programme No. 99/027, 28th April 1999, O.J. 1999, C 132/1; DG Comp. Document, White Paper on Reform of Regulation 17: Summary of the observations, 29th February 2000, available at: [http://www.europa.eu.int/comm/competition/antitrust/others/wp\\_on\\_modernisation/summary\\_observations.pdf](http://www.europa.eu.int/comm/competition/antitrust/others/wp_on_modernisation/summary_observations.pdf).

10) White Paper on Modernisation of the rules implementing Articles 85 and 86 of the EC Treaty, Commission Programme No. 99/027, 28th April 1999, O.J. 1999, C 132/1.

11) White Paper on Modernisation of the rules implementing Articles 85 and 86 of the EC Treaty, Commission Programme No. 99/027, 28th April 1999, O.J. 1999, C 132/1, Explanatory Memorandum, Chapter 1.3.

12) 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 1017/68/EEC, 2988/74/EEC, 4056/86/EEC and 3975/87/EEC, COM (2000) 582 final, 27th September 2000, O.J. 2000 C 365 E/284.

13) Article 45 Regulation 1/2003.

The Commission has announced that a draft Regulation implementing the new Regulation 1/2003 and a number of draft Notices will be put out for consultation in August 2003.<sup>14)</sup> The period of consultation will last until October 2003, with a view to adoption by 1st May 2004. The notices are expected to cover the application of Article 81 (3) EC, complaints, the concept of “effect on trade”, the functioning of the European Competition Network (ECN) including the criteria for division of work, the maintenance of coherence and the exchange of confidential information, the cooperation with national courts and written opinions in individual cases.<sup>15)</sup>

The main impetus behind the reform is to devolve some of the Commission’s current enforcement responsibilities to national courts and national competition authorities by allowing them to apply Article 81 EC in its entirety on the one hand, and to undertakings and their legal advisers on the other. This will result in the decentralization of the enforcement of Articles 81 and 82 EC and is to be achieved through the following main changes:<sup>16)</sup>

- Notifications to the Commission under Article 81 EC will be abolished; instead, Article 81 (3) EC will apply automatically to exempt from Article 81 (1) EC all agreements falling within its scope, without the need for an official decision to be adopted by the Commission or any other authority (system of legal exception, Article 1<sup>17)</sup>);
- Additionally, the enforcement system will be decentralized, increasing the responsibility of national courts and competition authorities for the enforcement of Articles 81 and 82 EC (decentralized enforcement, Articles 4 – 6);
- National competition authorities and courts must apply Articles 81 and 82 EC, in addition to national law when an agreement or practice affects trade between Member States (Article 3);
- The uniform application of EC competition law will be ensured by rules governing the relationship between Articles 81 and 82 EC and national competition rules (Article 3), the burden of proof (Article 2), conflicts (Article 16) together with provisions on cooperation between national competition authorities and courts and the Commission (Articles 11 – 15);

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14) *Monti*, European Competition Policy: Quo Vadis, speech given at XXth International Forum on European Competition Law, Brussels, 10th April 2003, available at: [www.europa.eu.int/comm/competition/speeches/index\\_2003.html](http://www.europa.eu.int/comm/competition/speeches/index_2003.html); *Paulis*, Reform of Regulation No. 17/62 and the introduction of Regulation No. 1/2003, Law Society Seminar, Brussels, 25th March 2003.

15) *Monti*, European Competition Policy: Quo Vadis, speech given at XXth International Forum on European Competition Law, Brussels, 10th April 2003, available at: [www.europa.eu.int/comm/competition/speeches/index\\_2003.html](http://www.europa.eu.int/comm/competition/speeches/index_2003.html).

16) For a general overview about the provisions of the new Regulation see *Hossenfelder/Lutz*, WuW 2003, 118; *Paulis/Gauer*, Journal des Tribunaux 2003, 65; *Sheehan*, GLSI 2003, 97 (1), 57; *Weitbrecht*, EuZW 2003, 69.

17) Articles without indication of the legal instrument are provisions of Regulation 1/2003.

The Commission will have increased powers of investigation, including the power to enter private homes, to interview individuals and record their statements and to seal premises and documents as well as the power to impose more substantial fines (Chapters V and VI of the Regulation).

The result of the reforms introduced by Regulation 1/2003 is thus the abolition of the notification system and the increase of the Commission's powers with respect to the infringement procedure. However, the abolition of the notification system does not alleviate all concerns associated with the present system, as will be shown below. Nor can it be said that the infringement procedure has really been improved, except that the Commission has gained certain additional rights of investigation. However, the reform does not address the fundamental problems of the infringement procedure, as the Commission will continue to enjoy its multiple roles as investigator, prosecutor and judge in the same proceeding.

## II. The application of Articles 81 and 82 EC under the new enforcement system

One of the most frequently asked questions about the new system is how it will affect the – limited, but nevertheless existing – degree of legal certainty afforded by Regulation 17/62. In particular, it is feared that the trade-off between greater efficiency and room for manoeuvre for the Commission on the one hand, and less legal certainty on the other, will be at the expense of undertakings. In the following, we consider the legal basis of the new system and discuss how it may be applied in practice in order to prevent the balance from tipping too much to one side.

### 1. Replacement of the previous system of approval by a system of legal exception, Article 1 (2) Regulation 1/2003

According directly applicable status to Article 81 (3) EC constitutes a fundamental change to the enforcement of EC competition law. Yet this change has been introduced by means of a simple Council Regulation. From the day the White Paper was published, the legality of changing the regime without amending the EC Treaty has been the subject of intense legal debate,<sup>18)</sup> especially in Germany. It has been argued that the wording of Article 81 (3) EC requires a declaration of inapplicability, i.e. a positive administrative act, and that therefore the idea that an exemption could take effect (merely) by law, as provided

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18) See *Appeldoorn*, [2001] ECLR 400; *Deringer*, EuZW 2000, 1; *Deselaers/Obst*, EWS 2000, 41; *Geiger*, EuZW 2000, 165; *Mestmäcker*, EuZW 1999, 525; Monopolkommission, Sondergutachten 28, 1999, p. 16 – 21; *Montag*, Cahiers de droit européen, 2001, 145; *Möschel*, JZ 2000, 61; *Rodger*, [1999] ELRev Dec 653; *Schaub/Dohms*, WuW 1999, 1055; *Weitbrecht*, EuZW 2003, 72 with further reference.

by the new system, is incompatible with the Treaty.<sup>19)</sup> Moreover, it has been argued that Article 81 (3) EC cannot qualify as a norm that can be directly applicable either.<sup>20)</sup>

Other commentators have argued that an amendment of the Treaty is not a precondition for the reform, since the wording of Article 81 (3) EC does not decide the question whether the competition rules should be enforced by a system of prior approval or a legal exception system, but leaves a choice between an *ex ante* and *ex post* control.<sup>21)</sup> This view is in line with the general concept of EC competition law that in principle does not require a constitutive administrative act *ex ante*, but should as a general rule rather be directly enforced by competition authorities and courts *ex post*. The difficulties arising from the interpretation of the imprecise and vague conditions of Article 81 (3) EC may still favour a constitutive and binding approval by an authority, but cannot alter the general relationship of rule and exemption. Therefore, as Karsten Schmidt rightly pointed out, it is not the monopoly of the directly applicable law that needs to be justified, but the monopoly of the administrative approval system being the exception from the general rule.<sup>22)</sup>

With the adoption of Regulation 1/2003, the discussions on the legality of the reform may not have become completely irrelevant as a review of the Regulation by the ECJ is still possible, but they seem to have come to a halt. Even in Germany, resistance to the change of the system has abated in favour of examining the challenges (and burdens) of the new culture of enforcement.<sup>23)</sup>

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19) Monopolkommission, Sondergutachten 28, 1999, p. 17; *Deringer*, EuR 2001, 306, 307; *Möschel*, JZ 2000, 61, 62; *Mestmäcker*, EuZW 1999, 523, 525.

