

EC Competition Law: A Revolution?

Author: Marc ter Heide
(ANR S924206)



Bachelor's thesis for International and European Law, University of Tilburg

INTRODUCTION

Competition rules form an important part of the Community rules, which try to remove any barriers preventing the full effectiveness of the common market. Articles 81 and 82 of the EC Treaty (Treaty of Rome, as amended) are the key provisions on this behalf, prohibiting competition-limiting actions and the abuse of a dominant position. These rules are elaborated in secondary legislation, like regulations and directives. After being in service for more than forty years, the old competition rules as laid down in secondary legislation created an unfeasible workload for the European Commission that would only increase with the introduction of new Member States¹. Already in 1999, the European Commission elaborated proposals for new competition rules in a White Paper² and in 2000, the European Commission proposed a new regulation to the Council of the European Union.³ Final piece of the definitive modernisation package was the adoption of this regulation: Council Regulation 1/2003⁴, which entered into force on 1 May 2004. This created a new system of application of Articles 81 and 82 of the EC Treaty. At this time, the old Council Regulation 17/1962⁵ was revoked.

Although introducing a new system after 40 years always inflict great changes, the question remains whether Council Regulation 1/2003 is revolutionary for the application of the European competition rules. This thesis will demonstrate that the Regulation in fact is revolutionary because it leads to enormous changes in the application of the European competition rules and the distribution of tasks at national and European level. To be able to do so, a number of steps have to be taken. First, the application of the competition rules under Council Regulation 17/1962 needs to be reviewed. After that, a review of the system under Council Regulation 1/2003 will follow. Next, these systems will be compared and the changes discussed. Finally, the consequences of these changes are brought up.

¹ WT Eijsbouts and others *Europees Recht; Algemeen Deel* (European Law Publishing Groningen 2004) 141.

² White Paper on Modernisation of the Rules Implementing Articles 81 and 82 of the EC Treaty [1999] OJ C-132/1.

³ Commission Proposal for a Council Regulation on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the EC Treaty COM(2000)582 final (27 September 2000) (Proposal).

⁴ Council Regulation 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the EC Treaty (2003) OJ L1/1, 25.

⁵ Council Regulation (EEC) no. 17/1962 of 6 February 1962 First Regulation Implementing Articles 81 and 82 of the EC Treaty (1962) OJ 13/204, as amended (1999) OJ L148/5, 6.

COUNCIL REGULATION 17/1962

This Regulation, the first implementing Articles 81 and 82 of the EC Treaty, was enacted by the Council of Ministers on 6 February 1962. In order to compare this with Council Regulation 1/2003, there are four subjects to be discussed, which are the main

issues covered by the Regulation:

- The powers of the institutions
- The co-operation between the institutions
- The Investigative powers of the European Commission
- The power to impose penalties

1 Powers of the institutions

In this paragraph, the powers of the institutions will be discussed. Main theme will be the key power, i.e. the power of these institutions to apply Articles 81 and 82 of the EC Treaty. There will be a differentiation between the European Commission and the national competition authorities, as the Regulation does so.

(a) European Commission

Under Council Regulation 17/1962, the European Commission had three ways to apply the rules of Articles 81 and 82 of the EC Treaty. The case law of the European Court of Justice provided the Commission with a fourth power. Each of them will be discussed here.

According to the European Court of Justice, the Commission has the power to take interim measures under Article 3(1) of the Regulation, in relation to infringements of Articles 81 and 82⁶. There are a number of requirements, which must be fulfilled before the Commission is empowered to do so. First, 'the interim measures must come within the framework of the final decision which may be adopted by virtue of Article 3'⁷. That means there must be a *prima facie* case of violation of the competition rules⁸.

Secondly, urgency is required. Thirdly, the applicant must prove that the interim measure is necessary to avoid a situation likely to cause serious and irreparable damage, or a situation that is intolerable for the public interest. Fourthly, the measures must be of a temporary and conservatory nature. Finally, the Commission has to consider the legitimate interests of the undertaking concerned.⁹

Article 3(1) of the Regulation empowers the Commission to require, by decision, that the undertaking or association of undertakings concerned brings infringements of Article 81 or 82 to an end. Therefore, the Commission may order undertakings to terminate the infringement.

⁶ Case 792/79R *Camera Care Ltd v. Commission* [1980] ECR 119 [18].

⁷ Cases 228-229/82 *Ford v. Commission* [1984] ECR 1129 [19].

⁸ Statement by the Commission given to Camera Care and Hasselblad before the hearing on 20 February 1980 in Case No. IV/29.895.

