Regulation 1/2003: An Assessment After Twenty Years

Wouter P.J. Wils*

paper written for the conference 20 Years of Regulation 1/2003
(Mannheim Centre for Competition and Innovation, 11 November 2022)
published in (2023) 46 World Competition 3-36
and accessible at http://ssrn.com/author=456087

Regulation 1/2003 brought about a radical change in the way in which the EU antitrust prohibitions contained in Articles 101 and 102 TFEU are enforced. The previous enforcement regime, under Regulation 17, which dated from 1962, was characterised by a centralised notification and authorisation system for Article 101(3) TFEU. Regulation 1/2003 abolished this system and replaced it by a system of ex post enforcement. The objectives of this reform were to allow the European Commission to become more active in the pursuit of serious infringements of Articles 101 and 102 TFEU, as well as to decentralise enforcement to the Member States’ competition authorities and to the national courts, while maintaining EU-wide consistency.

This paper provides an overview of the genesis of Regulation 1/2003, its objectives, and its main results, as apparent twenty years later. It finds that the decentralisation to the national competition authorities, cooperating with the European Commission and each other in the European Competition Network, has been a major success, beyond expectations. On the other hand, the prediction that the reform would lead to a significant increase in the number of prohibition decisions adopted by the European Commission has turned out to be too optimistic. Ten possible explanations for this lack of increase in the number of prohibition decisions are tentatively examined. Taking together the figures for the European Commission and the national competition authorities, however, there can be no doubt that Regulation 1/2003 has led to a spectacular increase in the enforcement of Articles 101 and 102 TFEU, and that Regulation 1/2003 has thus been a great success.

* Legal Advisor, Legal Service, European Commission; Visiting Professor, King’s College London; former Hearing Officer for competition proceedings, European Commission. I am grateful to Céline Gauer, Heike Schweitzer, Thomas Deisenhofer, Maria Jaspers, Fernando Castillo de la Torre, Lorenzo Ruocco and Sophia Stephanou for helpful comments on a draft. This paper builds on an earlier paper ‘Ten Years of Regulation 1/2003 – A Retrospective’ (2013) Journal of European Competition Law & Practice 293, also published in Concurrences, N° 4-2013, and in Neue Zeitschrift für Kartellrecht, N° 1-2014. All views expressed in this paper are strictly personal, and should not be construed as reflecting the opinion of the European Commission or any of the above mentioned persons. Comments are welcome at Wouter.Wils@ec.europa.eu.
# TABLE OF CONTENTS

I. INTRODUCTION ................................................................................................................................. 3

II. GENESIS .............................................................................................................................................. 4

   A. Modernisation Group......................................................................................................................... 4
   B. White Paper on Modernisation, legislative proposal and final compromise .................................... 5

III. OBJECTIVES ..................................................................................................................................... 7

   A. Intensified enforcement by the European Commission ................................................................. 8
   B. Decentralisation of enforcement, while maintaining EU-wide consistency .................................... 8

IV. RESULTS ............................................................................................................................................ 9

   A. National competition authorities and the European Competition Network .................................. 9
   B. National courts ................................................................................................................................. 12
   C. European Commission .................................................................................................................... 17

V. ANNEXES .......................................................................................................................................... 28

   A. Decisions adopted by the European Commission in the first 17 full years of application of Regulation 1/2003 ................................................................................................................... 28
   B. Decisions adopted by the European Commission in the last 17 years of application of Regulation 17 ................................................................................................................................. 32

Electronic copy available at: https://ssrn.com/abstract=4268365
I. INTRODUCTION

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

This paper provides an overview of the genesis of Regulation 1/2003, its objectives, and its main results, as apparent twenty years later.

Regulation 1/2003 was adopted by the Council of the European Union on 16 December 2002. It bears the number 1/2003 because it was the first regulation published in the Official Journal of the European Union in the year 2003, on 4 January 2003. According to its Article 45, it entered into force on the 20\(^{th}\) day following that publication, but it only applied from 1 May 2004.\(^3\) While today’s conference coincides closely with the twentieth anniversary of the adoption of Regulation 1/2003, there will thus only be twenty years of experience with the application of Regulation 1/2003 by the end of April 2024. On the other hand, much of the thinking behind Regulation 1/2003 goes back to already twenty five years ago. Indeed, as described below, the basic ideas underlying Regulation 1/2003 were already conceived inside the European Commission in 1997.\(^4\)

---


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

\(^4\) See text accompanying notes 5 to 7 below.
II. GENESIS

A. Modernisation Group

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

The starting point for the Modernisation Group's reflections was that the procedural rules for the application of Articles 101 and 102 TFEU had been laid down in 1962 in Regulation 17, which had never been reviewed since, whereas the EU had undergone substantial change, and would change further as a result of the planned accession of 10 Central and Eastern European countries, which would significantly increase the workload of the Commission's Directorate-General for Competition.

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


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

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

The European Commission adopted and published the White Paper on Modernisation in 1999.8 It advocated the ending of the notification and authorisation system, and its replacement by a system of ex post enforcement, allowing the Commission to refocus its action on combating the most serious competition infringements, and allowing an enhanced role for national competition authorities and national courts. It also proposed to strengthen the European Commission's investigatory powers.

The publication of the White Paper on Modernisation came as a complete surprise. Indeed, the work which the Modernisation Group had been doing over the two preceding years had been carefully kept secret, also inside the European Commission.9 The general view at the time, both inside and outside the European Commission, was that the Commission would never propose to replace Regulation 17, for fear of losing the substantial powers which it had been granted by the Council in 1962.10 While occasionally the notification system was criticised by some authors, nobody had made a sustained argument for its abolition.11

7 See further S. Norberg, as note 5 above.


9 See further S. Norberg, as note 5 above.


11 See for instance the at that time very influential paper by B.E. Hawk, 'System Failure: Vertical Restraints and EC Competition Law' (1995) 32 Common Market Law Review 973, which criticised the notification system at page 984, but did not include its abolition through a revision of Regulation 17 among the list of possible solutions at pages 986-988; see also the discussion of the notification system in the Commission's Green Paper on vertical restraints in EC competition policy, COM(96)721, and in
Once the initial surprise had subsided, however, the reactions to the White Paper were mostly (very) positive,\(^\text{12}\) though with one exception and one qualification.

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

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

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

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

\(^{12}\) See for instance B. Hawk, 'EU 'modernisation': a latter-day Reformation' (August/September 1999) Global Competition Review 12.


\(^{14}\) See White Paper, as note 8 above, footnote 48.


\(^{16}\) See also Judgment of 14 February 2012, Toshiba, C-17/10, EU:C:2012:72, paragraph 83.
practices affecting trade between Member States that are not prohibited under Article 101 TFEU, but it leaves Member States the freedom to apply on their territory national laws that are stricter than Article 102 TFEU in prohibiting unilateral conduct.\textsuperscript{17}

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

\section*{III. Objectives}

The White Paper on Modernisation,\textsuperscript{20} the explanatory memorandum of the legislative proposal,\textsuperscript{21} and the recitals of Regulation 1/2003 highlight two objectives: intensified enforcement by the European Commission, and decentralisation of enforcement to national authorities and national courts, while maintaining EU-wide consistency in the interpretation of Articles 101 and 102 TFEU.


