DAWN OF A NEW ERA?
POWERS OF INVESTIGATION AND ENFORCEMENT UNDER REGULATION 1/2003

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I. INTRODUCTION

On December 16, 2002, the Council of Ministers adopted Council Regulation (EC) No. 1/2003. Regulation 1/2003, which took effect on May 1, 2004, replaces Regulation 17/62 and establishes the procedures governing the enforcement of European Community (EC) antitrust law. In addition, the Commission has published various guidelines and notices to assist in the interpretation and application of Regulation 1/2003, as well as a regulation that establishes formal rules for dealing with procedural matters (all documents together referred to as the “Modernization Package”).

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3 References to EC antitrust law are to Articles 81 and 82 of the Treaty Establishing The European Community, Nov. 10, 1997 O.J. (C 340) 173 (as amended by the Treaty of Amsterdam) [hereinafter EC Treaty].

4 In addition to Regulation 1/2003, the Modernization Package includes:

- Commission Regulation Relating to Proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, 2004 O.J. (L 125) 18 [hereinafter Procedural Regulation].
Modernization developed from a perceived need to re-think the centralized enforcement of EC antitrust law. Regulation 1/2003 empowers the national competition authorities of the Member States (NCAs) to apply in full Articles 81 (including the exemption at Article 81(3)) and 82 alongside the European Commission (Commission). NCAs and national courts are now expected to participate fully in the enforcement of EC antitrust law.

The Commission has described Regulation 1/2003 as “an ambitious and fundamental overhaul of the antitrust rules implementing Articles 81 and 82 of the Treaty”; the “big bang”; and “the most comprehensive antitrust reform undertaken since 1962.” It has further claimed that Regulation 1/2003 “will fundamentally simplify the way in which the Treaty’s antitrust rules are enforced throughout the European Union.”

Despite the significance accorded Regulation 1/2003 and the accompanying documents, the Modernization Package does not change any

- Notice on Co-operation within the Network of Competition Authorities, 2004 O.J. (C 101) 43 [hereafter Cooperation Notice].
- Notice on the Handling of Complaints by the Commission, 2004 O.J. (C 101) 65 [hereafter Complaints Notice].

All of these documents are available at http://europa.eu.int/comm/competition/antitrust/legislation/#procedural_rules.


6 See Regulation 1/2003, art. 35, which requires the Member States to designate responsibility for the enforcement of Articles 81 and 82 in their respective territory to one or more national authorities. National courts can be designated for that purpose. “NCAs” in this paper refers to the authorities that have been appointed by the Member States in accordance with Article 35 of Regulation 1/2003.

7 See Regulation 1/2003, arts. 5, 6, 11, 12, 15, 22, 29, 35 & recitals 2–4, 6–8.


10 See 32d Report, supra note 8, at 25.

11 See id.
of the EC’s substantive antitrust rules.\textsuperscript{12} Rather, modernization reforms the procedural rules that allow for the implementation of EC antitrust law. Regulation 1/2003 is based on four key “pillars” of reform: decentralization of enforcement by involving the NCAs; uniform application of EC antitrust law regardless of the enforcer; close cooperation between EC and Member State antitrust enforcement agencies; and strengthened powers of investigation and enforcement.

The Commission’s goals for Regulation 1/2003 are substantial. They include: more effective and efficient enforcement of EC antitrust law, simplified administration, and reduced administrative costs and burdens on undertakings. The Commission hopes that by sharing the enforcement burden with the NCAs, it will be able to focus more on the most significant competition infringements (e.g., cartels and pervasive abuses of a dominant position) with its increased investigation and enforcement powers.

Whether modernization will achieve the lofty objectives with which it has been introduced, however, will depend on its implementation by the Commission, NCAs, and national courts, and in particular the degree of cooperation among them. Many of the underlying principles of modernization are actually not new, but instead existed in one form or another before Regulation 1/2003.\textsuperscript{13} Thus, to measure the effectiveness of modernization, key questions need to be answered, including:

\begin{itemize}
  \item Will the Commission cede responsibility to the NCAs for the investigation and enforcement of matters over which it has jurisdiction?
  \item Will Member States devote the resources necessary to enforce EC antitrust law by ensuring that NCAs and national courts are fully equipped to take up their new challenge?
\end{itemize}

\textsuperscript{12} However, James Venit has noted that by making Article 81 directly applicable in its entirety, it will eliminate the artificial bifurcation that existed under Regulation 17/62 between paragraphs (1) and (3) of Article 81 (explained below), which, in turn, “may very well have an important impact on the substance of Article 81.” See James S. Venit, \textit{Brave New World: The Modernization and Decentralization of Enforcement Under Articles 81 and 82 of the EC Treaty}, 2003 \textit{Common Mkt. L. Rev.} 545, 575.

\textsuperscript{13} For example, Regulation 17/62 prescribed broad investigative and enforcement powers to the Commission. See Regulation 17/62. The principle of close cooperation between the Commission and the NCAs was embodied in Regulation 17/62, EC \textit{Treaty} art. 10 and the Commission Notice on Co-operation between the National Competition Authorities and the Commission, 1997 O.J. (C 313) 3 [hereinafter 1997 NCA Cooperation Notice]; see also T-353/94, Postbank NV v. Commission, 1996 E.C.R. II-921 at ¶¶ 63–65. Similarly, EC \textit{Treaty} art. 10 and the Co-operation Notice between National Courts and the Commission, 1993 O.J. (C 39) 6 [hereinafter 1993 National Court Cooperation Notice] established the principle of close cooperation between the Commission and the Member States’ courts. Many of the guidelines included as part of the Modernization Package could
Will NCAs and national courts satisfy, both in law and in spirit, the obligation of uniform treatment of antitrust law to agreements and concerted practices?

Only experience and time will provide the answers to these questions. However, a full understanding of the modernization package is necessary in order to help predict how EC antitrust law will change over the next few years. This article seeks to provide that foundation. First, it describes the manner in which enforcement will be decentralized under modernization. Second, it outlines both the new and the pre-existing investigative powers set out in Regulation 1/2003, including the complaints process. Third, the article describes the mechanisms for cooperation among the Commission, the NCAs, and the national courts. It then identifies new enforcement powers given to the Commission and reforms that the modernization package aims to achieve with other enforcement agents of EC antitrust law, including private parties. Finally, the article also highlights certain important issues that often arise in practice and that may require further consideration and/or clarification by the Commission or by the European courts in the future.

II. THE FRAMEWORK OF DECENTRALIZATION

Although modernization does not change the substance of EC antitrust law, decentralization will nonetheless have important effects on the way the law is enforced. Articles 81 and 82 of the EC Treaty set out the substantive antitrust rules that regulate commercial practices. Article 82 addresses unilateral conduct by undertakings, while Article 81(1) prohibits agreements that have as their object or effect the prevention, restriction, or distortion of competition. However, as a practical matter, consideration is given to whether there exists an objective justification for the allegedly abusive conduct and, if so, whether that conduct is proportionate to the objective sought. Case 311/84, Centre Belge d’études de Marché–Télémarketing (BEM) v. SA Compagnie Luxembourgeoise de Télédiffusion (CLT) Information Publicité Benelux (IPB), 1985 E.C.R. 3261 at ¶ 26.

The term “undertaking” is a term of art in EC parlance. It has been defined broadly to include “any entity engaged in an economic activity regardless of its legal status and the way in which it is financed.” See Höffner and Elser, 1991 E.C.R. I-1979 at ¶ 21. Accordingly, an undertaking can include, for example, natural persons, partnerships, companies, and public bodies that perform an economic activity.

Article 81(1) specifically applies to “agreements between undertakings, decisions by associations of undertakings, and concerted practices.” For the purposes of this article, however, these three categories of conduct are referred to collectively as “agreements.”
exempts from this latter prohibition agreements that satisfy four cumulative conditions.\(^{17}\)

To increase the certainty of the application of the exemption to agreements that prima facie are not anticompetitive, the Commission adopted regulations known as “block exemption” regulations, which automatically exempt agreements that meet certain conditions from Article 81(1).\(^{18}\)

For those agreements that do not satisfy the terms of a block exemption, their impact on competition must be assessed individually in order to determine whether they meet the Article 81(3) exemption conditions.\(^{19}\)

If an agreement prohibited by Article 81(1) does not satisfy the conditions of a block exemption or individual exemption criteria under Article 81(3), it is void and prohibited.\(^{20}\)

Until modernization, Regulation 17/62 formally allowed undertakings to notify their agreement to the Commission.\(^{21}\) By notifying, the parties to the agreement were not subject to fines for conduct that was consistent with the notified agreement but which was later determined to infringe EC antitrust law.\(^{22}\) The Commission alone had the power to receive notifications and to grant individual exemptions.\(^{23}\)

EC Treaty art. 81(3).

Block exemption regulations continue to apply under Regulation 1/2003. Indeed, Article 29 of the Regulation sets out the conditions under which the Commission and the NCAs can withdraw the benefit of a block exemption regulation from a particular agreement or agreements.

As part of the Modernization Package, the Commission has published Guidelines to assist in the interpretation and application of article 81(3). See Article 81(3) Guidelines, supra note 4.

However, the European Court of Justice (ECJ) has held that Article 81(2) does not require that agreements be automatically declared void \textit{ab initio}, but rather that it may be appropriate to sever the infringing provisions, provided that doing so does not do an injustice to the parties’ intentions. The scope and availability of severance is a matter of national law. It is therefore at the discretion of a national court as to whether to apply the principle of severance in an individual case, so long as that principle exists under national law. Case 56-65, Société Technique Minière v. Maschinenbau Ulm GmbH, 1966 E.C.R. 235, 250.

See Regulation 17/62 art. 4(1). A few exceptions were prescribed at Regulation 17/62 arts. 4(2) and (3).

See Regulation 17/62 art. 15(1).

In practice, the Commission rarely granted individual exemptions. Rather, the Commission would typically issue “comfort letters,” which stated either that an agreement
however, eliminated this procedure when Regulation 1/2003 replaced Regulation 17/62.

Under Regulation 1/2003, parties have no formal right to obtain an individual exemption from the Commission. In addition, because the new regime contemplates the NCAs and national courts and tribunals sharing the burden of enforcing EC antitrust law, Articles 81 and 82 may be enforced not only by the Commission but also by the NCAs. To facilitate this, NCAs have the authority to adopt decisions and interim measures, accept binding commitments, and impose fines.

To ensure uniform application of EC antitrust law, NCAs are required to apply Articles 81 and 82 to anticompetitive agreements and conduct that “may affect trade between Member States.” While the NCAs are permitted to apply national competition law in parallel with EC antitrust law, Regulation 1/2003 confirms that national law may not prohibit conduct that is permissible under EC antitrust law. The NCAs and

appeared not to infringe Article 81(1) or that it appeared to satisfy the terms of Article 81(3), and in either case that it was closing its file. Because comfort letters did not constitute a “decision,” they did not bind national courts. See Procureur de la République v. Giry and Guerlain, 1980 E.C.R. 2327 at ¶ 13.

Regulation 1/2003 recital 3.
national courts are required to ensure that their decisions are consistent with the Commission’s decisional practice. To help ensure the consistent application of EC antitrust law, the NCAs are required to give the Commission at least thirty days prior notice before adopting decisions to bring infringements to an end, accept commitments, or withdraw the benefit of a block exemption. The Commission is entitled, at any time, to assume exclusive competence for the investigation of a particular matter by initiating proceedings. Where the Commission invokes this authority, the NCAs are precluded from investigating that matter. The Commission is also entitled to adopt decisions finding that Articles 81 and 82 are not applicable to agreements or to other conduct. These decisions are binding on NCAs and national courts. National courts continue to be entitled to refer legal issues to the European Court of Justice under Article 234 of the EC Treaty. Regulation 1/2003 confirms that the national courts are permitted to ask the Commission for its opinion on the application of EC antitrust law.

III. COMMISSION INVESTIGATIONS AND THE COMPLAINTS PROCESS

Consistent with the goal of enabling the Commission to focus on severe anticompetitive conduct (e.g., hard-core cartels and pervasive abuses of a dominant position), Regulation 1/2003 expanded the

29 See Regulation 1/2003 art. 16.
30 See id. art. 11(4).
31 See id. art. 11(6). Presumably, the Commission can exercise this discretionary power either where it is concerned that an NCA will adopt a decision that is contrary to existing EC law or to a decision that the Commission is contemplating adopting in a different matter at the same time. The Commission does not have a similar right to take over a case that is before a national court.
32 See id. art. 10. Regulation 1/2003 places limitations on the application of this provision. The first limitation is that the Commission alone is entitled to invoke it. There is no formal right to petition the Commission to issue (or consider issuing) a declaration of inapplicability (although in appropriate cases an undertaking may informally request it). Second, the Commission is entitled to invoke this provision only “[w]here the Community public interest relating to the application of Articles 81 and 82 of the Treaty so requires . . . .” While the Commission has the authority to define the Community interest, the reference by Article 10 to Articles 81 and 82 of the EC Treaty possibly limits the scope of the Commission’s discretion. As well, pursuant to Article 230 of the EC Treaty, an undertaking can make application for judicial review to the Court of First Instance before the Court of First Instance (CFI). See Case T-24/90, Automec v. Commission, 1992 E.C.R. II-2223.
33 See Regulation 1/2003 art. 16.
34 See id. art. 15(1).
Commission’s investigative powers. For example, new with Regulation 1/2003 are the abilities to seal premises, take voluntary statements from witnesses, and conduct on-site inspections in a broader range of locations (e.g., private homes).