⁹ Case 792/79R *Camera Care Ltd v. Commission* [1980] ECR 119 [19]

This includes the power to order positive measures to be taken by the undertakings concerned.¹⁰ A decision finding an infringement can also impose a fine and/or a periodical penalty payment. In case an infringement has been terminated, the Commission can issue a declaratory decision, concluding that the conduct constituted an infringement and not include a termination order.

Under Article 2 of the Regulation, the Commission can issue a decision giving negative clearance. This means, the Commission concludes there are no grounds under Article 81(1) or 82 of the EC Treaty for action on the Commission's part in respect of the agreement, decision or practice in question. An application by the undertaking or association of undertakings concerned is thereto necessary. The decision, however, may not give the parties complete legal protection, as Article 7 of the Regulation enables the Commission to negate retroactively the prohibitions of Article 81(1) under certain conditions.

The last key power of the Commission is provided in Article 81(3) of the EC Treaty and Article 6 of the Regulation. The Commission, by decision, can grant exemption, declaring inapplicability of the prohibition in Article 81(1). The agreements, decisions and practices must satisfy the conditions as specified in Article 81(3). The decision of the Commission can be subject to conditions, can impose duties on the undertakings concerned and will be for a fixed period¹¹. According to Article 6(1), the decision has, to specify the date from which it shall take effect, while the date shall not be earlier than the notification. This is an exclusive power of the Commission; it is not available to the national authorities.

(b) National authorities

Article 9(3) of the Regulation provides that as long as the Commission has not initiated a procedure, the national authorities are competent to apply Articles 81(1) and 82 of the EC Treaty in accordance with Article 84 of the EC Treaty. These authorities are the national competition authorities, whose competence is provided by Article 84¹². The national competition authorities are the national authorities 'entrusted (...) with the task of applying domestic legislation on competition subject to the review of the legality of that application carried out by the competent courts, or else the courts to which (...) that task has been especially entrusted'¹³.

The national authorities lose their competence the moment the Commission initiates a procedure. Therefore, an official act on the Commission's part, indicating its intention to proceed to a decision under the Articles cited in Article 9(3) of the Regulation, is necessary. An administrative formality does not suffice¹⁴.

When the Commission has initiated a procedure, the national authorities still have the competency to apply their own competition rules, differing from Community rules. Nevertheless, a conflict resulting from the simultaneous application of national and Community law has to be resolved on the basis that community law takes

¹⁰ Cases 56&58/64 *Corsten and Grundig v. Commission* [1966] ECR 299.

¹¹ CS Kerse *E.C. Antitrust Procedure* (4th edn Sweet & Maxwell London 1998) 248.

¹² Case 127/73 *B.R.T. v S.A.B.A.M.* [1974] ECR 51 [18].

¹³ Cases 209-213/84 *Ministère Public v. Asjes and Others* [1986] ECR 1425 [55].

¹⁴ Case 48/72 *Brasserie de Haecht v. Wilkin II* [1973] ECR 77 [16].

precedence¹⁵. Furthermore, to prevent conflicts between national courts' rulings on the compatibility of an agreement or practice with Articles 81(1) and 82 of the EC Treaty and Commission decisions, the European Court of Justice has pointed out that the courts cannot take a decision contradictory to a Commission's decision¹⁶. The relationship between the national competition law and the Community competition rules is not covered by the Regulation.

2 Co-operation between the institutions

Co-operation exists in multiple forms. First, the obligations of the Commission as regards the competent authorities will be discussed. Secondly, the support by the competent authorities will come up, followed by the Advisory Committee on Restrictive Practices and Monopolies.

(a) Obligations of the Commission

Under Article 10(1), the Commission is obliged to supply information to the competent authorities of the Member States. Purpose is to inform Member States of proceedings affecting undertakings established in their territory, to enable the Commission to compare its own information with the Member States' information, to allow the competent authority to give its views to the Commission and to enable the Commission to evaluate and use the information in a better way¹⁷.

The Commission also has the duty to notify the competent authorities of certain procedural steps under Council Regulation 17/1962. When the Commission sends a request for information to an undertaking, Article 11(2) requires the Commission that a copy of the request is also send to the competent authority of the Member State in whose territory the undertaking is situated. Under Article 14(2) the Commission is also obliged to inform the competent authority of any investigations planned in their territory. Before the Commission issues a decision ordering an investigation, the competent authority has to be consulted according to Article 14(4). Finally, the Commission should inform the competent authorities of the initiation of proceedings in view of the possible consequences, although this Regulation does not explicitly impose any obligation to do so¹⁸.

(b) Support from the competent authorities

Support from the competent authorities can be achieved in a number of ways. First, Article 11(1) empowers the Commission to obtain any necessary information from competent authorities of the Member States.