\textsuperscript{19} [2004] OJ C101/43.

\textsuperscript{20} As note 8 above.

\textsuperscript{21} As note 15 above.
A. Intensified enforcement by the European Commission

The first objective was to allow the European Commission to become more active in the pursuit of serious infringements of Articles 101 and 102 TFEU.\(^{22}\)

At the time of the White Paper, the European Commission dealt every year with 150 to 200 notification cases through comfort letters.\(^{23}\) It thus spent substantial resources on cases of little or no value for the effective enforcement of Articles 101 and 102 TFEU. The abolition of the notification system would allow the Commission to redirect these resources to curbing the more serious infringements of Articles 101 and 102 TFEU.\(^{24}\) The White Paper predicted that thus “the number of individual prohibition decisions can be expected to increase substantially”.\(^{25}\)

This intensified enforcement by the European Commission was further helped by strengthening the Commission’s powers of investigation,\(^{26}\) and by encouraging the victims of antitrust infringement to approach the Commission as complainants, in particular by introducing a time limit of four months by the end of which the Commission would inform the complainant of the action it proposed to take on the complaint.\(^{27}\)

B. Decentralisation of enforcement, while maintaining EU-wide consistency

The second objective was to decentralise the application of Articles 101 and 102 TFEU more to the Member States’ competition authorities and to the national courts, making both the national competition authorities and the national courts play an enhanced role in the application of the EU antitrust rules.\(^{28}\)

To this effect, Regulation 1/2003 not only abolished the European Commission’s monopoly for applying Article 101(3) TFEU. It also obliged all Member States to designate national competition authorities empowered to apply Articles 101 and 102

---

22 White Paper, as note 8 above, paragraphs 10, 13 and 42.

23 White Paper, as note 8 above, paragraph 34.

24 Recital 3 of Regulation 1/2003.

25 White Paper, as note 8 above, paragraph 87.

26 White Paper, as note 8 above, paragraphs 109 to 116 and 124 to 126, and recitals 25, 26 and 29 and Articles 19 to 21 and 23(1) of Regulation 1/2003.

27 White Paper, as note 8 above, paragraph 120, and Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, [2004] OJ C 101/65.

28 White Paper, as note 8 above, paragraphs 46, 91 and 99, and recitals 6 and 7 of Regulation 1/2003.
TFEU, and obliged both national competition authorities and national courts to apply also Articles 101 and 102 TFEU whenever they apply national competition law to agreements or practices within the scope of Articles 101 and 102 TFEU.

At the same time, this decentralisation was not to lead to inconsistent application of EU antitrust law.

To this effect, the European Commission was to continue adopting block exemptions, and draw up more notices and guidelines to provide guidance on the application of Articles 101 and 102 TFEU. The European Competition Network was created, bringing together the European Commission and the national competition authorities to make them apply Articles 101 and 102 TFEU in close cooperation. Arrangements were also established for cooperation between the national courts and the European Commission.

IV. RESULTS

A. National competition authorities and the European Competition Network

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

From the start of the application of Regulation 1/2003 on 1 May 2004 until 31 December 2021, the national competition authorities have informed the European Commission and their fellow national competition authorities of 2515 investigations under Articles 101

________________________________________________________________________________________

29 Article 35(1) and Article 5 of Regulation 1/2003.

30 Article 3 of Regulation 1/2003 and text accompanied by notes 15 to 17 above.

31 White Paper, as note 8 above, paragraphs 42, 47 and 83, and recitals 17 and 21 of Regulation 1/2003.

32 White Paper, as note 8 above, paragraphs 84 to 86.


34 Recital 21 and Article 15 of Regulation 1/2003, and Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, [2004] OJ C 101/54.
and 102 TFEU, and of envisaged final decisions ordering termination of infringements, imposing fines or accepting commitments in 1336 cases.\footnote{I have taken these statistics from the European Commission’s website \url{https://competition-policy.ec.europa.eu/european-competition-network/statistics_en}.}

During the same period, the European Commission informed the Network of 429 investigations of its own, and 137 draft final decisions.\footnote{According to the same statistics, as note 35 above.}

The national competition authorities have thus in quantitative terms become the primary public enforcers of Articles 101 and 102 TFEU, adopting 90\% of all decisions. Given that under Regulation 17 the number of cases in which the national competition authorities applied Articles 101 and 102 TFEU was negligible, this means that the overall number of decisions ordering termination of infringements of Articles 101 or 102 TFEU, imposing fines or accepting commitments has increased very substantially.

The list below shows per Member State, and in descending order, the number of envisaged final decisions submitted by the national competition authorities under Article 11(4) of Regulation 1/2003 in the period from 1 May 2004 to 31 December 2021, as well as the number of draft final decisions submitted by the European Commission in the same period:\footnote{According to the same statistics, as note 35 above.}

<table>
<thead>
<tr>
<th>Member State</th>
<th>National Authorities</th>
<th>European Commission</th>
</tr>
</thead>
<tbody>
<tr>
<td>Italy</td>
<td>178</td>
<td></td>
</tr>
<tr>
<td>France</td>
<td>173</td>
<td></td>
</tr>
<tr>
<td>Spain</td>
<td>140</td>
<td></td>
</tr>
<tr>
<td>Commission</td>
<td>137</td>
<td></td>
</tr>
<tr>
<td>Germany</td>
<td>128</td>
<td></td>
</tr>
<tr>
<td>Romania</td>
<td>67</td>
<td>(since EU accession on 1 January 2007)</td>
</tr>
<tr>
<td>Denmark</td>
<td>66</td>
<td></td>
</tr>
<tr>
<td>Greece</td>
<td>61</td>
<td></td>
</tr>
<tr>
<td>Netherlands</td>
<td>61</td>
<td></td>
</tr>
<tr>
<td>Hungary</td>
<td>54</td>
<td></td>
</tr>
<tr>
<td>UK</td>
<td>49</td>
<td>(until 31 December 2020)</td>
</tr>
<tr>
<td>Austria</td>
<td>47</td>
<td></td>
</tr>
<tr>
<td>Portugal</td>
<td>46</td>
<td></td>
</tr>
<tr>
<td>Slovakia</td>
<td>33</td>
<td></td>
</tr>
<tr>
<td>Slovenia</td>
<td>31</td>
<td></td>
</tr>
<tr>
<td>Sweden</td>
<td>28</td>
<td></td>
</tr>
<tr>
<td>Czechia</td>
<td>27</td>
<td></td>
</tr>
<tr>
<td>Belgium</td>
<td>26</td>
<td></td>
</tr>
<tr>
<td>Poland</td>
<td>25</td>
<td></td>
</tr>
<tr>
<td>Finland</td>
<td>22</td>
<td></td>
</tr>
<tr>
<td>Lithuania</td>
<td>20</td>
<td></td>
</tr>
</tbody>
</table>
Cyprus 13
Bulgaria 8  (since EU accession on 1 January 2007)
Latvia 8
Luxembourg 8
Ireland 5
Croatia 4  (since EU accession on 1 July 2013)
Estonia 4
Malta 4

