EC Antitrust Modernisation: The Commission Does Very Nicely—Thank You! Part One: Regulation 1 and the Notification Burden

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Introduction

This paper, which is in two parts, contends that Regulation 1/2003 is far from being the comprehensive reform that the Commission suggests.[1] In Part One, having provided an outline and analysis of the new Regulation, it argues that the abolition of the notification procedure is not the radical step it first appears. In reality it is argued that it is merely the abolition of an already irrelevant procedure with marginal impact on the operation of the EC competition rules. In Part Two the paper further contends that the purported decentralisation of the EC competition rules to the National Competition Authorities (hereafter "NCAs") and the national courts is likely to have very little effect on the case load of the NCAs and almost no effect on the number of cases before the national courts of the Member States. The central thesis of the paper is that the Commission has orchestrated a political masterstroke. It has given the impression of radical reform to the Member States by abolishing the notification procedure and offered decentralisation provisions largely based on the existing and under-used NCA and National Courts Notices,[2] which in no way undermine its central role in the development of EC competition policy or the enforcement of EC competition law. DG Competition has in fact managed to centralise European competition law even more than under Regulation 17 on its Rue Joseph II headquarters. Via Art.3 it has ousted the operation of national competition law from most major restrictive practices cases and thereby ensured direct supervision over such cases. Furthermore, as a consequence of the power to take over cases contained in Art.9(3) of Regulation 17 having been retained in Regulation 1, the reach of that power has been considerably extended by Art.3. Under Regulation 1 the NCAs appear to have no escape from Community jurisdiction and potential Commission take over of a restrictive practice case if it has an effect on trade between Member States. In addition, the Commission's existing powers have been upgraded and made more legally secure, and its investigatory powers have been increased. It is, however, argued that the situation created by Regulation 1 is fundamentally unstable. Pressure from the NCAs, particularly the better resourced and experienced NCAs of the larger Member States, is likely to force the Commission to concede a greater degree of genuine decentralisation.

Part One provides an outline and analysis of Regulation 1 and then examines the claims in the Regulation as to the advantages of the abolition of the notification procedure. Part Two focuses on the decentralisation of the EC competition rules. It first considers the role of the NCAs under the new regime; then the position of the national courts in the new system; it examines the impact of increasing market integration on the ability of the regulatory agencies and the courts to decentralise. Part Two finally asks the fundamental question, "Who benefits from Regulation 1?", and then considers the extent of the pressure for further reform.

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1 IP/02/1739, Landmark reform simplifies and strengthens antitrust enforcement, November 26, 2002.

2 Respectively the Notice on Co-operation between National Competition Authorities and the Commission in Handling Cases Falling Within the Scope of Arts 85 or 86 of the EC Treaty [1997] O.J. C313/3; and the Notice on Co-operation Between National Courts and the Commission in Applying Arts 85 and 86 of the EC Treaty [1993] O.J. C39/6.

Outline of Regulation 1/2003

This outline of Regulation 1/2003 is divided into four sections: Section 1, the abolition of the notification and individual exemption contained in Regulation 17/1962; Section 2, the uniform application of EU competition law; Section 3, the powers of the Commission; and Section 4, the new system of co-operation instituted by Regulation 1/2003.

1. Abolition of the system of notification and individual exemption

Articles 4–9 of Regulation 17/1962 created a system of notification and individual exemption. Undertakings seeking to escape from the prohibition contained in Art.81(1) could file their agreements with the Commission in the hope of an exemption under Art.81(3). As explained below, this procedure contained significant weaknesses resulting in the Commission adopting a number of administrative fixes, including comfort letters, block exemptions and *de minimis* notices to reduce the burden of the individual exemption system.

Article 1 of Regulation 1/2003 abolishes this central feature of the Community competition system. In future Art.81(3) will be directly applicable. This means that the Commission will itself not provide exemptions from Art.81(3). It will only apply Art.81(3) in the course of other proceedings, such as infringement proceedings. Hence, where it initiates proceedings and comes to the conclusion that although there is an infringement of Art.81(1) there are good grounds to apply Art.81(3), that latter provision will be applied. However, no actual undertaking inspired application for exemption will be entertained.

The NCAs and the national courts will for the first time be able to apply Art.81(3) directly. Currently under Art.9(1) of Regulation 17 the Commission has sole power to apply Art.81(3). However, NCAs will not be able to grant individual exemptions. As with the Commission, the NCAs will apply Art.81(3) in the context of other proceedings, such as infringement proceedings. Equally national courts will only be able to apply Art.81(3) in the course of ordinary civil proceedings. National courts will not be able to grant individual exemptions to applicants. The courts, unlike the current situation under Regulation 17, will not have to stay proceedings in an antitrust action where one of the parties files an application for an individual exemption with the Commission. Instead they will be able to apply Art.81(3) directly, just as they now apply Art.81(1). So, for example, in a case where Art.81(1) is pleaded as a defence to, say, an intellectual property right claim, the plaintiff IPR holders can now not just deny Art.81(1) does not apply, they can also in the alternative rely on the provisions of Art.81(3) to escape the prohibition contained in Art.81(1).

Regulation 1 also introduces a new element into the way Art.81(3) is to be applied. Article 2 shifts the burden of proof in respect of Art.81(3) on to the person relying on that provision. The argument behind Art.2 is that under Regulation 17 undertakings requesting exemption have to demonstrate to the Commission that the conditions of Art.81(3) are fulfilled. In a directly applicable system, without a change in the burden of proof the party alleging an infringement of an agreement would also have to demonstrate that Art.81(3) did not apply. Given the wide-ranging nature of the evidence and its likely location with the allegedly infringing party, it would be difficult, if not impossible, to meet that burden.[3] Consequently, Art.2 provides that in respect of Art.81(1) the burden of proof lies upon the party alleging an infringement of that provision. However, once that burden has been met, the burden shifts to the party seeking to rely on Art.81(3), who now has the burden of proving that the exemption provisions of Art.81(3) apply.[4]

A conceptually curious part of Regulation 1 is that the existing block exemption system is retained.[5] While it is at first sight undoubtedly conceptually odd to retain a system of block exemption when the individual exemption system is abolished, there are sound practical reasons for taking this approach. In particular, the block exemption system, especially the new more broad-based and flexible vertical and horizontal block exemption regulations, provide significant legal security to industry. This access to legal security is even more important given that there is likely to be a period of legal uncertainty following the coming into force of Regulation 1 as the scope of Art.81(3) is debated in the national courts and ultimately decided by the European Court of Justice ("ECJ").