20) Monopolkommission, Sondergutachten 28, 1999, p. 16 – 21; *Mestmäcker*, EuZW 1999, 523, 525. According to the ruling of the ECJ a provision must be clear, precise and unconditional, it must not require any national implementation and must not grant the Member States a margin of appreciation in order to be directly applicable; ECJ, Case 4/69 ECR [1971] 325 – *Lütticke v. Commission*. The ECJ has not yet ruled on the direct applicability of Article 81 (3) EC.

21) *Geiger*, EuZW 2000, 165, 167; see for the opinion of the Commission White Paper on the Modernisation of the rules implementing Articles 85 and 86 of the EC Treaty, Commission Programme No. 99/027, 28th April 1999, O.J. 1999, C 132/1, 11, para. 12; Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, COM (2000) 582 final, 27th September 2000, O.J. 2000 C 365 E/284, Explanatory Memorandum, Chapter 1, B.; see for the supporting opinion of the Legal Service Council Document 7615/01 Limite JUR 111, RC 6.

22) *K. Schmidt*, Die neue VO 1/2003 (Art. 81/82) – Eine kritische Analyse, speech given at XXth International Forum on European Competition Law, Brussels, 11th April 2003.

23) *Klocker*, WuW 2002, 1151; *Zöttel*, Das europäische Kartellrecht wird dezentralisiert, Frankfurter Allgemeine Zeitung, 12th March 2003; *K. Schmidt*, Die neue VO 1/2003 (Art. 81/82) – Eine kritische Analyse, speech given at XXth International Forum on European Competition Law, Brussels, 11th April 2003.

## 2. Consequences for individuals and undertakings

The most conspicuous innovation of the new Regulation from an undertaking's perspective is that there is no longer any need to notify an agreement to the Commission in order to benefit from exemption under Article 81 (3) EC. Conversely, undertakings will no longer be able to ask the Commission for an exemption decision or negative clearance in order to avoid the risk of nullity of an agreement, or to obtain immunity from fines. Therefore, undertakings will have to assess their agreements themselves and rely on the results of such assessment.

In principle, the future situation will not be so different from the situation today. Already today, undertakings assess the compliance of their agreements with the competition rules themselves before they notify an agreement to the Commission. As a result of this preliminary screening, the overwhelming majority of cases are not notified to the Commission. Only a relatively small number of cases (which still represent a great administrative burden for the Commission), where the respective undertakings and their advisers believe that there could be a real competition issue are notified.

However, it is precisely in these difficult cases that the current system can provide for a high (in case of a negative clearance or exemption) or at least limited (in case of a comfort letter) degree of legal certainty and, as from the date of notification, for the guarantee that no fines will be imposed until such time as the Commission either revokes the immunity or finds that the agreement in question violates Article 81 (1) EC and cannot be exempted. In this respect, even the simple and qualified comfort letters<sup>24)</sup> that the Commission offers do provide comfort in many circumstances, assuring that the compatibility of the agreements with Article 81 EC will only rarely become the subject of a court proceeding. Having issued a comfort letter, which informally confirms either that there is no ground for action under Article 81 (1) EC, or that the conditions for an individual exemption under Article 81 (3) EC, or for the application of a block exemption, are fulfilled, the Commission will usually not take any action, unless the facts of a case change. Although not formally binding, comfort letters nevertheless carry a certain degree of authority that a national court hearing an Article 81 EC case is de facto expected to take into account.<sup>25)</sup> Indeed, in the case of most notifications the Commission closes the file by issuing a comfort letter,<sup>26)</sup> while only very few notified agreements receive a formal

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24) While a simple comfort letter merely confirms that the Commission does not intend to take any action, a qualified comfort letter is issued in accordance with Article 19 (3) Regulation 17/62 after third parties have been given the opportunity to comment following the publication of the main elements of the notified agreement in the Official Journal; see *Bellamy/Child*, European Community Law of Competition, 5th Edition, 2001, para. 11 – 017.

25) *Ritter/Braun/Rawlinson*, European Competition Law: A Practitioner's Guide, 2nd Edition, 2000, p. 135.

and de jure binding decision in the form of a negative clearance or exemption, sometimes after lengthy delays.

The new system does not offer instruments to replace formal decisions and informal comfort letters, except in certain very narrow circumstances. Undertakings may still be able to notify agreements to certain national competition authorities (“NCAs”) under their respective national law. However, such notifications are unlikely to be of much help, since, according to Article 3 (1), Community law takes precedence over national law and needs to be applied in parallel with national law if trade between Member States is affected. At any rate, Article 3 will lead to the harmonization of national law with EC competition law so that national notification systems are likely to be repealed (see Section IV 1 below).

Article 10 empowers the Commission to make a positive “finding of inapplicability” by decision, which, however, will likewise only be of limited help for an undertaking seeking legal certainty. As was stated in a Commission Staff Working Paper, Article 10 is not intended to restore the notification system.<sup>27)</sup> According to Article 10, a finding of inapplicability can only be made on the Commission’s own initiative and where it is in the public interest to take a decision. More importantly, findings of inapplicability are only of declaratory nature, as any constitutive decision regarding the compatibility of an agreement with Article 81 EC would be alien to the system of ex post control introduced by the Regulation.<sup>28)</sup> Furthermore, Recital 14 of the Regulation implies that non-applicability decisions will only be adopted by the Commission where there are strong public policy considerations which are strictly linked to the implementation of Article 81 and 82 EC and where the law needs to be clarified, such as “with regard to new types of agreements or practices that have not been settled in the existing case-law and administrative practice”. Notwithstanding these limitations, in our view the wording of Article 10 allows a broader interpretation of the notion of “Community public interest”, covering cases where a significant Community policy goal is at stake, e.g. a large Community infrastructure project. Also cases of significant financial risk or capital involvement of the undertakings concerned may qualify for an Article 10 decision in exceptional circumstances.<sup>29)</sup>

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26) When notifying an agreement to the Commission, parties are asked to state whether they would be satisfied with a comfort letter instead of a formal decision; *Ritter/Braun/Rawlinson* (footnote 25), p. 135, 902.

27) Commission Staff Working Paper, “The proposal for a new Regulation implementing Articles 81 and 82 EC: The notion of ‘Community public interest’ in Article 10”, SEC (2001) 1828 of 13th October 2001.

28) Recital 14 Regulation 1/2003.

Under the new system, the Commission will provide informal guidance only in relatively few cases. According to Recital 38 of the Regulation undertakings will be able to seek guidance from the Commission in “genuine cases of uncertainty because they present novel or unresolved questions for the application of these rules”. It is likely that the Commission will accept such genuine uncertainties only to a very limited extent, since otherwise the reform would not achieve one of its main goals, namely freeing Commission resources from dealing with relatively innocuous commercial agreements in order to allow these resources to be redeployed for the investigation of serious infringements. That being said, there will certainly be more cases that qualify for informal guidance than for Article 10 decisions. The value of informal guidance will very much depend on what status such informal Commission opinions will have in proceedings before a national judge or court, which in turn will depend on what procedure the Commission follows in issuing these informal opinions. If the Commission carries out investigations in appropriate cases before issuing a positive informal opinion, the value of such an opinion should be somewhat similar to that of a qualified comfort letter, i.e. *de facto* binding on the Commission and representing an important element for the assessment of a court. If a NCA were to initiate proceedings in such a case with a possibility of a conflicting decision, the Commission should initiate proceedings itself with a view to taking an Article 10 decision as this would appear to be precisely the situation envisaged by Recital 14, i.e. where a clarification of the law is required in order to ensure its consistent application. The initiation of proceedings by the Commission would relieve the NCA of its competence according to Article 11 (6).