Article 7 of Regulation 1/2003 authorizes the Commission to order an end to an infringement of EC antitrust law. The Commission may initiate the investigative process on its own or based on a complaint so long as it has reason to believe that an undertaking or undertakings may be infringing EC antitrust law. It may develop this suspicion from any number of sources, such as by observing market conditions (e.g., close pricing between competitors), by monitoring the trade press, by receiving information from a whistle-blower who comes forward to announce the existence of a cartel in order to benefit from the Commission’s leniency program, or from a foreign government. Third parties may also initiate the enforcement process by filing a complaint.

A. The Commission’s Complaints Process

The Complaints Notice describes the manner in which parties may bring complaints before the Commission, as well as the manner in which the Commission should handle complaints once it receives them. In effect, it formalizes the Commission’s previous practice for accepting complaints while also setting out time frames within which the Commission intends to (typically) conduct its investigation.

A complaint can be lodged by any natural or legal person who can demonstrate a “legitimate interest.” The concept of a “legitimate interest” is broad and includes any person whose economic interests are

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35 Despite the overall goal of decentralization, Regulation 1/2003 addresses only the Commission’s investigative powers. The powers and procedures that the NCAs and national courts will use to apply Articles 81 and 82 need to be prescribed by national law.

36 See id. art. 20(2).

37 See id. art. 19.

38 See id. art. 21(1).

39 Commission Notice on Immunity From Fines and Reduction of Fine in Cartel Cases, 2002 O.J. (C 45) 3 [hereinafter Leniency Notice].

40 E.g., the Commission has signed cooperation agreements or otherwise participated in less formal cooperation arrangements with numerous countries. A list of these countries is available at http://www.europa.eu.int/comm/competition/international/bilateral/bilateral.html.

41 Although the Complaints Notice explains that complaints can be filed with one or more NCAs or national courts rather than with the Commission, national law will determine how those complaints are handled.

42 See Regulation 1/2003 art. 7(2); Procedural Regulation, supra note 4, art. 5(1); Complaints Notice, supra note 4, ¶ 33.
affected. In addition, representative organizations, such as consumer associations, are entitled to lodge complaints on behalf of their members. Member States are also entitled to submit complaints to the Commission.

Complaints can be brought to the Commission either informally or formally. The Complaints Notice does not provide any specific requirements that must be followed when making an informal complaint. However, one negative consequence of filing an informal complaint is that the complainant is not entitled to invoke any of the procedural rights that apply to the formal process.

Formal complaints must be submitted to the Commission on a “Form C” document, a copy of which is annexed to the Complaints Notice. Once a party files a formal complaint, it is entitled to a range of procedural rights, including the right to participate at an oral hearing, the right to submit documents, and the right to receive a copy of the Statement of Objections. Upon request, a complainant is entitled to maintain its anonymity provided that the request is not “manifestly unjustified.”

The Complaints Notice describes three stages of action the Commission will undertake following receipt of a complaint. In the first stage, the Commission will assess “Community interest” in the complaint by examining carefully the factual and legal statements alleged. As a matter of EC law, the Commission can allocate different degrees of administrative priority to complaints, thereby deciding to pursue those complaints that satisfy a broad Community interest criterion. In the second stage,

43 A “legitimate interest” exists where an undertaking lodges a complaint on behalf of its members, provided that the undertaking is entitled to represent the interests of its members and the allegedly infringing conduct is capable of adversely affecting the interests of its members. See, e.g., Case T-114/92, Bureau des Européen des Médias et de l’Industrie Musicale (BEMIM) v. Commission 1995 E.C.R. II-147 at ¶ 28; see also Complaints Notice ¶ 37.

44 See Complaints Notice ¶ 29; Procedural Regulation art. 5(1) (providing the formal requirements, such as the number of copies that must be submitted and so forth).

45 The procedural rights available to complainants are set out in the Complaints Notice ¶¶ 64–79.

46 See id. ¶ 81.

47 See id. ¶ 55; see also T-37/92, Bureau Européen des Unions des Consommateurs v. Commission, 1994 E.C.R. II-236 at ¶ 29 (providing a similar description of the investigation process). The Commission is under a duty to consider carefully the factual and legal issues brought to its attention by the complainant in order to assess whether they indicate a possible infringement of EC antitrust law. Case 210/81, Oswald Schmidt v. Commission, 1983 E.C.R. 3045 at ¶ 19; Automex, 1992 E.C.R. at ¶ 79. The Complaints Notice summarizes the relevant jurisprudence regarding “Community interest.” See Complaints Notice.

48 The EC courts have held that the Commission is responsible for defining and implementing the orientation of Community competition policy and that, in order to perform that task effectively, it can give differing degrees of priority to the complaints brought before it. See C-344/98, Masterfoods v. HB Ice Cream, 2000 E.C.R. I-11369 at

2004]  Changes in Regulation 1/2003  167
the Commission may investigate the matter, which will include the right to request further information from, and to discuss the complaint informally with, the complainant.49 The Commission will then decide whether to initiate a formal investigation or to reject the complaint.50 The Commission has stated that, in principle, it will try to make this determination within four months of its receipt of a complaint.51 A complainant can refer a decision by the Commission not to pursue an investigation to the Court of First Instance (CFI) for judicial review.52

The third stage occurs when the Commission initiates proceedings against the allegedly infringing undertaking(s).53 A complainant who has initiated a formal complaint will receive a non-confidential version of the Statement of Objections54 and will be entitled to comment on it within a fixed period of time.55 Where requested by the complainant, it will be entitled to make oral observations should an oral hearing be held.56

If the Commission decides to reject a complaint, it must issue a decision that explains its reasons for doing so.57 A complainant is not permitted to ask for the investigation to be reopened unless it puts forward significant new evidence.58 However, the Commission remains entitled to reopen a file, and both NCAs and national courts can take up a case that


49 See Complaints Notice ¶ 56; see also Procedural Regulation art. 7(1). If the complainant does not respond to the Commission, the complaint will be deemed to have been withdrawn. See Complaints Notice ¶ 57.
50 See id. ¶ 57.
51 See id. ¶ 61.
52 See id. ¶ 78. The Procedural Regulation confirms that a complainant will be given access to the (non-confidential) documents on which the Commission has based its provisional assessment. These documents can be used by the complainant only for the purposes of the application of Articles 81 and 82. See Procedural Regulation art. 8(2).
53 See Complaints Notice ¶ 57.
54 This is a formal document that sets out the nature of the alleged infringement. It is addressed to the undertaking that is (or the undertakings that are) being investigated.
55 See Complaints Notice ¶ 64; Procedural Regulation art. 6(1). In Postbank NV, 1996 E.C.R. at ¶ 67, the CFI held that a private litigant can submit a non-confidential Statement of Objections to a national court in the context of private enforcement proceedings. As a Statement of Objections is prepared by the Commission after conducting its preliminary investigation, access to this document can be very helpful to a complainant who is considering whether to initiate civil proceedings.
56 See Complaints Notice ¶ 65; Procedural Regulation art. 6(2).
57 See EC Treaty art. 253; see also Complaints Notice ¶¶ 74–75.
58 See Complaints Notice ¶ 78.
has been closed by the Commission without a decision regarding whether the impugned conduct has infringed EC antitrust law.\textsuperscript{59}

B. Investigative Techniques Available to the Commission

Historically, the two principal investigative techniques available to the Commission were the powers to receive information and to conduct on-site inspections. These powers remain, and indeed have been broadened, under Regulation 1/2003. Additionally, Regulation 1/2003 gives the Commission the formal power to take statements, although it is entitled to exercise this power only through a voluntary request.

1. Requests for Information

Article 18(1) of Regulation 1/2003 provides that “the Commission may, by simple request or by decision, require undertakings and associations of undertakings to provide all necessary information.” The addressee of a request for information is limited to undertakings or associations of undertakings.\textsuperscript{60} Typically, a request will require an undertaking to provide documents in its possession and/or to provide information.

The Commission may make a request for information either informally or formally. Informal requests are initiated through a “simple request” for information and are non-binding.\textsuperscript{61} In contrast, formal requests are binding and mandatory. They are issued through a “decision” and are subject to possible review by the CFI. A request for information must state the legal basis and purpose of the request; specify the information that must be supplied; fix the time within which the information must be provided; and set out the potential penalties in the event of non-compliance.\textsuperscript{62}

\textsuperscript{59} The Commission’s statement of facts in a decision to reject a complaint may be taken into account by the NCAs and/or the national courts when deciding whether an agreement or conduct in question complies with Articles 81 and 82. See Complaints Notice ¶ 79.

\textsuperscript{60} Article 18(4) of Regulation 1/2003 provides that:

The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or associations having no legal personality, the persons authorised to represent them by law or by their constitution shall supply the information requested on behalf of the undertaking or the association of undertakings concerned. Lawyers duly authorised to act may supply the information on behalf of their clients. The latter shall remain fully responsible if the information supplied is incomplete, incorrect or misleading. (emphasis added)

\textsuperscript{61} There is no penalty for refusing to accept a simple request, although a penalty can be imposed where, having voluntarily agreed to participate, an undertaking supplies incomplete or misleading information.

\textsuperscript{62} See Regulation 1/2003 arts. 18(2) & (3). As previously noted, in the case of a simple request, penalties may apply for supplying incorrect or misleading information.
2. Powers of Inspection

Article 20(2) of Regulation 1/2003 allows the Commission to conduct inspections of undertakings and associations of undertakings. Much of the inspection procedure is the same as existed before Regulation 1/2003. However, the new Regulation does make several important changes. First, the Commission is now formally permitted to authorize non-Cvonmission persons to assist in inspections. Second, the Commission may now inspect a broad category of “other premises" where it suspects those premises may have relevant materials.

Commission officials and “other accompanying persons” authorized for that purpose by the Commission may:

1. enter any premises, land, or means of transport of undertakings and associations of undertakings;
2. examine the books and other records related to the business, irrespective of the medium on which they are stored;
3. take or obtain in any form copies of or extracts from such books or records;
4. seal any business premises and books or records for the period and to the extent necessary for the inspection;
5. ask any representative or member of staff of the undertaking or the association of undertakings for an explanation on facts and documents relating to the subject matter and purpose of the inspection and to record the answers.66

As under Regulation 17/62, the Commission is entitled to demand an on-the-spot explanation of facts and documents relating to the subject matter and purpose of an inspection. This power can have wide-

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63 See id. art. 20(1).
64 See Regulation 17/62 arts. 14(1)–(3).
65 Regulation 1/2003 does not specify who can be appointed as “other accompanying persons." An obvious possibility would be IT experts who can assist with gaining access to information stored electronically. No limits are placed on the activities that “other accompanying persons“ can engage in. See Regulation 1/2003 art. 20(2).
66 Id.
67 See id. art. 20(2)(e). The Procedural Regulation states that the explanations given under Article 20(2)(e) may be recorded in any form and that a copy will be made available to the undertaking after the inspection. The undertaking is given a chance to rectify any statement given within a time limit set by the Commission. Procedural Regulation art. 4.
reaching implications because undertakings may be compelled to give oral evidence to the Commission or face sanctions.\(^68\)

Procedurally, the Commission may initiate an inspection either through a voluntary written request or through a formal decision. Inspections initiated by formal decision are sometimes referred to as "dawn raids." The key attribute of this type of inspection is that Commission officials appear unannounced at the undertaking’s premises. Whether through a voluntary or mandatory request, the Commission must specify the subject matter and purpose of the investigation, and also must set out the time of the inspection and the penalties that apply for non-performance.\(^69\) Prior to effecting the inspection, the Commission must give advance notice to the NCA in whose territory the inspection is to be carried out.\(^70\) Where an inspection will be carried out pursuant to a decision, Commission officials and other accompanying persons conducting the inspection may request the relevant Member State to provide the assistance of its law enforcement agents.\(^71\) In addition, officials conducting an investigation are entitled to request the assistance of an NCA.\(^72\)

Commission decisions ordering inspections can be reviewed at the EC or national levels. First, the Commission is entitled to seek the authorization of a national court where it considers it advisable to do so or where it is mandatory under the national law of the Member State.\(^73\) The reviewing national judicial authority must limit its review to ensuring that the Commission’s decision is authentic and that the measures set out in the decision are neither arbitrary nor excessive, consistent with the principle of proportionality.\(^74\) Second, the undertaking (or association of undertakings) may seek judicial review of the Commission’s inspection decision before the CFI.\(^75\)

The review procedures applicable to Commission decisions ordering inspections of "other premises" differ from those applicable to inspections of an undertaking’s premises. Article 21(1) of Regulation 1/2003

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\(^{68}\) As discussed in greater detail below, this power is limited by the privilege against self-incrimination and legal and professional privilege.

\(^{69}\) Regulation 1/2003 arts. 20(3) & (4).

\(^{70}\) See id.

\(^{71}\) See id. art. 20(6).

