

# Ten Years of Regulation 1/2003

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## A Retrospective

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*Regulation 1/2003 brought about a radical change in the way in which the EU antitrust prohibitions contained in Articles 101 and 102 TFEU are enforced. The previous enforcement regime, under Regulation 17, which dated from 1962, was characterised by a centralised notification and authorisation system for Article 101(3) TFEU. Regulation 1/2003 abolished this system and replaced it by a system of decentralised ex post enforcement, in which the European Commission and the competition authorities of the EU Member States (national competition authorities), forming together the European Competition Network, pursue infringements of Articles 101 and 102 TFEU.*

*This paper provides a brief reminder of the genesis of Regulation 1/2003, and a short overview of its main results, as apparent ten years later.*

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## I. INTRODUCTION

Regulation 1/2003<sup>1</sup> brought about a radical change in the way in which the EU antitrust prohibitions contained in Articles 101 and 102 TFEU are enforced. The previous enforcement regime, under Regulation 17,<sup>2</sup> which dated from 1962, was characterised by a centralised notification and authorisation system for Article 101(3) TFEU. Regulation 1/2003 abolished this system and replaced it by a system of decentralised *ex post* enforcement, in which the European Commission and the competition authorities of the EU Member States (national competition authorities), forming together the European Competition Network, pursue infringements of Articles 101 and 102 TFEU.

This paper provides a brief reminder of the genesis of Regulation 1/2003, and a short overview of its main results, as apparent ten years later.

Regulation 1/2003, which was adopted by the Council of the European Union on 16 December 2002, bears the number 1/2003 because it was the first regulation published in the Official Journal of the European Union in the year 2003, on 4 January 2003. According to its Article 45, it entered into force on the 20<sup>th</sup> day following that publication, but it only applied from 1 May 2004.<sup>3</sup> There will thus only be ten years of experience with the application of Regulation 1/2003 in a year from now. On the other hand, much of the thinking behind Regulation 1/2003 goes back to already fifteen years ago. Indeed, as described below, the basic ideas underlying Regulation 1/2003 were already conceived inside the European Commission in 1997.<sup>4</sup>

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<sup>1</sup> 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 [2003] OJ L1/1. Articles 81 and 82 of the then EC Treaty have since (without any modification) become Articles 101 and 102 TFEU. In this paper I will systematically refer to the current numbers and name. For a detailed analysis of Regulation 1/2003, in comparison with the regime preceding it, see my *Community Report* in D. Cahill and J.D. Cooke (eds), *The Modernisation of EU Competition Law Enforcement in the EU – FIDE 2004 National Reports* (Cambridge 2004), 661-736, and my book *Principles of European Antitrust Enforcement* (Hart 2005).

<sup>2</sup> Council Regulation No 17 [1962] OJ 13/204 (Special English Edition 1959-62, p 87).

<sup>3</sup> The latter date is also the date on which the number of EU Member States increased from 15 to 25. This is not a coincidence; indeed the perspective of this enlargement was the main impetus for the European Commission to start working in 1997 on new rules for the implementation of Articles 101 and 102 TFEU; see below, text following footnote 5.

<sup>4</sup> See text accompanying notes 5 to 7 below.

## II. GENESIS

### A. Modernisation Group

The origin of Regulation 1/2003 lies in January 1997, when a group of approximately a dozen officials of the European Commission started meeting, at the initiative and under the chairmanship of Gianfranco Rocca, then Deputy Director-General of the Commission's Directorate-General for Competition, in what was called the Modernisation Group (or rather *groupe de modernisation*, as everything happened in French).<sup>5</sup>

The starting point for the Modernisation Group's reflections was that the procedural rules for the application of Articles 101 and 102 TFEU had been laid down in 1962 in Regulation 17, which had never been reviewed since, whereas the EU had undergone substantial change, and would change further as a result of the planned accession of 10 Central and Eastern European countries, which would significantly increase the workload of the Commission's Directorate-General for Competition, without an increase in resources being envisaged.

When examining what type of procedural rules would be most appropriate in this new context, the Modernisation Group quickly came to the view that the centralised notification and authorisation system for Article 101(3) TFEU, as created by Regulation 17, should be abandoned and replaced by a directly applicable exception system. The choice between these two enforcement systems had been much discussed already at the time of the drafting of the Treaty provisions in the 1950s, and at the time of the adoption of Regulation 17 in the early 1960s. At that time, Germany favoured a notification and authorisation system, while France favoured a directly applicable exception system. The question was left open at the level of the Treaty. In its proposal for what became Regulation 17, the Commission opted for a centralised notification and authorisation system, and the Council eventually endorsed this choice in Regulation 17. The analysis made by the Modernisation Group in 1997 was that the Commission and Council had made the right choice in the conditions prevailing in 1962, but that, given the development of the EU and of competition policy in the EU since that time, a directly applicable exception system had now become preferable.<sup>6</sup>

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<sup>5</sup> See further S. Norberg, 'Making Virtue out of Necessity and at Same Time Strengthening European Competition Law Enforcement – How the White Paper on Modernisation Reform came about', in M. Monti, Prinz N. von und zu Lichtenstein, B. Vesterdorf, J. Westbrook and L. Wildhaber (eds), *Economic Law and Justice in Times of Globalisation – Festschrift for Carl Baudenbacher* (Nomos 2007), 523.