Consequently, in situations where the block exemption regulations do not apply, with the exception of the guidance to be provided by the future Commission notice on the application of Article 81 (3) EC and the possibility of case-specific guidance in the limited situations as described above, the new system does not offer undertakings any means to eliminate the risk of fines for infringement of the EC competition rules. In the future therefore, undertakings will have to rely on their own assessment of their agreements, including those agreements that formerly would have been notified to the Commission. However, in many cases there will be no simple evidence available to show that the conditions of Article 81 (3) EC are met so that self-assessment entails a significant amount of uncertainty.

To minimize the risk associated with self-assessment, undertakings will probably resort to asking independent legal counsel for advice. In addition, where

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29) The European Parliament would support such a view; see Amendment of Article 10, proposed by the European Parliament, quoted in Commission Staff Working Paper, the notion of ‘Community public interest’ in Article 10, para. 18.

it is difficult to establish the facts for the application of Article 81 (3) EC, e.g. what the concentration of the market may be and whether the parties have market power, a study by an economic expert or a market research institute may help. A well reasoned expert legal opinion, which concludes on the basis of an economic study that a particular agreement should not be caught by Article 81 (1) EC because of the application of Article 81 (3) EC, should have strong evidential value in a proceeding before an NCA, the Commission or a national court where the imposition of fines is at issue. In particular, it should suffice to prove that the undertaking committed a violation neither intentionally nor negligently as required by Article 23 (2) for the imposition of fines by the Commission and by similar rules in national competition law. In addition, in certain cases undertakings are likely to resort to seeking informal guidance from the NCA in whose territory the agreement has its centre of gravity. Although the opinion of one NCA does not bind other NCAs in proceedings before them, it should at the very least be an important relevant factor when a decision on the imposition of fines is to be made.

Despite these options, there is no denying that under the new system undertakings and their legal advisors will be at greater risk in assessing the compatibility of their conduct with Article 81 EC than under the current regime. It will be up to the courts and ultimately the ECJ to define the standards of diligence to be met by an undertaking when assessing an agreement as to its compatibility with Article 81 EC. It is to be hoped that the courts will settle for a standard of reasonable diligence which strikes an equitable and practicable balance between the obligation to observe the law and the possibility to establish the facts required for showing that Article 81 (3) EC applies.

### III. Burden of proof in the new system

A new feature of Regulation 1/2003 is the explicit establishment of rules for the burden of proof in competition proceedings. These rules raise a number of questions as to their legal content and their implications for the various types of competition proceedings.

#### 1. The substance of Article 2 Regulation 1/2003

Regulation 17/62 does not contain any rules concerning the burden of proof in competition proceedings. Instead, these have been established by case law.<sup>30)</sup> Accordingly, under the present notification system the determination of wheth-

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30) See e.g. ECJ, Case T-66/89 [1992] ECR II-1995, para. 69 – Publishers' Association v. Commission; Commission Decision of 27th July 1992, Case IV/32.800 and IV/33.335 – Quantel International-Continuum/Quantel, O.J. 1992 L 235/9.

er there is a violation of Article 81 (1) EC is the task of the Commission.<sup>31)</sup> If the Commission finds that there has been an infringement, then the burden of proof shifts to the undertaking claiming the benefit of an exemption under Article 81 (3) EC.<sup>32)</sup> As far as civil proceedings in national courts are concerned, it would fall to the party alleging an infringement of Article 81 (1) EC to prove the facts supporting such a conclusion. The defendant would in turn have to show either that it holds or has applied for an individual exemption under Article 81 (3) EC or that the agreement satisfies the requirements of a block exemption. If it cannot do so, the court would have to declare the agreement in question void.

While the White Paper initiating the reform of Regulation 17/62 in May 1999 proposed that the notification regime be changed, it did not address the issue of burden of proof. Moreover, in the White Paper the Commission stated that there is no presumption that restrictive practices are void under Article 81 (2) EC, because this provision applies only when all the conditions for a prohibition are met.<sup>33)</sup> This would appear to include the conditions laid down in Article 81 (3) EC and to imply that, in the new system, the burden on the Commission or a NCA in an administrative procedure or a plaintiff in a civil procedure would be twofold: they would have to prove not only an infringement of competition under Article 81 (1) EC, but also that the conditions for an exemption (Article 81 (3) EC) are not fulfilled.<sup>34)</sup>

However, Article 2 now provides that the burden of proving an infringement of Article 81 (1) or of Article 82 EC rests on the party or the authority alleging the infringement, whereas the undertaking claiming the benefit of Article 81 (3) EC shall bear the burden of proving that the conditions of that paragraph are met. The effect of this rule is therefore to keep the burden of proof rules of the present notification system while the system itself is changed.

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31) See e.g. ECJ, Cases 29/83 and 30/83 [1984] ECR 1679, para. 19 – 20 – CRAM and Rheinzink v. Commission, and recently Case C-199/92-P [1999] ECR I-4287, para. 152 – Hüls v. Commission.

32) ECJ, Cases 43/82 and 63/82 [1984] ECR 19, para. 52 – VBVB and VBVB v. Commission; ECJ, Case 42/84 [1985] ECR 2545, para. 45 – Remia v. Commission; ECJ, Case C-29/92 [1995] ECR II-289, para. 262 – SPO and others v. Commission; CFI, Case C-9/93 [1995] ECR II-1611, para. 141 – Schöller v. Commission.

33) See para. 78 of the White Paper on Modernisation of the Rules implementing Articles 85 and 86 of the EC Treaty, Commission Programme No. 99/027, 28th April 1999, O.J. 1999, C 132/1.

34) Wissenschaftlicher Beirat beim Bundesministerium für Wirtschaft und Technologie, Reform der europäischen Kartellpolitik, BMWi-Dokumentation Nr. 480 of 1st July 2000, p. 5, available under: <http://www.bmwi.de/Homepage/download/doku/Doku480.pdf>.

## 2. Practical implications

In looking at Article 2 not only should one consider its scope of application, but, more importantly (in practical terms), the question whether Article 2 entails a change for the application of the EC competition rules by NCAs and the Commission on the one hand and by national courts and the CFI/ECJ on the other.

### 2.1 Proceedings before NCAs and the Commission

In proceedings before NCAs and the Commission nothing has really changed, because Article 2 codifies the existing rules. Under the present system, undertakings have to show that Article 81 (3) EC could reasonably apply. It is then for the Commission or the NCA to investigate whether the conditions of Article 81 (3) EC are satisfied in the case at hand. This will remain the same under the new Regulation, as according to Recital 5 of the Regulation, the application of Article 2 will not affect the obligation of a competition authority to ascertain the relevant facts of the case.

However, the applicability of Article 2 to a non liquet situation is unclear insofar as an administrative procedure is concerned which may lead to the imposition of a fine for the infringement of Article 81 EC. Such proceedings may be regarded as equivalent to criminal proceedings where the principle of *in dubio pro reo* applies.