\(^{72}\) See id. art. 20(5); see also Regulation 17/62. In that case, the NCA is required to appoint officials to assist. An NCA is also able to appoint or authorise additional persons to assist.

\(^{73}\) See Regulation 1/2003 art. 20(7).

\(^{74}\) See id. art. 20(8). The national judicial authority is not entitled, however, to question the necessity of the inspection or to request access to the information in the Commission’s files. Concerns regarding the lawfulness of the decision can be appealed to the ECJ.

\(^{75}\) See id. art. 20(4).
provides that the Commission can inspect “such other premises, land and means of transport” including “the homes of directors, managers and other members of staff of the undertakings and association of undertakings concerned.”

No limit is placed on the locations that may constitute an “other premises,” although the Commission must have a reasonable suspicion that “books or other records related to the business and to the subject matter of the inspection, which may be relevant to prove a serious violation of Article 81 or Article 82 of the Treaty, are being kept in other premises, land and means of transport.”

The Commission may only initiate inspections of “other premises” through a formal decision. It may not use the voluntary request process available for inspections of undertakings’ premises. Furthermore, the Commission is entitled to adopt a decision only after it has consulted with the relevant NCA and has received authorization from the relevant Member State’s judicial authority.

3. Power to Take Statements

In addition to the changes it makes to the Commission’s existing investigative powers, Regulation 1/2003 endows the Commission with a new investigative technique, namely the ability to take statements from natural and legal persons. However, the Commission may only request statements on a voluntary basis. It may not adopt a binding decision or otherwise compel a statement. Furthermore, no penalties apply to a refusal to grant an interview or to the supply of incorrect information. On the other hand, the Commission is not required to inform the subject of the investigation that the statement is being taken, even where the Commission is interviewing an employee of that undertaking.

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76 See id. art. 21(1).
77 See id.
78 The decision must specify the subject matter and purpose of the inspection; appoint the date on which the inspection will begin; state the reasons that lead the Commission to suspect that the books or other records will be found at the other premises; and indicate the right to have the decision reviewed by the CFI. See Regulation 1/2003 art. 21(2).
80 See id. art. 21(3). The scope of review is limited in the same manner as for a request for judicial authorisation in respect of a search of an undertaking’s premises.
81 See id. art. 19(1). The power would appear to be aimed at allowing the Commission to take statements from people like ex-employees of the undertaking or competitors without exposing them to the risks of Commission sanctions.
82 The lack of sanctions, of course, may undermine the reliability of the evidence the Commission obtains.
The Procedural Regulation requires the Commission to state the legal basis and purpose of the interview. A copy of the record must be provided to the person giving the statement and the Commission must set a time limit within which the interviewee can correct his or her statement, although as discussed above, no sanctions follow from an incorrect statement.

C. Limitations on the Commission’s Investigative Powers

In using its investigative powers under Regulation 1/2003, the Commission is required to observe the general principles and rights prescribed by EC law. The two most important limitations on the Commission’s powers of investigation are the concepts of proportionality and privilege.

First, Regulation 1/2003 codifies the European Court of Justice’s (ECJ) Roquette decision regarding the principle of proportionality and the protection against arbitrary investigations. In Roquette, the ECJ considered the scope of review to be undertaken by a national court on an application for assistance made under Article 14(6) of Regulation 17/62. The Court held that the Commission must respect national law procedures when exercising its investigative powers. At the same time, national authorities must respect general principles of EC law; namely, the protection against

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83 Procedural Regulation art. 3(1). In addition, Article 19(2) of Regulation 1/2003 prescribes certain safeguards when the interview takes place in the premises of the undertaking. In that case the Commission must give advance warning to the NCA of the relevant Member State and must give the NCA an opportunity to assist with the interview. This is distinct from the Commission’s right to ask a representative or employee of an undertaking to explain certain facts or documents. See Regulation 1/2003 art. 20(2)(e).

84 Procedural Regulation art. 3(1).

85 See id. art. 3(3). However, as a matter of fairness, clear guidance should be adopted that would oblige the Commission to inform a witness that he or she is not required to consent to an interview, is entitled to retain legal counsel, and that counsel is entitled to be present during the interview. Moreover, since the giving of an incorrect or false statement may expose a witness to criminal and/or civil penalties under national law, a witness should be given all possible information necessary to make an informed decision and to safeguard his or her rights.

86 Regulation 1/2003 arts. 20(8), 21(2) & 21(3) & recitals 27–29; see Case C-94/00, Roquette Frères, SA v. Directeur Général de la Concurrence, de la Consummation et de la Répression des Frauds and Commission, 2002 E.C.R. I-9011.

87 See Roquette Frères, 2002 E.C.R. The equivalent provision in Regulation 1/2003 is Article 20(6), which states:

Where the officials and other accompanying persons authorised by the Commission find that an undertaking opposes an inspection ordered pursuant to this Article, the Member State concerned shall afford them the necessary assistance, requesting where appropriate the assistance of the police or of an equivalent enforcement authority, so as to enable them to conduct their inspection.
both arbitrary and disproportionate intervention by public authorities in private activities. The ECJ described in detail the law on the principles of proportionality and arbitrariness in the context of a regulatory investigation.

As noted above, because Regulation 1/2003 codifies Roquette, strictly speaking, the powers the Regulation gives the Commission do not conflict with the principles established by this case. In practice, however, conformity with these principles will depend on how investigations under Regulation 1/2003 are conducted by the investigating authorities. Because one aim of modernization is to free up the Commission’s resources to investigate the most serious infringements, the number of on-site investigations may very well increase. Furthermore, the Roquette protections may be particularly important in coming years given the Commission’s new ability to search private homes for evidence.

In addition to proportionality limitations, general EC law principles regarding privilege apply to investigations carried out under Regulation

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88 Under the principle of proportionality, a national court must satisfy itself that reasonable grounds exist for suspecting that an infringement has occurred. The Commission must give a substantiated explanation of the factual information and evidence that gives rise to its suspicions. The national court may not demand to see the actual evidence in the Commission’s file. Instead, it must base its decision on whether the Commission’s explanation is reasonable. The national court must take into account the fact that a preliminary reference prior to authorization (as opposed to a later appeal) would generally jeopardize the effectiveness of the investigation.

89 In the context of a regulatory investigation, the principle against arbitrariness requires a national court to establish: (a) that the measures are appropriate to ensure that the investigation can be carried out; and (b) that the coercive measures do not constitute a disproportionate and intolerable interference. As regards the appropriateness of the measures, coercive measures may be requested on a precautionary basis only if there are grounds for suspecting opposition to the investigation and/or that evidence would be concealed or disposed of in the event of prior notice. The Commission must satisfy the national court that without the assistance requested, it would be impossible or very difficult to prove the infringement. As regards the proportionate nature of the measures, to carry out its review the national court must be aware of the seriousness of the suspected infringement, the nature of involvement of the undertaking, or the importance of the evidence sought. It is open to the national court to refuse the application if the suspected impairment of competition is so minimal, the extent of likely involvement of the undertaking so limited, or the evidence sought so peripheral that intervention necessarily appears manifestly disproportionate and intolerable in the light of the objectives pursued by the investigation.

90 I.e., Regulation 1/2003 does not impose any requirements on the Commission that would automatically necessitate arbitrary or excessive conduct.

91 See Regulation 1/2003 recital 3.

92 The Cooperation Notice, which addresses investigations and the exchange and use of confidential information by and between the Commission and the NCAs, is likely to be important in this regard.
1/2003. Of particular importance in this regard are the privilege against self-incrimination and legal professional privilege.

Generally speaking, an individual can refuse to produce evidence that would be self-incriminating. This includes the right to refuse to answer questions where it would require a person to admit to the infringement that the Commission is seeking to establish. However, it appears that there is no absolute right to silence in competition proceedings, except that an undertaking or person may not be compelled to admit an infringement. The privilege against self-incrimination does not allow an entity to refuse to hand over documents that could establish an offense.

Similarly, the Commission cannot take or compel the production of lawyer/client communications, provided that the communications were made for the purpose, and in the interest, of a client’s rights of defense after initiation of proceedings by the Commission. In some cases, correspondence created prior to the initiation of proceedings which have a relationship to the subject matter of an investigation and which emanate from an independent lawyer may also be protected. The privilege is

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94 See infra Part VI.3. for a more detailed discussion regarding the principle of privilege against self-incrimination.
96 Id.
97 Case T-112/98, Mannesmannröhren-Werke AG v. Commission, 2001 E.C.R. II-729 at ¶¶ 66–67. This is picked up in Regulation 1/2003, which states that:
When complying with a decision of the Commission, 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.
99 In a recent interim decision, the President of the CFI held on an interim application that privilege may extend to memoranda prepared for the purpose of obtaining legal advice, although this point must be determined at a final hearing. The Court stated that the Commission was not, prima facie, entitled to examine (or even cast a cursory glance over) documents over which privilege was claimed before the reviewing court first had an opportunity to consider the claim to privilege. See Joined Cases T-125/03 R and T-253/03 R, Akzo Nobel Chemicals Ltd. & Akcros Chemicals Ltd. v. Commission (unreported) at ¶ 139.
100 AM&S Europe Ltd., 1982 E.C.R. at ¶¶ 18–27.
limited in the EC to dealings between clients and independent lawyers. Generally, this has been interpreted to exclude in-house lawyers.101

IV. COOPERATION BETWEEN THE COMMISSION, NCAS, AND NATIONAL COURTS

The Commission recognizes that decentralization can succeed only with cooperation among the relevant authorities. Accordingly, Regulation 1/2003 is designed to facilitate cooperation and the exchange of information between the Commission and the NCAs and national courts, as well as among the NCAs themselves.102

The principle of cooperation is not unique to Regulation 1/2003. It was the subject matter of Commission Notices published in 1993 and 1997 concerning cooperation between the Commission and the national courts and NCAs, respectively.103 However, Regulation 1/2003 and other documents in the Modernization Package make clear that cooperation and information exchanges apply at the investigatory stages, as well as in relation to enforcement generally. Regulation 1/2003 thus confirms that these obligations bind the NCAs and national courts notwithstanding any contrary requirement under their respective national law.104

A. Cooperation Between and Allocations of Matters Among the Commission and the NCAs

Regulation 1/2003 requires the Commission and the NCAs to apply EC antitrust law in “close cooperation.”105 To achieve this goal, Regulation

101 In its interim decision, the CFI left open the possibility that privilege can emanate from communications with an in-house lawyer. The case is pending final determination. Akzo Nobel Chemicals, supra note 99, ¶ 130.
102 See Regulation 1/2003 arts. 11(4) (final clause), 12(1) and 22(1). A separate issue, and one that is not addressed by this article, is whether the Commission has the resources necessary to cooperate in a full and timely manner with the NCAs and the many national courts empowered under Regulation 1/2003 to consider and apply EC antitrust law in its entirety (all of which can occur in one of 21 official languages). Recital 3 of Regulation 1/2003 notes that one impetus for modernization is to allow the Commission to free up its resources in order to focus on the most serious infringements of EC antitrust law. If Regulation 1/2003 is truly successful in encouraging the NCAs and the national courts to cooperate with the Commission, including submitting requests to the Commission for its opinion and assistance, will the Commission be able to meet this demand or will it be forced, in a sense, to be “uncooperative”? Article 11(1) of Regulation 1/2003 provides that the Commission “shall” cooperate with the NCAs. There is no similar mandatory language under Article 15(1) regarding cooperation with the national courts.
104 This is consistent with the principle that EC law prevails over national law where it is necessary to achieve the objective of the EC Treaty. See Wilhelm, 1968 E.C.R. at ¶¶ 5 & 6.
105 See Regulation 1/2003 art. 11(1).
1/2003 established the European Competition Network (ECN).\textsuperscript{106} The ECN, which is made up of the Commission and NCAs, serves to facilitate exchanges of information, joint investigations, and the allocation of cases between the Commission and the NCAs. In particular, the objectives for (and of) the ECN are set out in the Cooperation Notice in the following terms:

Together the NCAs and the Commission form a network of public authorities: they act in the public interest and cooperate closely in order to protect competition. The network is a forum for discussion and cooperation in the application and enforcement of EC competition policy. It provides a framework for the cooperation of European competition authorities in cases where Articles 81 and 82 of the Treaty are applied and is the basis for the creation and maintenance of a common competition culture in Europe. The network is called “European Competition Network” (ECN).\textsuperscript{107}

The Commission and representatives of the Member States continue to participate in the Advisory Committee on Restrictive Practices and Dominant Positions.\textsuperscript{108}

Under Regulation 1/2003, the same agreement or conduct may be investigated concurrently by two or more NCAs.\textsuperscript{109} An investigation by one NCA does not preclude another from investigating that same matter, even where the initial (or concurrently) investigating NCA has not found there to be any infringement of EC antitrust law.\textsuperscript{110}

While NCAs retain jurisdiction to establish their own enforcement priorities, the Commission’s Cooperation Notice is designed to encourage the efficient allocation of investigations. It is also intended to indicate the types of matters that the Commission is likely to investigate (i.e., in

\textsuperscript{106} See id. recitals 15 and 16.

\textsuperscript{107} See Cooperation Notice, supra note 4, ¶ 1.