3 Ehlermann, *The Modernisation of EC Antitrust Policy: A Legal and Cultural Revolution* (2000) CMLRev 537, 562–563

4 Council Regulation 1/2003 of December 16, 2002 *on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty*, O.J. 2003 L1/1 (hereafter Regulation 1). Recital 5 of Regulation 1 indicates that the legal standard of proof is a matter for each national court according to its own national rules, provided that such rules are compatible with the general principles of Community law. The general principles of law include basic legal doctrines such as legal certainty, right to a fair hearing, as well as fundamental rights. For a further discussion on Community general principles of law see, Hartley, *Foundations of Community Law*, (OUP, 1998) 137 *et seq*.

5 Both the Commission and the NCAs may withdraw the benefit of a block exemption from an individual undertaking. Article 29.

In a further step to improve legal security the Commission intends to publish a notice on the scope of Art.81(3).[6] It accepts that because for almost all of its existence Art.81(3) has been the subject of administrative decisions, in which the Commission has had considerable discretion rather than rulings of the ECJ, its scope remains uncertain. The Commission believes that individual practitioners will be able to advise their business clients on the application of Art.81 as a whole with the aid of the existing case law, together with its notice. However, even the Commission accepts that there is likely to be some uncertainty, and recourse to the ECJ before the final shape of Art.81(3) post-abolition of the notification system is clear.

2. Uniform application of EC competition law

Currently the Member States are permitted to apply national competition law alongside the application of EC competition law by the Commission. The principal restraint on parallel application is a decision by the ECJ in *Walt Wilhelm v Bundeskartellamt* in which the Court ruled that the parallel application of national and community competition law is permissible insofar as the former does not impinge on the uniform application of community law or the full effect of measures taken in its implementation.[7] However, as there have been few cases of parallel action by the Commission and the NCAs the complexities of *Walt Wilhelm* remain largely unexplored. The NCAs are only able to apply EC competition law if they are so permitted by their national legislatures. Not all NCAs can apply EC competition law,[8] and even where they are permitted to do so the application of EC competition law is infrequent.[9] The national courts by contrast have been able to apply Arts 81(1) and (2) and 82 in parallel with any application of those same provisions by the Commission.[10] Although as explained below, application by the national courts of the Member States is also infrequent.

Regulation 1 adopts, via a convoluted text, a much more radical approach to the application of competition law by the national authorities. Article 3 requires that Community competition law be applied by all the NCAs and national courts in place of national competition law where an agreement has an effect on trade between Member States. Where the footprint of Art.81(1) applies, national competition law is ousted. This is likely to mean than in most smaller EU states Art.81 will become the predominant restrictive business practice competition law to be applied. There is likely to be more room to apply national competition law in those states with larger economies and geographic areas. By contrast, in respect of Art.82, the Member States retain the power to impose a more restrictive national competition law. Recital 8 in particular makes it clear that stricter national laws may include provisions which prohibit or impose sanctions on abusive behaviour toward economically dependent undertakings. Recital 9 also seeks to protect national law, particularly, unfair trading legislation from the effects of Art.3. So long as the national measures have a different object to competition law and comply with the general principles and other provisions of Community law Art.3 will not apply.

Recital 8 also takes national criminal antitrust statutes, such as the British Enterprise Act 2002, out of the scope of Art.3. The recital expressly states that Regula-

6 A draft notice expounding the Commission's view of the scope and substance of Article 81(3) is due to be published by September 2003. It is planned that the notice should be adopted to coincide with the coming into force of Regulation 1 in May 2004. The Commission is in fact planning to adopt approximately six accompanying notices and a supplementary regulation. In addition to one concerning Article 81(3); notices are planned in respect of the scope of the effect on trade between Member States doctrine; co-operation between the NCAs and the NCAs and the Commission; co-operation between the Commission and the national courts; a notice on complaints and one setting out the basis upon which the Commission will apply its power to make inapplicability decisions. The supplementary Regulation will deal set out the procedures for antitrust hearings; rights of complainants and third parties in cases in which the Commission intends to impose a prohibition and/or fines. Monti, *European Competition Policy: Quo Vadis?* XXth International Forum on Competition Policy, Brussels, April 10, 2003, Speech/03/195.

7 Case 14/68 [1969] E.C.R. 1, para.9

8 At the time the Modernisation White Paper was published in April 1999, only eight Member States permitted their NCAs to apply the EC competition rules. In the slipstream of the modernisation project more Member States have permitted their NCAs to apply EC competition law. By the time DG Competition's Annual Report for 2001 was published, all but three Member States, Austria, Finland and the United Kingdom, permitted their NCAs to apply EC competition law. See XXXI *Competition Annual Report* (Brussels, European Commission, 2001), 343.

9 For a further discussion of the infrequent application of EC competition law by the NCAs, **see below in part 4.5.**

10 Case 127/73 *BRT v SABAM* [1974] E.C.R. 51. However, the national courts must also take account of the danger of coming to a decision which conflicts with one taken by the Commission. See Case C–344/98 *Masterfoods v H.B. Ice Cream* [2001] 4 C.M.L.R. 449; and Case C–234/89 *Delimitis v Henninger Brau AG* [1991] E.C.R. 935. Also note that in C–250/92 *Gottrup-Kilm v Dansk Landbrugs Grovvareselkab AmbA* [1994] E.C.R. I 5641, the ECJ clarified the role of national courts in applying Art.81(3), indicating that they could apply Art.81(3) negatively at least in clear cases. For a discussion of this issue see Kerse, *EC Antitrust Procedure*, (4th ed., Sweet & Maxwell, 1998), para. 10.13.

tion 1 does not apply to laws that impose criminal sanctions on natural persons.[11]

The consequence of Art.3 is at the very least to introduce a common rule in respect of restrictive business practices across the European continent. The NCAs and national courts cannot depart from the application of Art.81 and must comply with the entire body of EU competition case law and legislation.

3. Increased powers of the Commission

The powers of the Commission as enumerated in the Regulation fall into three categories: the decisional powers; the investigatory powers and the penal powers.

Decisional powers

Articles 7 to 10 set out the principal decisional powers of the Commission. Most of these decisional powers provide for powers that are either already found in Regulation 17 or have been conferred on the Commission by the ECJ. For example, Art.7 provides, as in Regulation 17 for the Commission to have the power to find an infringement and by decision require that an undertaking bring the infringement to an end. Also in Art.7 the new Regulation expressly grants the Commission the power to adopt behaviour and structural remedies. Such remedies may be adopted in the context of infringement decisions which

> are proportionate to the infringement committed and necessary to bring the infringement effectively to an end.[12] Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy.