This raises an issue that was hotly debated during the legislative procedure in the Council of Ministers and which has not been expressly resolved. Germany and other Member States requested that the question of the burden of proof and the principle of *in dubio pro reo*<sup>35)</sup> be dealt with in the framework of Article 2. They suggested adding the following paragraph: “This is without prejudice to national rules whereby competition authorities and courts of the Member States are obliged to investigate into the subject matter of the case or to national rules on the standard of proof or other hereto related issues such as the presumption of innocence in criminal proceedings.”<sup>36)</sup> Only the first part of this proposal has been included into the wording of Recital 5 of the Regulation, which states that the Regulation “affects neither national rules on the standard of proof nor obligations of competition authorities and courts of the Member States to ascertain the relevant facts of a case, provided that such rules and obligations are compatible with general principles of Community law”.<sup>37)</sup>

As the issue of procedural guarantees remained unsolved, in a statement on Article 2 issued at the time of adoption of the Regulation, the German delegation

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35) See also *Montag*, [1996] 8 ECLR 428, at 429 and 433.

36) Council of the EU, DG C II, 14471/02 Limite RC 20, 21st November 2002, there footnote 15.

expressed its opinion that Article 2 cannot introduce or amend provisions governing criminal law or criminal proceedings, especially with regard to the fundamental procedural guarantees in criminal proceedings such as the presumption of innocence of the accused, as Article 83 EC does not constitute a sufficient legal basis for introducing or amending provisions concerning criminal law or criminal proceedings.<sup>38)</sup> This would also apply to proceedings equivalent to criminal proceedings such as proceedings on administrative fines (“Ordnungswidrigkeitenverfahren”). Besides Germany, also Portugal, Sweden, The Netherlands, Austria and Spain differentiate between administrative offences (“Ordnungswidrigkeitenrecht”) and criminal offences (“Strafrecht”).<sup>39)</sup>

However, even without the declaration of the German government, in our view there is no doubt that the principle of *in dubio pro reo* cannot be modified by a Regulation based on Article 83 EC, as it has the status of a fundamental principle in the hierarchy of Community law, which is binding for the interpretation of secondary Community legislation.<sup>40)</sup> Furthermore, the Treaties do not provide for a general legal basis for the approximation of criminal laws or laws on criminal proceedings. The national rules on the burden of proof in criminal proceedings therefore remain unaffected by Article 2.

In our view, this result holds also true for the infringement procedure before the Commission. As the ECJ stated in its “Hüls”-judgment,<sup>41)</sup> the principle of *in dubio pro reo* is applicable in proceedings against undertakings which may lead to the imposition of fines because of the kind and gravity of the sanctions. Therefore, the infringement procedure does not lend itself to the application of a rule on the burden of proof if this would mean that an undertaking would have to prove the non-applicability of Article 81 (1) EC because of Article 81 (3) EC being applicable as this would be incompatible with the presumption of innocence. Consequently, Article 2 does not change the current situation where an undertaking in an infringement proceeding must show that Article 81 (3) EC could reasonably apply, but where it is then up to the Commission to investi-

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37) Recital 5 of the unofficial draft of July 2002 was different. It provided that the rule on the burden of proof “respects the guarantees of the rights of defence as recognised by the Charter of Fundamental Rights”. Such references, e.g. to the Charter of Fundamental Rights, cannot be found in the final version of Recital 5; for the unofficial draft see SN 3238/02, 26th July 2002.

38) Statement by the German Delegation on Article 2 of the Regulation, Council of the EU, Doc. No. 15664/02 ADD 1 of 3rd March 2003, p. 12; see also: [http://www.bmwi.de/Homepage/download/wirtschaftspolitik/DVO\\_Protokollerklaerung.pdf](http://www.bmwi.de/Homepage/download/wirtschaftspolitik/DVO_Protokollerklaerung.pdf).

39) Deutscher Bundestag, Antwort der Bundesregierung, BT-Drucks. 14/4991 of 14th December 2000, p. 6, available from <http://dip.bundestag.de/btd/14/049/1404991.pdf>.

40) The principle of *in dubio pro reo* is laid down in Article 48 of the Charter of Fundamental Rights and Article 6 of the European Convention on Human Rights. It belongs to the fundamental principles which are protected by Community law. See in particular ECJ, Case C-199/92-P ECR [1999] I-4287, para. 149 – Hüls v. Commission.

41) ECJ, Case C-199/92-P [1999] ECR-I 4287, para. 150 – Hüls v. Commission.

gate these facts further. A situation of non liquet at the end of such an investigation would have to be decided in favour of the undertaking concerned and not against it as suggested by the wording of Article 2.

## 2.2 Proceedings before national courts

Cases concerning EC competition law which come before national courts are typically civil litigation cases in which the parties are in dispute over the enforceability of a contract. In the future, it is likely that we will see more actions for damages, in particular in situations where, after an enforcement decision of the Commission or an NCA, customers of the undertakings found to have violated the competition rules will request compensation for too high prices in the past. However, such cases are not the subject of our discussion of the impact of the burden of proof rules, since the decision of the competition authority will already have settled the issue whether there was a violation of Article 81 EC. The classic scenario where the burden of proof plays a role involves one party claiming that the entire contract or a part of it is void, because of a violation of Article 81 (1) EC, whereas the other party defends the agreement by relying on Article 81 (3) EC. Currently, the courts cannot address the issue of the Article 81 (3) EC if the parties have notified the agreement to the Commission, but have to stay the proceedings until the Commission has made its decision. For this decision, the Commission frequently carries out a market investigation, and it enjoys a wide margin of discretion in the appreciation of the facts, as acknowledged by the European Court of Justice.<sup>42)</sup>

Under the new system, national courts will have to apply Article 81 (3) EC directly and will reject a claim for infringement of Article 81 (1) EC if the conditions of Article 81 (3) EC are fulfilled. For this, the party relying on Article 81 (3) EC will have to submit sufficient facts to justify the application of this provision. The difficulty for private parties in showing that Article 81 EC does or does not apply is highlighted by the “*Delimitis v. Henninger Bräu*” case.<sup>43)</sup> In that case, the Court found that a party relying on Article 81 (2) EC bears the burden of proof for all elements of Article 81 (1) EC, including the question whether a “bundle” of parallel agreements amounts to an appreciable restriction of competition, when it is otherwise clear that such an effect cannot be attributed to the specific agreement at issue, due to its limited economic importance. It is evident that it is very difficult for the party to show this, as it requires factual evidence which is typically not at its disposal and which is typically unavailable in the absence of an investigation by a competition authority.

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42) CFI, Case T-39/92 and T-40/92 [1994] ECR II-49, para. 109 – *Groupement des cartes bancaires (CB) and Europay International S.A. v. Commission*.

43) ECJ, Case C-234/89 [1991] ECR I-935 – *Delimitis v. Henninger Bräu*.

The direct applicability of Article 81 (3) EC increases these procedural difficulties as a party relying on this provision will have to provide evidence for the conclusion that an agreement promotes technical or economic progress, that consumers will obtain a fair share of the benefits of such agreement, and that the agreement does not afford the undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. This is an onerous obligation and may even be impossible to fulfill. In particular the condition that competition may not be eliminated requires an analysis of the product and geographic markets affected by the agreement, of the market structure, and the position of the parties on the market, i.e. whether they have market power. Such analysis can only be done satisfactorily on the basis of detailed data. Private parties will often be unable to produce this data so that in a significant number of cases, the finding of a non liquet situation could be expected. In this situation the application of Article 2 will lead to a decision against the party defending the validity of the contract.

