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Sodišča držav članic EU v novem sistemu izvajanja pravil antitrusta

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Preface

> *"Effective competition is crucial to an open market economy. It cuts prices, raises quality and expands customer choice. Competition allows technological innovation to flourish."* [*]

May, 1st 2004, the day of the biggest enlargement of the EU coincided with the entering into force of the new EC Competition law regime. The Communitarian competition rules cover three main areas: antitrust, mergers and state aids.

Antitrust rules prohibit collusions and prevent dominant undertakings from abusing their position on the market driving out or exploiting competitors. The European Commission scrutinises and controls the large cross-border mergers, which impact the EU market, in order to prevent that only so few players are left in the market, which would stifle and significantly reduce innovation, price competition or consumer choice. Furthermore, the Commission monitors various forms of state aid granted to companies.

This introductory guide focuses on the new antitrust policy which pursues several aims. Firstly, it will unburden the European Commission. Under the notification system prior to the reform only the Commission was entitled to grant exceptions from the prohibition of collusive behaviour. Thus, the notification system was abolished. The enforcement of antitrust rules was decentralised, consequently National Competition Authorities (NCAs) and domestic courts evaluate the economic and legal facts and decide on whether an anticompetitive agreement or practice of undertakings falls under the strict exception rules or not and is thus justified. This new task, indeed, entails new challenges - and judges are especially called to task! Secondly, it will encourage private enforcement. Undertakings and consumers are supposed to benefit from the possibility of bringing up damage claims following violations of EC cartel rules. A recent study of the European Commission has shown that the private enforcement by means of damage claims is underdeveloped in the EU member states.

[*] http://europa.eu/pol/comp/overview_en.htm

The European Commission being aware of the challenges for the judiciary launched a call for projects focusing on the training of judges in order to foster and instill the uniform and effective application of EC competition rules in the Member States. The Institute for European Integration Research (EIF) of the Austrian Academy of Sciences was successful in getting a grant from the Commission to launch such a project. EIF and its partners realised the project "The Implementation and Application of EC Competition Rules in Austria, the Czech Republic, Hungary, Poland and Slovenia". The project web site http://www.oeaw.ac.at/eif/competition offers general information on the project, a data base containing domestic and European case law on Art. 81, 82 EC, soft law on the application of EC competition rules, guidelines elaborated by competition law experts in Czech, English, German, Hungarian, Polish and Slovene language.

The Introductory Guide written by Ana Vlahek, research assistant at the Civil Chair of the Faculty of Law in Ljubljana is specialised in Competition law and addresses the Slovene law applicant directly and for the first time in her mother tongue. This monograph offers an excellent and comprehensive overview on the leading cases of the ECJ and the CFI concretising the primary and secondary cartel rules as well as on the decisions of the European Commission. Most of these documents are not yet officially translated into Slovene and therefore this achievement represents an indispensable tool to access the specific features of Communitarian competition rules which demand in depth economic knowledge and great legal skills from judges. This scientific work analyses frictions between Slovene procedural rules and European competition rules and explains the intricate interplay of the two legal orders.

We would like to express our deep gratitude to the author for making our joint project a success and writing this informative text, which, we are truly confident, will be of great help to the law applicant in making her way through the abundant verdure of competition rules.
May this introductory guide contribute to a better understanding of the European Competition law regime, and thus enable to master the challenges of their effective enforcement.

Sonja Puntscher Riekmann - Bedanna Bapuly

1. Uvodoma

Področje antitrusta predstavlja poleg področja koncentracij temeljni steber skupnostnega prava konkurence.[1] Izraz antitrust, ki izvira iz konca 19. st., se nanaša na zakonodajo, sodno prakso in postopke v zvezi s konkurenco, natančneje v zvezi s kartelnimi in drugimi sporazumi ter z zlorabami prevladujočega položaja. Že od samega začetka obstoja Skupnosti mu je kot sestavnemu delu gospodarskega področja, ki je vsaj na začetku pravzaprav predstavljalo samo bit Evropske skupnosti, namenjenega precej prostora tako v skupnostnih aktih kot tudi v praksi skupnostnih sodišč in teoretičnih razpravljanjih, kar pa se z nedavno reformo področja še stopnjuje.