Secondly, there is the involvement of the competent authorities with the investigation.

¹⁵ Case C-67/91 *DGDC v. AEB* [1992] ECR I-4785 [11-12].

¹⁶ Case C-344/98 *Masterfoods v. HB Ice Cream* [2000] ECR I-11369 [60].

¹⁷ Case C-67/91 *DGDC v. AEB* [1992] ECR I-4785 [33-34].

¹⁸ CS Kerse *E.C. Antitrust Procedure* (4th edn Sweet & Maxwell London 1998) 212.

Article 14(5) gives the competent authority the right or the duty to assist with the investigation. Article 13(1) also enables the competent authorities to undertake the investigation on behalf of the Commission. Article 13 elaborates the conditions under which this kind of investigation may be used. In case an undertaking opposes an investigation under Article 14, the competent authorities are obliged to assist the Commission under Article 14(6).

Lastly, Article 19(2) gives the competent authorities the power to require the Commission to hear a third party where they consider it necessary for such party to be heard, while the third party does not show a sufficient interest entitling it to be heard.

(c) The Advisory Committee on Restrictive Practices and Monopolies

The Advisory Committee on Restrictive Practices and Monopolies consists of officials appointed by each Member State. The relevant provisions of the constitution and function of the Advisory Committee are contained in Article 10(3)-(6). It must be consulted in sector inquiries and prior to the taking of certain decisions and draft regulations, as can be found in Articles 10(3), 12(4) and 15(3).

3 Powers of investigation

To carry out the duties assigned to it by Article 85 and by provisions adopted under Article 83 of the EC Treaty, the Commission has three powers of investigation. First, the Commission may obtain all necessary information under Article 11 of the Regulation. Secondly, Article 12 enables the Commission to conduct a general inquiry into an economic sector. Thirdly, Article 14 empowers the Commission to undertake all necessary investigations into undertakings and associations of undertakings. All will be discussed here.

(a) Request of information

Article 11(1) gives the Commission the power to obtain all necessary information from undertakings, Governments and competent authorities. The last two sources of information have already been discussed in the paragraph about the co-operation between the institutions. The undertakings, from which information can be obtained, are not described in the Regulation and the Commission's power is not limited to undertakings involved in any breach of the competition rules. The only limitation is, that there should be a relationship between the information requested and the infringement being investigated, as is indicated by Article 11(1). Article 11(4) specifies who have a duty to supply the requested information. Requesting information may also require the disclosure of documents¹⁹. Article 11 has a two-stage procedure: under Article 11(3), there will be a simple request for information first, if necessary followed by a decision under Article 11(5) requiring information to be supplied.

¹⁹ Case 374/87 *Orkem v. Commission* [1989] ECR 3283 [14].

(b) Sector inquiries

Under Article 12, the Commission can conduct a general inquiry into an economic sector if there is some sign the trade in that specific sector is restricted or distorted within the common market. In the past, the Commission has only used this power twice, carrying out inquiries into the market for beer and the market for margarine²⁰.

(c) Inspections

Article 14 of the Regulation provides the Commission with two types of investigations, one ordered by decision under Article 14(3), the other pursuant to Article 14(1) with a mandate or authorisation in the form contemplated by Article 14(2). This does not mean that there is a two-stage procedure, like in Article 11, but undertakings are under no legal obligation to supply information or to submit to investigations unless the Commission has taken a formal decision to that effect²¹. Again, the investigation must be necessary, as is indicated in the first part of Article 14(1). Differing from Article 11, investigations can only be executed regarding undertakings or associations of undertakings.

The inspectors have a number of powers under Article 14. First, they may examine the books and other business records, including all documentation, whether it is written or otherwise²², relating to the undertaking's business. The undertaking concerned has an obligation to co-operate actively; it must provide the documents required by the inspectors²³. Secondly, the inspectors may take copies of or extracts from the books and business records. Thirdly, the inspectors are allowed to ask for oral explanations on the spot. Finally, they may enter any premises, land and means of transport of undertakings.

4 Penalties

Under Articles 15 and 16 of Council Regulation 17/1962, the Commission has the power to impose fines and periodic penalty payments in case of a substantive or procedural infringement.

(a) Fines

Fines can be imposed on undertakings for procedural and substantive infringements. The first-mentioned can be found in Article 15(1), where the Commission may by decision impose fines from 100 to 5,000 EUR²⁴. Procedural infringements exist in three categories as mentioned in Article 15(1).

²⁰ M Furse *Competition Law of the EC and UK* (4th edn Oxford University Press Oxford 2004) 84.