What kind of evidence a party will have to adduce depends on the national procedural rules. Article 2, as outlined above, does not affect national rules on the standard of proof. In any event, it is clear that an excessively severe standard for substantiation of facts to support the application of Article 81 (3) EC would in effect mean a substantial shift of the risk of litigation from the party alleging the invalidity of an agreement to the party defending the agreement as the latter can no longer hope that the Commission would establish (or at least assist in establishing) the facts required for a positive finding. In order to alleviate the situation, courts should therefore use their power to provide guidance and to discuss the issues with the parties insofar as this is provided for in national rules of procedure.<sup>44)</sup> Some authors believe that the differences in the national procedural rules, such as the disclosure procedure in civil proceedings in the UK, are likely to give rise to forum shopping.<sup>45)</sup> Indeed, a plaintiff who argues the invalidity of a contract may be better off in a civil law system where the defendant cannot rely on discovery in order to obtain some of the facts required for the application of Article 81 (3) EC from the plaintiff. Conversely, the same plaintiff may want to sue in a common law country in order to use the discovery procedure to obtain the facts required for showing that Article 81 (1) EC is violated, e.g. in difficult cases such as the “*Delimitis vs. Henninger Bräu*” situation.

In addition, if a national court considers that there is a gap in the facts submitted by a party who wants to benefit from Article 81 (3) EC, then, in our view,

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44) *Hirsch*, Anwendung der VO 1/2003 durch nationale Gerichte, speech given at the XXth International Forum on EC Competition Law, Studienvereinigung Kartellrecht e.V., Brussels, 10th April 2003.

45) See e.g. *Forrester*, Legal Issues of Economic Integration 28(2): 173, 2001.

the court can ask the Commission to transmit relevant information in its possession in accordance with Article 15 (1), or request the assistance of the NCA, if the national law provides for such a possibility (see Section V 2.2 below). Moreover, it is likely that the court will require the opinion of an expert economist to decide on the application of Article 81 (3) EC, in particular with respect to the condition that competition will not be eliminated, which is generally interpreted in the sense that the parties to the agreement in question will not have a dominant position in the relevant market.<sup>46)</sup> To ask the ECJ for a preliminary ruling is, however, not a practicable solution in those cases, as proceedings under Article 234 EC are not equipped for dealing with factual issues.

The burden of proof rule contained in Article 2 should thus only apply, if, after exercising guidance, having heard economic experts and having involved the Commission or the NCA, a national court still finds itself in a situation of non liquet.

#### **IV. Relationship between Articles 81 and 82 EC and national competition laws**

Another feature of the new Regulation that causes some difficulty is the parallel application of EC and national competition law provided for in Article 3. In general, the obligation of parallel application, with EC law prevailing in cases of conflict, is likely to lead to a harmonization of substantive competition rules in the EU inasmuch as this has not already happened. In particular, harmonization will be prompted by the difficulties of applying the test of “effect on trade between Member States” which determines whether national law may apply exclusively in a case.

##### **1. The substance of Article 3 Regulation 1/2003**

The objective of the parallel application of EC and national competition law mandated in Article 3 is “to ensure the effective enforcement of the Community competition rules and the proper functioning of the cooperation mechanisms contained in this Regulation”<sup>47)</sup> and “to create a level playing field”<sup>48)</sup> for agreements within the internal market. The EC legislator wants to make sure that agreements having a cross-border effect are treated in the same way across the EU.

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46) Commission Decision of 22nd December 1976, Case IV/24.510 – Gerofabrik, O.J. 1977 L 16/8, 12; Commission Decision of 3rd June 1975, Case IV/712 – Haarden- en Kachelhandel, O.J. 1975 L 159/22, 28; ECJ, Cases 209-215, 218/78 [1980] ECR-3125, para. 189 – Van Landewijck v. Commission; ECJ, Case 61/80 [1981] ECR-851, para. 18 – Cooperative Stremsel- en Kleurselfabriek v. Commission.

47) Recital 8 sentence 1 of the Regulation.

48) Recital 8 sentence 2 of the Regulation.

According to the original proposal for the Regulation,<sup>49)</sup> Article 3 was to provide for the exclusive application of Community competition law in all cases where Articles 81 and 82 EC would be applicable. However, this proposal was not welcomed by the Member States, which criticised that the exclusive application of Community competition law unduly restricted the application of national competition law contrary to the Community law principle of subsidiarity.<sup>50)</sup> Moreover, taken in conjunction with Article 11 (6), according to which the Commission can relieve NCAs of their competence to apply either Article 81 or 82 EC by initiating proceedings itself, the proposal for the exclusive application of Community competition law rendered these national authorities overly subject to the Commission's control.<sup>51)</sup> In relation to Article 82 EC, it was argued that in many jurisdictions the national law concerning the control of unilateral conduct is more developed than EC law. Therefore to give Article 82 EC precedence over national law would be a step backwards, with national authorities losing enforcement powers the effectiveness of which had already been proven.

As adopted, Article 3 shows that these criticisms have been taken into consideration and its scope curtailed. Indeed, Article 3 does not provide for the exclusive application of EC law. While the obligation on national competition authorities and courts to apply Articles 81 and 82 EC in all cases that may affect trade between Member States remains, national law may also be applied in parallel.<sup>52)</sup> Furthermore, national courts and competition authorities retain the right to apply national rules that are stricter than Article 82 EC in cases of unilateral conduct.<sup>53)</sup>

These concessions are somewhat less dramatic than they may seem at first sight because of the strong incentive to harmonize national laws with EC law contained in Article 3. According to Article 3 (2) the application of national competition law may not lead to the prohibition of agreements or concerted practices affecting trade between Member States that are permissible under Article 81 EC.<sup>54)</sup> This goes beyond the current rules for the relationship between national and EC competition law. The principle of the primacy of EC law as set out in

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49) COM (2000) 582 final.

50) See Minutes of 2394th Council meeting – Energy/Industry – Brussels, 4th and 5th December 2001, Commission Press Release PRES/01/452 of 4th December 2001.

51) See Minutes of 2394th Council meeting – Energy/Industry – Brussels, 4th and 5th December 2001, Commission Press Release PRES/01/452 of 4th December 2001. See also Report from the Presidency to the Permanent Representative Committee and Council, 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, 2000/0243 (CNS) and 13798/00, 24th November 2000.

52) Article 3 (1) and Recital 8 of the Regulation.

53) Article 3 (2), sentence 2 and Recital 8 of the Regulation.

54) Article 3 (2) of the Regulation.

the “Walt Wilhelm” judgment<sup>55)</sup> provides that EC competition law shall not only have priority in cases where a practice violates EC competition rules, but also where an agreement is exempted from the application of Article 81 (1) EC by an express decision of the Commission. Where such an express positive Commission decision does not exist and is not forthcoming because an agreement has not been notified and a block exemption does not apply, national law may prohibit the conduct despite the fact that it may potentially qualify for an exemption under Article 81 (3) EC. Article 3 (2) eliminates this last possibility of differing results of the application of national and EC law.

Since there is practically no more room for the independent application of national law in cases where EC law also applies, Article 3 (2) represents a powerful incentive for Member States to harmonize their national competition rules with EC competition law. This would also eliminate the need to determine whether a particular agreement has an effect on trade between Member States. This theory of convergence is confirmed by the recent draft main objectives for a 7th Amendment of the German Act on the Restraints of Competition (“ARC”). According to these objectives, large sections of the existing ARC will be deleted that are deemed to be incompatible with Article 81 EC under the terms of Article 3 of the Regulation.<sup>56)</sup> It should be noted, however, that the incentive to harmonize created by Article 3 (2) only concerns substantive competition rules. The rules of procedure are likely to remain national unless some day harmonizing legislation is adopted at Community level.