<sup>6</sup> See further S. Norberg, as note 5 above, and G. Marengo, 'Does the Legal Exception System Require an Amendment of the Treaty?' in C. D. Ehlermann and I. Atanasiu, *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Hart 2001), 145, as well as, for a systematic analysis of why the notification system made sense in 1962 but no longer today, my publications 'Notification, Clearance and Exemption in EC Competition Law: An Economic Analysis' (1999) 24 *European Law Review* 139; 'The Modernisation of the Enforcement of Articles 81 and 82 EC: A Legal

Having obtained the agreement of Karel Van Miert, the Member of the European Commission then responsible for competition policy, the Modernisation Group subsequently went to work on the modalities of the change to a directly applicable exception system, and examined, article by article, the whole of Regulation 17, so as to identify any other changes or improvements that could be made. After two years and around fifty half-day or day-long meetings, a draft White Paper setting out the proposed reforms was produced.<sup>7</sup>

## **B. White Paper on Modernisation, legislative proposal and final compromise**

The European Commission adopted and published the White Paper on Modernisation in 1999.<sup>8</sup> It advocated the ending of the notification and authorisation system, and its replacement by a system of *ex post* enforcement, allowing the Commission to refocus its action on combating the most serious competition infringements, and allowing an enhanced role for national competition authorities and national courts. It also proposed to strengthen the European Commission's investigatory powers.

The publication of the White Paper on Modernisation came as a complete surprise. Indeed, the work which the Modernisation Group had been doing over the two preceding years had been carefully kept secret, also inside the European Commission.<sup>9</sup> The general view at the time, both inside and outside the European Commission, was that the Commission would never propose to replace Regulation 17, for fear of losing the substantial powers which it had been granted by the Council in 1962.<sup>10</sup> While occasionally the notification system was criticised by some authors, nobody had made a sustained argument for its abolition.<sup>11</sup>

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and Economic Analysis of the Commission's Proposal for a New Council Regulation Replacing Regulation No 17', in B. Hawk (ed.), *Annual Proceedings of the Fordham Corporate Law Institute 2000* (Juris 2001), 313; *The Optimal Enforcement of EC Antitrust Law* (Kluwer 2002), Chapters 5 and 6, and *Principles of European Antitrust Enforcement*, as note 1 above, Section 1.1.3.

<sup>7</sup> See further S. Norberg, as note 5 above.

<sup>8</sup> White Paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty [1999] OJ C132/1.

<sup>9</sup> See further S. Norberg, as note 5 above.

<sup>10</sup> See C.D. Ehlermann, 'The Modernization of EC Antitrust Policy: A Legal and Cultural Revolution' (2000) 37 *Common Market Law Review* 537.

<sup>11</sup> See for instance the at that time very influential paper by B.E. Hawk, 'System Failure: Vertical Restraints and EC Competition Law' (1995) 32 *Common Market Law Review* 973, which criticised the notification system at page 984, but did not include its abolition through a revision of Regulation 17 among the list of possible solutions at pages 986-988; see also the discussion of the notification system in the Commission's Green Paper on vertical restraints in EC competition policy, COM(96)721, and in the reactions to this Green Paper, summarised in the Communication from the Commission on the application of the Community competition rules to vertical restraints (Follow-up to the Green Paper on Vertical Restraints) [1998] OJ C365/3.

Once the initial surprise had subsided, however, the reactions to the White Paper were mostly (very) positive,<sup>12</sup> though with one exception and one qualification.

The one exception was Germany, where in particular some highly respected professors, mostly of an older generation, and thus more likely to remember the discussions of the 1950s and early 1960s in which the German arguments in favour of a notification and authorisation system had ultimately convinced the Commission and the Council at the time of Regulation 17, were strongly opposed to the abolition of the notification system.<sup>13</sup> Moreover, the *Bundeskartellamt* had in 1998 (without any knowledge of the work being done at that time by the Modernisation Group inside the European Commission) proposed to decentralise the notification and authorisation system, thus sharing the work between the European Commission and the national competition authorities.<sup>14</sup>

The one qualification concerned the reaction of industry and the European Parliament, which expressed the fear that the decentralisation of the application of EU competition law would lead to a renationalisation of competition policy.

This last concern explains the main addition, as compared to the White Paper, which the European Commission included in the legislative proposal which it submitted to the Council in 2000.<sup>15</sup> Article 3 of the proposed regulation excluded the application of national competition laws to all agreements or concerted practices within the meaning of Article 101 TFEU and all abuses of a dominant position within the meaning of Article 102 TFEU that affect trade between Member States, thus ensuring the sole applicability of EU law.

This last proposal in turn caused significant opposition from a number of Member States, and proved the most contentious point in the deliberations of the Council. The compromise which was ultimately found, and enacted in Article 3 of Regulation 1/2003, obliges national competition authorities and national courts, when applying national competition law to agreements or practices falling within the scope of application of Articles 101 or 102 TFEU, to apply also EU law.<sup>16</sup> It further provides that the application of national competition law may not lead to the prohibition of agreements or concerted practices affecting trade between Member States that are not prohibited under Article

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<sup>12</sup> See for instance B. Hawk, 'EU 'modernisation': a latter-day Reformation' (August/September 1999) *Global Competition Review* 12.