This list makes visible that the national competition authorities with the largest output each adopt as many or indeed more decisions than the European Commission. It also shows that generally the competition authorities of the larger Member States adopt the highest number of decisions, with the notable exceptions of Poland and the United Kingdom (which remained bound by Regulation 1/2003 until 31 December 2020, the end of the transition period of its withdrawal from the EU).38

The differences between Member States also show the potential for further increase, as national competition authorities increase their output over time.39

The functioning of the European Competition Network has also been a clear success. Work sharing between the different competition authorities has generally been unproblematic, and the cooperation and coordination mechanisms provided for in Regulation 1/2003 have generally worked well. The application of Regulation 1/2003 has also given rise to a significant degree of voluntary convergence of Member States’ laws as to the procedures and sanctioning powers of national competition authorities, supported by the policy work in the European Competition Network.40

---

38 The UK government has recognised the low number of decisions as a problem: see Department for Business Innovation & Skills (BIS), A Competition Regime for Growth: A Consultation on Options for Reform (March 2011), paragraph 5.6.

39 Indeed, the European Competition Network, with its statistics, creates a basis of comparison which may lead Member States and national competition authorities that perform relatively less well to take measures so as to increase their output; see BIS, as note 39 above.

This process of convergence has been accelerated through Directive (EU) 2019/1, often referred to as the ‘ECN + Directive’.41 This Directive, adopted by the European Parliament and the Council at the end of 2018, sets out certain rules to ensure that national competition authorities have the necessary guarantees of independence, resources, and enforcement and fining powers to be able to effectively apply Articles 101 and 102 TFEU.42 It harmonises to a large extent the investigation, decision and fining powers of the national competition authorities, broadly along the lines of the European Commission’s powers under Regulation 1/2003.43 It also contains further provisions on mutual assistance between the national competition authorities and on the functioning of the European Competition Network, adding to the provisions contained in Regulation 1/2003.44 Member States were required to adapt their national laws to conform to this Directive by 4 February 2021.45

B. National courts

Three different roles of national courts should be distinguished:46

First, in some Member States the national competition authority does not adopt decisions finding infringements of Articles 101 or 102 TFEU and imposing fines, but rather brings

---

41 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, [2019] OJ L11/3 (‘ECN + Directive’).

42 Article 1(1) of Directive 2019/1, as note 41 above.

43 Articles 6 to 23 of Directive 2019/1, as note 41 above.

44 Articles 24 to 28 and Articles 10(2), 11(1), last sentence, and 33 of Directive 2019/1, as note 41 above.

45 Article 34 of Directive 2019/1, as note 41 above.

46 See Commission Notice on co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, [2004] OJ C101/4, paragraph 2; Staff Working Paper, as note 17 above, paragraph 269; and Decision-Making Powers Report, as note 40 above, section 2.3.
the case before a national court that acts as first-instance decision-maker. When thus adopting decisions finding infringements of Articles 101 or 102 TFEU and/or imposing fines, these national courts act as national competition authorities, and their decisions are included in the above statistics of national competition authorities’ decisions.

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

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

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

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

As to the use of Article 101 TFEU as a sword, in actions for injunctive relief or for damages brought in national courts by victims of anti-competitive agreements, the

---


48 See Article 35 of Regulation 1/2003, and Principles of European Antitrust Enforcement, as note 1 above, section 1.2.10.

49 See text accompanying notes 35 to 37 above.

50 As note 8 above, at paragraphs 99-100.

51 See further The Modernisation of the Enforcement of Articles 81 and 82 EC: A Legal and Economic Analysis of the Commission's Proposal for a New Council Regulation Replacing Regulation No 17, as note 6 above, at 352-353 and Principles of European Antitrust Enforcement, as note 1 above, section 1.1.4.1.
abolition of the European Commission's exclusive competence to apply Article 101(3) TFEU also has a beneficial effect in that it is no longer possible, in particular in cases where injunctive relief is sought, for defendants to delay the national court procedure by notifying the agreement to the European Commission.

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

Independently from Regulation 1/2003, the European Commission published in 2005 a Green Paper on Damages actions for breach of the EU antitrust rules, in which it put up for discussion measures to encourage private actions for damages as an instrument for deterrence, inspired by the US conception of private antitrust enforcement. The reactions to this Green Paper were mostly negative, and this led to a change of orientation: The Commission published in 2008 a White Paper on Damages actions for breach of EU antitrust rules, which focused no longer on deterrence and private enforcement, but rather on the right of victims to obtain compensation for damage suffered as a result of antitrust infringements.


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


56 Indeed, the 2008 White Paper states, at page 3, that its "primary objective […] is to improve the legal conditions for victims to exercise their right under the Treaty to reparation of all damage suffered as a result of a breach of the EC antitrust rules. Full compensation is, therefore, the first and foremost
In line with the 2008 White Paper, and following the European Commission’s 2013 legislative proposal, the European Parliament and Council adopted Directive 2014/104/EU in November 2014. This Directive sets out certain rules to ensure the effective exercise by victims of antitrust infringements of their right to full compensation from the antitrust infringers for the harm suffered. It also contains some provisions to safeguard public enforcement, and in particular the use of leniency in public enforcement by protecting leniency and settlement submissions from disclosure and use in actions for damages and by limiting the joint and several liability of immunity recipients to their own direct and indirect customers and providers. Member States were required to adapt their national laws to conform to this Directive by 27 December 2016.


59 Article 1(1) of Directive 2014/14/EU, as note 58 above.


61 Recitals 26, 27 and 38 and Articles 1(2), 6(6), 7(1) and 11(4) and (5) of Directive 2014/14/EU, as note 58 above.

62 Article 21 of Directive 2014/14/EU, as note 58 above.
The principal intended and likely effect of Directive 2014/104 on the practice of private enforcement is an increase in the number of (purely compensatory) follow-on actions for damages. Significant change as to the frequency of stand-alone actions for damages was not intended by the legislator and is most unlikely to result from the Directive.63

To some extent the intended effect of Directive 2014/104 appears to have already materialised before the Directive became applicable on 27 December 2016. Indeed, it appears that already since 2005 there has been in several EU Member States a marked increase in the number of follow-on actions for damages.64 In part this increase may be the result of increased awareness as a result of (the discussions surrounding) the European Commission’s 2005 Green Paper, 2008 White Paper and 2013 legislative proposal.65

Indeed already in the last years before Directive 2014/104/EU became applicable, in Germany, the Netherlands and the UK, practically every infringement decision of the European Commission or of the national competition authority appears to have triggered follow-on actions for damages.66 The Directive has helped spreading this development to other EU Member States.67

In particular the European Commission’s decision in the Trucks cartel case68 appears to have given rise to follow-on actions for damages in many Member States, resulting also

---

63 See P. Van Nuffel, as note 58 above, at 239, and R. Roth, as note 58 above, at 52; see also text accompanied by notes 52 to 56 above. The text of the Directive does not however not distinguish between follow-on and stand-alone actions for damages and applies to both; see Opinion of Advocate-General Pitruzzella of 8 September 2022, Repsol Comercial de Productos Petroliferos, C-25/21, EU:C:2022:659, paragraph 44.