\textsuperscript{108} See Regulation 1/2003 art. 14. The operations and functions of the Advisory Committee are not examined in this article.

\textsuperscript{109} The Cooperation Notice makes clear that the NCAs are entitled to establish their own enforcement priorities, including the right to decide which agreements and conduct to investigate. Cooperation Notice ¶ 5. Furthermore, Article 13 of Regulation 1/2003 confirms that the NCAs and the Commission are entitled to suspend proceedings or reject a complaint altogether where the same conduct is being investigated by another NCA if a formal investigation has been initiated. See Cooperation Notice ¶ 20. Unless the Commission has initiated proceedings (which ousts the NCAs’ jurisdiction per Article 11(6) of Regulation 1/2003), the NCAs are not required to suspend proceedings or reject a complaint where the same conduct is being investigated by another NCA.

\textsuperscript{110} The Cooperation Notice explains that there may be some circumstances where an NCA decides to investigate conduct even though the same conduct is being investigated by another NCA. Cooperation Notice ¶ 22. For example, it suggests that the first investigating NCA may not have the evidence necessary to prove the infringement. \textit{Id}. 72
accordance with its enforcement priorities) and, thus, over which it is likely to claim jurisdiction. To ensure that the Commission is kept aware of investigations taking place in the EC involving the application of Articles 81 or 82, Regulation 1/2003 requires the NCAs to inform the Commission of such investigations before, or without delay upon, commencing “the first formal investigative measure.”

The Cooperation Notice sets out criteria for the allocation of investigations among the NCAs and the Commission. In particular, cases are to be allocated to the NCA that is “well placed” to conduct an investigation and to bring the infringing conduct to an end. Three cumulative criteria determine whether a particular authority qualifies as being “well placed:”

1. the agreement or practice has substantial direct actual or foreseeable effects on competition within its territory, is implemented within or originates from its territory;

2. the authority is able to effectively bring to an end the entire infringement i.e., it can adopt a cease and desist order the effect of which will be sufficient to bring an end to the infringement and it can, where appropriate, sanction the infringement adequately; and

3. it can gather, possibly with the assistance of other authorities, the evidence required to prove the infringement.

Generally speaking, the NCA that receives a complaint or starts an ex-officio procedure will be considered “well placed” and will have sole responsibility over the investigation. However, the Cooperation Notice addresses the possibility that, in certain circumstances, it may be appropriate for a different NCA, or multiple NCAs, to investigate the matter. In particular, two or more NCAs may be “well-placed” where anticompetit-

111 Article 11(3) of Regulation 1/2003 provides that an investigating NCA “may” inform the other NCAs in addition to the Commission. However, it seems reasonable to assume that, consistent with the principle of close cooperation, the Commission will keep the NCAs aware of investigations carried out by other NCAs.

112 See Regulation 1/2003 art. 11(3). The Cooperation Notice provides that the Commission has a similar obligation under Article 11(2) of Regulation 1/2003. Cooperation Notice ¶ 17. However, in contrast to the timing obligation imposed on the NCAs, Article 11(2) does not prescribe a time frame in which the Commission must supply information, other than perhaps prior to it taking a decision under Articles 7–10 or 29(1).

113 Cooperation Notice ¶ 6.

114 See id. ¶ 8.

115 See id. ¶¶ 6, 9–10.

116 See id. ¶¶ 7, 10–14.
Changes in Regulation 1/2003

Conductive conduct substantially affects the territory of the investigating NCAs and a single NCA would not, on its own, be able to bring the infringement to an end and/or sanction the conduct adequately. Alternatively, it may be that the Commission will be considered “well placed” to investigate the matter. The Cooperation Notice suggests that a Commission investigation is appropriate where the anticompetitive conduct has an effect in more than three Member States.

The Cooperation Notice specifies that any re-allocation from one NCA to another should be done “swiftly” and normally within a period of two months from notification. After two months, re-allocation is limited to situations where the facts known “change materially” during the course of proceedings.

Even where responsibility for an investigation has been allocated to a single authority, other authorities may be asked to participate in the investigation. Regulation 1/2003 provides that NCAs may carry out inspections or other fact-finding exercises in their respective territories to assist another NCA with an investigation. NCAs may consult with the Commission at any time on matters involving the application of EC law.

B. Exchanges of Information Among the Commission, NCAs, and National Courts

1. Exchanges of Information Between the Commission and NCAs as well as Among the NCAs

Regulation 1/2003 expands the scope of information exchanges among the Commission and NCAs in a number of respects. First, it

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117 The Cooperation Notice provides that in such circumstances it may be appropriate for one NCA to be designated as the lead authority in order to coordinate the investigation. Id. ¶ 15.
118 See id. ¶ 18. Presumably the notice under Article 11(2) will have been provided in advance of the Commission initiating proceedings because the initiation of proceedings “shall” relieve an NCA from investigating the matter. See Regulation 1/2003 art. 11(6).
119 See Cooperation Notice ¶ 19.
120 See Regulation 1/2003 art. 22(1). The investigation by a particular NCA is in all cases conducted in accordance with the powers available to it under its national law. As discussed below, this can lead to limits on the use of information where, for example, the information may be used to impose sanctions against a natural person. Article 22(2) sets out the Commission’s right to request an NCA to carry out an investigation in its territory on the Commission’s behalf.
121 See id. art. 11(5).
122 Under Regulation 17/62, the Commission was required to provide the NCAs with “copies of the most important documents lodged with the Commission” for the purposes of establishing an infringement of Articles 81 or 82, or when it was going to issue a negative clearance or decision regarding the application of Article 81(3). Regulation 17/62 art. 10(1).
formally establishes a system for a two-way exchange of information between the Commission and the NCAs.\textsuperscript{123} Second, Regulation 1/2003 confirms the right of the NCAs to exchange information with one another.\textsuperscript{124} Third, Regulation 1/2003 provides for exchanges of information with national courts.\textsuperscript{125}

The Commission is required to provide NCAs with "the most important documents" related to, inter alia, the application of EC law; the adoption of interim measures; investigations into possible infringements; the acceptance of commitments; the adoption of decisions of inapplicability; and decisions to withdraw the benefits of block exemption to agreements.\textsuperscript{126} The Commission has historically provided the NCAs with a wide range of information.\textsuperscript{127} However, the opportunity for information exchanges under Regulation 1/2003 is potentially even broader. Article 11(2) of Regulation 1/2003 allows the NCAs to request, and the Commission "shall provide," "a copy of other existing documents necessary for the assessment of the case."

The NCAs are similarly obliged to provide information to the Commission. In particular, the NCAs must provide the Commission with summaries of their cases, as well as details of their anticipated courses of action.\textsuperscript{128} These documents must be provided to the Commission at least thirty days before the adoption of one of a number of classes of decisions.\textsuperscript{129} Upon request from the Commission, an NCA is required to provide the Commission with "other documents it holds which are necessary for the assessment of the case."\textsuperscript{130} Although not mandatory, Article 11(4) of

\textsuperscript{123} See Regulation 1/2003 art. 12(1).
\textsuperscript{124} See id. Regulation 17/62 did not provide this right.
\textsuperscript{125} In addition to the ECN, Regulation 1/2003 contemplates the exchange of information through the Advisory Committee. The operations and functions of the Advisory Committee are not examined in this article.
\textsuperscript{126} See Regulation 1/2003 art. 11(2).
\textsuperscript{127} See Regulation 1/2003 art. 11(4). For example, typically the Commission provided to the NCAs, inter alia, the following: (i) copies of notifications and applications for clearance by parties in respect of Article 81; (ii) copies of decisions to initiate proceedings as well as reasons for not initiating proceedings; (iii) copies of the Statement of Objections; (iv) comments on notifications received from third parties; and (v) final decisions.
\textsuperscript{128} See Regulation 1/2003 art. 11(4). This obligation does not extend to a decision not to initiate proceedings or to a decision that an infringement has not taken place. In such cases, the NCA "shall have the power" to provide any information to the Commission. See Regulation 1/2003 art. 12(1). The NCAs are also required to provide the Commission with copies of written decisions published by their national courts that concern Articles 81 or 82. See id. art. 15(2).
\textsuperscript{129} For example, the NCAs must provide documents before requiring an infringement be terminated, adopting a commitment decision, and withdrawing the benefit of a block exemption. See id. art. 11(4).
\textsuperscript{130} See id.
2004] \textit{Changes in Regulation 1/2003} 181

Regulation 1/2003 empowers the NCAs to provide this same information to other NCAs.

The Commission and the NCAs may exchange documents and other materials even where they include confidential information.\footnote{See id. art. 12(1).} However, certain safeguards apply. The Commission and NCAs, along with their officials and other accompanying persons, are required to respect “professional secrecy.”\footnote{See id. art. 28(2). This obligation will extend to information received from the Advisory Committee.} This obligation does not, however, “prejudice the disclosure of information necessary to prove an infringement of Articles 81 and 82.”\footnote{Cooperation Notice ¶ 28(a).}

In addition, Regulation 1/2003 provides limitations on the use of information exchanged. First, exchanged information generally may only be used as evidence for applying Articles 81 and 82.\footnote{See Regulation 1/2003 art. 12(2). This is reiterated at Article 28(1), which states that information collected pursuant to Articles 17–22 (i.e., relating to the Commission’s powers of investigation) can be used only for the purposes for which it was collected. By virtue of Article 12(2), this means for purposes of enforcement of Articles 81 and 82.} Exceptionally, the information may be used to enforce national antitrust law where that law is applied in parallel with EC antitrust law and doing so would “not lead to a different outcome.”\footnote{See id. art. 12(2). However, while it is not possible to use the information transmitted as evidence in respect of stricter national law, an NCA is likely to be able to use it for the purposes of deciding whether to initiate proceedings under national law. According to the ECJ, an NCA is not required to “undergo . . . acute amnesia.” See Spanish Banks, 1992 E.C.R. at ¶¶ 39 & 42.}

Second, Regulation 1/2003 establishes certain safeguards that apply where the information exchanged will be used in the prosecution of a natural person. Implicit in the Regulation is the concept that Member States have their own antitrust laws with differing available sanctions and differing procedural safeguards. In particular, an NCA is not entitled to use information received from another NCA to enforce antitrust law against a natural person unless the national antitrust law of the transmitting NCA provides for “sanctions of a similar kind.”\footnote{See Regulation 1/2003 art. 12(3) (first clause). Because Regulation 1/2003 only foresees penalties against undertakings and associations of undertakings, it is expected that exchanges of information referred to in Article 12(3) will be between NCAs.} Thus, for example, if the law of both the receiving and transmitting Member States provides for custodial sanctions, then the receiving party is entitled to use the exchanged information for purposes of enforcing its national antitrust law. However, restrictions on the use of information transmitted between

\begin{itemize}
\item \footnote{See id. art. 12(1).}
\item \footnote{See id. art. 28(2). This obligation will extend to information received from the Advisory Committee.}
\item \footnote{See Regulation 1/2003 art. 12(3).}
\item \footnote{Cooperation Notice ¶ 28(a).}
\item \footnote{See Regulation 1/2003 art. 12(2). This is reiterated at Article 28(1), which states that information collected pursuant to Articles 17–22 (i.e., relating to the Commission’s powers of investigation) can be used only for the purposes for which it was collected. By virtue of Article 12(2), this means for purposes of enforcement of Articles 81 and 82.}
\item \footnote{See id. art. 12(2). However, while it is not possible to use the information transmitted as evidence in respect of stricter national law, an NCA is likely to be able to use it for the purposes of deciding whether to initiate proceedings under national law. According to the ECJ, an NCA is not required to “undergo . . . acute amnesia.” See Spanish Banks, 1992 E.C.R. at ¶¶ 39 & 42.}
\end{itemize}
antitrust authorities apply where the national law of the transmitting NCA provides for sanctions of a different kind on natural persons than is provided for by the national law of the receiving NCA. In such cases, the receiving NCA may use the evidence received for enforcing its national antitrust law only where the information was collected in a way that respects the same level of protection of the rights of defense as is provided for under the national law of the receiving authority.137 The information cannot be used for purposes of imposing custodial sanctions.138

Furthermore, where the receiving NCA’s antitrust law regarding unilateral conduct is stricter than Article 82, the limitations on use of the information applies regardless of whether the national laws provide equal procedural rights.139

2. Exchanges of Information with the National Courts

A concern regarding the potential increased role of national courts in the enforcement of EC antitrust law under the Modernization Package is whether they have the experience necessary to deal with the complex economic issues that underlie antitrust law.140 Regulation 1/2003 contemplates the Commission and the NCAs assisting national courts in the application of Articles 81 and 82.141 The mechanism for this assistance and the necessary exchanges of information are provided by both the

137 See id. art. 12(3) (second clause).
138 See id. It is perhaps curious that an NCA is not entitled to use the exchanged information for custodial sanction where the transmitting and receiving Member States offer similar procedural protection, but only if both Member States provide for the same level of sanctions, whether or not the transmitting country’s national laws provide an equal level of procedural protection. However, it seems from the Cooperation Notice, at ¶ 28(c), that the rationale for this difference is that where both the receiving and transmitting Member States provide for the same kind of sanctions: “procedural safeguards in both systems are considered equivalent.” In this context it would seem that “considered” equates to “presumed.”
139 In particular, Article 12(3) (first clause) of Regulation 1/2003, refers only to “Article 81 or Article 82 of the Treaty” and not to parallel national law. As already noted, Regulation 1/2003 permits Member States to impose stricter controls on unilateral conduct than are provided for under Article 82. The same allowance applies for sector-specific regulations.
140 For example, courts will be obligated to define a relevant market, determine the structure of competition and the effect that an agreement or conduct has on that structure as required by the efficiencies-based analysis under Article 81(3).
141 The principle of close cooperation between the Commission and the national courts is not new. It was described in the Commission’s 1993 National Courts Cooperation Notice, supra note 13, as well as in the EC Treaty, which establishes the principle of “sincere cooperation.” This principle was described by the ECJ as follows: “This duty of sincere cooperation imposed on Community institutions is of particular importance vis-à-vis the judicial authorities of the Member States, who are responsible for ensuring that Community law is applied and respected in the national legal system.” Case C-2/88, Imm J.J. Zwartveld, 1990 E.C.R. I-3365 at ¶ 18.
terms of Regulation 1/2003 and the National Courts Cooperation Notice (which replaces the previous 1993 Notice).