²¹ Answer to Written Question 677/79 by Lady Elles to the Commission 'The Community's Competition Policy' [1979] OJ C310/30.

²² L Ortiz Blanco *EC Competition Procedure* (Clarendon Press Oxford 1996) 130.

²³ Case 374/87 *Orkem v. Commission* [1989] ECR 3283 [27].

²⁴ Council Regulation 17/1962 art. 17. Momentarily, the unit of account is the Euro, replacing the ECU since 1 January 1999.

The first is supplying incorrect or misleading information, the second is not supplying information within the time fixed by a decision under Article 11(5) and finally, producing the required books or other business records in incomplete form during investigations under Articles 13 or 14 or refuse to submit to an investigation ordered by decision under Article 14(3).

Article 15(2) mentions substantive infringements, giving the Commission the power to impose fines from 1,000 to 1,000,000 EUR, or a sum not exceeding 10% of the turnover in the preceding business year of each undertaking involved. The Commission can impose fines in case of infringement of Articles 81 and 82 of the EC Treaty or in case an undertaking commits a breach of an obligation imposed pursuant to Article 8(1) of the Regulation. However, the Commission has never imposed any fines in respect of conduct within the second category²⁵. According to Article 15(4), fines do not have a criminal nature.

(b) Periodic penalty payments

Under Article 16(1), the Commission has the power to impose periodic penalty payments in the range of 50 to 1000 EUR per day. This way, undertakings can be compelled to end an infringement of Article 81 or 82 of the EC Treaty, to refrain from any act prohibited under Article 8(3) of the Regulation, to supply complete and correct information as requested under Article 11(5) or to submit to an investigation ordered under Article 14(3).



²⁵ CS Kerse *E.C. Antitrust Procedure* (4th edn Sweet & Maxwell London 1998) 293.

COUNCIL REGULATION 1/2003

The Council of the European Union, the former Council of Ministers, enacted this Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty, on 16 December 2002. Since 1 May 2004, this Regulation replaces Council Regulation 17/1962. It will be discussed in the same order as Council Regulation 17/1962.

1 Powers of the institutions

As in the review of Council Regulation 17/1962, the key power of the authorities will be discussed. This is the power of the different institutions to apply Articles 81 and 82 of the EC Treaty. There is a differentiation between the European Commission, the national competition authorities and the national courts, just as the Regulation does.

(a) The European Commission

Chapter III of the Regulation specifies the decisions the Commission can take. As these decisions contain the key power of the Commission, all the provisions will be discussed.

Article 7 contains the most important power in respect of individual cases. Where it finds an infringement, the Commission may require, by decision, that undertakings and associations of undertakings concerned end such infringements. To that end, she can impose any behavioural or structural remedy, as long as it is both proportionate and necessary. The Commission has already imposed a wide range of behavioural remedies in the past, but structural remedies are new in this Regulation. The use of structural remedies has to satisfy an extra requirement and Recital 12 of the preamble makes a remark on the proportionality of structural remedies. Finally, the Commission can take a decision, concluding that there has been a breach of Article 81 or 82 of the EC Treaty, but that it has been terminated.

Article 8 empowers the Commission to order interim measures, codifying the case law of the European Court of Justice under Council Regulation 17/1962²⁶. A number of conditions must be satisfied. There must be the risk of serious and irreparable damages to competition, urgency and a prima facie finding of an infringement.

According to Article 9, the Commission may also accept commitments from undertakings to meet the concerns expressed to them by the Commission in its preliminary assessment. By a decision, the Commission can make these commitments binding. Because of Article 9(2), the Commission has limited possibilities afterwards to reopen the procedure.

Article 10 enables the Commission to conclude that the provisions of Articles 81 and 82 of the EC Treaty are inapplicable to the activities of an undertaking or association of undertakings, where the Community public interest requires so. Such decisions are most likely to be issued in respect of new types of agreements or practices that have not been settled yet in the existing case law and administrative

²⁶ Case 792/79R *Camera Care Ltd v. Commission* [1980] ECR 119 [18].

practice²⁷.

(b) The national courts

Article 6 of the Regulation provides the national courts with the power to apply Articles 81 and 82 of the EC Treaty. Articles 81 and 82 already had direct effect before the adoption of this Regulation, but Article 81(3) did not until the adoption of Article 1(2) of this Regulation. Now the national courts can research if the prohibition of Article 81(1) of the EC Treaty applies, but also judge whether the conditions of Article 81(3) of the EC Treaty are satisfied. In this way the national courts can consider if Article 81 of the EC Treaty completely applies.

If national courts apply national competition law, Article 3(1) may impose a duty to apply those Community competition rules too.