<sup>13</sup> See for instance E.-J. Mestmäcker, 'The EC Commission's Modernization of Competition Policy: a Challenge to the Community's Constitutional Order' (2000) 1 *European Business Organization Law Review* 401.

<sup>14</sup> See White Paper, as note 8 above, footnote 48.

<sup>15</sup> Proposal for a Council Regulation implementing Articles 81 and 82 of the Treaty, COM(2000)582.

<sup>16</sup> See also Judgment of the Court of Justice of 14 February 2012 in Case C-17/10 *Toshiba*, not yet published in ECR, paragraph 83.

101 TFEU, but it leaves Member States the freedom to apply on their territory national laws that are stricter than Article 102 TFEU in prohibiting unilateral conduct.<sup>17</sup>

Another contentious issue in the deliberations of the Council concerned the respective roles of the European Commission and the national competition authorities, and the functioning of the European Competition Network. Some national competition authorities, in particular the *Bundeskartellamt*, the national authority with the proudest tradition of competition law enforcement, feared that the Commission would play too dominant a role in the new system. This issue was resolved through the adoption of the Joint Statement of the Council and the Commission on the functioning of the network of competition authorities, entered into the Council minutes at the time of the adoption of Regulation 1/2003.<sup>18</sup> The principles set out in this Joint Statement were later fleshed out in the Commission's Notice on cooperation within the network of competition authorities,<sup>19</sup> which was agreed with all national competition authorities.

### III. RESULTS

#### A. National competition authorities and the European Competition Network

Ten years after the adoption of Regulation 1/2003, there can be no doubt that, as far as the national competition authorities and the functioning of the European Competition Network are concerned, the new enforcement system has been a major success, beyond expectations.

From the start of the application of Regulation 1/2003 on 1 May 2004 until 31 December 2012, the national competition authorities have informed the European Commission and their fellow national competition authorities of 1344 investigations under Articles 101 and 102 TFEU, and of envisaged final decisions ordering termination of infringements, imposing fines or accepting commitments in 646 cases.<sup>20</sup>

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<sup>17</sup> See Communication from the Commission to the European Parliament and Council – Report on the functioning of Regulation 1/2003, COM(2009)206, Chapter 4; Commission Staff Working Paper accompanying the Report on the functioning of Regulation 1/2003, SEC(2009)574, section 4.4; and I. Kokkoris, *A Gap in the Enforcement of Article 82* (British Institute of International and Comparative Law 2009).

<sup>18</sup> Council Document 15435/02 ADD 1 of 10 December 2002, available at <http://register.consilium.europa.eu>; see Judgment of the General Court of 8 March 2007 in Case T-339/04 *France Télécom v Commission* [2007] ECR II-521, paragraph 85, and Opinion of Advocate General Mazák of 16 December 2010 in Case C-360/09 *Pfleiderer*, not yet reported in ECR, paragraph 26.

<sup>19</sup> [2004] OJ C101/43.

<sup>20</sup> These and other statistics can be found at <http://ec.europa.eu/competition/ecn/statistics.html>.

During the same period, the European Commission informed the Network of 228 investigations of its own, and adopted 88 final decisions.<sup>21</sup>

The national competition authorities have thus in quantitative terms become the primary public enforcers of Articles 101 and 102 TFEU, adopting 88 % of all decisions. Given that the European Commission's output has not declined,<sup>22</sup> and that under Regulation 17 the number of cases in which the national competition authorities applied Articles 101 and 102 TFEU was negligible, this means that the overall number of decisions ordering termination of infringements of Articles 101 or 102 TFEU, imposing fines or accepting commitments has undergone an eightfold increase.

The list below shows per Member State, and in descending order, the number of envisaged final decisions submitted by the national competition authorities under Article 11(4) of Regulation 1/2003 in the period from 1 May 2004 to 31 December 2012, as well as the number of final decisions adopted by the European Commission in the same period:

France	90	
<i>Commission</i>	88	
Germany	84	
Italy	82	
Spain	73	
Netherlands	41	
Denmark	39	
Greece	32	
Romania	23	<i>(since EU accession on 1 January 2007)</i>
Slovenia	22	
Hungary	21	
Sweden	17	
UK	16	
Lithuania	15	
Portugal	15	
Poland	12	
Slovakia	12	
Belgium	10	
Finland	10	
Czech Rep	8	
Austria	6	
Bulgaria	6	<i>(since EU accession on 1 January 2007)</i>
Latvia	4	
Estonia	3	
Ireland	2	
Malta	2	
Cyprus	1	
Luxembourg	0	

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<sup>21</sup> See text accompanying notes 45 to 48 below.

<sup>22</sup> See text accompanying notes 45 to 48 below.