65 See text accompanied by notes 52 to 57 above. In part the increase may also be a consequence of legislative initiatives at the national level, some of which may have reflected competition between jurisdictions to attract legal business; see C.-D. Ehlermann, ‘Foreword’, in A.P. Komninos, EC Private Antitrust Enforcement – Decentralised Application of EC Competition Law by National Courts (Hart Publishing, 2008), at x.

66 See P.C. Müller-Graf, General Report - Private enforcement of EU competition law, XXVII FIDE Congress (Budapest, 18-21 May 2016), at 94.


in requests for preliminary rulings by the EU Court of Justice originating in several Member States.69

C. European Commission

The impact of Regulation 1/2003 on the activity of the European Commission has in many respects been as expected.

The European Commission has made good use of the increased investigatory and sanctioning powers which it obtained through Regulation 1/2003, such as the increased possibility to ask oral questions during inspections, the possibility to put seals,70 the possibility to inspect private homes, the increased penalties for obstruction of investigations,71 and the higher level of periodic penalty payments for non-compliance with decisions.72

The European Commission has also made use of the increased scope for prioritising its action.73 It has published a list of general prioritisation criteria in its Annual Report on Competition Policy 2005.74

As to the number of decisions adopted by the European Commission, the White Paper on Modernisation had predicted that, following the abolition of the notification system, "the number of individual prohibition decisions can be expected to increase substantially".75

---

69 See, among other, Judgments of 29 July 2019, Tibor-Trans, C-451/18, EU:C:2019:635 (reference from a Hungarian court), of 6 October 2021, Sumal, C-882/19, EU:C:2021:800 (reference from a Spanish court) and of 1 August 2022, Daimler, C-588/20, EU:C:202:607 (reference from a German court).


A look at the figures shows that this prediction has been too optimistic.

Annex A below counts, for the years 2005 to 2021 (the 17 full years of application of Regulation 1/2003 for which figures are available at the time of writing), the decisions adopted by the European Commission. The first four columns concern prohibition decisions *stricto sensu*, that is decisions finding an infringement of Articles 101 or 102 TFEU, ordering its termination and/or imposing fines (Articles 7 and 23(2) of Regulation 1/2003). These are grouped in four categories: decisions concerning cartels adopted following the normal (non-settlement) procedure, decisions concerning cartels adopted following the settlement procedure, decisions concerning non-cartel infringements following the normal procedure (without cooperation), and decisions concerning non-cartel infringements in cases in which the companies investigated admitted the infringement and agreed to follow a streamlined procedure (with cooperation). The fifth column lists decisions pursuant to Article 9 of Regulation 1/2003, through which the European Commission makes binding commitments offered by the companies under investigation in lieu of a prohibition decision (commitment decisions).

Annex B below similarly counts, for the 17 last years of application of Regulation 17, that is 1988 to 2004, the prohibition decisions adopted by the European Commission.

---

75 White Paper, as note 8 above, paragraph 87, and text accompanied by notes 22 to 27 above.

76 Article 2(14) of the Directive 2014/104/EU defines "cartel" as "an agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition through practices such as, but not limited to, the fixing or coordination of purchase or selling prices or other trading conditions, including in relation to intellectual property rights, the allocation of production or sales quota, the sharing of markets and customers, including bid-rigging, restrictions of imports or exports or anti-competitive actions against other competitors".


80 Even if Regulation 1/2003 entered into application on 1 May 2004, it appears appropriate to consider the entire year 2004 as representative of the decisional output under Regulation 17 rather than under...
The first column lists the prohibition decisions concerning cartels, and the second column those concerning non-cartel antitrust infringements. No distinction is made according to whether the cartel settlement procedure was followed or whether cooperation took place, given that the cartel cooperation procedure was only introduced in 2008, and the practice of cooperation in non-cartel antitrust proceedings only started in 2016. The third column lists the negative clearance and exemption decisions in notification cases (formal decisions, as opposed to comfort letters). The decisions marked with an asterisk are decisions containing commitments offered by the notifying companies, which makes these decisions comparable to commitment decisions under Article 9 of Regulation 1/2003.

To avoid double counting, re-adoptions of decisions annulled on procedural grounds by the EU Courts are not included in the statistics. Also to avoid double counting, when a single investigation is closed through the adoption of more than one decision (for instance, because some parties to a cartel investigation opt for the settlement procedure, whereas a normal non-settlement decision is adopted for the other parties, or because for one half of the investigation a settlement or commitment outcome is reached early, whereas the other half of the investigation is closed through a later prohibition or commitment decision), such multiple decisions are only counted as one. This explains, for instance, in the row for the year 2021 in Annex A, that the Canned vegetables and Forex cartel non-settlement decisions are counted as half decisions, because a first settlement decision in each of these cases was already adopted in 2019. Similarly, the cartel settlement decision in Ethanol benchmarks is counted as a half decision, because it only closed the investigation with respect to one of the three suspected cartel parties, the proceedings still being ongoing in relation to the two other parties. Similarly, in the rows for the years 2010, 2014 and 2021, the three commitment decisions in the Visa MIF case are each counted as one third of a decision, because the three decisions concern parts of a single investigation.

Adding up the figures in Annex A, it appears that, in the 17 full years of application of Regulation 1/2003, the European Commission adopted 121 and a half prohibition decisions stricito sensu, that is on average 7 decisions per year. Adding up the figures in Annex B, it appears that in the last 17 years of application of Regulation 17, 130...
prohibition decisions were adopted, that is on average seven and a half per year. Instead of a “significant increase”, there has thus in fact been a slight decrease in the number of prohibition decisions.

It may be fair to add to the 121 and a half prohibition decisions the 42 commitment decisions adopted in the 2005 - 2021 period, but then a fair comparison would require also to take into account the 47 negative clearance or exemption decisions with commitments in the 1988 – 2004 period. Adding the commitment decisions does thus not alter the finding of a slight decrease in enforcement output.