(c) The national competition authorities

According to Article 5 of the Regulation, the national competition authorities can apply Articles 81 and 82 of the EC Treaty. They are empowered to take a number of decisions that coincide with most of the powers of the Commission. They may require the termination of an infringement, order interim measures, accept commitments and impose fines, periodic penalty payments or any other penalty provided for in their national law. Especially the last part of the latter power is significant, as this makes some divergence possible. The duty to apply Community competition rules as laid down in Article 3(1) of the Regulation, limits the possibility of the national competition authorities to apply national competition law. It does not make it impossible though. Purpose is ensuring the effective enforcement of the Community competition rules and the proper functioning of the co-operation mechanisms as laid down in this Regulation²⁸.

2 Co-operation between the institutions

Chapter IV of the Regulation covers the co-operation between the Commission and the Member States and will be fully discussed. There will not be a separation here between the different kinds of co-operation, as the Regulation does not enable this, because the Regulation does not split the different kinds of co-operation itself.

Article 11(1) simply provide that the Commission and the national competition authorities apply the Community competition rules in close co-operation. Therefore, the national competition authorities and the Commission shall share information under Article 11(2), while the first have to inform the Commission of any (intended) acts under Articles 81 and 82 of the EC Treaty, as Article 11(3) provides. The national competition authorities also have to inform the Commission before certain decisions are adopted, according to Article 11(4), while the Commission is empowered to request any other relevant documents.

²⁷ Recital 14 of the preamble of Council Regulation 1/2003.

²⁸ Recital 8 of the preamble of Council Regulation 1/2003.

Article 11(6) enables Commission to relieve the national competition authorities of their competence to apply Articles 81 and 82 of the EC Treaty, by initiating proceedings for the adoption of a decision. If the national authority is already dealing with the case, however, the Commission has to consult the national authority before acting.

Article 12 covers the exchange of information. First, information may be exchanged expressly under Article 12(1), including confidential information. This information has to be used as proof for applying Article 81 or 82 of the EC Treaty, in respect of the subject matter for which it was collected by the national competition authority. Under Article 12(2), it is also possible to exchange information when national competition law is applied parallel to Community competition rules, but there are some requirements that have to be satisfied. According to Article 12(3), the exchanged information may only be used as evidence to impose sanctions on natural persons if it fulfils two demands the provision contains.

Article 13 describes when an investigating authority will terminate or suspend proceedings. This Article is important to prevent or terminate the situation in which two national competition authorities are investigating the same case.

Article 14 makes provision for an Advisory Committee on Restrictive Practices and Dominant Positions. The Commission has to consult this Committee before taking some decisions, as is described in Article 14(1). Article 14(2) elaborates the composition of the Committee. It is an important link between the Commission and the Member States as the Commission is required to consider its advice as best possible. On request of a national competition authority, the Committee can discuss national cases, but the Committee will not deliver any opinions in respect of these cases²⁹.

Article 15 deals with the co-operation between the national courts and the Commission. Courts may request the Commission to supply information or advice on the application of Community competition rules, according to Article 15(1). Under Article 15(3), national competition authorities are allowed to submit written comments to courts dealing with the applicability of Articles 81 and 82 of the EC Treaty. With the permission of the court, they may also make oral comments. The same applies to the Commission, although the coherent application of Article 81 or 82 of the EC Treaty has to require her comments.

Article 16, finally, elaborates the uniform application of Community competition law. National courts and competition authorities may not take any decisions conflicting with decisions adopted by the Commission. Article 3 combined with Recital 9 of the preamble of the Regulation already sets out clear rules on the relationship between national and Community law, preventing conflicts between decisions taken by the national courts and competition authorities and Community law.

3 Powers of investigation

Chapter V of the Regulation contains the specific powers of investigation of the Commission. Articles 23 and 24 back them up, empowering the Commission to impose penalties on those who fail to cooperate with investigations.

²⁹ Council Regulation 1/2003 art. 14(7).

The Commission has a general power under Article 17 to conduct investigations into particular types of agreements or across sectors of the economy. The Commission can publish a report, based on this investigation. Without an infringement of Article 81 or 82 of the EC Treaty by specific undertakings, the Commission has no power though to deal with any kind of market failure.

Article 18 empowers the Commission to require information from undertakings and associations of undertakings. Two ways are possible, by request and by decision. The information has to be necessary, which means relating with possible infringements of Articles 81 and 82 of the EC Treaty³⁰. Under Article 18(5), the obligations are only to be imposed on undertakings and their owners or their representatives who have to supply the information. In case lawyers provide wrong information, the undertaking itself remains responsible for the breach of Article 18.