The express conferment of powers in respect of behavioural and structural remedies provides a stronger legal foundation for Commission action and may encourage greater application of this remedy than hitherto. However, the ECJ had already determined in cases such as *Continental Can v Commission* and *Magill v Commission* that the Commission does have the power to adopt positive remedies such as behaviour and structural remedies in respect of infringements of the competition rules.[13] Equally, in respect of the power to adopt interim measure decisions in Art.8 the new Regulation is only providing an express, secure legal basis for a power already granted to the Commission by the ECJ.[14]

By contrast, Arts 9 and 10 provide the Commission with new decisional powers. Article 9 grants the Commission power to adopt a decision imposing commitments on an undertaking. The provision envisages the Commission adopting commitment decisions in the course of an infringement procedure where an undertaking offers commitments to meet the concerns of the Commission. Such a decision will be adopted for a specific period and will provide that given the commitments accepted by the undertaking that there are no longer grounds for action by the Commission.[15] Recital 13 provides a further gloss on the binding nature of the commitments accepted by undertakings. It indicates that while such commitments bind the undertaking, such decisions are without prejudice to the powers of the NCAs and the national courts to make a finding that an infringement has taken place and decide upon the case.[16]

While the Commission can attach conditions and obligations to an exemption decision and take positive behavioural and structural measures in respect of infringement decisions, it currently cannot accept legally binding commitments from undertakings in the course of infringement decisions. Article 3(3) of Regulation 17 grants the Commission power to terminate infringements by the non-legally binding method of recommendations. However, this power is rarely used. In practice the Commission enters into informal settlements with undertakings and closes the file.[17] Article 9 will therefore at least give the Commission the power to

11 The recital explains that criminal statutes are not covered where they are means by which the competition rules applying to undertakings are enforced. Presumably this would mean that co-operation under Regulation 1 could take place in cases such as where executives of an undertaking who refuse to answer questions are personally subject to criminal fines, it is alleged that an executive gave a misleading answer to a question posed by a competition authority, or in the case of an executive ordering the destruction of documents.

12 Recital 12 indicates that changes to the structure of an undertaking as it existed before the infringement was committed would only be proportionate where there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking.

13 Kerse, *op. cit.*, para.6.19.

14 The leading case is Case 792/79R *Camera Care v Commission* [1980] E.C.R. 119. For a discussion of the case law see Kerse, *op. cit.*, para.6.02 *et seq.*

15 The Commission may, upon request or on its own initiative re-open commitment proceedings (a) where there has been a material change in any of the facts on which the decision was based (b) where the undertakings concerned act contrary to their commitments or (c) where the decision was based on incomplete, incorrect or misleading information provided by the parties.

16 Recital 22, last paragraph. Recital 13 also indicates that the commitment decisions are not appropriate in cases where the Commission intends to impose a fine.

17 Bellamy and Child, *European Community Law of Competition* (Roth ed., 5th edition).

transform such settlements into legally binding commitment decisions.

Article 10 provides a wholly new power of decision, the power to adopt a decision of inapplicability. This provision can be applied solely by the Commission "where the Community public interest so requires" that the provisions of Art.81(1) do not apply or that the conditions of Art.81(3) are satisfied. The Commission may also make a finding of inapplicability in respect of Art.82.[18] This provision is not intended to provide a back door notification procedure. In recital 14 it is indicated that such decisions shall be of a declaratory nature. The aim is that such decisions should be adopted in order to clarify the law and ensure consistent application of Community competition law in particular with regard to new types of agreements or practices that have not been settled in the existing case law.

Investigatory powers

At first sight the Commission's investigatory powers appear to be very similar to those it had under Regulation 17; in particular, the power to obtain information by decision and the power to carry out on the spot inspections. However, there in fact are a number of significant extensions of the scope of the Commission's investigatory powers. In the first place the power to obtain information now contained in Art.18 of the new regulation is considerably strengthened in comparison with the power as it now exists in Art.11 of Regulation 17. Under Art.11 the Commission must undertake a two-stage process. It first requests information under Art.11(3). If the request is refused then it may proceed to require that the information be provided under Art.11(5). Under the new Art.18 the Commission has a choice: it can either proceed first by request and then by decision as under the current procedure, or it may proceed immediately to a decision requiring that information be provided.

Article 19 of Regulation 1/2003 grants the Commission an entirely new power to take statements from volunteer witnesses. Although voluntary, this power could prove significant in respect of leniency applications. It may prove to be a means by which undertakings can provide evidence to the Commission without opening themselves to significant discovery requests. In particular, testimony evidence given to the Commission is likely to prove more difficult for plaintiffs in antitrust litigation in the United States and Europe to obtain than corporate statements or other documentary evidence generated directly by leniency applicants.[19]

Although the structure of the power of inspection contained in Art.20 of Regulation 1/2003 is very little different from the structure of the power contained in the equivalent provision found in Art.14 of Regulation 17, there are a number of significant extensions of the Commission's powers.[20] Under Art.14 it has always been unclear and an issue of controversy between antitrust counsel and Commission officials as to how far the latter could ask questions during an inspection. Some commentators have argued that the Commission's power is limited to asking questions relating to documents found during the investigation and which can be readily be answered, such as to the abbreviations on documents. Other commentators and the Commission have taken the view that a much broader range of questions can be asked.[21] Article 20 clears away any confusion in the Commission's favour. The Commission will now be able

> to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record answers.

Unlike Art.14 the new Art.20(8) does provide additional rights for undertakings subject to Commission inspections. However, in large part these additional rights are rights developed by the ECJ in the *Hoechst AG v Commission*[22] cases of the late 1980s, and the more recent *Roquette Freres SA v Directeur Général de*

[18] Art.10, para.2.

19 For a discussion of the importance of leniency in modern competition law, and the potential of Art.19, see Riley, "Cartel Whistleblowing Toward an American Model" [2002] *MJECL* 67.