The table below takes a closer look at the last five full years for which figures are available at the time of writing, 2017 to 2021, in comparison with an equal five-year period twenty years earlier, 1997 to 2001.85

<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>5 + ½ cartel non-settlement decisions</td>
<td>18 cartel decisions</td>
</tr>
<tr>
<td>12 + ½ cartel settlement decisions</td>
<td></td>
</tr>
<tr>
<td>= 18 cartel decisions</td>
<td>18 cartel decisions</td>
</tr>
<tr>
<td>9 + ½ non-cartel prohibition decisions without cooperation</td>
<td>22 non-cartel prohibition decisions</td>
</tr>
<tr>
<td>11 + ½ non-cartel prohibition decisions with cooperation</td>
<td>= 40 prohibition decisions</td>
</tr>
<tr>
<td>= 21 non-cartel prohibition decisions</td>
<td>35 negative clearance and exemption decisions</td>
</tr>
<tr>
<td>= 39 prohibition decisions</td>
<td>of which 11 decisions with commitments</td>
</tr>
<tr>
<td>7 commitment decisions</td>
<td></td>
</tr>
</tbody>
</table>

Like for the entire 17-year periods in Annexes A and B, the table above shows a slight decrease in the number of prohibition decisions compared with the European Commission’s enforcement output under Regulation 17 twenty years earlier. Adding commitment decisions to the comparison again does not alter this conclusion.

We are thus presented with a real puzzle: Why is it that the abolition of the notification system, which was meant to free up resources and allow the European Commission to

85 All figures are taken from those in Annexes A and B. The figure for the commitment decisions in the 2017 -2021 period was rounded up from six plus a half and a third to seven decisions.
adopt a significantly higher number of prohibition decisions, has in fact resulted in a slightly lower number of prohibition decisions?

As mentioned above, under Regulation 17, the Commission dealt every year with 150 to 200 notification cases through comfort letters. In addition, a number of notification cases where dealt with through formal negative clearance and exemption decisions without commitments. It appears from the table just above that there were 24 such decisions in the five-year period 1997 - 2001, which is almost five per year. The resource savings from no longer dealing with all these notifications must have been significant indeed.

In addition, many cases may in fact require fewer resources to deal with today than twenty years ago, because of the use of leniency and of settlement and cooperation procedures. The European Commission already started operating a leniency programme for cartels in 1996, but the use of leniency in cartel enforcement became generalised only after a few years. In the table above comparing the enforcement in the five-year period 2017 – 2021 under Regulation 1/2003 with the five-year period 1997 – 2001 under Regulation 17, the number of cartel decisions equals 18 for both periods. All the 18 cartel decisions in the 2017 – 2021 period benefited from the full use of leniency, whereas only some of those in the 1997 – 2001 period benefited from leniency. Moreover, as indicated in the table above, two thirds of the cartel decisions in the 2017 – 2021 period additionally benefited from the use of the cartel settlement procedure. Among the 21 non-cartel prohibition decisions in the 2017 – 2021 period (one fewer than during the 1997 – 2001 period), more than half similarly benefited from cooperation by the companies under investigation. Cases benefiting from leniency, settlement and/or cooperation require fewer resources to handle than fully contested cases.

---

86 Text accompanied by note 23 above.

87 The equivalent of such decisions under Regulation 1/2003 would be non-infringement decisions (finding of inapplicability) pursuant to Article 10 of Regulation 1/2003, but not a single such decision has been adopted since the entry into application of Regulation 1/2003; see R. Whish, ‘Reflections on Regulation 1/2003, declarations of inapplicability and informal guidance’, Concurrences N° 2-2022, 2.


91 As note 88 above.
I do not have the answer to this puzzle, which undoubtedly merits further research. Below are some initial, in part speculative, thoughts about possible explanations.

A first possible explanation is that the European Commission’s resources dedicated to the enforcement of Articles 101 and 102 TFEU would have gone down. This is not what happened, however. Resources have gone up rather than down.92

A second possible explanation for the lack of increase in the number of prohibition decisions is that, instead of spending its newly freed resources on more enforcement, the European Commission would have continued spending those resources on providing informal guidance to businesses, continuing the old practice of comfort letters under another guise. While confirming that the European Commission could still provide informal guidance, recital 38 of Regulation 1/2003 limited this possibility to cases giving rise to genuine uncertainty because they present novel or unresolved questions for the application of Articles 101 and 102 TFEU. This strict approach was also followed in the initial Informal Guidance Notice published in 2004.93 While the European Commission has provided informal guidance in a few cases,94 though not under the Informal Guidance Notice, and has recently revised its Informal Guidance Notice, broadening the definition of “novel (or unresolved)” issues,95 this activity has remained very limited and can thus not explain the lack of increase in the number of prohibition decisions.96

A third possible explanation for the lack of increase in the number of prohibition decisions is that the European Commission may spend a substantial amount of resources on its coordination tasks under Regulation 1/2003, monitoring the enforcement of

92 Within the European Commission, the staff dedicated to the enforcement of Articles 101 and 102 TFEU are in the Directorate-General for Competition (which also deals with merger and state aid control) and in the Competition Team of the Legal Service. Compared with 20 years ago, the number of lawyers in this Competition Team (which also deals with merger control) has roughly doubled; see also text accompanied by notes 107 and 109 below. The number of staff in the Directorate-General for Competition dealing with the enforcement of Articles 101 and 102 TFEU appears to have followed a similar evolution.

93 Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters), [2004] OJ C101/78.

94 In the context of the Coronavirus outbreak, the European Commission has issued two comfort letters; see https://competition-policy.ec.europa.eu/antitrust/coronavirus_en. In the Car Emissions case, the European Commission also provided, in the margin of a cartel prohibition decision, the car producers concerned with guidance on aspects of their cooperation that raised no competition concerns; see Press release IP/21/3581 of 8 July 2021.


96 As already mentioned in note 87 above, the European Commission has not adopted any formal non-infringement decisions (finding of inapplicability) pursuant to Article 10 of Regulation 1/2003 either; see R. Whish, ‘Reflections on Regulation 1/2003, declarations of inapplicability and informal guidance’, Concurrences N° 2-2022, 2.
Articles 101 and 102 TFEU by the national competition authorities and the national courts. In its Report on the functioning of Regulation 1/2003, the European Commission indicated that its Directorate-General for Competition had developed a practice of submitting (oral or written) observations to the national competition authorities in many cases.97

A fourth possible explanation is that, as a result of increased prioritisation, the European Commission may deal to a larger extent with cases that are inherently more complex and thus consume more resources.98

A fifth possible explanation is that, due to the so-called ‘more economic approach’,99 more resources are needed to produce economic evidence to show consumer harm, or to deal with claims of absence of consumer harm. The so-called ‘more economic approach’ was initiated by the European Commission itself.100 The emblematic example is the 2009 Intel decision, in which the European Commission included a 150-pages long ‘as efficient competitor analysis’ not required by the case-law of the EU Courts.101 To some extent, the so-called ‘more economic approach’ has since been adopted by the EU Court of Justice, and hence become part of the binding interpretation in particular of Article 102 TFEU.102 The so-called ‘more economic approach’ does however not affect all types of antitrust cases. In particular cartel cases have remained unaffected by this approach.


