

European competition rules : The new enforcement system for Articles 81 and 82 EC is soon to be reality

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Regulation 1/2003¹, the new regulation on the enforcement of the European competition rules laid down in Articles 81 and 82 of the EC Treaty, will be applicable from 1 May 2004. It replaces Regulation 17 of 1962, bringing about major changes in the way the fundamental competition rules of the EC Treaty are enforced. The Commission and Member States' competition authorities are busy preparing for the new system. This includes setting up the European Competition Network (ECN), their new framework for co-operation. The Commission is in the process of launching a consultation of interested parties on a series of new Notices designed to provide guidance on various aspects of the new enforcement system.

THE NEW ENFORCEMENT SYSTEM

The operational provisions of Regulation 1/2003 become applicable as from 1 May 2004. This implies that from that date :

a) The *notification and exemption system* for the application of Article 81(3) will be *abolished*. Articles 81 and 82 become directly applicable in their entirety, that is including Article 81(3), the provision that sets out the conditions that a restrictive agreement must fulfil in order to be legal under Community competition law. Under Regulation 17, only the Commission could declare Article 81(3) applicable, upon receipt of a formal notification. The abolition of the notification system means that the Commission can re-focus its enforcement action in order to do more meaningful enforcement work for the benefit of consumers and the competitiveness of the European economy.

b) Proceedings by *Member States' courts and competition authorities* will no longer be blocked or delayed by notifications to the Commission. In the new system, the defence of Article 81(3) can be invoked in all proceedings where it is legally plausible. National competition authorities and courts will have the power and the obligation to apply the provision, where its conditions are fulfilled. Article 81 in its entirety can thus be applied by the Commission, national courts and national competition authorities, extending the potential for effective enforcement.

c) In *all cases that have an effect on trade between Member States* the *EC competition rules* will be applied. Where a case falls inside the scope of application of Articles 81 and 82, Member States' courts and competition authorities will not be able to base their decisions solely on national law. Under Article 3 of the new Regulation, they will also have an obligation to apply the EC competition rules, at least alongside

¹ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 04.01.2003, pages 1-25.

national law. Of course they may also apply Articles 81 and 82 on a stand-alone basis. Article 3 is a genuine quantum leap in terms of ensuring a level playing field for agreements within the internal market.

d) *Member States' competition authorities will have to inform the Commission* about new cases opened and envisaged decisions. If necessary, the Commission can step in by opening proceedings itself (this ends the competence of Member States' competition authorities to deal with a case). All elements of the Commission's proposal that aim at promoting coherent application have been retained, thus effectively addressing the concerns expressed by the European Parliament during the discussions.

THE MODERNISATION PACKAGE

The Commission, working closely with the Member States' competition authorities in the European Competition Network (ECN), is currently preparing a *package of six new notices* and a new Commission implementing regulation. Drafts of these texts are heading for public consultation² so as to give all stakeholders the opportunity to scrutinise the texts and to comment. Final texts will be adopted by the Commission before the date of application of the new Regulation on 1 May 2004.

a) The *Guidelines on the effect on trade concept contained in Articles 81 and 82* summarise the case law on the jurisdictional criterion that determines the reach of Article 81 and 82 vis-à-vis national competition laws. Guidance on this issue is of particular interest to national enforcers as they will be obliged to apply EC competition law, where it is applicable, pursuant to Article 3 of the new Regulation. While introducing a carefully designed *de minimis* rule, the Guidelines do not in any way seek to limit the jurisdictional reach of Articles 81 and 82.

b) The *Guidelines on the application of Article 81(3) of the Treaty* develop a framework for the application of Article 81(3) and provide guidance on the application of each of the four conditions contained in this provision. Extensive guidance on the requirements set out in Article 81(3) will help courts and competition authorities of the Member States to apply their new power and contribute to ensuring coherent application from the outset.

c) The *Notice on cooperation within the network of competition authorities* sets out the main elements of the cooperation between the Commission and the competition authorities of the Member States in the European Competition Network (ECN). The most important aspect of the notice are the principles for sharing work between the members of the network. The Notice also deals with co-ordination and co-operation activities within the ECN.

d) The *Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC* assembles the relevant case law to clarify the procedural context in which national judges are operating when they apply Articles 81 and 82 in conformity with Regulation 1/2003. It also spells out

² The documents will be published i.a. on http://europa.eu.int/comm/competition/index_en.html.

the modalities of the co-operation mechanisms provided for in Regulation 1/2003, including the newly established possibility for the Commission to submit *amicus curiae* briefs to the national courts.

e) The *Notice on informal guidance relating to novel questions that arise in individual cases* sets out details about the new instrument of ‘guidance letters’. The abolition of the notification system is the central pillar of the reform. It would not be acceptable that any kind of notification mechanism be reintroduced through the back door. However, the Commission reserves the possibility to provide guidance to undertakings in writing (guidance letter) in a limited number of cases, where a genuinely unresolved question concerning Articles 81 or 82 arises and subject to its other enforcement priorities.

f) The *Notice on the handling of complaints that concern Articles 81 and 82* was announced by the Commission in its White Paper on Modernisation of 1999. The Notice provides guidance on the work sharing between different enforcers and invites potential complainants to choose the most appropriate authority to lodge their complaint. The largest part of the Notice explains the Commission’s assessment of complaints in the field of antitrust and the procedures applicable.

OUTLOOK

The team spirit shown by the national competition authorities in the setting up of the European Competition Network (ECN) is a very encouraging sign in the context of preparing the new enforcement system. The ECN is already now actively considering general questions concerning the implementation of Regulation 1/2003. Moreover, working level co-operation on sectoral topics has been successfully initiated, for example in the insurance field. The new Member States have been involved fully from the outset. All competition authorities are showing great openness, even eagerness to leave their home ground and work together to ensure the best possible enforcement of Articles 81 and 82. This promises well for the time after 1 May 2004, when the ECN team will enter the competition enforcement arena.