20 There are also a number of minor changes to Art.14, now Art.20. These include Art.20(2) (b) which grants the Commission the power "to examine the books and other records related to the business irrespective of the medium on which they are stored" and (c) "to take or obtain in any form copies of or extracts from such books or records". Both of these provisions take account of modern forms of electronic data storage, providing a more legally secure basis for the Commission to obtain electronically held information. Currently, the Commission relies on an interpretation of the phrase, "to examine" in Art.14(a) of Regulation 17 to obtain electronic records. Kerse believes that the Commission's interpretation would be upheld by the ECJ if subject to challenge; Kerse, *op. cit.*, para.3.31. Also Art.20(2)(d) grants the Commission the power "to seal any business premises and books or business records for the period and to the extent necessary for the inspection". An informal seal procedure already exists; Art.20(2)(d) will provide a much more secure basis for the procedure and probably encourage greater use of the procedure by the Commission and acceptance by industry; Bellamy and Child, *op. cit.*, 12–016.

21 Kerse, *op. cit.*, paras 3.34–3.35.

22 Case 227/88 [1989] E.C.R. 2859.

la Concurrence, de la Consommation et de la Répression des Frauds.[23]

Article 20(8) provides that where national law requires judicial authorisation for an inspection,[24] the national judicial authority shall ensure that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. The Regulation provides the national court with powers to ask the Commission for further information on the grounds for suspecting an infringement and the seriousness of the infringement. Recital 23 also indicates that there are some limits on the questions that the Commission can ask the representatives and staff of undertakings. It provides that:

> undertakings cannot be forced to admit that they have committed an infringement, but they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against them or against another undertaking the existence of an infringement.

Recital 23 reproduces the text of the *Hoechst* ruling and hence ensures a minimum protection against self-incrimination. However, it is open to question whether the *Hoechst* ruling itself provides an adequate level of protection against self-incrimination.[25]

The other significant development in the power of the Commission in respect of inspections is contained in Art.21. It grants the Commission the power to carry out inspections in the homes of directors, managers and other members of staff of the suspect undertaking. National courts have similar powers to supervise a Commission inspection decision as in Art.20(8). In addition, however, the Commission must show reasonable suspicion and judicial authorisation is required in every EU Member State.[26]

Article 22 also permits NCAs to carry out inspections or other fact finding measures permitted under national law on behalf of other NCAs. Such inspections or other measures can be requested in respect of an investigation seeking to establish an infringement of Arts 81 or 82. The exchange of any information that is obtained is subject to the co-operation procedures which are discussed below. As in Regulation 17, the Commission is granted the power in Art.22(2) of the new regulation to request NCAs to carry out inspections under Art.20 on its behalf.

Penal powers

Articles 15 and 16 of Regulation 17 provide for frankly risible procedural fines. Even in 1962 it is open to question the extent to which a fine of €100 to €5,000 or a daily penalty of €50 to €1,000 for refusal to comply with a request for information or an inspection constituted a deterrent. Given the inflation of the last thirty years any deterrent effect has by now certainly been eroded. Articles 23(1) and 24(1) of the new regulation restore the deterrent power of the Commission's procedural fining system. Fixed fines will now be set at up to 1 per cent of annual turnover and the daily periodic penalty at up to 5 per cent of the average daily turnover of the undertaking concerned.

There are two significant consequences of this restoration of the Commission's fining powers. First, the restoration of the fining power may well encourage the Commission to make greater use of its new power to issue Art.18(3) decisions requiring information to be provided. Where it knows that the information is available, an Art.18(3) decision backed up by significant financial consequences may well save the Commission the time and resources of organising an inspection under Art.20. Secondly, in respect of periodic penalty fines the Commission can impose more than one obligation on an undertaking and attach a periodic penalty to fine to each obligation. For example, in *Commercial Solvents v Commission*,[27] the Commission imposed two obligations on Commercial Solvents and its subsidiaries, first to resupply the alleged victim of the supposed abusive practices, and secondly to submit within the two months proposals for continued supplies to the alleged victim.

23 Case C–94/00, October 22, 2002, not yet reported. There are a number of issues surrounding the compliance of the Commission's investigative procedures with the case law of the European Court of Human Rights, which are not necessarily resolved by the case law of the ECJ. See Riley, "The ECHR Implications of the Investigative Provisions of the Draft Competition Regulation" [2002] *ICLQ* 55.

24 Five EU Member States do not require any form of judicial warrant or other form of judicial authorisation. For details, see *White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty* European Commission, Commission Programme No.99/0027, April 28, 1999, para.110, fn.64. The Commission identifies 10 Member States who do require judicial warrants, *e.g.* Belgium, Denmark, France, Germany, Greece, Ireland, Luxembourg, Portugal and Spain. The five states who do not require judicial authorisation are Finland, Austria, Sweden, the Netherlands and Italy.

25 Riley, "Saunders and the Power to Obtain Information in United Kingdom and European Community Competition Law" [2000] *ELRev* 264.

26 Which distinguishes the position of a natural person from that of an undertaking. The latter only has protection if it is afforded to undertakings by national law. Art.20(8) by contrast requires judicial authorisation in respect of the private premises of a natural person.

27 Case 6&7/73 [1974] E.C.R. 233.

In each case the Commission imposed a periodic penalty payment of €1000 per day. The ECJ upheld this practice, albeit *sub silentio*.[28] There is the prospect therefore that the Commission could impose several obligations upon an undertaking and attach a periodic penalty of up to 5 per cent of average daily turnover to each of them.[29]

4. The new system of co-operation

What perhaps distinguishes Regulation 1 from Regulation 17 are the co-operative provisions found in Regulation 1. The core provision of the new co-operation regime is Art.11. It states that the objective of the new regime is that the Commission and the NCAs shall apply the competition rules in close co-operation. The Commission further elaborated on the nature of the co-operation system in the two press releases accompanying the adoption of Regulation 1. The Commission explained that a European Competition Network ("ECN") had been set up between the NCAs and the Commission. It would provide a focus for regular contact and consultation on enforcement policy to ensure against divergent application. The Commission would have a central role in the network to ensure consistency.[30]

Article 11 introduces a number of co-operative provisions. Article 11(2) requires the Commission to provide the most important documents of cases to the NCAs where it intends to adopt an infringement decision[31]; an interim measures decision[32]; a commitments decision[33]; an inapplicability decision[34] or a decision withdrawing the benefit of a block exemption.[35] NCAs may also request further documents relevant to the assessment of the case.