98 See text accompanied by notes 73 and 74 above. The activity of prioritisation also in itself consumes resources; see my paper ‘Discretion and Prioritisation in Public Antitrust Enforcement, in Particular EU Antitrust Enforcement’ (2011) 34 World Competition 353, also accessible at http://ssrn.com/author=456078.


100 As note 99 above.


A sixth possible explanation for the lack of increase in the number of prohibition decisions is an increase in the intensity of judicial review by the EU Courts, requiring the European Commission to spend more care on handling its cases and to strengthen the reasoning of its decisions, as well as making the European Commission spend resources on readopting annulled decisions.

A seventh possible explanation, closely related to the intensification of judicial review, is that the European Commission has increased the levels of internal quality control. Indeed, in 2003, the European Commission created the office of the Chief Economist inside the Directorate-General for Competition, and introduced the practice of peer review panels in Article 102 TFEU cases and in some non-cartel Article 101 TFEU cases. An important quality control function is also performed by the European Commission's Legal Service. While the Legal Service has always existed, its role appears to have expanded in practice, as reflected by the doubling in size of its Competition Team in the past twenty years. Obviously, increased quality control entails increased use of resources.

Apart from being costly, systematic and extensive quality control also risks having a


104 See my paper ‘Readoption by the European Commission of cartel decisions annulled on procedural grounds by the EU Courts’, Concurrences N° 3-2021, 63, also accessible at http://ssrn.com/author=456087.


deresponsibilizing effect on the primary case handlers, thus perversely lowering quality. It also risks increasing the duration of investigations, which, as explained below, may in turn have a further negative effect on the number of decisions.

An eighth possible explanation for the lack of increase in the number of prohibition decisions might be a failure to detect more infringements. The White Paper on Modernisation had pointed out that, in order to detect the infringements that would be the object of the additional infringement decisions, the European Commission would have to make more use of sector inquiries and of complaints. The lodging of complaints by victims of antitrust infringements was to be encouraged in particular by introducing a time limit of four months by the end of which the Commission would inform the complainant of the action it proposed to take on the complaint.

The European Commission has indeed conducted more sector inquiries under Regulation 1/2003 than previously under Regulation 17. In particular the inquiries in the energy sector and in the pharmaceutical sector have also been followed by a series of prohibition or commitment decisions in those sectors.

As to the encouragement of complaints through the four-month time limit, a recent study by Ben Van Rompuy has found that, during the twelve year period 2009 – 2020, the median time period until the sending of a pre-rejection letter for those complaints that were formally rejected for lack of Union interest was more than one and a half years, far above the target of four months.

Still in relation to complaints, it has been argued that the obligation for the European Commission to reject non-priority complaints through a formal decision, preceded by a pre-rejection letter, is a source of inefficiency that consumes substantial resources. While it is undoubtedly true that the formal rejection of non-priority complaints requires a non-insignificant amount of resources, this can however not help explain the lack of

---

110 Text accompanied by notes 118 to 123 below.

111 White Paper on Modernisation, as note 8 above, paragraphs 115 and 118.

112 White Paper on Modernisation, as note 8 above, paragraph 120, and Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, [2004] OJ C 101/65.

113 See Annex A below.

114 B. Van Rompuy, ‘The European Commission’s Handling of Non-priority Antitrust Complaints: An Empirical Assessment’ (2022) 45 World Competition 265 at 289. See also Case T-771/21, Bategu Cummitechv European Commission, currently pending before the EU General Court, in which a complainant seeks damages inter alia on the ground that it took the European Commission approximately four years to inform the complainant that it did not intend to act upon the complaint.

115 See in particular Directorate-General for Competition, Ex-post evaluation of key procedural aspects of Regulation (EC) no. 1/2003 access to file and complaint - Final report (Publication office of the European Union 2016) at 111.
increase in the number of prohibition decisions. Indeed, the obligation to reject non-priority complaints through a formal decision, preceded by a pre-rejection letter, already existed under Regulation 17, and the number of formal decisions rejecting complaints has decreased rather than increased.

A ninth possible explanation for the lack of increase in the number of prohibition decisions is a loss of expertise due to increased staff turnover. Two types of expertise are relevant for the enforcement of Articles 101 and 102 TFEU: *primo* knowledge of the relevant markets, products, industry structures and business practices; and *secondo* practical mastery of the legal instruments and procedures, for instance how to conduct inspections effectively, how to formulate requests for information that elicit useful information without overburdening the file with superfluous information, or how to draft statements of objections.

As already mentioned, sector inquiries are one of the ways for the European Commission to obtain knowledge about markets and business practices. For the knowledge thus gained subsequently to be fully used, the same staff dealing with the sector inquiry should subsequently deal with the antitrust investigations in the same sector. Similarly, knowledge about markets can also be obtained through merger control. The effective transfer of knowledge gained through merger control does however require that the same staff who have dealt with merger cases in a certain sector subsequently deal with antitrust enforcement in that sector. Also for the second type of expertise (the practical mastery of legal instruments and procedures), staff retention is obviously a very important factor.

Finally, a tenth possible explanation is related to the long duration of antitrust investigations.

It appears very difficult to assemble statistics on the duration of the European Commission’s antitrust investigations, because the date on which the European Commission received the first information about the infringement (through a complaint, informant, leniency application, or otherwise) is in most cases not made public. Decisions typically mention the date on which the European Commission formally initiated proceedings, but this information is of little use, as the initiation of proceedings happens after a more or less extended period of preliminary investigation (or inaction).

---

116 See White Paper on Modernisation, as note 8 above, paragraph 121.

117 According to paragraph 121 of the White Paper on Modernisation, as note 8 above, under Regulation 17, formal decisions rejecting complaints were more numerous than other formal decisions, and, according to the statistics in Annex B of the present paper, there were on average fourteen and a half other formal decisions per year in the 1988 – 2004 period. There must thus have been at least 15 formal decisions rejecting complaints per year under Regulation 17. According to the study by Ben Van Rompuy, as note 114 above, at 279 and 280, there were eighty-six formal rejection decisions in the 2009-2020 period, that is around seven per year, and 164 pre-rejection letters, that is 14 per year.

118 See already text accompanied by note 110 above.

remains unknown whether or not the European Commission’s antitrust investigations are slower today than they were twenty years ago.

What appears more clearly, is that complaints about the slowness of the European Commission’s antitrust investigations have increased. This has, for instance, become a recurrent theme in the European Parliament’s annual resolution on competition policy in response to the European Commission’s annual report on competition policy. Concern about the slowness of antitrust proceedings has also been one of the drivers behind the recent adoption of the Digital Markets Acts, as well as behind the calls for more frequent use of interim measures pursuant to Article 8 of Regulation 1/2003, a power which the European Commission has used in 2019 for the first (and so far only) time since the entry into application of Regulation 1/2003.