As provided in Article 19, the Commission may also take statements from any natural or legal person, consenting with the interview. However, if the interview is taking place at the premises of the undertaking, the Commission is obliged to inform the national competition authority of the Member State where the interview is taking place.

Articles 20 and 21 specify the powers of the Commission to conduct inspections. Normally inspections can only be conducted at the premises of an undertaking or association of undertakings. When serious breaches of Articles 81 or 82 of the EC Treaty are under investigation, the Commission may also conduct inspections at private premises. Commission officials and other accompanying persons have a number of powers as laid down in Article 20(2). Article 20 also contains rules on the liaison between the Commission and the national competent authorities of the Member States and the situation where national judicial approval of an inspection is required³¹. Inspection of other premises than the undertakings' is possible now, but Article 21(3) requires the prior authorization of the judicial authority of the Member State concerned.

Finally, Article 22 enables the national competition authority to carry out inspections on behalf and for the account of the national competition authority or at the request of the Commission.

4 Penalties

Articles 23 and 24 empower the Commission to impose fines and periodic penalty payments on undertakings as a reaction on infringements.

(a) Fines

Fines are mentioned in Article 23 and may be imposed by decision on (associations of) undertakings. According to Article 23(5) though, these fines do not have a criminal nature. In case of breaches of procedural law, fines may not exceed 1% of the total turnover in the preceding business year, according to Article 23(1). There are five categories of procedural infringements, which can be found in Article 23(1).

³⁰ Case T-39/90 *SEP v. Commission* [1992] ECR II-1497.

³¹ Council Regulation 1/2003 art. 20(8). Compare Case C-94/00 *Roquette Frères SA v Directeur Général de la Concurrence de la Consommation et de la Répression des Fraudes* [2003] ECR I-9011 [99].

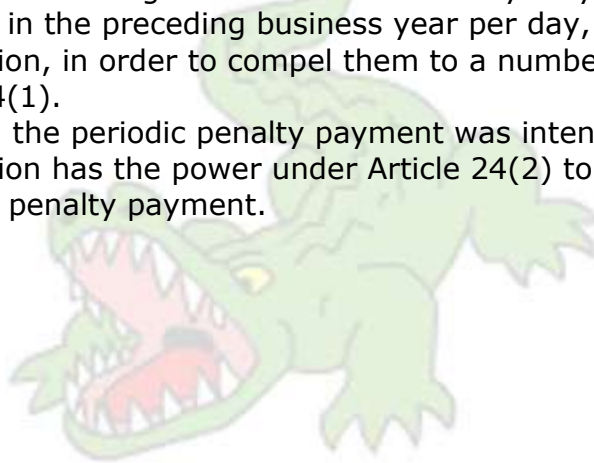
More important is Article 23(2), under which the Commission has the power to impose fines in case of substantive infringements. Substantive infringements are infringements of Articles 81 and 82 of the EC Treaty, contravening a decision ordering interim measures under Article 8 and failing to comply with a commitment made binding by a decision pursuant to Article 9. The fine may not exceed 10% of the total turnover in the preceding business year of the involved undertaking or association of undertakings. In case the infringement of the association relates to the activities of its members, the fine shall not exceed 10% of the total turnover of each member active on the market affected by the infringement.

If a penalized association of undertakings is not solvent, the association has the duty to ask its members for contributions to be able to pay the fine. This is provided in Article 23(4), to guarantee the collecting of fines³².

(b) Periodic penalty payments

Under Article 24, the Commission has the power to impose by decision periodic penalty payments on undertakings and associations. They may not exceed 5% of the average daily turnover in the preceding business year per day, from the date appointed by the decision, in order to compel them to a number of actions as mentioned in Article 24(1).

If the obligation, which the periodic penalty payment was intended to enforce, is satisfied, the Commission has the power under Article 24(2) to lower the definitive amount of the periodic penalty payment.



³² Recital 30 of the preamble of Council Regulation 1/2003.

CHANGES

1 Powers of the institutions

Council Regulation 1/2003 changed the most in this part of the procedural rules, as discussed in this article.

Before Council Regulation 1/2003 was adopted, there were two ways in which Article 81(3) of the EC Treaty could be invoked: 'either by making an individual application to the Commission; or by structuring an agreement so as to fall within a block exemption regulation'³³. With the adoption of Council Regulation 1/2003, undertakings seeking to rely on the legal exception may establish the exception's application itself. They can defend this before a national court or competition authority, while according to Article 2 of the Regulation the undertakings bear the burden of proof. It has not become impossible though, to approach the Commission with questions, according to its own Notice³⁴. In other words, in the application of Article 81 there was a move 'from an *ex ante* notification and authorisation mechanism to an *ex post* directly applicable exception system'³⁵. Especially conferring direct effect upon Article 81(3) of the EC Treaty and including a provision on the function of the national courts, constituted this changed system.