The Commission and the national courts are entitled to exchange information either at the request of a national court or at the Commission’s own initiative.\(^\text{142}\) Article 15(1) of Regulation 1/2003 provides that a national court can request the Commission’s “opinion on questions concerning the application of Community competition rules.”\(^\text{143}\) The Commission’s National Courts Cooperation Notice specifies that the Commission will endeavor to provide requested information within four months from its receipt of a request.\(^\text{144}\) Additionally, the Commission is entitled to provide written observations on matters of economics, facts, or law to a national court where “the coherent application of Article 81 or Article 82 of the Treaty so requires.”\(^\text{145}\) With leave of the relevant national court, the Commission is also entitled to submit oral observations.\(^\text{146}\) The Commission will not consider the views of private parties when formulating its observations.\(^\text{147}\)

NCAs are also entitled to submit observations to national courts. The procedures for doing so track those applicable to the Commission.\(^\text{148}\) To facilitate their observations, both the Commission and the NCAs may ask a national court to supply them with the information in its possession.\(^\text{149}\) Information exchanged on this basis can be used only for the purposes of making observations.\(^\text{150}\)

Member States will need to ensure that their procedural rules allow for the submission of observations to national courts. According to the

\(^\text{142}\) Through its National Courts Cooperation Notice, supra note 4, ¶ 19, the Commission has made it clear that it will not welcome a request by an undertaking for the Commission to intervene before a national court. The Commission has characterized its role of providing assistance as being “part of its duty to defend the public interest.” In order to maintain the appearance of impartiality, the National Courts Cooperation Notice states that in the event that an undertaking contacts the Commission in regard to a matter before a national court, the Commission will inform the national court of that fact “whether this contact took place before or after the national court’s request for co-operation.”

\(^\text{143}\) The National Courts Cooperation Notice states that “assistance offered by the Commission does not bind the national court.” Id. ¶ 19.

\(^\text{144}\) See id. ¶ 28. In addition, national courts also continue to be entitled to refer questions of EC law to the ECJ in accordance with Article 254 of the EC Treaty.

\(^\text{145}\) See Regulation 1/2003 art. 15(3).

\(^\text{146}\) Id.

\(^\text{147}\) National Courts Cooperation Notice ¶ 30.

\(^\text{148}\) See Regulation 1/2003 art. 15(3). The Commission’s and the NCAs’ rights under Article 15(3) is without prejudice to any wider powers they may have to make observations under the national law of a Member State. See Regulation 1/2003 art. 15(4).

\(^\text{149}\) See id. art. 15(3).

\(^\text{150}\) See id.
National Courts Cooperation Notice, the procedural framework for accepting the submission of observations:

1. must be compatible with the general principles of Community law, in particular the fundamental rights of the parties involved in the case;

2. cannot make the submission of such observations excessively difficult or practically impossible (the principle of effectiveness); and

3. cannot make the submission of such observations more difficult than the submission of observations in court proceedings where equivalent national law is applied (the principle of equivalence).151

In addition, the national courts may request information from the Commission to assist with proceedings under Articles 81 or 82. Regulation 1/2003 places no limitation on these exchanges based on the purposes for which the information was originally collected.152 In theory, this may mean that information collected by the Commission in a different matter, but which is relevant to the request, could be provided. However, this is subject to the limitation that the Commission will respect professional secrecy pursuant to Article 287 of the EC Treaty.153

151 National Courts Cooperation Notice ¶ 35.

152 For example, this is different from the obligations that apply to the exchange of information between the Commission and the NCAs or among the NCAs. Article 12(2) of Regulation 1/2003 provides that information exchanged “shall only be used in evidence for the purpose of applying Articles 81 or 82 of the Treaty and in respect of the subject-matter for which it was collected by the transmitting authority” (emphasis added). That said, information supplied to the Commission from an NCA pursuant to Article 12(1) is probably covered by the limitation on use set out at Article 12(2) of Regulation 1/2003. In addition, information in the Commission’s possession is subject to the Commission’s general requirement to respect professional secrecy. To that end, the ECJ has stated that:

Professional secrecy entails not only establishing rules prohibiting disclosure of confidential information but also making it impossible for the authorities legally in possession of such information to use it, in the absence of an express provision allowing them to do so, for a reason other than that for which it was obtained.


153 National Courts Cooperation Notice ¶ 19. However, the Commission also states that under its interpretation of Articles 10 and 287 of the EC Treaty, it does not view itself as being precluded in all cases from transmitting information covered by professional secrecy. Instead, the Commission will transmit such information provided that a national court can guarantee protection of confidential information and business secrets. See id. ¶¶ 23–25. The Commission, however, will not transmit information to a national court where the information was supplied by an applicant under the Commission’s Leniency Notice. See Leniency Notice, supra note 59. The CFI has confirmed that the scope by which the Commission can withhold information from a national court on grounds that it may not protect professional secrecy is limited in light of the general presumption that national courts will respect this obligation:

there is a presumption that the national courts will guarantee the protection of confidential information, in particular business secrets, since, in order to ensure
V. ENFORCEMENT MEASURES UNDER REGULATION 1/2003

Regulation 1/2003 sets out the Commission’s enforcement powers.

A. INTERIM MEASURES

Regulation 1/2003 explicitly confirms the Commission’s authority to adopt interim measures.\(^ {154} \) The ECJ had previously held that, as a general principle of EC law, the Commission can impose interim measures because without such powers the Commission’s ability to enforce antitrust law could be “illusory.”\(^ {155} \) To formalize and make this explicit, Regulation 1/2003 adopts the ECJ’s approach by providing that “in cases of urgency due to the risk of serious and irreparable damage to competition, the Commission, acting on its own initiative may by decision, on the basis of a prima facie finding of infringement, order interim measures.”\(^ {156} \)

The requirement that there must be a risk of “damage to competition” confirms that the Commission should focus on the effect that the conduct has on the structure of competition in a market rather than its impact on private rights. This is also consistent with the requirement that an order will be issued only where there is a prima facie indication of an infringement of EC antitrust law.\(^ {157} \) Furthermore, in contrast to the provision under Article 7(1) that allows the Commission to investigate an infringement action based on a complaint or on its own initiative, Article 8(1) provides only that the Commission may issue an interim order “acting on its own initiative.” No reference is made to complaints by third parties. While it can be expected that undertakings being harmed by anticompetitive conduct will request the Commission to impose interim orders, Regulation 1/2003 does not formally acknowledge undertakings’ right to make such requests. Accordingly, it appears that third-

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\(^ {154} \) Although many undertakings choose to cease their allegedly anticompetitive behavior during an investigation, others do not. Regulation 17/62 did not address this situation.


\(^ {156} \) See id. ¶s 14 & 18. In Camera Care, the Court indicated that the Commission can order interim measures where the measures are: (1) “indispensable” for the effectiveness of any future decision bringing the conduct to an end (¶ 18); (2) “urgent in order to avoid a situation likely to cause serious and irreparable damage to the party seeking their adoption, or which is intolerable for the public interest” (¶ 19); (3) of a “temporary and conservatory nature and restricted to what is required in the given situation” (¶ 19); and (4) adopted through a decision that is subject to judicial review by the Community Court (¶ 19).

\(^ {157} \) This likely equates to “probable existence.” See Case T-44/90, La Cinq SA v. Commission, 1992 E.C.R. II-1 at ¶ 32.
party complainants are not entitled to appeal a decision by the Commission not to issue an interim order. 158

Regulation 1/2003 provides that interim orders will be limited to a specified period of time, although they can be renewed by the Commission where it considers it "necessary and appropriate" to do so. 159 The fact that interim orders are issued by decision serves to confirm that they are subject to judicial review. 160

B. Bring Infringements of Articles 81 and 82 to an End

Under Regulation 1/2003, the Commission is able to fashion measures to require undertakings to bring their infringements to an end and to prevent them from being re-introduced.

1. Remedies

Regulation 1/2003 confirms the Commission’s ability to order, by decision, the end of an infringement of EC antitrust law. 161 In particular, Article 7(1) provides that the Commission can impose behavioral or structural remedies on an infringing undertaking. In the case of behavioral remedies, for example, the Commission can require negative conduct (e.g., requiring that certain conduct ceases and/or not be repeated in the future) 162 and/or positive conduct (e.g., requiring certain conduct, such as the supply of a product to third parties on a non-discriminatory basis). 163 Structural remedies can include an order requiring that an undertaking divest a particular asset or business. 164

158 Of course, as a practical matter, this will not prevent a third-party from trying to "encourage" the Commission to impose an interim measure or from seeking an interim measure before a national court pursuant to national procedural rules.

159 See Regulation 1/2003 art. 8(2).

160 See id. art. 8(1).

161 See id. art. 7(1). In connection with that decision, the Commission may impose monetary penalties as well as periodic payment penalties for each day that the infringement continues (explained below).


164 In the context of Article 82, the Commission ordered a structural remedy in IV/26.811, Continental Can Co., 1972 O.J. (L 7) 25. The Commission’s decision was annulled on appeal. Case 6/72, Europemballage Corporation and Continental Can Co. v. Commission, 1973 E.C.R. 215. The Commission has, however, ordered structural remedies in many
Regulation 1/2003 places two limits on the Commission’s selection of remedies. First, remedies must be proportionate to the competitive harm created and necessary to bring the infringement to an end. This helps to ensure that the Commission does not try to deal with systemic structural competition issues in a particular market through its power to impose remedies. Second, all things being equal, the Commission is required to prefer behavioural remedies to structural remedies. In particular, the Commission is entitled to impose structural remedies only “where there is no equally effective behavioral remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy.”

2. Commitment Decisions

Regulation 1/2003 formalizes the Commission’s power to accept “commitments” from undertakings in lieu of making infringement decisions. Article 9(1) provides that an undertaking that is the subject-matter of an investigation can propose commitments to the Commission that are designed to bring the (allegedly) infringing conduct to an end. The Commission “may” accept such offers, although it is not bound to do so.

When accepted, the Commission will adopt a decision imposing the commitments, thereby making them binding on the addressee. The decision will not, however, find that the undertaking has breached EC antitrust law, but only that “there are no longer grounds for action by
Commitment decisions will be limited to a specified period of time.

Because the commitment procedure is new, it is unclear whether it will become a regular means by which undertakings settle investigations with the Commission or with the NCAs. It has the potential to save time and expenses, given that all parties concerned can avoid having to proceed to a final determination. In addition, from the Commission’s standpoint, commitment decisions are likely to be favored over informal agreements, given that they are binding under the terms of Regulation 1/2003. On the other hand, the effects of a commitment decision for an undertaking are mixed.

The commitment process will afford an undertaking an opportunity to negotiate the scope of the remedies with the Commission as opposed to facing the possibility of remedies being imposed unilaterally by the Commission. In addition, by agreeing to a commitment decision, undertakings avoid the issuance of an infringement decision that could have an adverse effect in civil proceedings before a national court. By virtue of Article 16(1), national courts are bound by the Commission’s determinations regarding the infringement of Articles 81 and/or 82. As a practical matter, however, a commitment decision itself is likely to have a (highly) persuasive effect before a national court. Furthermore, in circumstances where the Commission has issued a Statement of Objections, the information set out in that document could have a (highly) persuasive effect before a national court.