Equally the NCAs are required under Art.11(3) to inform the Commission before applying Arts 81 or 82, or without delay after commencing the first formal investigative measure. In addition, no later than 30 days before the adoption of an infringement, commitment, withdrawal of benefit or block exemption decision the NCAs should inform the Commission. The NCAs should provide the Commission with a summary of the case and the envisaged decision, or in the absence thereof other documents indicating the proposed course of action.[36] NCAs should also be prepared to make available further documents to the Commission which may be necessary for the assessment of the case. The NCAs may also exchange information between themselves necessary for the assessment of a Community competition case. In addition, the NCAs may consult the Commission on any case involving the application of Community law.[37]

Article 11(6) of Regulation 1 retains the Commission's power to take over cases from the NCAs. Where the Commission initiates proceedings in respect of an Art.81 or 82 case, the NCA which has already commenced proceedings automatically loses competence to act. The Commission justifies the existence of the take-over procedure on the grounds that it is necessary to ensure that the competition rules are to be applied consistently.[38]

In pursuit of effective co-operation Art.12 provides the basis for the exchange of information between the NCAs, and the NCAs and the Commission. For the purpose of applying Arts 81 and 82 the competition authorities will have the power to provide one another with and use in evidence any matter of fact or law, including confidential information. The information obtained under an Art.12 exchange of information request may also be used in respect of national competition law where it is applied in the same case and in parallel with Community competition law, and does not lead to a different outcome.

Article 12(3) places restrictions on the use of information gathered from other authorities in evidence leading to the imposition of sanctions. Such evidence can only be used in cases involving natural persons where the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of Arts 81 or 82 of the Treaty. Or in the absence thereof, the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority. However, Art.12(3) makes it clear

28 For further discussion see Kerse, *op. cit.*, para.7.46. As he notes *Commercial Solvents* is "an old but instructive case".
29 However, it may be questioned whether the ECJ would take such a relaxed view as in *Commercial Solvents*. Even in 1974 the procedural fines of the Commission had been eroded by inflation. Whether the ECJ would take the same view of the Commission's restored fining power may well be open to question.
30 IP/02/1739 Landmark reform simplifies and strengthens antitrust enforcement, November 26, 2002; Memo/02/268 Antitrust reform frequently asked questions, November 26, 2002.
31 Art.7.
32 Art.8.
33 Art.9.
34 Art.10.
35 Art.29(1).
36 This information may also be made available to the competition authorities of the other Member States. **Query,** although the NCAs have an obligation to provide a copy of the draft decision to the Commission there is curiously no obligation to provide a copy of the final decision. By contrast in Art.15(2) the Member States are required to send a copy of the final judgments of national courts applying Arts 81 and 82 to the Commission.
37 Art.11(5).
38 Recital 17.

that in the latter event information exchanged cannot be used by the receiving authority to impose custodial sanctions on natural persons. Article 12(3) therefore is likely to make it difficult for information to be exchanged in a context in which criminal antitrust law is being applied against natural persons.[39] The level of protection of rights of defence are likely to be very different, making it difficult to see how information can be transferred without infringing Art.12(3).[40]

The co-operation provisions of Regulation 1 also include an allocation of jurisdiction provision. Article 13 provides that where two or more NCAs have received a complaint against the same agreement or concerted practice, the fact that one authority is dealing with the case shall be sufficient grounds for the other NCAs to suspend the proceedings or reject the complaint before them. The Commission may also reject a complaint on the grounds that another authority is dealing with the matter.[41] Where a NCA or the Commission has received a complaint which has already been dealt with by another authority it may reject it. The Commission may also reject a complaint for lack of Community interest, even if no NCA has indicated its intention of dealing with the case.[42]

The Commission will publish a draft allocation notice during 2003 to flesh out the rules contained in Art.13.[43] It is however already clear from Regulation 1 that the objective of the suspension and termination procedures contained in Art.13 is that each case should be handled by a single authority.[44] Even without the allocation notice it is possible to put together a picture of how the Commission intends cases to be allocated between competition authorities. In the press releases accompanying the publication of Regulation 1 the Commission indicated that national authorities should deal with cases the geographical scope of which do not extend far beyond their territory.[45] The Commission by contrast will deal with cases primarily, but not exclusively, affecting more than three Member States; if the case is closely linked to other Community provisions, such as Art.86 or the State Aid rules, which can be more effectively applied by the Commission; or if the Community interest requires the adoption of a Commission decision to develop Community competition policy, particularly when a new competition issue arises.[46]

The Advisory Committee on Restrictive Practices and Dominant Positions, consisting of representatives of the NCAs and the Commission, created by Regulation 17 is given an enhanced status in the new co-operation system. It will be able to be both a forum for discussing cases being handled by the Commission and the NCAs.[47] For the first time the Advisory Committee's written opinions attached to a draft decision may be published.[48] A NCA may place on the agenda of the Advisory Committee a Community competition case being dealt with by the NCA of another Member State.[49] A NCA subject to the Commission takeover procedure contained in Art.11(6) may also table the discussion of that case before the Advisory Committee.[50]

So far the only basis for co-operation between the Commission and the national courts have been a few judgments of the ECJ[51] and a 1993 Commission Notice.[52] Article 15 now provides an explicit legal basis for co-operation. Article 15(1) provides that the Commission, at the request of a national court, may provide that court with information in its possession or its opinion on the application of Community competition law. Article 15(3) grants the Commission and the NCAs power to submit written observations to the national courts on issues relating to the application of Arts 81 and 82. With the permission of the court the Commission and the NCAs may submit oral observations.[53]

39 At least where terms of imprisonment rather than criminal fines are envisaged.

40 However, as pointed out above the situation may be different in respect of criminal sanctions in support of civil antitrust proceedings, *e.g.* destruction of documents in the course of civil antitrust proceedings. See Recital 8, last sentence. However, even here it is open to question how easily information can be transferred in respect of criminal proceedings if criminal law standards of protection are not put in place. For a discussion of these issues, see Wouter, "The EU Network of Competition Authorities, the European Commission on Human Rights and the Charter of Fundamental Rights of the EU"; and Waelbroeck, "Twelve Feet All Dangling Down and Six Necks Exceedingly Long": The EU Network of Competition Authorities and the European Convention on Human Rights. Both papers are available at *www.iue.it/RSCAS/Research/Competition/2002 (papers).shtml* (hereafter "EUI 2002").

41 Art.13(2) also provides a similar procedure where a NCA or the Commission has received a complaint which has already been dealt with.

42 Recital 18.

43 Recital 15.

44 Recital 18.

45 DN Memo/02/268 Antitrust Reform Frequently Asked Questions, November 26, 2002.

46 Para.19, Joint Statement of the Council and the Commission, as yet unpublished.

47 Art.14 and Recital 19.

48 Art.14(6).

49 The Commission may also place on the agenda discussion of a case being dealt with by a Member State. Whether the agenda item is tabled by another NCA or the Commission, in both cases the NCA in question must be informed.