## 2. The “effect on trade” concept

The legal definition of the “effect on trade” condition in Articles 81 and 82 EC is pivotal for the scope of Article 3, since it is this concept that will determine whether a NCA or national court is obliged to apply EC law alongside its respective national law in a given case.<sup>57)</sup> In addition, the effect on trade criterion determines whether the cooperation and information sharing processes in the framework of the ECN apply. The concept of effect on trade has been interpreted by the ECJ in numerous cases. However, most of the case law dates back to the 1960s and 70s, when the single market was still in its infancy.<sup>58)</sup> Therefore, the notion of effect on trade has been accorded a wide interpretation in the past, so wide in fact that it is arguable that almost all trade within a Member

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55) ECJ, Case 14/68 [1969] ECR-1 – Walt Wilhelm and others v. Bundeskartellamt.

56) Entwurf von Eckwerten für eine 7. GWB-Novelle, available at: [www.bmwa.bund.de](http://www.bmwa.bund.de) (see Politikfelder/Wirtschaftspolitik/Wettbewerbspolitik/Reform des GWB/Pressemitteilung 4th March 2003).

57) Article 3 (1) of the Regulation.

58) See e.g. ECJ, Case 56/65 [1966] C.M.L.R. 357 – La Technique Minière v. Maschinenbau Ulm, and ECJ, Case 22/78 [1979] ECR-1869 – Hugin Kassaregister AB v. Commission.

State affects trade between Member States. Such an interpretation would maximise the “parallel” application of EC and national competition law. On the other hand, it is questionable whether such maximising of the application of Community law would be in line with the principle of subsidiarity.

In order to leave some room for the application of national competition laws, it has been suggested that the concept of effect on trade would need to be updated to reflect the changes of the development of the single market in the last decade. If only from the need for a reasonably concrete test, it might be possible to establish as the main element of such a test the requirement for some kind of “Community dimension”, e.g. by establishing a *de minimis* clause with respect to a minimum number of Member States in which an agreement would have to be implemented.<sup>59)</sup> Under such a test agreements and concerted practices implemented in more than one Member State would be deemed to affect trade between Member States and thus have the requisite “Community dimension”, whereas those implemented within the territory of only one Member State would be subject to national law. For the large Member States such a rule could be refined further by assuming an effect on intra-Community trade if an agreement is applied in the entire territory and satisfies certain minimum requirements as to the affected turnover. A market share test, on the other hand, has proved to be very difficult in practice and so would not represent an easy solution to the problem. It remains to be seen whether the Commission will adopt such a bold approach in its Notice on effect on trade between Member States which is due to be published later this summer.

However, it should be emphasized that the concept of effect on trade will become largely irrelevant if and when the progressive harmonization of the laws of Member States with EC law takes place, given that essentially the same legal tests will be applied regardless of which law is applied. The concept will remain decisive with respect to the cooperation in the framework of the ECN and with respect to the treatment of unilateral conduct, due to the exclusion of unilateral conduct from the principle contained in Article 3 (2) of the Regulation.

## V. Cooperation of national courts, NCAs and the Commission

In a system of legal exception in which the Community competition rules are applied by a multitude of NCAs and national courts in addition to the Commission, the rules governing the cooperation between these various actors are of the utmost importance to ensure an efficient and consistent enforcement.

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<sup>59)</sup> This idea was aired by *Sir Christopher Bellamy* in a speech delivered to the Xth International Competition Law Forum in Sankt Gallen on 25th April 2003.

Whereas the new Regulation contains provisions on certain types of cooperation, it is awkwardly silent on others.

### 1. Allocation of cases between the Commission and NCAs

A striking omission from the Regulation is the almost complete absence of any rules governing the division of competencies for handling cases or the allocation of responsibilities between the national competition authorities on the one hand and the Commission on the other. The only rules provided in this respect are Article 11 (6) allowing the Commission to initiate proceedings thereby relieving NCAs of their competence, and Article 13 (requiring a NCA to suspend a proceeding or to reject a complaint if another NCA is already dealing with the case). However, there are no guidelines indicating the circumstances in which either a NCA (and if so which NCA) or the Commission should take up a particular case in the first place. Clearly, the effect on trade criterion which determines whether national or Community law applies does not help for the allocation of cases, as it is intended that NCAs will also deal with cases which have a cross-border effect. According to Commissioner Monti, this apparent gap in the Regulation allows greater flexibility for the allocation of cases between the authorities.<sup>60)</sup>

A first indication as to how cases are to be allocated between the authorities is provided in a statement of the Council and the Commission on the functioning of the network of competition authorities.<sup>61)</sup> This statement is only of limited value however, as it is “political in nature and does therefore not create legal rights or obligations”.<sup>62)</sup> Nevertheless, the joint statement sets out a number of relatively concrete guidelines for the allocation of cases within the network. According to paragraph 16 of the statement, as often as possible “cases will be dealt with by a single competition authority”. Thus “where an agreement or practice substantially affects competition in more than one Member State, the Network members will seek to agree between them who is best placed to deal with the case successfully”.<sup>63)</sup> Furthermore, “in cases where competition in several Member States is affected and no NCA can deal with the case alone successfully, the Network members should coordinate their action and seek to designate one competition authority as the lead institution”.<sup>64)</sup> According to

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60) *Monti*, European Competition Policy: Quo Vadis?, speech given at the EU Commission/IBA Conference on EU Merger Control, Brussels, 7th December 2002, SPEECH/02/545 of 7th December 2002.

61) Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities, Council of the EU, Doc. No. 15664/02 ADD 1 of 3rd March 2003, p. 7.

62) *Ibid.* (footnote 61), para. 3; see also *Rocca/Gauer/Dalheimer/Kjølbye/De Smijter*, EC Competition Policy Newsletter, (2003) 1, 3 at 9.

63) *Ibid.* (footnote 61), para. 17.

Article 13a NCA may suspend proceedings or reject a complaint if another NCA is already dealing with the same case. It is clear, therefore, that the intention of the Commission and the NCAs is for NCAs to take on a large numbers of cases, even those in which several Member States are affected.

This said, the Commission is considered to be particularly well placed to deal with a case “if more than three Member States are substantially affected by an agreement or practice, if it is closely linked to other Community provisions which may be exclusively or more effectively applied by the Commission, if Community interest requires the adoption of a Commission decision to develop Community competition policy particularly when a new competition issue arises or to ensure effective enforcement”.<sup>65)</sup> Actual allocation between national authorities may therefore only be necessary if more than one, but fewer than four Member States are affected. This is unlikely to apply to the majority of cases having an effect on trade between Member States, as in many of these cases more than three Member States will be affected.

The allocation of cases concerning more than one Member State will be further explained in one of the envisaged Notices of the Commission. In general, however, it makes sense that the Commission should handle cases that affect a large number of Member States, as each NCA can only investigate the facts of a case and enforce its decision within its territory due to the geographic limitation of its national laws. In order to overcome this obvious difficulty, Article 22 provides for the possibility to ask other NCAs to investigate the facts in their territory on behalf of the NCA handling the case. Moreover, according to Article 11 there will be a regular exchange of information between NCAs and the Commission. The cooperation between NCAs will, however, reach practical limits in cases concerning most or all Member States. In such cases, only the Commission can effectively and efficiently carry out an investigation.

## 2. The role of national courts

The level of private enforcement of Articles 81 and 82 EC in the Community is generally low, because the current regime has made plaintiffs reluctant to bring Article 81 EC cases. In particular, the notification of an agreement causes proceedings before national courts to be blocked or prolonged. Once a national court concludes that an agreement or concerted practice violates Article 81 (1) EC, it can confirm the application of a block exemption or give effect to an individual exemption already declared by the Commission, but the national court does not currently have competence to issue an individual exemption itself. On

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64) *Ibid.* (footnote 61), para. 18.