When antitrust investigations continue for many years, the opening of new investigations becomes more difficult, as resources remain tied up by the old investigations. The longer investigations last, the more likely that case handlers will leave before the end of the investigation, either for reasons unrelated to the duration of the investigation or precisely because they feel they have been dealing with the same case for too long. New case handlers then need time to familiarize themselves with the case, leading to a further slowing down of the investigation, and an increased difficulty of opening new investigations. When antitrust investigations proceed slowly, it also takes longer before new staff gain the expertise allowing them to deal faster and more effectively with subsequent other cases. A vicious circle of slowness and fewer investigations might thus develop.

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


121 See [… Digital Markets Act].


123 See text accompanied by notes 35 to 37 above.
### V. **ANNEXES**

#### A. Decisions adopted by the European Commission in the first 17 full years of application of Regulation 1/2003

<table>
<thead>
<tr>
<th>Year</th>
<th>Cartel non-settlement decisions</th>
<th>Cartel settlement decisions</th>
<th>Non-cartel antitrust prohibition decisions without cooperation</th>
<th>Non-cartel antitrust prohibition decisions with cooperation</th>
<th>Commitment decisions</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>2005</td>
<td>5 (Monochloroacetic acid, Italian raw tobacco, Industrial thread, Industrial bags, Rubber chemicals)</td>
<td>0</td>
<td>2 (Peugeot, Astra Zeneca)</td>
<td>0</td>
<td>2 (German Football League, Coca-Cola)</td>
<td>9</td>
</tr>
<tr>
<td>2006</td>
<td>5 (Fittings, Dutch bitumen, Hydrogen peroxide, Butadiene rubber, Methacrylates)</td>
<td>0</td>
<td>1 (Tomra)</td>
<td>0</td>
<td>4 (Premier League, Repsol, De Beers, Cannes Agreement)</td>
<td>10</td>
</tr>
<tr>
<td>2007</td>
<td>8 (Dutch beer, Professional videotape, Chloroprene rubber, Spanish bitumen, Elevators and escalators, Gas insulated)</td>
<td>0</td>
<td>4 (MasterCard, Morgan Stanley/Visa, Groupement des cartes bancaires, Telefónica)</td>
<td>0</td>
<td>2 (Distigaz, Carmakers)</td>
<td>14</td>
</tr>
</tbody>
</table>

---

See text accompanied by notes 75 to 85 above for an explanation which decisions have been included in these Annexes and how they have been counted.
<table>
<thead>
<tr>
<th>Year</th>
<th>Items</th>
<th>Value</th>
<th>Earnings</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>7 (International removal services, Synthetic rubber, Sodium chlorate, Carglass, Aluminum fluoride, Candle waxes, Bananas)</td>
<td>0</td>
<td>1 (CISAC)</td>
<td>1 (E.ON - German electricity wholesale and balancing markets)</td>
</tr>
<tr>
<td>2009</td>
<td>5 (Heat stabilisers, Power transformers, Calcium Carbide, E.ON-GDF, Marine hoses)</td>
<td>0</td>
<td>1 (Intel)</td>
<td>5 (Rambus, GDF, RWE, Ship classification, Microsoft - tying)</td>
</tr>
<tr>
<td>2010</td>
<td>4 + ½ (Pre-stressing steel, Bathroom fittings, Airfreight, LCD, ½ Animal feed phosphates)</td>
<td>1 + ½ (DRAMs, ½ Animal feed phosphates)</td>
<td>1 (French pharmacies)</td>
<td>5 + ½ (ENI, E.ON - gas, Swedish interconnectors, EDF, BA/AA/IB, ⅓ Visa MIF)</td>
</tr>
<tr>
<td>2011</td>
<td>1 (Exotic fruit)</td>
<td>3 (Consumer detergents, CRT glass bulbs, Refrigeration compressors)</td>
<td>1 (Telekomunikacja Polska)</td>
<td>2 (Standard &amp; Poor's, IBM – maintenance services)</td>
</tr>
<tr>
<td>2012</td>
<td>3 (Window mountings, Freight forwarding, TV &amp; computer monitor tubes)</td>
<td>1 (Water management products)</td>
<td>0</td>
<td>4 (Rio Tinto Alcan, Siemens/Areva, Reuters, E-books)</td>
</tr>
<tr>
<td>2013</td>
<td>2 (Shrimps, Telefónica/Portug al Telecom)</td>
<td>2 (Wire harnesses, ½ YIRD, ½ EIRD)</td>
<td>2 (Lundbeck, Fentanyl)</td>
<td>3 (Star Alliance, Deutsche Bahn, CEZ)</td>
</tr>
<tr>
<td>Year</td>
<td>Categories</td>
<td>Count</td>
<td>Compliance Issues</td>
<td>Notes</td>
</tr>
<tr>
<td>------</td>
<td>---------------------------------------------------------------------------</td>
<td>-------</td>
<td>----------------------------------------------------------------------------------</td>
<td>-------------------------------</td>
</tr>
<tr>
<td>2014</td>
<td>2 (Power cables, Smart card chips)</td>
<td>6</td>
<td>4 (OPCOM, Motorola GPRS, Perindopril - Servier, Slovak Telekom)</td>
<td>1 + ⅓ (Samsung UMTS, ⅝ Visa MIF)</td>
</tr>
<tr>
<td></td>
<td>(Polyurethane foam, Power exchanges, Automotive bearings, ½ Steel abrasives, CHIRD, ½ Mushrooms, Envelopes)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2015</td>
<td>2 + ½ (Optical disc drives, Retail Food Packaging ½ YIRD)</td>
<td>2</td>
<td>2 (Parking heaters, Blocktrains)</td>
<td>2 (BEH Electricity, AF-KL/DL/AZ)</td>
</tr>
<tr>
<td></td>
<td>2 (Parking heaters, Blocktrains)</td>
<td>0</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2016</td>
<td>1 + ½ (½ Steel abrasives, ½ Mushrooms, ½ EIRD)</td>
<td>2 + ½</td>
<td>1 (ARA)</td>
<td>3 + ½ (Deutsche Bahn, CDS, Container shipping, ½ Pay-TV)</td>
</tr>
<tr>
<td></td>
<td>(½ Steel abrasives, ½ Mushrooms, ½ EIRD)</td>
<td>0</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2017</td>
<td>1 + ½ (Car battery recycling, ½ Trucks)</td>
<td>3</td>
<td>3 (Google search shopping, Baltic rail, International Skating Union*)</td>
<td>1 (Amazon)</td>
</tr>
<tr>
<td></td>
<td>(Occupant safety systems, Thermal systems, Lighting systems)</td>
<td>0</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2018</td>
<td>1 (Capacitors)</td>
<td>3</td>
<td>3 (BEH gas, Google Android, Qualcomm exclusivity payments)</td>
<td>2 (Gazprom, DE/DK interconnector)</td>
</tr>
<tr>
<td></td>
<td>(Braking systems, Maritime car carriers, Spark plugs)</td>
<td>0</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2019</td>
<td>2 (Occupant safety systems II, ½ Canned vegetables, ½ Forex)</td>
<td>2</td>
<td>2 (Google search adsense, Qualcomm predation)</td>
<td>½ + ½ (½ Pay-TV, ½ Visa MIF)</td>
</tr>
<tr>
<td></td>
<td>(Braking systems, Maritime car carriers, Spark plugs)</td>
<td>0</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2020</td>
<td>0</td>
<td>2</td>
<td>2 (Universal, Meliá)</td>
<td>2 (Romanian gas interconnectors)</td>
</tr>
<tr>
<td></td>
<td>(Ethylene, Closure)</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Year</td>
<td>Cases / Settlements</td>
<td>Non-Cartel Antitrust Prohibition Decisions</td>
<td>Cartel Antitrust Decisions</td>
<td>17 Years</td>
</tr>
<tr>
<td>------</td>
<td>---------------------</td>
<td>------------------------------------------</td>
<td>-----------------------------</td>
<td>----------</td>
</tr>
<tr>
<td>2021</td>
<td>3 (½ Canned vegetables, EGB, SSA bonds, ½ Forex)</td>
<td>2 + ½ (Car emissions, Rail cargo, ½ Ethanol benchmarks)</td>
<td>½ ( ½ Video games)</td>
<td>7 + ½</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>½ + ½ non-cartel antitrust prohibition decisions without cooperation</td>
<td>1 (Aspen)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>12 + ½ non-cartel antitrust decisions with cooperation together 39 non-cartel antitrust prohibition decisions</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>42 commitment decisions</td>
<td></td>
</tr>
</tbody>
</table>
### B. Decisions adopted by the European Commission in the last 17 years of application of Regulation 17