The Commission does have some new powers, although most of them also have something to do with the changing application of Article 81 of the EC Treaty and the codification of case law of the European Court of Justice. A new possibility for the Commission is to accept commitments from undertakings to meet the concerns expressed to them by the Commission in its preliminary assessment. In addition, if the Commission finds an infringement of Article 81 or 82 of the EC Treaty, it is possible now to impose structural remedies next to the already existing possibility to impose behavioural remedies. There is some expectance though, that the Commission will only use this possibility, if there is no fitting behavioural remedy³⁶.

2 Co-operation between the institutions

Council Regulation 1/2003 contains a large number of provisions concerning the cooperation between the institutions. Article 3 and Recitals 8 and 9 of the preamble set out clear rules on the relationship between national and Community law, while Chapter IV of the Regulation contains provisions on the "real" co-operation between the European Commission, the national competition authorities and the national courts. In the past, a few of those rules were laid down in Council Regulation 17/1962, but a number of rules were created in the case law of the European Court of Justice. In addition, nothing was provided in Council Regulation 17/1962 on the co-operation with national courts, they were treated like the national competition authorities.

³³ M Furse *Competition Law of the EC and UK* (4th edn Oxford University Press Oxford 2004) 176.

³⁴ Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters) [2004] OJ C101/78.

³⁵ D Gerard and K Lenaerts 'Decentralisation of EC Competition Law Enforcement: Judges in the Frontline' (2004) 27 *World Competition* 313, 313.

³⁶ M Furse *Competition Law of the EC and UK* (4th edn Oxford University Press Oxford 2004) 112.

Therefore, there have been some changes in Council Regulation 1/2003, although part of this is just codification of the case law.

3 Powers of investigation

On this field, there have been a number of minor changes, providing the Commission with extra powers or making it easier to execute already existing powers.

First, the procedure to obtain information is no longer a two-stage one. The Commission immediately has the choice now of issuing a request or a decision when it is gathering information, instead of using the decision as a more forceful way of requesting information.

Article 19 of Council Regulation 1/2003 provides the Commission with a new power, to take statements from a person. The Commission did not have this possibility before. Most likely, the Commission will especially use this power in non-contentious cases³⁷. In addition, the Commission may conduct inspections now in a broader range of premises like private homes.

4 Penalties

Most important change under Regulation 1/2003 in this field is the increasing tariff of both fines and periodic penalty payments. According to Recital 29 of the Preamble, compliance with Articles 81 and 82 of the EC Treaty and the fulfilment of the obligations laid down in this Regulation should be enforceable by means of fines and periodic penalty payments. Deterrence has always been a purpose of fines³⁸, while periodic penalty payments are compulsive and intend to prevent specific actions contravening the competition provisions or to force undertakings to comply with Commission decisions³⁹. To keep that effect and have regard for Recital 29, the levels of the fines and periodic penalty payments are adjusted upward.

In addition, the Commission may impose fines and period penalty payments in more situations than under Regulation 17/1962. Especially the number of procedural infringements has increased.

CONSEQUENCES

In the chapters before, the procedural rules as laid down in Council Regulations 17/1962 and 1/2003 were compared and the changes brought forward. Now the consequences of these changes will be discussed, showing what Council Regulation 1/2003 actually does. Here it will also become clear why some call it "the beginning of an era and style of EC competition law enforcement and the end of the beginning of a great leap forward"⁴⁰.

³⁷ M Furse *Competition Law of the EC and UK* (4th edn Oxford University Press Oxford 2004) 84.

³⁸ Case 49/69 *BASF v. Commission* [1972] ECR 713 [38].

³⁹ CS Kerse *E.C. Antitrust Procedure* (4th edn Sweet & Maxwell London 1998) 221.

⁴⁰ JS Venit 'Brave New World: the Modernization and Decentralization of Enforcement under Articles 81 and 82 of the EC Treaty' (2003) 40 *Common Law Market Review* 545, 545.