This list makes visible that the national competition authorities with the largest output each adopt as many or even more decisions than the European Commission. It also shows that generally the competition authorities of the larger Member States adopt the highest number of decisions, with the notable exceptions of the United Kingdom and Poland.<sup>23</sup>

The differences between Member States also show the potential for further increase, as national competition authorities increase their output over time. The best example of this is the Spanish competition authority: In the first three years of application of Regulation 1/2003 (from 1 May 2004 to 31 December 2006), it accounted for 8 decisions out of the 172 for all national competition authorities, ranking (shared) eighth among the national competition authorities; in the following three years (from 1 January 2007 to 31 December 2009), it accounted for 20 out of 202 decisions, ranking fourth; and in the most recent three years (from 1 January 2010 to 31 December 2012), it accounted for 45 out of 272 decisions, ranking first.<sup>24</sup>

The functioning of the European Competition Network has also been a clear success. Work sharing between the different competition authorities has generally been unproblematic, and the cooperation and coordination mechanisms provided for in Regulation 1/2003 have generally worked well. The application of Regulation 1/2003 has also given rise to a significant degree of voluntary convergence of Member States' laws as to the procedures and sanctioning powers of national competition authorities, supported by the policy work in the European Competition Network.<sup>25</sup>

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<sup>23</sup> The UK government has recognised this as a problem: see Department for Business Innovation & Skills (BIS), *A Competition Regime for Growth: A Consultation on Options for Reform* (March 2011), paragraph 5.6.

<sup>24</sup> Indeed, the European Competition Network, with its statistics, creates a basis of comparison which may lead Member States and national competition authorities that perform relatively less well to take measures so as to increase their output; see BIS, as note 23 above.

<sup>25</sup> See *Report on the functioning of Regulation 1/2003*, as note 17 above, chapter 5; *Commission Staff Working paper*, as note 17 above, chapter 5; '10<sup>th</sup> Anniversary of Regulation 1/2003: Convergence and Cooperation in the ECN', *ECN Brief 05/2011*, accessible at [http://ec.europa.eu/competition/ecn/brief/05\\_2011/brief\\_05\\_2011.pdf](http://ec.europa.eu/competition/ecn/brief/05_2011/brief_05_2011.pdf), 5-6; ECN Working Group Cooperation Issues and Due Process, *Investigative Powers Report* and *Decision-Making Powers Report* (31 October 2012), accessible at <http://ec.europa.eu/competition/ecn/documents.html>; L. Idot, 'Regards sur le règlement n° 1/2003', in *Etudes à la mémoire de Fernand-Charles Jeantet* (Lexis Nexis 2010), 193; C. Lemaire and J. Gestalter, 'The Silent Revolution Beyond Regulation 1/2003', *Global Competition Policy*, October 2008 (2); and B. Lasserre, 'Effective Enforcement of Competition Rules in Europe: The Leading Role of the European Competition Network', in *Studienvereinigung Kartellrecht, Kartellrecht in Theorie und Praxis: Festschrift für Cornelis Canenbley zum 70. Geburtstag* (Beck 2012), 307.

## B. National courts

Three different roles of national courts should be distinguished:<sup>26</sup>

First, in some Member States the national competition authority does not adopt decisions finding infringements of Articles 101 or 102 TFEU and imposing fines, but rather brings the case before a national court that acts as first-instance decision-maker.<sup>27</sup> When thus adopting decisions finding infringements of Articles 101 or 102 TFEU and/or imposing fines, these national courts act as national competition authorities,<sup>28</sup> and their decisions are included in the above statistics of national competition authorities' decisions.<sup>29</sup>

Second, in all Member States an appeal or application for judicial review can be brought against the decisions of national competition authorities before a (higher) court that acts as review court. Obviously, the more decisions are adopted by national competition authorities, the more appeals or applications for judicial review can be brought before these review courts. It is probably in respect of this second role that Regulation 1/2003 has had its main impact on national courts.

Third, national courts deal with litigation between private parties in which Articles 101 and 102 TFEU may be applied. The impact of Regulation 1/2003 on the application of Articles 101 and 102 TFEU in litigation between private parties has been as expected:

As explained in the White Paper on Modernisation,<sup>30</sup> under Regulation 17 the notification system and exclusive competence of the European Commission to apply Article 101(3) TFEU constituted an obstacle to the application of Article 101 TFEU by national courts.

The first impact of the change to a directly applicable exception system is in the area of contractual litigation, where Article 101 TFEU can be used as a shield to avoid contractual liability. Regulation 1/2003 has brought to an end the phenomenon of agreements falling under Article 101(1) TFEU and fulfilling the conditions of Article 101(3) TFEU but not covered by a block exemption being unenforceable simply because they had not been notified to the European Commission. In all situations where in a contractual dispute before a national court the defendant invokes Article 101(2) TFEU,

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<sup>26</sup> See Commission Notice on co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, [2004] OJ C101/4, paragraph 2, and Staff Working Paper, as note 17 above, paragraph 269.

<sup>27</sup> This is the case in Austria, Ireland, Denmark (only for (non-administrative) fines), Estonia (under the criminal procedure), Finland (only for fines), and Sweden (only if the imposition of a fine is sought); see *Decision-Making Powers Report*, as note 25 above, section 2.3.

<sup>28</sup> See Article 35 of Regulation 1/2003, and *Principles of European Antitrust Enforcement*, as note 1 above, section 1.2.10.

<sup>29</sup> See text accompanying notes 20 to 23 above.