171 See id. recital 13.
172 Article 5 of Regulation 1/2003 provides that the NCAs also may establish national laws to issue commitment decisions.
173 Although it would be up to the national court alone to determine whether such infringement merits compensation or other damages.
174 I.e., Regulation 1/2003 provides that the Commission will be prepared to accept commitments where it “intends to adopt a decision requiring that an infringement be brought to an end . . . .” Regulation 1/2003 art. 9(1).
175 The Commission can accept commitments only once “it intends to adopt a decision,” and a preliminary assessment must have been communicated to the concerned undertaking. For example, in a recent article John Temple Lang mentions matter-of-factly that a Statement of Objections will have been issued at the time that the Commission adopts a commitment decision. See John Temple Lang, Commitment Decisions Under Regulation 1/2003: Legal Aspects of a New Kind of Competition Decision, 2003 Eur. Community L. Rev. 347. However, the final text of the Procedural Regulation, art 2(1), suggests that the Commission can issue its “preliminary assessment” referred to at article 9(1) of Regulation 1/2003 prior to, and thus without having to issue, the Statement of Objections. While this may provide some protection to parties who are contemplating whether to offer commitments, it is likely not sufficient to prevent the flow of information from the Commission to third parties. In particular, Article 27(4) of Regulation 1/2003 provides that the Commission must publish a concise summary of the case and its proposed commitments before adopting a decision to accept commitments under Regulation 1/2003, art. 9(1).
give potential litigants before national courts significant background information.\textsuperscript{176}

To the extent that commitment decisions have the practical effect of eliminating future investigations into the same conduct by other NCAs or the Commission, undertakings may find them beneficial. That said, Recitals 13 and 22 both provide that commitment decisions are without prejudice to the powers of the NCAs (and courts) to decide upon the same case. The Complaints Notice provides that when the Commission rejects a complaint that results in a commitment decision, the national courts and the NCAs are entitled to review the same matter.\textsuperscript{177}

Notwithstanding some of the benefits of the powers for the Commission and undertakings, there are a number of reasons that suggest that commitment decisions may not be common. First, if the Commission follows the (implied) direction in Recital 13 not to accept commitments in those cases where it intends to impose fines, the number of cases in which the Commission will be prepared to settle through commitments may be significantly limited.\textsuperscript{178} Second, it is difficult to gauge the likely reaction of both the business community and the Commission to settling matters through formal commitment decisions. Prior to May 1, 2004, Regulation 17/62 provided the Commission with a right to issue “recommendations” to terminate infringing conduct.\textsuperscript{179} The procedure was not used often because recommendations were not binding on the infringing party.\textsuperscript{180} Instead, the Commission settled many investigations through informal negotiations.\textsuperscript{181} However, the historical use of informal

Interested third parties will be entitled to submit observations regarding the draft commitments within a specified period of time.

\textsuperscript{176} See Postbank NV, 1996 E.C.R. at ¶ 67, where the CFI confirmed that national courts can refer to the information set out in a Statement of Objections.

\textsuperscript{177} Complaints Notice ¶ 79.

\textsuperscript{178} As a practical matter, it would also mean that commitment decisions are not available as a means by which to avoid, or to seek a reduction in, fines.

\textsuperscript{179} See Regulation 17/62 art. 3(3).

\textsuperscript{180} Furthermore, once the proceedings were completed, the limitation period for the Commission to re-initiate an investigation would begin to run. See Council Regulation 2988/74 concerning Limitation Periods in Proceedings and the Enforcement of Sanctions Under the Rules of the European Economic Community Relating to Transport and Competition, 1974 O.J. (L 319) 1. According to Bellamy and Child, in only one instance has the Commission settled an investigation through a formal recommendation. See Bellamy & Child, European Community Law of Competition 12-073 n.40 (P.M. Roth ed., 5th ed. 2001).

\textsuperscript{181} For an example of a recent case, see EC Press Release IP/04/281, Competition Probe Leads to Decrease in Tariffs for Broadband Access Via Line Sharing in Germany (Mar. 1, 2004). There is nothing to prevent the Commission from continuing this practice under Regulation 1/2003. While the Commission may prefer to make the commitment binding through a decision, as explained, undertakings may be hesitant to proceed in that manner.
negotiations does not necessarily indicate that commitments will replace that process, especially where undertakings believe that they have a good chance to succeed in establishing that they have not breached EC antitrust law, at least following an appeal to the CFI.

3. Fines

Fines are an important measure available to the Commission to encourage compliance by undertakings and associations of undertakings with EC antitrust law. Both the penalty provisions of Regulation 1/2003 and the Commission’s enforcement practice demonstrate that violations of EC antitrust law can be met by substantial penalties. As was the case under Regulation 17/62, the Commission is entitled under Regulation 1/2003 to impose substantial fines on undertakings and associations of undertakings for infringements of Articles 81 and 82. Although Regulation 1/2003 does not increase the size of the fine the Commission may impose, it does introduce significantly increased fines for failures to comply with certain investigation or enforcement demands.

Regulation 1/2003 establishes three categories of fines, all of which are summarized in Table 1. The first category of fines covers conduct relating to investigations. Undertakings and associations of undertakings that “intentionally or negligently” fail to provide the required level of assistance and information to Commission officials or authorized persons conducting an investigation are subject to a fine. The Commission is entitled to impose fines of up to 1 percent of the total turnover of the undertaking or associations of undertakings in the preceding business year.

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[182] The Commission has made extensive use of its ability to impose fines. For example, during the three-year period between 2001 and 2003, the Commission imposed approximately 3.2 billion Euro in fines on cartel activity. See EC Press Release IP/03/1746, Commission Fines Three Companies in Industrial Copper Tubes Cartel (Dec. 16, 2003).

[183] The penalties set out in Regulation 1/2003 apply to “undertakings” and to “associations of undertakings.” Except where a natural person operates as an undertaking, generally speaking, penalties will be imposed only on legal persons. Fines and, in some cases, custodial sanctions also apply under the domestic law of a Member State for breach of antitrust law and those laws are not necessarily limited to “undertakings.” Article 23(4) confirms the Commission’s approach that members of an association are ultimately responsible for the fines imposed on an association where the association is unable to pay (e.g., because it is insolvent), including where one or more members are unable to pay. However, no undertaking is required to pay a fine in excess of 10% of its turnover in the preceding year. See Regulation 1/2003 art. 23(4). For a description of the Commission’s approach to associations, and in particular to its preference for imposing liability directly on the individual members of an association, see Guidelines on the Method of Setting Fines Imposed Pursuant to Article 15(2) of Regulation No. 17 and Article 65 (5) of the ECSC Treaty, 1998 O.J. (C 9) 3 § 5(c) [hereinafter Fine Setting Guidelines].

[184] See Regulation 1/2003 art. 23(1).
Table 1
Three Categories of Fines

<table>
<thead>
<tr>
<th>Grounds for Fines Related to Investigations Under Article 23(1)</th>
<th>(up to 1% of annual turnover)</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Incorrect or misleading information was given in respect of a sector inquiry or a non-binding request for information (by simple request or by decision—if by decision, also where the information is incomplete);</td>
<td></td>
</tr>
<tr>
<td>• Incorrect, incomplete, or misleading information was given in response to a decision requiring the supply of information for an investigation or sector inquiry;</td>
<td></td>
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<tr>
<td>• Failure to provide information requested by decision within a specified time;</td>
<td></td>
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<tr>
<td>• Supplying books or other records in an incomplete form during an inspection;</td>
<td></td>
</tr>
<tr>
<td>• Refusal to submit to an inspection ordered by Commission decision or a failure to provide a complete answer during inspection;</td>
<td></td>
</tr>
<tr>
<td>• Failure to rectify an incorrect, incomplete, or misleading response given during an inspection, including in response to a question asked during an investigation by an inspector; or</td>
<td></td>
</tr>
<tr>
<td>• Breaking a seal affixed to premises or to books and records.</td>
<td></td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Grounds for Fines Related to Infringement &amp; Failures to Comply with Decisions Under Article 23(2)</th>
<th>(up to 10% of annual turnover)</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Infringement of Articles 81 or 82;</td>
<td></td>
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<tr>
<td>• Contravention of an interim measure; or</td>
<td></td>
</tr>
<tr>
<td>• Failure to comply with binding commitments.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Grounds for Fines for Continuing Conduct Under Article 24</th>
<th>(up to 5% of average daily turnover)</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Bring an on-going infringement of Articles 81 or 82 to an end as quickly as possible;</td>
<td></td>
</tr>
<tr>
<td>• Ensure compliance with an interim measure;</td>
<td></td>
</tr>
<tr>
<td>• Ensure compliance with a binding commitment;</td>
<td></td>
</tr>
<tr>
<td>• Require the supply of complete and correct information requested by decision for a sector inquiry or investigation; or</td>
<td></td>
</tr>
<tr>
<td>• Require an undertaking or association of undertakings to submit to an inspection.</td>
<td></td>
</tr>
</tbody>
</table>

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185 This does not extend to the inspection of “other premises, land and means of transport” carried out pursuant to Article 21 of Regulation 1/2003.
The second category of fines covers infringements of EC antitrust law, as well as the failure to comply with a Commission decision bringing infringements to an end. Similar to the first category, these fines are imposed where an undertaking or an association of undertakings intentionally or negligently breaches EC antitrust law. Fines imposed under Article 23(2) can be up to 10 percent of an undertaking’s total turnover in the preceding business year.

Periodic penalty payments constitute the third category of fines, and they are imposed where it is necessary to bring continuing conduct to an end. The penalty is applied for each day that the infringing conduct is continued. Under Article 24, the Commission is entitled to impose a fine of up to 5 percent of an undertaking’s average daily turnover, based on the preceding business year, for each day that the infringing conduct is not terminated.

The Commission’s Fine Setting Guidelines, which were established to increase transparency, provide that the Commission will consider both the gravity and duration of the infringing conduct in setting a fine. The Fine Setting Guidelines also describe aggravating and attenuating circumstances that the Commission considers when setting fines. A decision by the Commission to impose a fine can be appealed directly to the CFI. The CFI can cancel, reduce, or increase the fine or periodic penalty imposed by the Commission.

In addition to the fines the Commission is authorized to impose, Member States are entitled to establish under their national laws fines, periodic penalty payments, or “any other penalty” for the purposes of enforcing Articles 81 and 82.
4. Private enforcement

An undertaking can face not only fines imposed by the Commission and the Member States’ NCAs, but also private litigation. Litigation between private parties with respect to the EC antitrust law can result in monetary compensation, restitution, a declaration that an agreement is void and/or interlocutory measures depending on the circumstances.

a. Private Enforcement of EC Antitrust Law Pre-Regulation 1/2003

It was settled law before Regulation 1/2003 that individuals could enforce Articles 81(1) and 82 before national courts. It was also settled law that national courts could apply Article 81(2) to declare anticompetitive agreements void. Indeed, the Commission sought to encourage private enforcement, particularly in relation to matters that did not have a sufficient EC interest to warrant investigation by the Commission:

As the administrative authority responsible for the Community’s competition policy, the Commission must serve the Community’s general interest. The administrative resources at the Commission’s disposal to perform its task are necessarily limited and cannot be used to deal with all the cases brought to its attention. The Commission is therefore obliged, in general, to take all organizational measures necessary for the performance of its task and, in particular, to establish priorities.

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The Commission considers that there is not normally a sufficient Community interest in examining a case when the plaintiff is able to secure adequate protection of these rights before national courts. . . .

In this respect the Commission would like to make it clear that the application of Community competition law by the national courts has considerable advantages for individuals and companies . . .

Modernization is not, therefore, necessary for private undertakings to enforce EC antitrust law through national courts. In practice, however, very few private damages actions for breach of EC antitrust law were ever brought before national courts before modernization. A number

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194 1993 National Court Cooperation Notice ¶¶ 14, 15–16.
195 Clifford A. Jones, Private Enforcement of Antitrust Law in the EU, UK and USA 85 (1999). Indeed, Professor Whish has recently noted that “there has yet to be a case in which a court in the UK has actually made an award of damages.” See Richard Whish, Competition Law 301 (5th ed. 2003). The position has recently changed with the first damages award for breach of EC antitrust laws, in Bernard Crehan v. Inntrepreneur Pub Co. CPC, Case No. 13/2003/1725 (unpublished) (S. Ct. of Judicature Ct. of Appeal, Civil Div. May 21, 2004). The decision is being appealed to the House of Lords.
of reasons explain this reluctance. Despite efforts by the ECJ to address some of the issues that faced litigants, significant uncertainties remained. For example, there was:

- **Uncertainty regarding the application of Article 81(3)**—The Commission’s exclusive jurisdiction under Regulation 17/62 to declare agreements exempt from Article 81(1) on the basis of Article 81(3) created an obstacle for would-be litigants and courts. Under Regulation 17/62, national courts typically suspended proceedings where a party retrospectively notified its agreement to the Commission in the hope that it would receive an individual exemption. To some extent, the ECJ dealt with this issue in an important 1991 decision. Nevertheless, timely resolution before national courts was relatively uncommon before modernization.

- **Uncertainty concerning national law**—Even assuming that a national court found an infringement of Articles 81 or 82, there remained the separate issue of whether an applicant could seek damages under the Member State’s national law. Neither the EC Treaty nor Regulation 17/62 addressed this fundamental question. In **Courage**, the ECJ stated that:

  196 Case C-234/89, Stergios Delimitis v. Henniger Bräu AG, 1991 E.C.R. I-935 at ¶¶ 50–54. In this case the Court stated that a national court could proceed with its case and rule on the agreement at issue:

  - if the conditions for the application of Article 81(1) are clearly not satisfied and there is scarcely any risk of the Commission taking a different decision; or
  - if it is clear that the conditions for Article 81(1) are not satisfied and, having regard to any block exemption regulation and the Commission’s decisional practice, it is clear that the agreement would not meet the conditions of Article 81(3), and the agreement had not been notified or was not exempted from notification under Regulation 17/62 (at ¶¶ 50–51);
  - by staying proceedings or adopting interim measures pursuant to national rules and referring the matter to the Commission to consider whether to grant an individual exemption (at ¶ 52);
  - by staying proceedings to await the outcome of a pending decision by the Commission or seeking information from the Commission on the state of any procedure pending, on the Commission’s view as to the likelihood of it giving a ruling on the impugned agreement pursuant to Regulation 17/62 or to obtain economic and legal information to assist with the application of Articles 81(1) or 82;
  - by staying proceedings in order to make a reference to the ECJ for a preliminary ruling under Article 234 of the EC Treaty.