50 Art.14(7).

51 See in particular, *Delimitis, op.cit.* and *Masterfoods, op.cit.*

52 *National Courts Notice*, *op.cit.*

53 For the purpose of the preparation of their observations only, the competition authorities of the Member States and the Commission may request the relevant court of the Member States to transmit or ensure the transmission to them of any documents necessary for the assessment of the case.

Regulation 1 emphasises that these written and oral observations should be submitted within the framework of national procedural rules and practices, including those safeguarding the rights of the parties.[54]

The Member States are required to forward to the Commission a copy of any written judgment of national courts deciding on the application of Arts 81 or 82.[55]

To further ensure legal certainty and uniform application of parallel powers Art.16 provides that national courts cannot take decisions running counter to the decisions adopted by the Commission. The national courts are also required to avoid giving decisions that would conflict with a decision contemplated by the Commission in proceedings it has initiated. National courts in such situations may assess whether it is necessary to stay proceedings while the outcome of the Commission decision is awaited. Article 16(1) is based on the ruling of the ECJ in the *Masterfoods* case placing the Commission at the centre of the system of competition enforcement.[56] However, both Art.16 and the *Masterfoods* case make it clear that the national court can always make a reference for a preliminary ruling to the ECJ under Art.234 if the national court has doubts concerning the legality of the Commission's decision.

Article 16(2) also seeks to underpin the uniformity of Community competition law by providing that when the NCAs take decisions on agreements or concerted practices which have already been the subject of a Commission decision, they cannot take decisions which run counter to the decision adopted by the Commission. It will be interesting to see how the Commission, the NCAs, and ultimately the ECJ approach Art.16(2), and whether the ECJ will take a similar *Masterfoods* approach to the NCAs operating in a decentralised network. Regulation 1 will come into force on May 1, 2004.[57]

The abolition of the notification procedure

Recital three of Regulation 1 sets out the reasons for the abolition of the notification procedure. The recital argues that the notification procedure hampers the application of the Community competition rules by the courts and NCAs; it prevents the Commission from concentrating its resources on curbing the most serious infringements and it also imposes considerable costs on undertakings.

There are considerable doubts whether the reasons given in the regulation stand up to close examination. First, take the argument that the national courts and NCAs are hampered in their application of the competition rules by the notification procedure. In respect of the national courts it is argued that plaintiffs do not like to bring proceedings under the EC competition rules for fear that a defendant will immediately file a notification with the Commission, hence forcing a national court to stay proceedings. Cases of such "notification torpedoes" are in fact rare.[58] It could be argued that the reason notification torpedoes are rare is because of their chilling effect on plaintiffs before national courts. However, the Commission has indicated that where a notification is subject to national proceedings it will endeavour to give priority to such cases.[59] More fundamentally, the notification procedure has no bearing on an action for damages brought by plaintiffs seeking damages for loss caused by such major infringements of the competition rules as the operation of a cartel or big rigging.[60]

In comparison, particularly with the United States, the gaping hole in competition litigation is in respect of such major plaintiff litigation, which occurs rarely, if it all, across the territories of the Member States.[61] The reason for such lack of litigation is less to do with Art.81(3) and a lot more to do with the lack of effective

54 Recital 21.
55 Art.15(2).
56 *Masterfoods, op.cit.* See also Bellamy and Child, *op.cit.* 10–018.
57 Art.44. This is also the same day that the ten accession states enter the European Union.

58 Each year in its Annual Report the Commission sets out information received from the NCAs and direct from undertakings on the level of antitrust activity in the Member States in the section entitled, "Application of the Competition Rules in the Member States". The level of activity reported in respect of the National Courts Notice is very low, the number of cases per year has never reached more than 10, and very few of them are in fact contacts with the Commission as the result of supposed notification torpedoes. Equally, other parts of the section which cover national court cases reported by the NCAs give very few examples where a notification torpedo has been reported.
59 National Courts Notice, *op.cit.*, para.37. Furthermore, in Cases C–174 & 189/98P *Netherlands Van der Wal v Commission* [2000] E.C.R. I 1, the Commission has now indicated that it will provide an interim opinion on the possibility of an exemption for an agreement the subject of national proceedings.
60 It is just about conceivable that a defendant would be advised to file a notification torpedo in such a case. However, the downside is so great, including the immediate rejection by the Commission of the notification and the hostility of the national judge to such blatant procedural trickery that it is doubtful that any rational practitioner would advise that such a step be taken.
61 The paucity of case law is illustrated by the fact that in only one case has a plaintiff brought an action against a cartel without the Commission adopting a prohibition decision against the cartel; Case 319/83 *Kerpen & Kerpen* [1983] E.C.R. 4173. See Van Gervern, "Substantive Remedies for the Private Enforcement of EC Antitrust Rules Before National Courts", available at *www.iue.it/RSCAS/Research/Competition/2001(papers).sbtml 16* (hereafter "EUI 2001").

procedures before the national courts, from lack of pre-trial discovery rules; inability to submit economic evidence; lack of contingency fee rules to treble damages. These weaknesses make it very unlikely that plaintiffs will sue for damages before the national courts, particularly when they are likely to face a defendant who has significantly greater financial resources than themselves.[62] The weaknesses of the national court's procedural rules are discussed in Part Two of this paper.

Turning to the NCAs, it is argued that they will not apply the competition rules because they also suffer from the impact of the "notification torpedo". A NCA would seek to apply the prohibition contained in Art.81(1); the undertaking responds by notifying the suspect agreement to the Commission. The effect of the notification is to oust the jurisdiction of the NCA to apply Art.81(1) under Art.9(3) of Regulation 17. The difficulty with this argument is first, as the Commission admits itself in the NCA Notice, they form a very small percentage of notifications received.[63] Secondly, in the NCA Notice, the Commission indicated that it is willing to reject such notifications if their object is simply to frustrate national procedures.[64]

Thirdly, if any authority initiated proceedings under Arts 81 and 82 there is the danger that the Commission could take over the case. This threat of takeover, despite the fact that the provision has not, to the author's knowledge, ever been used is likely to have acted as at least a significant deterrent as the threat of the "notification torpedo". Fourthly, if a NCA has a choice between national and EC law, operationally it is almost always going to choose national competition law rather than EC competition law. National officials are likely to reason that if they initiate proceedings under national law they have to prove that there is restriction of competition between two or more parties, and examining the economic context of the agreement or whether there is dominance in the relevant geographic and product markets, and if so whether there is an abuse. If a NCA applies EC law instead, it also has to prove an effect on trade between Member States. No public official will rationally choose a procedure that places additional evidential and procedural burdens upon his or her case, when another procedure, often word for word the same text, relying on the same case law, and with the same legal effect, is available.[65] Fifthly, as discussed in Part Two of this paper, the reason for the lack of application of EC competition law by many NCAs had less to do with notification torpedoes or Art.9(3) and far more to do with lack of resources. Some NCAs are in the position that they have far too few resources to initiate proceedings under EC or national law.[66]

Secondly, the recital takes the view that the notification procedure is burdensome: that by abolishing the procedure the Commission will be able to re-direct enforcement resources more profitably elsewhere, and in addition, undertakings will be saved the "red tape" of filing notifications. The view contained in the recital is open to some not inconsiderable doubt.