<sup>30</sup> As note 8 above, at paragraphs 99-100.

the claimant can now fully rely on Article 101(3) TFEU and the national court can itself decide on the matter.<sup>31</sup>

As to the use of Article 101 TFEU as a sword, in actions for injunctive relief or for damages brought in national courts by victims of anti-competitive agreements, the abolition of the European Commission's exclusive competence to apply Article 101(3) TFEU also has a beneficial effect in that it is no longer possible, in particular in cases where injunctive relief is sought, for defendants to delay the national court procedure by notifying the agreement to the European Commission.

Apart from this change, which merely aligned the legal situation as to Article 101 TFEU to the situation already existing under Regulation 17 as to Article 102 TFEU, Regulation 1/2003 did not contain any measure to encourage the bringing of actions in national courts seeking injunctive relief or damages for infringements of Articles 101 or 102 TFEU.

Independently from Regulation 1/2003, the European Commission published in 2005 a Green Paper on Damages actions for breach of the EU antitrust rules,<sup>32</sup> in which it put up for discussion measures to encourage private actions for damages as an instrument for deterrence,<sup>33</sup> inspired by the US conception of private antitrust enforcement.<sup>34</sup> The reactions to this Green Paper were mostly negative, and this has led to a change of orientation: The Commission published in 2008 a White Paper on Damages actions for

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<sup>31</sup> See further 'The Modernisation of the Enforcement of Articles 81 and 82 EC: A Legal and Economic Analysis of the Commission's Proposal for a New Council Regulation Replacing Regulation No 17', as note 6 above, at 352-353 and *Principles of European Antitrust Enforcement*, as note 1 above, section 1.1.4.1.

<sup>32</sup> COM(2005)672 of 19 December 2005; see also D. Waelbroeck and D. Slater, 'The Commission's Green Paper on Private Enforcement: "Americanization" of EC Competition Law Enforcement?', in C.-D. Ehlermann and I. Atanasiu (eds), *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels* (Hart Publishing 2007), 425.

<sup>33</sup> See *idem*, page 3: "public and private antitrust enforcement [...] serve the same aims: to deter anti-competitive practices [...]"; see also the comment by the then Director-General for Competition of the European Commission at the OECD Roundtable on private remedies in February 2006 (i.e. shortly after the publication of the 2005 Green Paper): "compensation of victims should not be seen as an end in itself, but part of an overall strategy to enhance deterrence"; OECD, *Private Remedies*, DAF/COMP(2006)34 of 11 January 2008, at 271.

<sup>34</sup> See generally my paper 'Should Private Antitrust Enforcement Be Encouraged in Europe?' (2003) 26 *World Competition* 473; *Principles of European Antitrust Enforcement*, as note 1 above, Chapter 4; W. Möschel, 'Should Private Enforcement of Competition Law Be Strengthened?', in D. Schmidtchen, M. Albert and S. Voigt, *The More Economic Approach to European Competition Law – Conferences on New Political Economy* 24 (Mohr Siebeck 2007), 101, and (2013) 6 *Global Competition Litigation Review* 1; P. Nebbia, 'Damages actions for the infringement of EC competition law: compensation or deterrence?' (2008) *European Law Review* 23; K.S. Bernard, 'Private Antitrust Litigation in the European Union – Why Does the EC Want to Embrace What the US Federal Trade Commission is Trying to Avoid?' (2010) 3 *Global Competition Law Review* 69; and Opinion of Advocate General Jääskinen of 7 February 2013 in Case C-536/11 *Donau Chemie*, not yet published in ECR, paragraph 48.

breach of EU antitrust rules,<sup>35</sup> which focuses no longer on deterrence and private enforcement, but rather on the right of victims to obtain compensation for damage suffered as a result of antitrust infringements, leaving the task of deterrence to public enforcement.<sup>36</sup>

Even if the 2008 White Paper has not (yet) been followed by any EU legislation to facilitate private actions for damages, there appears to have been in the past decade a very significant increase in the number of actions for damages following infringement decisions taken by the European Commission or national competition authorities.<sup>37</sup>

### C. European Commission

The impact of Regulation 1/2003 on the activity of the European Commission has mostly also been as expected.

The European Commission has made good use of the increased investigatory and sanctioning powers which it obtained through Regulation 1/2003, such as the increased possibility to ask oral questions during inspections, the possibility to put seals,<sup>38</sup> the possibility to inspect private homes, the increased penalties for obstruction of

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<sup>35</sup> COM(2008) 165 of 2 April 2008; see also F.W. Bulst, 'Of Arms and Armour – The European Commission's White Paper on Damages Actions for Breach of EC Antitrust Law' (2008) *Bucerius Law Journal* 81.

<sup>36</sup> Indeed, the 2008 White Paper states, at page 3, that its "primary objective [...] is to improve the legal conditions for victims to exercise their right under the Treaty to reparation of all damage suffered as a result of a breach of the EC antitrust rules. Full compensation is, therefore, the first and foremost guiding principle. [...] Another important guiding principle of the Commission's policy is to preserve strong public enforcement of Articles 81 and 82 by the Commission and the competition authorities of the Member States". The European Commission has thus returned to the classic, time-honoured conception of the different roles of public enforcement and private actions for damages, not just in the area of antitrust but in the law more generally, as notably set out by John Locke in 1690 in his *Second Treatise on Civil Government*, Chapter II; see further my paper 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages' (2009) 32 *World Competition* 3.