First, the new system leads to a decentralised control of Community competition rules and application of the concept of subsidiarity as laid down in Article 5 of the EC Treaty⁴¹. The Commission has a changing workload. Instead of granting exemptions based on notifications of agreements, decisions and practices, the Commission now has more time to spend in investigating hardcore infringements⁴². Now, undertakings may evaluate themselves whether Article 81(3) of the EC Treaty applies and defend their decisions before national competition authorities or courts. National competition authorities and national courts will receive more work, having to fully apply Article 81 of the EC Treaty. They become more important in this system, applying Articles 81 and 82 of the EC Treaty. Objective is to increase the effectiveness of the public enforcement of Community competition rules by freeing more resources for the European competition authorities, enabling them to concentrate on the investigation and prosecution of the more serious infringements of Articles 81 and 82 of the EC Treaty, while possibly also the private enforcement of the competition rules is encouraged⁴³. On the other hand, bureaucracy for companies will also be reduced, as they no longer have to notify agreements, decisions and practices to the Commission⁴⁴.

In addition, the new Regulation makes it better possible to protect the uniform application of the Community competition rules by including new provisions on that matter, codifying case law of the European Court of Justice. This is important due to the increasing involvement of the national competition authorities and courts with the application of the Community competition rules.

Another consequence of the adoption of Council Regulation 1/2003 is the huge increase of the maximum fines for procedural infringements and periodic penalty payments the Commission can impose. Instead of fixed maximum fines and periodic penalty payments, the maximum now fully depends of the turnover of the penalized undertaking. It must be noted though, that high fines for substantive infringements were already possible under Council Regulation 17/1962, as the € 497.2 million fine imposed on Microsoft shows⁴⁵.

Finally, the Regulation will increase the speed of the development of case law of the European Court of Justice. The involvement of more actors will lead to more cases being handled and appealed, leading to extra explanation of Community law⁴⁶.

⁴¹ WT Eijsbouts and others *Europees Recht; Algemeen Deel* (European Law Publishing Groningen 2004) 144.

⁴² White Paper on Modernisation of the Rules Implementing Articles 81 and 82 of the EC Treaty [1999] OJ C-132/1 [13].

⁴³ L Davey and M Holmes 'Competition Enforcement in the European Union: a Three-Way Partnership' (2005) 71 *Defense Counsel Journal* 31, 32.

⁴⁴ D Woods 'Private Enforcement of Antitrust Rules --- Modernization of the EU Rules and the Road Ahead' (2004) 16 *Loyola Consumer Law Review* 431, 431.

⁴⁵ Commission Decision relating to a proceeding under Article 82 of the EC Treaty against Microsoft Corporation (Case No. 37.792) COM(2004)900 final (24 March 2004).

⁴⁶ JS Venit 'Brave New World: the Modernization and Decentralization of Enforcement under Articles 81 and 82 of the EC Treaty' (2003) 40 *Common Law Market Review* 545, 546.

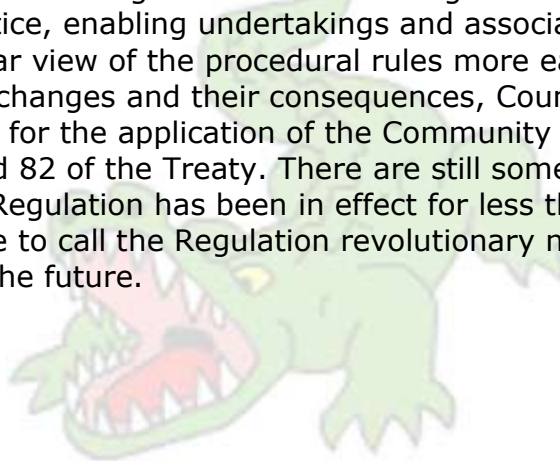
CONCLUSION

As was said in the introduction, Council Regulation 1/2003 replaces a forty-year-old Council Regulation 17/1962. Although this would of course result in changes, the changes in fact have been revolutionary. The former basics under the application of Articles 81 and 82 of the Treaty have been removed and replaced by something very different with large consequences. Instead of having to notify the Commission of agreements, decisions and practices, there is a directly applicable exemption system now. Companies get more responsibilities this way, as they are the first who will have to decide if an exemption applies on, for example, an agreement, while they may have to defend this decision later on. Private enforcement of competition rules might also be encouraged this way.

National competition authorities and courts have been awarded more powers and are full-fledged players now in the public and private enforcement of competition rules, while the Commission can narrow down its work to the more important infringements.

Furthermore, the new Regulation codifies a large amount of case law of the European Court of Justice, enabling undertakings and associations of undertakings concerned to get a clear view of the procedural rules more easily.

Based on these changes and their consequences, Council Regulation 1/2003 can be called revolutionary for the application of the Community competition rules as laid down in Articles 81 and 82 of the Treaty. There are still some questions left for the future though, as the Regulation has been in effect for less than one year now. Therefore, it is possible to call the Regulation revolutionary now, but the real effects are to be reviewed in the future.



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