<table>
<thead>
<tr>
<th>Year</th>
<th>Cartel decisions</th>
<th>Non-cartel antitrust prohibition decisions</th>
<th>Negative clearance or exemption decisions (* = with commitments)</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1989</td>
<td>1 (Welded steel mesh)</td>
<td>2 (Bayo-n-ox, Sugar beet)</td>
<td>7 (National Sulphuric Acid Association, UIP*, Dutch banks, Degeto Film, APB, TEKO, Concordato incendio)</td>
<td>10</td>
</tr>
<tr>
<td>1990</td>
<td>1 (Soda-ash)</td>
<td>4 (Ansac, ICI, Solvay, Bayer Dental)</td>
<td>8 (D'Ieteren, KSB/Goulds/Lowara/ITT*, Cekacan, ECR 900, Elopak/Metal Box-Odin, Metaleurop, Moosehead/Whitbread, Alcatel/ANT*)</td>
<td>13</td>
</tr>
<tr>
<td>1991</td>
<td>0</td>
<td>6 (Peugeot, Tetra Pak II, Toshiba, Martell, EBU, Ijsselcentrale)</td>
<td>6 (Yves Saint-Laurent parfums*, Eirpage*, IATA Passenger Agency Programme, Scottish Nuclear, IATA Cargo Agency Programme, Sippa*)</td>
<td>12</td>
</tr>
<tr>
<td>1993</td>
<td>1 (CNSD)</td>
<td>2 (Auditel, Zera/Montedison and</td>
<td>3 (Grundig*, UER/Eurovision*,</td>
<td>6</td>
</tr>
<tr>
<td>Year</td>
<td>Participants</td>
<td>Combined transport of goods*</td>
<td>Notes</td>
<td></td>
</tr>
<tr>
<td>------</td>
<td>--------------</td>
<td>------------------------------</td>
<td>-------</td>
<td></td>
</tr>
<tr>
<td>1995</td>
<td>2 (SCK/FNK, COAPI)</td>
<td>1 (BASF/Accinauto)</td>
<td>2 (UIC, PMI-DSV)</td>
<td>5</td>
</tr>
<tr>
<td>1997</td>
<td>1 (Wirtschaftvereinigung Stahl)</td>
<td>1 (Irish Sugar)</td>
<td>9 (Unisource, Uniworld, Euroasal, NCS, AAS/AT&amp;T, Sealand/P&amp;O, JOS, West Coast-Mediterranean Agreement, North Sea Container Liner Conference)</td>
<td>11</td>
</tr>
<tr>
<td>1998</td>
<td>4 (Greek ferries, Pre-insulated pipes, British sugar, Alloy surcharge)</td>
<td>6 (TACA, AAMS, Aéroports de Paris, Van den Bergh Foods, VW-Audi, Frankfurt Airport)</td>
<td>7 (Sicasov*, SAECs, TMM/Tecomar, European Rail Shuttle, DHLI, Inter-Operator Agreements)</td>
<td>17</td>
</tr>
<tr>
<td>2000</td>
<td>2 (FETTSCA, Amino acids)</td>
<td>3 (JCB, Nathan &amp; Bricolux, Opel Nederland)</td>
<td>3 (EBU-Eurovision, Intntrepreneur, Spring Inns)</td>
<td>8</td>
</tr>
<tr>
<td>2001</td>
<td>9 (Carbonless paper, Graphite electrodes, Citric acid, Zinc phosphate, SAS/Maersk, Vitamins, Belgian beer, Luxembourg beer, Bank charges)</td>
<td>8 (DSD, UPS/Deutsche Post, Michelin, Mercedes-Benz, Volkswagen, British Post/Deutsche Post, Glaxo-Wellcome, De Post / La Poste)</td>
<td>4 (Visa*, Eco-Emballages*, Identrus, UEFA*)</td>
<td>21</td>
</tr>
<tr>
<td>Year</td>
<td>Cartel Decisions</td>
<td>Non-Cartel Decisions</td>
<td>Total Decisions</td>
<td></td>
</tr>
<tr>
<td>------</td>
<td>------------------</td>
<td>----------------------</td>
<td>-----------------</td>
<td></td>
</tr>
<tr>
<td>2002</td>
<td>9 (Austrian banks, Industrial and medical gases, Plasterboard, Methionine, Specialty graphite, Food flavour enhancers, Auction houses, Concrete reinforcing bars, Methylglucamine)</td>
<td>1 (Video games)</td>
<td>15</td>
<td></td>
</tr>
<tr>
<td>2003</td>
<td>5 (Sorbates, Organic peroxide, Copper tubes, French beef, Electrical and mechanical carbon and graphite products)</td>
<td>4 (Deutsche Telekom, Ferrovie dello Stato, Yamaha, Wanadoo)</td>
<td>16</td>
<td></td>
</tr>
<tr>
<td>2004</td>
<td>6 (Choline chloride, French beer, Copper plumbing tubes, Spanish raw tabacco, Needles, Belgian architects)</td>
<td>4 (Microsoft, Nintendo, Clearstream, GDF)</td>
<td>11</td>
<td></td>
</tr>
<tr>
<td>Total 17 years</td>
<td>61 cartel decisions</td>
<td>69 non-cartel antitrust prohibition decisions</td>
<td>130 total cartel and non-cartel antitrust prohibition decisions</td>
<td></td>
</tr>
</tbody>
</table>

118 negative clearance or exemption decisions (of which 47 with commitments)

****

Electronic copy available at: https://ssrn.com/abstract=4268365