<sup>37</sup> See already in 2007: Response of Monckton Chambers to the OFT's Discussion Paper 'Private actions in competition law: effective redress for consumers and business', accessible at [http://www.offt.gov.uk/shared\\_offt/consultations/Private-responses/Monckton.pdf](http://www.offt.gov.uk/shared_offt/consultations/Private-responses/Monckton.pdf), paragraph 5: "there is considerable evidence that companies are now seeking – and obtaining – compensation following an infringement decision taken by the OFT or the Commission".

<sup>38</sup> See Commission Decisions of 30 January 2008 in Case COMP/39.326 *E.ON Energie* [2008] OJ C240/6 and of 24 May 2011 in Case COMP/39.796 *Suez Environnement breach of seal*, full text accessible at [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39796/39796\\_554\\_6.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/39796/39796_554_6.pdf); Judgments of the General Court of 15 December 2010 in Case T-14/08 *E.ON Energie v Commission* [2010] ECR II-5761, and of the Court of Justice of 22 November 2012 in Case C-89/11 P *E.ON Energie v Commission*, not yet reported in ECR; and A. Riley, 'Seal Breaking: Practical Compliance Lessons from Recent Cases' (2012) 3 *Journal of European Competition Law & Practice* 141.

investigations,<sup>39</sup> and the higher level of periodic penalty payments for non-compliance with decisions.<sup>40</sup>

The European Commission has also made use of the increased scope for prioritising its action.<sup>41</sup> It has published a list of general prioritisation criteria in its Annual Report on Competition Policy 2005.<sup>42</sup>

As to the number of decisions adopted by the European Commission, the White Paper on Modernisation had predicted that, following the abolition of the notification system, "the number of individual prohibition decisions can be expected to increase substantially".<sup>43</sup>

The following overview of the number of decisions adopted by the European Commission in the last 25 years suggests that this prediction may have been too optimistic:

For the years 1988 to 2003, when Regulation 17 was still applicable, the table below shows, for each year, the number of decisions finding an infringement of Articles 101 or 102 TFEU, ordering its termination and/or imposing fines (prohibition decisions), the number of exemption decisions under Article 101(3) TFEU subject to conditions or obligations (condition or obligation decisions), the total of these two types of decisions, the number of negative clearance decisions or exemption decisions without conditions or obligations (exemption or negative clearance decisions), and the total of all three types of decisions:<sup>44</sup>

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<sup>39</sup> See Commission Decision of 28 March 2012 in Case COMP/39.793 *EPH and Others* [2012] OJ C316/8, as well as note 38 above.

<sup>40</sup> See Commission Decisions of 12 July 2006 and of 27 February 2008 in Case COMP/37.792 *Microsoft* [2008] OJ C138/10 and [2009] OJ C166/20, and Judgment of the General Court of 27 June 2012 in Case T-167/08 *Microsoft v Commission*, not yet published in ECR.

<sup>41</sup> See generally my paper 'Discretion and Prioritisation in Public Antitrust Enforcement, in Particular EU Antitrust Enforcement' (2011) 34 *World Competition* 353.

<sup>42</sup> SEC(2006)761, June 2006, at 26-27. See also Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, [2004] OJ C101/65.

<sup>43</sup> White Paper, as note 8 above, at paragraph 87.

<sup>44</sup> All figures are based on my own counting of the decisions as reported on the European Commission's competition website [http://ec.europa.eu/competition/index\\_en.html](http://ec.europa.eu/competition/index_en.html). Re-adoptions of decisions annulled by the EU Courts are not included.

	<b>Prohibition decisions</b>	<b>Condition or obligation decisions</b>	<i>Total</i>	<b>Exemption or negative clearance decisions</b>	<i>Total</i>
<b>1988</b>	13	5	18	6	24
<b>1989</b>	3	5	8	2	10
<b>1990</b>	6	2	8	6	14
<b>1991</b>	6	3	9	3	12
<b>1992</b>	17	3	20	4	24
<b>1993</b>	2	3	5	1	6
<b>1994</b>	7	7	14	8	22
<b>1995</b>	3	0	3	2	5
<b>1996</b>	4	3	7	8	15
<b>1997</b>	2	0	2	9	11
<b>1998</b>	10	1	11	6	17
<b>1999</b>	7	0	7	17	24
<b>2000</b>	5	0	5	4	9
<b>2001</b>	17	0	17	4	21
<b>2002</b>	10	0	10	7	17
<b>2003</b>	9	0	9	7	16
<i>Average</i>	7.5	2	9.5	6	15.5

For the years 2004-2012, under Regulation 1/2003,<sup>45</sup> the table below shows, for each year, the number of decisions finding an infringement of Articles 101 or 102 TFEU, ordering its termination and/or imposing fines (prohibition decisions), the number of

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<sup>45</sup> Even if Regulation 1/2003 only applied as from 1 May 2004, the figures include the whole year 2004.

decisions making commitments binding pursuant to Article 9 of Regulation 1/2003 (commitments decisions),<sup>46</sup> and the total of these two types of decisions:<sup>47</sup>