65) *Ibid.* (footnote 61), para. 19.

the other hand, if the agreement or practice has not been notified to the Commission, all the national court may do is to declare it to be void under Article 81 (2) EC,<sup>66)</sup> regardless of how deserving it may be of an individual exemption. If the agreement or practice has been notified to the Commission, but no decision has yet been taken on the notification, then the national court should determine whether it is “possible” that the Commission will issue an individual exemption. If the national court takes the view that the Commission could decide to exempt the agreement, then it should suspend proceedings and await the Commission’s decision. In view of this situation, national courts are not eager to apply Community competition law instead of or in addition to national law. As a prominent member of the Commission’s Legal Service put it, “in real life, the possibility of applying one half of Article 81 EC (the prohibition part) coupled with the impossibility of applying the other half (the derogation part) results in a formidable disincentive to the exercise of any power at all”.<sup>67)</sup>

The modernization reform aims to remove this obstacle and to promote private enforcement, the importance of which has generally been acknowledged by the ECJ in the *Courage* case.<sup>68)</sup> As from 1st May 2004, national courts will have the right and the duty to apply also the “second half” of Article 81 EC. However, the application of Article 81 (3) EC in individual cases is not obvious because of the difficult economic issues that must be assessed in the framework of the four conditions of Article 81 (3) EC.

## 2.1 Interpretation of the law

The four conditions employed in Article 81 (3) EC, such as “promoting technical or economic progress”, are not clearly defined legal concepts and necessitate complex economic appraisal. It was for this very reason that the Court of First Instance has limited its review “of the complex economic appraisals made by the Commission when it makes use of the discretion conferred on it by Article 85 (3) of the Treaty, with regard to each of the four conditions laid down in that provision, ... to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has not been any manifest error of appraisal or misuse of powers”.<sup>69)</sup> Although the four conditions of Article 81 (3) EC have not been altered, this “complex economic appraisal” will in the future have to

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66) ECJ, Case C-234/89 [1991] ECR I-935 – *Delimitis v. Henninger Bräu*.

67) *Marenco*, Consistent Application of EC Competition Law in a System of Parallel Competencies, Freiburg Conference, 9th – 10th November 2002.

68) ECJ, Case C-453/99 [2001] ECR I-6297 – *Courage Ltd v. Bernard Crehan and Bernard Crehan v. Courage Ltd and Others*.

69) CFI, Cases T-39/92 and T-40/92 [1994] ECR II-49, 51 – *Groupement des cartes bancaires (CB) and Europay International S.A. v. Commission*.

be conducted by the national courts, which until recently have not been regarded as competent to do this. The increased power and discretion granted to the courts clearly raises questions regarding the integrity and coherence of the law as it develops under the supervision of national courts in 25 different Member States. There exists a real possibility that inconsistent judgments will be handed down.

Regulation 1/2003 provides for a number of instruments which should help judges in interpreting Article 81 (3) EC and ensure the uniform application of EC competition law. These are the notices envisaged by the Commission on the application of Article 81 (3) EC and on the cooperation between national courts and the Commission, as well as *amicus curiae* briefs (Article 15) and the rule laid down in Article 16 (1) that national courts must respect Commission decisions. However, these instruments raise a number of legal issues.

The notice on the application of Article 81 (3) EC will be helpful in interpreting the conditions of Article 81 (3) EC. However, this notice is not binding. Therefore, a court will always have the discretion to deviate from the notice subject, of course, to the ultimate decision of the ECJ.

Similarly, *amicus curiae* briefs by the Commission or a NCA are no more than a legal opinion. According to Article 15 (1) and (3) both national competition authorities and the Commission may on their own initiative submit written observations and, with the permission of the respective court, oral observations in national court proceedings.<sup>70)</sup> Certainly, these will be important opinions since they will come from an expert agency and at least some courts with little experience of EC competition law may welcome such submissions. In addition, it is safe to assume that the party who is favoured by this opinion will rely heavily on it. However, again it is up to the national court to decide the case independently.

It would not be surprising if national judges, in particular those of specialist competition courts or chambers within a court, do not make much use of the possibility to obtain *amicus curiae* legal opinions from the Commission or do not regard written submissions made by the Commission on its own initiative as *de facto* binding. After all, judges do not like to be told by an administrative body how the law should be applied. In the case of questions about the interpretation of the law national judges are more likely to make use of the Article 234 EC proceeding to request the ECJ for a preliminary ruling. However, obtaining an *amicus curiae* legal opinion from the Commission should be much quicker than a reference to the ECJ which on average takes about two years. The immediate referral of a case to the ECJ, on the other hand, would have the

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70) For the mirror provision in German law, see Section 90 (2) ARC.

advantage of avoiding the further complication that despite an *amicus curiae* opinion by the Commission the case would have to go to the ECJ anyway to obtain a definitive decision on the interpretation of Community law. Thus, although according to Article 15 (2) the Commission is to be provided with a copy of any written judgment of national courts deciding on an Articles 81 and 82 EC case<sup>71)</sup> and will therefore be in a position to constantly review the application of EC competition law by the national courts, Commission guidance to courts alone may not be sufficient to ensure the coherent application and development of the law across the Community.

The most important safeguard for the uniform application of Community competition law provided by the Regulation is the conflict rule set out in Article 16. This rule, which codifies the “Masterfoods” case law,<sup>72)</sup> prohibits national courts from contradicting a decision adopted or envisaged by the Commission in the same case. Article 16 therefore ensures that conflicting decisions and thus inconsistencies, which create legal uncertainty, are avoided. However, whereas a judge may be able to accept the rule that he should not make decisions which are contrary to existing decisions of the Commission, it seems to be much more difficult to ask the judge to also take into account future decisions, which the Commission may want to make in a proceeding.<sup>73)</sup> National judges are not accustomed to this kind of deference to administrative agencies. On the other hand, although Article 16 (1) raises a serious question with respect to the separation of powers between the executive and the judiciary, it is a sensible rule from the point of view of the efficiency of proceedings.<sup>74)</sup>

The scope of the obligation under Article 16 (1) has not yet been determined. From the wording of the provision it would appear that each of the different types of Commission decisions provided for in Chapter 3 of the Regulation is covered by the conflict rule. This would include Article 7 decisions (“finding and termination of infringement”), because these decisions make a formal finding. Article 10 decisions also include a formal finding and should therefore be legally binding for a court, although they are only of a declaratory nature and generally not intended to provide legal certainty in individual cases.<sup>75)</sup> As far as commitment decisions adopted under Article 9 are concerned, such decisions should conclude that there are no longer grounds for action by the Commission

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71) A similar obligation is imposed by Section 90 (1) ARC on German courts with respect to the German Federal Cartel Office.

72) ECJ, Case C-344/98 [2000] ECR I-11369 – *Masterfoods Ltd v. HB Ice Cream Ltd.*

73) For an in-depth analysis of the “Masterfood” judgment see *Bornkamm*, ZWeR 2003, 73.

74) *Hirsch*, Anwendung der VO 1/2003 durch nationale Gerichte, speech given at the XXth International Forum on EC Competition Law, Studienvereinigung Kartellrecht e.V., Brussels, 10th April 2003.