It is true of course that when Regulation 17 was adopted a large number of individual notifications occurred. According to Goyder, by February 1963 the Commission had received over 34,000 notifications.[67] However, that initial burden was reduced by the use of block exemptions[68]; comfort letters[69] and the Notice of Agreements of Minor Importance,[70] and the successive amendments to that Notice. The burden was further

62 Bellamy, Panel Discussion, 272, *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Ehlermann and Atanasiu eds, Hart, 2001).

63 NCA Notice, *op.cit.*, para.55.

64 NCA Notice, *op.cit.*, paras 56, 57 and 58.

65 It is interesting to note that the Bundeskartellamt, one of the few NCAs to make use of Arts 81 and 82, with 21 cases between 1958 and 1999 applied the EC rules in areas such as utilities where the BkartA had at the time few powers under national law. House of Lords Select Committee on the European Union, *Reforming EC Competition Procedures* (HMSO, 2000), 79–87.

66 Furthermore, until recently only around half the NCAs were permitted under national law to apply Arts 81 and 82. Only in the wake of modernisation the Member States have now moved to grant their NCAs to apply the EC rules. Consequently for most of its life, in many parts of the Union the EC's competition rules were simply unable to be applied by the Member States. The latest state of play from the Commission's 2001 Annual Report indicates that all but five of the Member States have granted their NCAs power to apply Arts 81 and 82; see *XXXI Annual Competition Report, op.cit.*, 372.

67 Goyder, *EC Competition Law* (3rd ed., OUP, 1998), p.50.

68 In the view of Kerse, *op.cit.*, para.2.01 "the block exemptions have been the most effective means of clearing the backlog". This view is backed up by the statistics. In all 40,000 notifications were received by the Commission during the first years of the application of Arts 81 and 82. As many as 29,500 concerned exclusive dealing arrangements, more than 25,000 were disposed of on the basis of the exclusive dealing Regulation 67/67 [1967] O.J. L849/10, Spec. Edition. See Goyder, *op.cit.*, 71.

69 White Paper, *op.cit.*, para.34. By comparison with the handful of individual exemption decisions adopted each year the DG Competition issues a large number of comfort letters. *E.g.*, in 1999 the Commission adopted 32 comfort letters in respect of individual exemptions and 144 in respect of negative clearances; in 2000 35 individual exemption and 135 negative comfort letters and in 2001 21 individual exemption and 47 negative clearance comfort letters. See the Annual Competition Reports for each year respectively: pp.174–178 for 1999; 161–162 for 2000 and 212–214 for 2001.

70 The White Paper, *op.cit.*, paras 26 and 27, also highlights the 1970 Notice on Agreements of Minor Importance [1970] O.J. C64/3, as a means of reducing the block exemption. However,

reduced as the Commission painstakingly made its way through the overhang of cases.[71] However, undertakings and their advisers became increasingly unhappy with the notification procedure. First, it was not effective—because of the complexity of Commission procedures and translation requirements only four or five notification exemption decisions were adopted each year. Secondly, while there was an alternative of comfort letters, they were not legally secure.[72] Thirdly, undertakings simply did not like filing notifications of confidential business agreements to the Commission for public officials to examine. Consequently, undertakings were very receptive to legal advisers who pointed out that although the Commission took a broad interpretation of Art.81(1), the ECJ and latterly the CFI did not. From *Société Technique*[73] through *Delimitis*[74] to *European Night Services*[75] both courts have made it clear that alleged restrictions of competition have to be considered in their economic context.[76]

According to Forrester, at least from the late 1970s undertakings, working with their legal advisers, began to take the view that there was no need in the overwhelming majority of cases to notify agreements to the Commission.[77] Where an agreement did not involve a "hard core" offence, such as price-fixing, market sharing or export bans and the parties had no significant market power, advisers would self-assess the agreement as one which did not fall within Art.81(1). Only in the rarest of cases, where either there was a major investment, a novel legal point involved or a party wanted to see tactical advantage did the parties to an agreement file a notification with the Commission.[78] This view is borne out by the statistics. Throughout the 1990s the number of notifications to the Commission averaged approximately 200 a year.[79] Given the hundreds of thousands, if not millions of commercial transactions to which a broadly interpreted Art.81 could apply, 200 or so cases a year is truly minimal.

For decades pressure had been building for a reform of the Commission's approach to its interpretation of Art.81(1).[80] It was a new generation of DG Competition officials; a non-lawyer as Director-General of DG Competition;[81] greater intellectual firepower from the academic legal community on both sides of the Atlantic and undoubtedly Hawk's defenestration of the Commission's broad interpretation of Art.81(1) in his seminal article *System Failure: Vertical Restraints and EC Competition Law*,[82] the Commission began to give ground.[83] The acceptance that a more economic approach could be applied to Art.81(1) can be found in the Green Paper on Vertical Restraints[84] and the Notice on the Relevant Market.[85] From therein on the heresy of the economic approach rapidly became the new orthodoxy. The reform to the vertical restraints regime in 1999 saw the new orthodoxy firmly in the saddle. It also opened up new opportunities for undertakings to further reduce their use of the notification system. The most significant reform in this regard was the adoption of new broad-based block exemptions.[86] In particular, the fact that vertical agreements could be notified and receive retro-

until recently, it is difficult to see how far the restrictive terms of the Notice, even after the 1977 and 1986 amendments, respectively [1977] O.J. C 313/ 3 and [1986] O.J. C231/2, had an impact on the number of notifications. In Goyder's view past Notices have not substantially reduced the number of agreements deemed to fall within Art.81(1); see Goyder, *op.cit.*, 111. However, following the two subsequent reforms to the Notice in the 1997 amendments [1997] O.J. C372/13, and the 2001 amendments [2001] O.J. C368/07, a much stronger argument can be made that the Notice now has a significant impact on the notification burden. In 1997 the Commission abolished the turnover, which significantly restricted the application of the Notice and in 2001 uprated the market share figures to agreements between competitors where the parties have an aggregate market share of up to 10%, and agreements between non-competitors where the parties have an aggregate market share of up to 15%, subject to hard core restraints.