	<b>Prohibition decisions</b>	<b>Commitment decisions</b>	<b>Total</b>
<b>2004</b>	11	0	11
<b>2005</b>	7	2	9
<b>2006</b>	6	5	11
<b>2007</b>	12	1	13
<b>2008</b>	8	1	9
<b>2009</b>	6	5	11
<b>2010</b>	7	6	13
<b>2011</b>	4	2	6
<b>2012</b>	3	4	7
<b>Average</b>	7	3	10

The figures in both tables above show significant variations from year to year. If one looks at the averages, however, the figures are stable: whereas under Regulation 17, the European Commission adopted on average 7.5 prohibition decisions and 2 exemption

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<sup>46</sup> See generally J. Almunia, 'Remedies, commitments and settlements in antitrust', SPEECH/13/210 (8 March 2013); my papers 'Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No. 1/2003' (2006) 29 *World Competition* 345 and 'The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles' (2008) 31 *World Competition* 335; and F. Wagner-von Papp, 'Best and even Better Practices in Commitment Procedures after *Arosa*: The Dangers of Abandoning the "Struggle for Competition Law"' (2012) 49 *Common Market Law Review* 929.

<sup>47</sup> Again all figures are based on my own counting of the decisions as reported on the European Commission's competition website [http://ec.europa.eu/competition/index\\_en.html](http://ec.europa.eu/competition/index_en.html). Re-adoption of decisions annulled by the EU Courts are not included. No column is added for non-infringement decisions pursuant to Article 10 of Regulation 1/2003 (findings of inapplicability), as the Commission has not adopted any such decisions. This is neither surprising nor problematic. As indicated in recital 14 of Regulation 1/2003, Article 10 is only meant to be used in exceptional cases, and no such cases have arisen; see Staff Working Paper, as not 17 above, paragraphs 112-114; see further also *The Optimal Enforcement of EC Antitrust Law*, as note 6 above, section 6.2.2.3; *Principles of European Antitrust Enforcement*, as note 1 above, section 1.2.3; and Opinion of Advocate General Kokott of 28 February 2013 in Case C-681/11 *Schenker and Co and Others*, not yet reported in ECR.

decisions with conditions or obligations per year, the Commission has under Regulation 1/2003 adopted on average 7 prohibition decisions and 3 commitment decisions per year.

While these figures show no weakening of enforcement action by the European Commission, they raise the question why the substantial increase predicted in the White Paper on Modernisation has not happened.<sup>48</sup>

As the figures above show, under Regulation 17 the European Commission adopted on average 6 exemption or negative clearance decisions per year, for which there is no equivalent under Regulation 1/2003.<sup>49</sup> Apart from these formal exemption or negative clearance decisions, the European Commission also dealt with other notifications through informal comfort letters.<sup>50</sup> The resources saved as a result of the disappearance of this notification-related work have apparently not allowed a significant increase in prohibition and commitment decisions.

A first possible explanation is that the overall resources which the European Commission devotes to the enforcement of Articles 101 and 102 TFEU might have gone down.<sup>51</sup> Given that, as a result of Regulation 1/2003, many more resources are now devoted to the enforcement of Articles 101 and 102 TFEU at the level of the national competition authorities, it could be argued that it might be rational for the European Commission to devote fewer resources to this task. I am not aware of the European Commission having deliberately done so. Inside the European Commission, there is however no fixed amount of resources devoted to the enforcement of Articles 101 and 102 TFEU. The European Commission's Directorate-General for Competition is not only responsible for the enforcement of Articles 101 and 102 TFEU but also for merger control and state aid control, and there is no fixed allocation of resources between these three areas of activity. Given the European Commission's exclusive competences and the notification systems in the areas of merger control and state aid control, there is an inherent risk that these two areas of activity will always take priority over the enforcement of Articles 101 and 102 TFEU, for which the Commission has a large discretion whether or not to act.<sup>52</sup>

A second possible explanation for the absence of an increase in the number of decisions adopted by the European Commission is that the European Commission may spend a substantial amount of resources on its coordination tasks under Regulation 1/2003, monitoring the enforcement of Articles 101 and 102 TFEU by the national competition authorities and the national courts. In its Report on the functioning of Regulation 1/2003, the European Commission indicated that its Directorate-General for Competition had

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<sup>48</sup> See (text accompanying) note 43 above.

<sup>49</sup> See note 47 above as to non-infringement decisions pursuant to Article 10 of Regulation 1/2003.

<sup>50</sup> See White Paper, as note 8 above, paragraph 34.

<sup>51</sup> They risk in any event going down in the near future, as part of the general reduction of the European Commission's staff by 5 %; see Conclusions of the European Council (Multiannual Financial Framework), EUCO 37/13 (8 February 2013), paragraph 99.