75) Recital 14 of the Regulation.

and thus would not constitute a formal finding on the applicability of Article 81 or 82 EC. Consequently, according to Recital 22, Article 9 decisions should not be covered by the conflict rule set out in Article 16. Although the wording of Recital 22 seems clear in this respect, it is not at all clear whether Article 16 can or even should be interpreted in this sense. A commitment decision is a decision, and the only reason why it can be adopted is that it brings an alleged infringement to end, i.e. it takes an agreement or practice out of the scope of application of Article 81 EC. Therefore, the Article 9 decision includes the implicit positive finding that the agreement as modified by the commitments is in line with Article 81 EC. We do not see any reason why such a decision should be any less protected by Article 16 from interference by the national courts or a NCA than any other decision of the Commission.

Article 16 (1) is, of course, without prejudice to the rights and obligations of national courts to ask for a preliminary ruling of the ECJ under Article 234 EC as explicitly confirmed by its last sentence. An increase in preliminary references to the ECJ may not only secure the unity of EC law under the new regime, but may also represent a welcome development in the practice of EC competition law. It would place greater influence on the evolution of the law in the hands of the independent judiciary, of the ECJ, and less in the hands of the investigator and prosecutor, the Commission and the NCAs.

## 2.2 Establishment of the facts

The real difficulty in the application of Article 81 (3) EC by a national court is the establishment of the facts. As discussed above, it is unlikely that the appraisal of the four conditions laid down in Article 81 (3) EC will be done without an expert opinion of an economist. However, in many cases these expert opinions will not be conclusive because the undertakings will not be able to furnish all necessary data to the economist to allow him to come to a clear view of the situation. In particular, the parties are not able to carry out an investigation, as the Commission is presently able to do by issuing information requests to competitors and customers to which they have to reply.

Therefore, the legal question is whether a national court – or the ECJ in a preliminary reference proceeding – could require the Commission to carry out such an investigation to establish the facts necessary for the application of Article 81 (3) EC. There are no such instruments expressly provided for in the Regulation. Commission officials currently deny that this should be possible and interpret Article 15 *amicus curiae* briefs only as a possibility to ask for its interpretation of the law on a given set of facts. This, of course, is not what judges will want to hear from the Commission or a NCA. An efficient interpretation of Article 15 (1) would mean that the courts should be able to request the Commission to carry out investigations which the court deems necessary. Otherwise, courts may have to resort to the burden of proof rules in Article 2 in too many

cases, which would unduly disadvantage the party relying on Article 81 (3) EC. The downside of such a wide interpretation of Article 15 (1) is, of course, that the Commission would have to deal with many more cases than it originally envisaged which may, at least partly, defeat one of the main purposes of modernization. On balance, however, this may be the price that it will have to pay in order to make the new system work and produce fair results.

Another difficult question for the application of Article 81 (3) EC by national courts is the question of remedies. Currently, in administrative proceedings before the Commission, the parties are often given the opportunity to amend their agreements so that they come under Article 81 (3) EC. This possibility is now expressly provided for in Article 9 (1). In civil proceedings, however, judges do not have the power to impose commitments on the parties in order to deal with a case. It appears that the only situation in which remedies may play a role in a court proceeding would be as part of a settlement between the parties.

Due to the difficulties with the application of Article 81 (3) EC by national courts and the general length of the proceeding including expert opinions, *amicus curiae* submissions by the Commission or a NCA and suspension of proceedings for the purpose of a preliminary ruling by the ECJ, it is questionable whether there will be a massive increase in the private enforcement of rights under EC competition law as expected by some authors.<sup>76)</sup> On the contrary, we assume that potential plaintiffs will continue to complain to an NCA or the Commission to have them take up their case as the authorities are in a much better position to establish the facts than the plaintiff will ever be in a court proceeding. Court proceedings will continue to focus on contractual disputes where one side argues that there has been a breach of competition law, and on actions for damages after such a breach has been found to exist by a competition authority.

## VI. Conclusion

The abolition of the notification procedure in favour of a legal exception system will reduce the bureaucratic burdens for undertakings, as they will no longer need to notify their agreements to the Commission. The resulting reduction of legal certainty should be balanced by informal guidance to be provided by the NCAs and the Commission, at least until sufficient case law has developed. In addition, the assessment of the compatibility of their agreements by the undertakings themselves is likely to lead to the additional use of resources for ex-

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<sup>76)</sup> *Hirsch*, Anwendung der VO 1/2003 durch nationale Gerichte, speech given at the XXth International Forum on EC Competition Law, Studienvereinigung Kartellrecht e.V., Brussels, 10th April 2003.

pert opinions of economists and advice by experienced outside counsel. This will offset to some extent the advantage of less bureaucracy gained through the reform.

The parallel application of EC and national competition law, which, as has been shown, is likely to lead to further harmonization of competition law rules in the EU, will create the desired level playing field required in a common market. The Commission has argued that decentralization of competition enforcement is justified by the maturity of EC competition law which, for this reason, needs no longer to be enforced by a central body. The development of EC competition law in the last decades confirms this view, and enforcement by national competition authorities and courts will improve the acceptance of EC competition law in particular and of EC law in general in the Member States. The establishment of a network of competition authorities and the provision of informal guidance by the Commission within this network may, as far as the national competition authorities in 25 Member States are concerned, ensure the uniform application within public proceedings. However, the uniform application of EC competition law by the numerous courts of the Member States is only guaranteed to a limited extent by means of the conflict rule of Article 16 (1), and more importantly by the possibility to make references to the ECJ pursuant to Article 234 EC.

A major problem of the new system seems to be that courts in civil proceedings are not fully equipped for the direct applicability of Article 81 (3) EC as far as the establishment of the facts is concerned. In our view this problem will only be overcome by a liberal interpretation of Article 15 (1), in the sense that a national court may request the Commission to carry out an investigation on its behalf. The alternative is likely to be a too frequent use of the burden of proof rules in Article 2. The enforcement of EC competition law by national courts should lead to an increase of preliminary rulings under Article 234 EC. The length of such proceedings, however, is unlikely to encourage the enforcement of EC competition law by undertakings in private actions before the national courts. Moreover, the existence of differing national procedural rules and standards of proof, which are not harmonized by the Regulation, will lead to competition between procedures and will increase the likelihood of forum shopping.

It goes without saying that it is of course much too early to pass judgment on whether this radical reform of the enforcement system for EC competition law will be a success. Like any major reform, it creates new problems and challenges which did not exist in the old system. However, there can also be no doubt that the old system needed a major overhaul and that the new Regulation seems to be a major step forward in the right direction. It is regrettable that the Commission did not carry out a more comprehensive review of the infringement procedure rather than simply increasing its own powers of investigating and the level

of fines. As it is, the infringement procedure still has a number of legal and practical shortcomings. However, such a comprehensive legislative reform may just have been too ambitious leaving room for another reform in the future.

### **Abstract**

*Council Regulation (EC) No 1/2003 of 16th December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty will replace Regulation 17/62 and the existing system of approval. Under the new enforcement regime, which will apply as from 1st May 2004, notifications by companies and exemption decisions by the European Commission are no longer possible. This reform is complemented by the decentralised enforcement of Articles 81 and 82 EC by the national competition authorities and courts as well as a convergence rule regarding the relationship between Articles 81 and 82 of the Treaty and national competition laws, which will result in a strong harmonization of competition law within the Common Market. The analysis of the general principles of the new Regulation 1/2003 as provided for in Articles 1 to 3 reveals, however, that it does not provide sufficient solutions to all the problems of Regulation 17/62, which made the reform necessary. The requirements of legal and procedural certainty will oblige the Commission as well as national competition authorities to provide extensive informal guidance, at least for an interim period after 1st May 2004, and will require a higher level of scrutiny of competition enforcement by the European Court of Justice by means of preliminary rulings under Article 234 EC.*