

THE DEMISE OF EC REGULATION 17/62

On 1 January 2003 the long awaited new EC Regulation on the enforcement of the EC competition rules (Articles 81 and 82 EC Treaty) was published (Regulation 1/2003, OJ 2003 L1/1). The adoption of this Regulation, which will apply from 1 May 2004, marks a milestone in the history of the enforcement of EC competition rules. A complete reversal of enforcement policy has taken place. The centralized enforcement system set up by Regulation 17/62 (OJ Sp. Ed. 1962 No. 204/62 p87) in 25 articles has been replaced by a “directly applicable exception system” set out in 33 main articles in Regulation 1/2003.

For 40 years, the first Regulation implementing Articles 81 and 82, Regulation 17 has been in a class of its own. It has provided for a centralized scheme of enforcement of EC competition rules with the European Commission as the appropriate competition authority. The scheme was based on two fundamental characteristics. First, a system of notification of agreements containing actual or potential anti-competitive restrictions prohibited by Article 81(1) was introduced. Second, exclusivity was conferred on the European Commission to grant exemptions to such agreements where the conditions of Article 81(3) are satisfied. This system served not only the original common market of six Member States but also the internal market of 15 Member States. Such a centralized system placed an enormous investigative, administrative and quasi-judicial burden on the European Commission which would not have been able to cope with an enlarged market of a further 10 Member States.

However, the demise of Regulation 17 cannot be allowed to pass without comment. In spite of its procedural shortcomings, the provisions of the Regulation were interpreted widely by the European Court of Justice (ECJ) over a period of 40 years, so as to create an important set of procedural rules, many of which are now incorporated into Regulation 1/2003. These case-law developed rules, evolved from very basic provisions in Regulation 17/62, have provided a reasonable level of procedural protection to defendants and complainants when facing the European competition authority in its role as investigator, prosecutor and “first instance” judge. The new Regulation is concerned with ensuring effective enforcement as well as respect of fundamental rights of defence. It also decentralizes the enforcement of the EC competition rules by enabling national courts to be able to apply the whole of Article 81, including the granting of exemptions under Article 81(3), to agreements which contain provisions incompatible with Article 81(1). National competition authorities as well as national courts will be obliged to apply only the EC Competition rules to agreements falling within the meaning of Article 81(1). In order to create a level-playing field, national competition law will no longer be applicable to these cases.

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In a time when it is rare for a legislative measure to last more than a few years before it is reviewed, amended or replaced it is worth remembering that Regulation 17 survived so many years without substantial amendment. This was an incredible achievement and I hope we will not regret the demise of this extraordinary EC legislative measure.

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