<sup>52</sup> See my paper 'Discretion and Prioritisation in Public Antitrust Enforcement, in Particular EU Antitrust Enforcement' (2011) 34 *World Competition* 353.

developed a practice of submitting (oral or written) observations to the national competition authorities in many cases.<sup>53</sup>

A third possible explanation is that, as a result of increased prioritisation, the European Commission may deal to a larger extent with cases that are inherently more complex and thus consume more resources.<sup>54</sup>

A fourth possible explanation is that, even if the cases dealt with are not inherently more complex, the European Commission may spend more resources on dealing with them. This may be due to two factors. First, the European Commission has increased the levels of internal quality control, in particular with the creation in 2003 of the office of the Chief Economist inside the Directorate-General for Competition.<sup>55</sup> Obviously, increased quality control entails increased use of resources.<sup>56</sup> Secondly, in particular in Article 102 TFEU cases, the European Commission has developed a practice of including in its decisions, in addition to the analysis and reasoning legally required to find an infringement of Article 102 TFEU, a further analysis as to the economic effects of the practices at issue, in particular the effects on consumers.<sup>57</sup> Obviously, such additional analysis consumes additional resources.<sup>58</sup>

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<sup>53</sup> Communication from the Commission to the European Parliament and Council – Report on the functioning of Regulation 1/2003, COM(2009)206 of 29 April 2009, paragraph 28, and Commission Staff Working Paper accompanying the Report on the functioning of Regulation 1/2003, SEC(2009)574 of 29 April 2009, paragraph 257.

<sup>54</sup> See (text accompanying) notes 41 and 42 above.

<sup>55</sup> See [http://ec.europa.eu/dgs/competition/economist/role\\_en.html](http://ec.europa.eu/dgs/competition/economist/role_en.html). An important quality control function is also performed by the European Commission's Legal Service; see [http://ec.europa.eu/dgs/legal\\_service/index\\_en.htm](http://ec.europa.eu/dgs/legal_service/index_en.htm). While the Legal Service has always existed, its role appears to have expanded in practice, as reflected by the near doubling in size of its Competition Team in the past decade.

<sup>56</sup> See also my paper 'The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis' (2004) 27 *World Competition* 201 at 222; and *Principles of European Antitrust Enforcement*, as note 1 above, paragraph 619. Apart from being costly, systematic and extensive quality control also risks having a desensibilizing effect, thus perversely lowering quality.

<sup>57</sup> See Commission Decision of 29 March 2006 in Case COMP/38.113 *Prokent/Tomra*, [2008] OJ C219/11, full text at [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/38113/38113\\_250\\_8.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/38113/38113_250_8.pdf); Commission Decision of 13 May 2009 in Case COMP/37.990 *Intel* [2009] OJ C227/13, full text accessible at [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/37990/37990\\_3581\\_18.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/37990/37990_3581_18.pdf); Judgment of the General Court of 9 September 2010 in Case T-155/06 *Tomra v Commission* [2010] ECR I-4361, paragraphs 289-290; Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7; J. Kay, 'European monopoly laws are already fair and stringent', *Financial Times*, 4 October 2005, accessible at <http://www.johnkay.com/2005/10/04/european-monopoly-laws-are-already-fair-and-stringent>; and L.L. Gormsen, 'Are Anti-competitive Effects Necessary for an Analysis under Article 102 TFEU' (2013) 36 *World Competition* 223.

<sup>58</sup> See also S. Voigt, "'More Economic' Does Not Necessarily Mean 'Better' – Perils and Pitfalls of the 'More Economic Approach' as Recommended by the European Commission", in D. Schmidtchen, M. Albert and S. Voigt (eds), *The More Economic Approach to European Competition Law – Conferences on New Political Economy* 24 (Mohr Siebeck 2007), 97 at 99; L. Idot, 'Modern industrial

Taking together the figures for the European Commission and the national competition authorities, however, there can be no doubt that Regulation 1/2003 has led to a spectacular increase in the enforcement of Articles 101 and 102 TFEU,<sup>59</sup> and that Regulation 1/2003 has thus been a great success.

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economics revisited - comments on Daniel Rubinfeld, Michele Polo and Oliver Budzinski', in J. Drexl, W. Kerber and R. Podszun (eds), *Competition Policy and the Economic Approach – Foundations and Limitations* (Edward Elgar 2011), 139 at 141-142; J. Drexl, 'On the (a)political character of the economic approach to competition law', in J. Drexl, W. Kerber and R. Podszun (eds), as just above, 312 at 322; D. Zimmer, 'Law and Economics im Recht der Wettbewerbsbeschränkungen', in Studienvereinigung Kartellrecht, *Kartellrecht in Theorie und Praxis – Festschrift für Cornelis Canenbley zum 70. Geburtstag* (Beck 2012), 525 at 533; L. Ortiz Blanco and A. Lamadrid de Pablo, 'Expert Economic Evidence and Effects-Based Assessments in Competition Law Cases', in M. Merola and J. Derenne (eds), *The Role of the Court of Justice of the European Union in Competition Law Cases* (Bruylant 2012), 305; J. Steenbergen, 'Has Competition Analysis Become Too Sophisticated for Its Own Good?', *19<sup>th</sup> St. Gallen International Competition Law Forum* (7-8 June 2012), accessible at <http://papers.ssrn.com/abstract=2179905>; and S. Bishop, 'Snake-Oil with Mathematics is Still Snake-Oil: Why Recent Trends in the Application of So-Called "Sophisticated" Economics is Hindering Good Competition Policy Enforcement' (2013) 9 *European Competition Journal* 67.

<sup>59</sup> See (text accompanying) note 22 above.