  197 Gilliam has noted, for example, that because Article 81(3) could not be applied by national courts, "the court or the authority in such a case cannot dismiss based on the competition rules, and has little other choice than to suspend proceedings pending a formal decision of the Commission. This results in extended suspension periods, which tend to penalise unfairly practices that qualify for exemption." Hans Gilliam, Modernisation: From Policy to Practice, 2003 Eur. L. Rev. 451, 454–55.
the practical effect of the prohibition laid down in Article 85(1) (now 81(1)) [and, by implication, Article 82] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition. . . . Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.\textsuperscript{198}

Although the national courts were required to apply Articles 81 and 82 in a manner consistent with EC law, the powers available to them to ensure compliance were set by national law.

- **Questions regarding the party that can allege an infringement**—Historically, it was unclear whether a party to a prohibited agreement could allege a breach of EC antitrust law, relying on Article 81(2) and then seeking relief before a national court. In \textit{Courage}, the ECJ confirmed that any person injured as a result of a breach of Article 81(1), even a party to the prohibited agreement, can plead EC antitrust law provided that the party was not “significantly responsible.”\textsuperscript{199}

- **Questions regarding jurisdiction**—Litigants faced difficulties in determining the most appropriate jurisdiction in which to initiate proceedings.\textsuperscript{200} For example, litigants sometimes needed to initiate proceedings in more than a single Member State to ensure an end to the infringing conduct. This could have significant cost and timing related consequences.

- **Questions regarding inconsistencies between national procedures**—Another legal issue that discouraged private enforcement was the varied procedural rules that applied among Member States. These rules were, and still are, the exclusive domain of each Member State. At this time there is still no active EC initiative to interface between EC antitrust law, tort


\textsuperscript{199} See id. ¶ 24. Separate from this, however, is whether the allegedly infringing contract nominated an arbitration clause. In that case it might be unclear whether the arbitrator could refer a question of law to the ECJ under Article 234 of the EC Treaty, given that that treaty provision refers to “any court or tribunal.” To get around this, it could first have required a referral to a national court. The national court, in turn, could refer the matter to the ECJ. See Case 102/81, Nordsee v. Reederei Mond, 1982 E.C.R. 1095 at ¶ 15.

and contract laws, restitution and civil court procedures. It is also possible that inconsistencies lead to forum shopping.

These legal uncertainties are by no means exhaustive. Prospective litigants also faced a number of additional practical issues that often discouraged private enforcement, such as:

- **Costs**—At least one advantage of lodging a complaint with the Commission (or with an NCA) rather than initiating a private claim is that the Commission bears the cost (and burden) of investigating the matter. This is in contrast to private enforcement, where a plaintiff bears its own costs, subject to adjustments that may apply under national law (e.g., depending on whether or not the claim is successful). The downside is that the Commission or NCAs will not award compensation to individuals.

- **Difficulties in obtaining evidence**—Private parties seeking to enforce the antitrust rules must rely principally on the discovery rules prescribed under the procedural rules of the relevant Member State. This is limiting in two respects: (1) the scope of the discovery order itself may be limited; and (2) no physical, unannounced investigation can be ordered to search for documents (i.e., there is no “dawn raid” equivalent). In addition, a plaintiff often cannot appreciate the strength or weakness of its case until it sees the evidence. This generally will not occur until the litigation process is well under way and potentially substantial legal costs will already have been incurred (on both sides).

Before modernization, private actions were not a panacea to substantially relieve the Commission of its enforcement burden. It remains to be seen whether the new decentralized system of enforcement will change this situation.

b. Private Enforcement of EC Antitrust Law Post-Regulation 1/2003

The Commission has made clear that it does not consider the devolution of responsibility for the enforcement of EC antitrust law to the
NCAs as a sufficient means of achieving decentralization, but instead hopes that Regulation 1/2003 will increase private enforcement of EC competition rules as well. Indeed, Commissioner Monti explained, “it is our aim that companies and individuals should increasingly feel encouraged to make use of private actions before national courts in order to defend the subjective rights conferred on them by the EC competition rules.”

Regulation 1/2003, however, did not address all of the uncertainties that faced private litigants before modernization. The most significant change introduced by Regulation 1/2003 that could lead to increased private enforcement is the direct application of Article 81(3) at the national level. In theory, this could eliminate the need for national courts to suspend proceedings, as they were apt to do following Delimitis. Whether Regulation 1/2003 will succeed in achieving this goal is uncertain. In particular, the national courts are still allowed to stay proceedings in order to seek the Commission’s views or to refer a question of law to the ECJ. In addition, the Commission and the NCAs are entitled to submit amicus curiae briefs and, with leave, to make oral observations before national courts. As a practical matter, whether national courts will be comfortable applying the legal and complex economic principles relevant to EC antitrust law remains to be seen.

A further change that modernization introduces, which may encourage more private enforcement, is the elimination of the system for notifying agreements discussed above. While individual exemptions were rarely given, the Commission routinely issued comfort letters. Although not binding on national courts (nor on the Commission as a technical matter), they were persuasive. Knowledge that an undertaking would be able to submit a comfort letter to the court probably had a discouraging effect on some would-be litigants.

205 See Monti, Workshop Speech, supra note 201.
206 See discussion supra notes 195 and 196.
207 Venit has referred to the elimination of the system of making notifications as “eliminating the procedural presumption of validity conferred by notifications.” See Venit, supra note 12, at 555. However, it could be reasonably suggested that not all national courts will have been in all cases sufficiently sophisticated to make the distinction between “procedural presumption” and “substantive presumption.”
208 Commissioner Monti has pointed to Article 2 of Regulation 1/2003, which clarifies the burdens of proof, as well as the opportunities for close cooperation between the Commission and the national courts, as key reasons why private enforcement is likely to be more prevalent in a post-modernization environment. See Monti, Workshop Speech, supra note 201. Notwithstanding, it is noteworthy that Regulation 1/2003 does not address the applicable evidentiary standard, while close cooperation between the Commission and the national courts has existed as a formal objective at least since the Commission adopted its 1993 National Cooperation Notice.
Concern has been expressed about the ongoing effectiveness of the Commission’s leniency regime under Regulation 1/2003. Although some NCAs have introduced their own leniency programs, not all have done so. In addition, some have questioned whether there is adequate protection for companies and individuals that apply to the Commission for leniency from prosecution for antitrust infringements that also cause anticompetitive effects in jurisdictions that do not offer a leniency program. This issue may be even more fundamental in respect of jurisdictions that prescribe criminal sanctions for violations of antitrust law.

The Commission’s Leniency Notice applies alongside Regulation 1/2003. Under the Leniency Notice, the Commission invites undertakings to voluntarily provide information in exchange for total or partial immunity from fines. The Leniency Notice applies to “secret cartels between two or more competitors aimed at fixing prices, production or sales quotas, sharing markets including bid-rigging or restricting imports or exports.” Accordingly, it applies to the most serious infringements of Article 81, namely to “hard-core” restrictions.

The Commission will grant immunity to an undertaking in the following two sets of circumstances:

(a) “the undertaking is the first to submit evidence which in the Commission’s view may enable it to adopt a decision to carry out an [inspection in the sense of Article 20(4) of Regulation 1/2003]” and “the Commission did not have, at the time of submission, sufficient evidence to adopt [such] a decision . . .,” or


210 For example, the UK, France, Germany, the Netherlands, Sweden, and Ireland. In addition, in Member States where individuals face possible criminal sanctions on individuals for breach of EC antitrust law, a leniency program may also be available to individuals. See Enterprise Act Guidance, The Cartel Offence: Guidance on the Issue of No-Action Letters for Individuals (Apr. 2003), available at http://www.of.t.gov.uk (United Kingdom).

211 Presently, leniency exists in all Member State jurisdictions where there are criminal sanctions for violations of antitrust laws.

212 See Leniency Notice, supra note 39, ¶ 1.
(b) “the undertaking is the first to submit evidence which in the Commission’s view may enable it to find an infringement of Article 81 EC,” while “the Commission did not have, at the time of submission, sufficient evidence to find [such] an infringement . . .” and “no undertaking had been granted . . . immunity” under (a).213

However, an undertaking that does not meet the conditions for immunity may still be eligible for a reduction in fines.214

The Commission’s use of leniency as a means by which to encourage undertakings that have infringed EC antitrust law to come forward and make known their anticompetitive agreements and to provide valuable information to the Commission has been approved by the ECJ215 as being consistent with fundamental rights.216 Leniency is also consistent with the principle of privilege against self-incrimination because an

213 See id. ¶¶ 8–11. In both cases the undertaking must: (a) cooperate fully, on a continuous basis and expeditiously throughout the Commission’s administrative procedure and must provide the Commission with all evidence that comes into its possession or is available to it relating to the suspected infringement; (b) end its involvement in the suspected infringement no later than the time at which it submits evidence; and (c) not have taken steps to coerce other undertakings to participate in the infringement.

214 See id. ¶¶ 20–23. In order to qualify, an undertaking must provide the Commission with evidence of the suspected infringement that represents significant added value with respect to the evidence already in the Commission’s possession and must terminate its involvement in the suspected infringement no later than the time at which it submits the evidence.

215 Case C-298/98 P, Metsä-Serla Sales Oy v. Commission, 2000 E.C.R. I-10157 at ¶¶ 56 & 57. In particular, the ECJ stated:

Article 15(2) of Regulation No. 17 does not lay down an exhaustive list of the criteria which the Commission must take into account when fixing the amount of the fine. The conduct of the undertaking during the administrative procedure may therefore be one of the factors to be taken into account when fixing the fine. Moreover, the Commission cannot be criticised for having adopted guidelines to direct the exercise of its discretion concerning the fixing of fines, and for thus better ensuring equal treatment of the undertakings concerned.

Id. (citations omitted).

The Court’s reasoning remains valid under Regulation 1/2003 because Article 23(2) of Regulation 1/2003 is identical in this respect to Article 15(2) of Regulation 17/62.

216 The Court stated:

Nor . . . can the complaint of infringement of the rights of defence be upheld. An undertaking which, when challenging the Commission’s stance, limits its cooperation to that which is required under Regulation No. 17 will not, on that ground, have an increased fine imposed on it. If the Commission considers that it has proved the existence of an infringement and that the infringement can be imputed to the undertaking, the undertaking will be fined in accordance with criteria which may be lawfully be taken into account and which are subject to review by the Court of First Instance or the Court of Justice.

undertaking is fully entitled to incriminate itself when exercising free will.\textsuperscript{217} The same is true of individuals.

The Commission has acknowledged that the Leniency Notice may create a legitimate expectation on which undertakings may rely when disclosing the existence of a cartel to the Commission.\textsuperscript{218} However, the Leniency Notice applies only to matters over which the Commission has or assumes jurisdiction. The difficulty, post modernization, is how the leniency programs offered by the various NCAs and the Commission, along with the leniency programs that are available to individuals, will be coordinated in practice and whether undertakings and individuals will be protected from prosecution in Member States that do not offer a leniency program.\textsuperscript{219}

Prior to May 1, 2004, the Commission did not transmit information received through an immunity application to the NCAs for the purpose of an investigation under national law unless it first obtained the consent of the leniency applicant.\textsuperscript{220} Bertus Van Barlingen has noted, however, that where the Commission handled a case itself, it was obliged to pass on information from the leniency applicant to the Member State in the course of the normal preparation of inspections and the decision fining the cartel.\textsuperscript{221} NCAs were subject to the obligations of professional secrecy set out by Article 20 of Regulation 17/62 and could not use the information received for the purposes of national law enforcement.\textsuperscript{222} This position remains the same under Regulation 1/2003.\textsuperscript{223}

\textsuperscript{217} Saunders, supra note 96. Similarly, legal professional privilege does not preclude an undertaking from giving the Commission information and documents that are otherwise protected lawyer-client communications, given that “the principle of confidentiality does not prevent a lawyer’s client from disclosing the written communications between them if it considers that it is in this interest to do so.” AM&S, 1982 E.C.R. at ¶ 28.

\textsuperscript{218} Leniency Notice ¶ 29.

\textsuperscript{219} See Van Barlingen, supra note 209 (addressing some of these issues at a practical level).

\textsuperscript{220} This practice continues under Regulation 1/2003. See Cooperation Notice ¶ 40. In the case of an international cartel, the applicant may decide to also apply for leniency with an antitrust authority that offers a leniency/immunity program (e.g., Australia, Canada, Japan, and the United States). The Commission could ask the applicant to provide a waiver so that the Commission can fully discuss the case with these authorities and share information. Such a waiver allows, in particular, coordination of simultaneous surprise inspections in various parts of the world.