71 Goyder, *op.cit.*, 71.

72 Cases 253/78, 1–3/37 and 99/79 *Procureur de la Republique v Giry and Guerlain* [1980] E.C.R. 2327, para.13. Furthermore, changing circumstances may also undermine comfort letters; see *Langanese-Iglo Gmbh* [1993] O.J. L183/19.

73 Case 56/65 *Société Technique Minere v Maschinenbau Ulm GmbH* [1966] E.C.R. 235.

74 *op.cit.*

75 T–374/94 [1998] E.C.R. II 3141.

76 Whish, *Competition Law* (4th ed., Butterworths, 2001), pp.98–101.

77 Forrester, "The Modernisation of EC Antitrust Policy: Compatibility, Efficiency, Legal Security", pp.75 and 103, in *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Ehlermann and Atanasiu eds, Hart, 2001).

78 Forrester, "Reform of the Implementation of Articles 81 and 82 following publication of the Draft Regulation" (2001) *LIEI* 173, 177–178.

79 Following the introduction of the new block exemption regime in 1999 the numbers of notifications has begun to fall. There were 216 notifications in 1998 and 162 notifications in 1999; in 2000 there were 101 notifications, and 94 notifications in 2001; see *XXX1 Annual Competition Report*, *op.cit.*, 53.

80 One of the most attractive earlier challenges to the Commission's interpretation of Art.81(1) can be found in Forrester and Norall, "The Laicization of Community Law: Self Help and the Rule of Reason: How Competition Law is and could be applied" [1984] C.M.L.Rev. 11

81 Forrester, *The Modernisation of EC Antitrust Policy, op.cit.*, 75.

82 Hawk, "System Failure: Vertical Restraints and EC Competition Law" [1995] C.M.L.Rev. 973, 982.

83 Ehlermann, Introduction xvii, Ehlermann and Atanasiu (eds), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Hart, 2001).

84 COM(96)721.

85 [1997] O.J. C372.

86 Such as the Commission Regulation EC 2790/1999 on Vertical Agreements; Commission Regulation 2658/2000 on Specialisation Agreements [2000] O.J. L304/5; and Commission Regulation 2659/2000 on research and development [2000] O.J. L304/7.

spective exemption encouraged a further fall in the number of individual notifications. This new broad-based vertical and horizontal block exemption regime provided another means of obtaining significant legal security without using the notification system.

In order for the Commission to argue that it was significantly burdened by 200 or so notifications that were received each year through much of the 1990s, it would have to explain how the Bundeskartellamt with fewer staff could cope with a similar notification burden.[87] Furthermore, it is not as if the full weight of the Commission's notification procedures was applied to those 200 notifications, the overwhelming majority of which were negative clearances.[88] In each year only a handful of actual exemption decisions would actually be made. In most cases DG Competition officials would assess an agreement, and perhaps after some negotiation, issue a comfort letter. The argument that the notifications constituted a significant burden is even more difficult to make out when, as a result of the reforms, principally to the vertical restraints regime in the late 1990s, the number of notifications plunged to around 100. DG Competition would have to demonstrate that dealing with 100 or so notifications a year was more burdensome than dealing with the co-operation and supervision provisions of Regulation 1.[89] Furthermore, the Commission had a number of options at hand to further reduce the notification burden, *e.g.*, by extending the scope of retroactive exemption to horizontal agreements and by introducing a filing fee.[90] The former would have further cut the notification burden and the latter provided an effective management tool in case of a sudden increase in notifications, when, *e.g.*, the countries of Central and Eastern Europe join the Union.

It is even more difficult still to see how it can be argued that undertakings were burdened by the notification procedure. They did not notify. If they had taken the Commission's over broad approach interpretation of Art.81(1) seriously the Commission and the undertakings that filed those notifications would have had very significant burdens. It did not happen. Undertakings, assisted by their advisers relied on the case law of the ECJ and CFI, and self-assessed most agreements as not falling within Art.81(1), and latterly relied on the broader based block exemption and guidelines.

Consequently, the question arises as to why recital three alleges that the Commission and undertakings were burdened by the notification procedure. The reason it is submitted that the Commission had realised that its notification procedure was largely redundant. It therefore was no cost to the Commission to abandon the notification procedure. Abolition made the modernisation programme look a lot more radical than it actually was. The Commission knew that undertakings already self-assess agreements, this will continue as before. Given that most agreements will not fall into Art.81(1) in the first place, and considerable advantage can be taken of the vertical and horizontal block exemptions to bring many agreements within Art.81(3), it is doubtful that much trumpeted abandonment of the notification procedure will make much difference to the application of the EC competition rules.

The second part of this paper, focusing on the decentralising aspects of Regulation 1, will be published next month.

87 From an average of 200 or so a year in the mid to late 1990s, the number of notifications has now fallen to under 100 in 2001, *XXX1 Annual Competition Report op.cit.*, 53. The former President of the Bundeskartellamt has pointed out that if the BkartA with less resources than the Commission can cope with a notification procedure, then the Commission should also be able to cope with the burden; House of Lords, *Reforming EC Competition Procedures op.cit.*, Q157.

88 *E.g.*, see *XXXI Annual Competition Report op.cit.*, 212; *XXX Annual Competition Report* (European Commission, Brussels), *op.cit.*, 162; and *XXIX Annual Competition Report* (European Commission, Brussels) *op.cit.*, 179.

89 The potential impact of even a relatively minimal level of co-operation can be gauged by the observation of the House of Lords Select Committee on the EU point out that if just one national case from each Member State is discussed by the Advisory Committee, the work of the Committee will double; House of Lords, *Reforming EC Competition Procedures op.cit.*, para.128.

90 As Sir Jeremy Lever Q.C. has suggested, the Commission could impose a filing fee to cover the cost of administering the notification procedure; House of Lords, *Reforming EC Competition Procedures op.cit.* 157, 158. Interestingly, the Commission is now proposing the introduction of a filing fee to assist in covering the cost of running the Merger Regulation procedures. Filing fees may also be a solution to the argument that notifications on enlargement of the Union would pose a threat to the Commission's resources. See Art.23(1) (e) *Proposal for a Council*