\textsuperscript{221} Van Barlingen, supra note 209, at 20. The Cooperation Notice allows information provided as a result of a leniency program to be transferred to another authority with the permission of the leniency applicant, provided that the information is not used to impose sanctions on the applicant.

\textsuperscript{222} This would not preclude use of information for actions brought for infringements of the EC antitrust rules.

\textsuperscript{223} See Regulation 1/2003 art. 28.
The concern is that where an antitrust infringement can be prosecuted in a Member State with no equivalent leniency regime, or criminal sanctions can apply in a Member State against an individual involved in a cartel offense, the Commission’s leniency regime will be undermined if adequate protections are not put in place to preserve the protected position of the individual or undertaking. Van Barlingen has noted that, to date, there is not a single example of a case where the Commission has granted immunity to an undertaking while a Member State has prosecuted employees of that undertaking. Cartel cases have been dealt with by the Commission, or, where the effect was primarily limited to a single Member State (which is relatively rare in the case of cartels), by an NCA. However, this may be of little practical comfort to individuals who, and undertakings that, are the subject of an investigation by the Commission because the possibility of exposure under national law remains. Arguably, the risk has increased under Regulation 1/2003 because it may not be immediately clear which authority (or authorities) will assume jurisdiction over a given matter. A leniency application in such circumstances will require careful consideration by undertakings and individuals, along with their legal advisors.

There is the additional problem that, where it is not clear that the Commission will assume jurisdiction, one undertaking may apply for leniency in one affected Member State and another undertaking in another. It is unclear which undertaking would be protected in such a case (it could be both, one, or none). In practice, it will probably be that undertakings (and affected individuals) apply in all Member States where there is a leniency program.

As already noted, in relation to individuals, Article 12(3) of Regulation 1/2003 provides that information the Commission exchanges with Member States will be used in evidence to impose sanctions on natural persons only where:

(a) the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of Articles 81 and/or Article 82; or

225 Van Barlingen, supra note 209, at 20.
226 Id. at 21.
227 For example, it will require consideration of various strategic issues, including that qualification under a leniency program may require being the first-in to see the relevant antitrust authority.
(b) the information has been collected in a way that respects the same level of protection of the rights of defense of natural persons as provided for under the rules of the receiving authority.

This second condition is unlikely to be met in the case of an immunity application filed with the Commission on the basis of its voluntary and cooperative nature, which is different from the mandatory nature of investigations in criminal proceedings. In any case, it applies only to natural persons and not to undertakings. Therefore, any information from immunity applications that the Commission exchanges with Member States under Article 12 of Regulation 1/2003 should not be available as evidence by Member States to impose criminal sanctions on individuals. However, this does not preclude a Member State from taking action against an individual on the basis of national laws other than antitrust laws, provided that it does not use in evidence the information received through the ECN.228 This risk may jeopardize the attractiveness of leniency regimes both inside and outside the EU and, again, applications will require very careful coordination by undertakings and individuals that may have divergent interests. That said, it may be that this risk is more perceived than real but in any case, the Commission and the NCAs will need to publish guidelines to better explain the coordination of leniency applications. In an ideal world, leniency requirements and procedures would be harmonized throughout the EU and applicable in all Member States.

B. Ne bis in idem

A further issue that arises under Regulation 1/2003 is whether an undertaking can be prosecuted twice for the same conduct.229 This

228 The Cooperation Notice states that:
Save as provided under paragraph 41, information voluntarily submitted by a leniency applicant will only be transmitted to another member of the network pursuant to Article 12 with the consent of the applicant. Similarly, other information that has been obtained during or following an inspection or by means of or following any other fact-finding measures which, in each case, could not have been carried out except as a result of the leniency application will only be transmitted to another authority pursuant to Article 12 unless the applicant has consented to the transmission to that authority of information it has voluntarily submitted in its application for leniency. The network members will encourage leniency applicants to give such consent, in particular as regards disclosure to authorities in respect of which it would be open to the applicant to obtain lenient treatment. Once the leniency applicant has given consent to the transmission of information to another authority, that consent may not be withdrawn. This paragraph is without prejudice, however, to the responsibility of each applicant to file leniency applications to whichever authorities it may consider appropriate.

229 This issue is not novel; it also arose under Regulation 17/62.
involves consideration of the principle of *ne bis in idem*, as codified in the European Convention of Human Rights (ECHR)\(^\text{230}\) and the Charter of Fundamental Rights of the European Union (Charter of Fundamental Rights).\(^\text{231}\)

The issue arises in relation to prosecutions against individuals as well as undertakings, although in practice it is more likely to be an issue for undertakings in respect of levying fines. There are three situations in which the application of *ne bis in idem* is likely to arise: (1) where the Commission starts a second prosecution after an NCA has completed a first prosecution; (2) where several NCAs commence action for the same violation of Articles 81 or 82; or (3) where an NCA brings a second prosecution following a prosecution by a first NCA.

Article 50 of the Charter of Fundamental Rights specifies the right not to be tried or punished twice for the same offense “within the Union.”\(^\text{232}\) It may apply to bar the NCAs and the Commission from prosecuting an infringement of EC antitrust law where an NCA (or the Commission) has prosecuted that same conduct, regardless of the penalties that were imposed by the prosecuting NCA.

The application of the *ne bis in idem* principle will further encourage the Commission and the NCAs to use the coordination mechanisms envisaged by Regulation 1/2003 to ensure that the NCA considered “well placed” (as previously explained) is the one that is assigned responsibility for the case.\(^\text{233}\) It may also encourage the harmonization of national laws.

\(^{230}\) In particular:
1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case. ECHR art. 4 Protocol 7, available at http://www.echr.coe.int/Convention/webConvent ENG.pdf.

\(^{231}\) In particular: “No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.” Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1 art. 50 [hereinafter Charter of Fundamental Rights], available at http://europa.eu.int/comm/external_relations/human_rights/doc/charter364_01en.pdf.

\(^{232}\) Id. art. 50.

\(^{233}\) W.P.J. Wils, *The Principle of Ne Bis in Idem in EC Antitrust Enforcement: A Legal and Economic Analysis*, 26 World Competition No. 2 131, 146–47 (2003) (arguing that Article 50 CFR is likely to have the effect of inducing effective coordination between the
with regard to penalties imposed by NCAs,\textsuperscript{234} so as to ensure that penalties in all Member States are commensurate with the level set by the Commission and that all NCAs, when setting penalties, take into account the full effect of violations of Articles 81 or 82 throughout the EU and not just in their own territory.

The potential downside to the application of the \textit{ne bis in idem} principle is that it may increase the risks of pre-emptive prosecutions in that it may encourage an NCA to launch a prosecution earlier than it otherwise would have done. For example, bringing a prosecution early may increase the likelihood that it will have carriage of the investigation and, therefore, be able to collect fines in the event that the impugned agreement or conduct is determined to violate EC antitrust law. Additional motivations may include nationalistic or political reasons, such as in order to help protect an “important” national champion company from possibly facing higher fines in another jurisdiction or because the NCA wants to portray itself as a “trust buster.”

C. Privilege Against Self-incrimination

The scope of the privilege against self-incrimination\textsuperscript{235} is likely to require further clarification following modernization.\textsuperscript{236} Although Regulation 1/2003 appears consistent with the EC jurisprudence regarding the privilege against self-incrimination, in practice compatibility will depend on three factors: (1) clarification of the scope of the present law; (2) how investigations will be carried out by both the Commission and the NCAs (applying their own procedural laws); and (3) the use of information gathered through the ECN.

The lack of clarity in current law stems from an apparent conflict between the ECJ’s 1989 \textit{Orkem} decision and more recent decisions issued by the ECHR. In \textit{Orkem}, the ECJ held that an undertaking subject to an investigation relating to EC antitrust law could rely upon Article 6 of the European Convention of Human Rights.\textsuperscript{237} The ECJ held that the

\textsuperscript{234} For example, the Office of Fair Trading is likely to set the penalty levels at the same level as the Commission for both national and EC breaches, which represents a change from the present position in the UK.

\textsuperscript{235} For further detailed discussion on privilege against self-incrimination, see generally W.P.J. Wils \textit{Self-Incrimination in EC Antitrust Enforcement: A Legal and Economic Perspective}, 26 World Competition No. 4 567 (2003).

\textsuperscript{236} This issue also arose under Regulation 17/62.

\textsuperscript{237} \textit{Orkem, supra} note 93, at ¶ 30. At the time, there was no judgment of the European Court of Human Rights indicating that Article 6 guaranteed the right not to give evidence against oneself.
Commission "may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove." \(^{238}\)

In applying this test, the ECJ held that the Commission could use its mandatory powers of investigation to gather factual information about meetings or the subject matter of measures taken by the undertakings concerned. The Commission could also require the disclosure of documents in the undertaking’s possession, but could not require an undertaking to answer questions relating to the purpose or objectives of measures taken that would compel it to admit its participation in an infringement. \(^{239}\)

More recently, however, the European Court of Human Rights has held that the privilege against self-incrimination forms part of the notion of a fair procedure under the ECHR. \(^{240}\) The case law of the European Court of Human Rights allows the use of mandatory investigation powers to gather documents, but excludes the use in evidence of any answers obtained from the accused through compulsory questioning during a non-judicial investigation, including answers to purely factual questions. \(^{241}\) Thus, it is arguable whether the Commission can still ask factual

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\(^{238}\) Id. ¶ 35.

\(^{239}\) Id. ¶¶ 37–40. See also judgment in Case T-34/93, Société Générale v. Commission, 1995 E.C.R. II-547 at ¶¶ 75–76 (Ct. First Instance).


the right not to incriminate oneself cannot reasonably be confined to statements of admission of wrongdoing or to remarks which are directly incriminating. Testimony obtained under compulsion which appears on its face to be of a non-incriminating nature—such as exculpatory remarks or mere information on questions of fact—may later be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial or to otherwise undermine his credibility. Where the credibility of an accused must be assessed by a jury the use of such testimony may be especially harmful. It follows that what is of the essence in the context is the use to which evidence obtained under compulsion is put in the course of the criminal trial.

*Saunders*, supra note 95, ¶ 71.

\(^{241}\) In *Mannesmannrohren-Werke*, the CFI did not address this inconsistency and restated the law in *Orkem*, see *Mannesmannrohren-Werke*, supra note 97; *Orkem*, supra note 93. However, in a 2002 case the ECJ recognized in principle that it would have to take into account in its case law the developments in the case law of the European Court of Human Rights.
questions under *Orkem* in the context of investigations carried out under Regulation 1/2003.

Recital 37 of Regulation 1/2003 provides that “This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles.” However, the European Court of Human Rights may not grant the same scope of protection under the privilege against self-incrimination to legal persons in proceedings such as those that occur under Regulation 1/2003, to the extent that these proceedings will lead only to the imposition of fines on legal persons.

It also remains to be seen how privilege will be applied where information gathered by the Commission under Regulation 1/2003 (or by an NCA investigating a possible infringement of Articles 81 and/or 82) will be transmitted to a second enforcement body and then used to assist investigations in relation to criminal proceedings (even if it is not used in evidence in those proceedings). According to Wils, it is clear that “in those Member States whose national law allows the imposition of criminal sanctions on natural persons for violations of Articles 81 or 82 EC or for related offences, the stricter case law of the European Court of Human Rights is . . . applicable to the corresponding investigations by national competition authorities.”\(^{242}\) Indeed, the decentralized system that Regulation 1/2003 creates introduces an additional complication to this uncertainty. There is presently no harmonized rule agreed to by the Member States regarding the privilege against self-incrimination. In *Orkem*, the ECJ stated that:

> [I]n general, the laws of the Member States grant the right not to give evidence against oneself only to a natural person charged with an offence in criminal proceedings. A comparative analysis of national law does not therefore indicate the existence of such a principle, common to the laws of the Member states, which may be relied upon by legal persons in relation to infringements in the economic sphere, in particular infringements of competition law.\(^{243}\)

It can be expected that, in addition to challenges to the Commission’s interpretation of privilege, there will be similar types of challenges in respect of the national laws of the Member States.

\(^{242}\) Wils, *supra* note 209, at 577.

\(^{243}\) *Orkem*, *supra* note 93, at ¶ 29.
VII. CONCLUSION

Commissioner Monti has stated that the reforms introduced by the Modernization Package "aim at improving the effectiveness of our competition policy and at enhancing its real impact in opening and maintaining competitive markets."\(^{244}\) It is clear that the reforms introduced by Regulation 1/2003 are radical. The EC antitrust enforcement landscape has been significantly altered by the introduction of a decentralized system of enforcement of Articles 81 and 82, coupled with the elimination of the notification regime in favor of the principle of legal exception. The burden of enforcement should now, in theory, fall more evenly upon the NCAs, national courts (and private parties), and the Commission.

In practice, however, whether Regulation 1/2003 will successfully achieve the goals for which it has been adopted—namely, effective and efficient enforcement of EC antitrust law, simplified administration, uniform application of EC antitrust law throughout the EU, and reduced administrative costs for the Commission—will depend largely on its implementation and, in particular, the degree of cooperation between the various competition authorities and the national courts.

\(^{244}\) Monti, Fordham Speech, supra note 9.