V delu je na začetku predstavljena vsebina določb skupnostnega prava antitrusta, tj. 81. in 82. člen PES z vodilno prakso Komisije in skupnostnih sodišč, nato pa je analizirana reforma izvajanja pravil antitrusta, uvedena 01.05.2004 z novo Uredbo 1/2003, ki pomeni velik preobrat v delu in nalogah Komisije, nacionalnih organov za varstvo konkurence in nacionalnih sodišč. Poudariti je treba, da reforma same vsebine skupnostnih antitrustovskih določb ne zadeva, temveč se nanaša zgolj na izvajanje teh določb.

Hkrati z vstopom v Unijo nova antitrustovska uredba velja tudi v Sloveniji. Slovenska sodišča so poleg Urada RS za varstvo konkurence s tem postala del nove mreže izvajanja skupnostnih antitrustovskih pravil. Da bi to aktivnost lahko pravilno in učinkovito opravljala, morajo dobro poznati tako novo uredbo in na njej temelječo drugo sekundarno zakonodajo, kot tudi samo vsebino skupnostnega antitrusta od relevantnih določb PES do pripadajoče sekundarne pomožne zakonodaje in odločb Komisije ter ECJ in CFI. Naj jim to delo služi v pomoč pri tem.

2. Vsebina skupnostnih določb antitrusta

V Evropski skupnosti je področje antitrusta urejeno v PES v določbah členov 81 do 86, od katerih sta najpomembnejši določbi 81. in 82. člena, ki prepovedujeta horizontalne (kartelne) in vertikalne sporazume oz. usklajena ravnanja podjetij (81. člen) ter zlorabe prevladujočega položaja enega ali več podjetij skupaj (82. člen) s potencialnim vplivom na trgovanje med državami članicami. Skupaj

[1] Nekateri v področje konkurence prištevajo še področje državnih pomoči, tudi v PES je poglavje o državnih pomočeh uvrščeno v poglavje o konkurenci, medtem ko koncentracije sploh niso zajete v njej, temveč jih je na podlagi člena 308 PES uredila posebna Uredba 4064/89 o nadzoru koncentracij (do takrat pa so se primeri reševali kar preko 81. in predvsem 82. člena PES), ki jo je (z začetkom uporabe 01.05.2004) nadomestila povsem nova Uredba 139/2004 o nadzoru koncentracij. Več o koncentracijah (*mergers*) glej npr. Jones in Sufrin, EC Competition Law, str. 699-849; Whish, Competition Law, str. 779-917; Craig in deBurca, EU Law, str. 1034-1061; več o državnih pomočeh (*state aids*) glej npr. Craig in deBurca, EU Law, str. 1122-1169; Quigley in Collins, EC State Aid Law and Policy; Biondi, Eeckhout in Flynn, The Law of State Aid in the European Union.

s členi 83 do 86 tvorita Oddelek 1 (Pravila o podjetjih) Poglavja 1 (Pravila o konkurenci) Naslova VI (Skupna pravila o konkurenci, obdavčitvi in približevanju zakonodaje) PES.[2]

2.1. Prepovedani horizontalni in vertikalni sporazumi, sklepi in usklajena ravnanja
- 81. člen PES

Določba 81(1) PES (pred preštevilčenjem po Amsterdamski pogodbi člen 85[3]) prepoveduje konsenzualna dejanja v obliki sporazumov med podjetji, sklepov podjetniških združenj in usklajenih ravnanj, ki bi lahko prizadela trgovino med državami članicami in katerih cilj oz. učinek je preprečevanje, omejevanje ali izkrivljanje konkurence na Skupnem trgu, ter navaja nekatere najbolj tipične primere tovrstnih dejanj. Po 81(2) PES so vsi taki sporazumi ali sklepi nični, se pa lahko po določbi 81(3) PES določba 81(1) PES v določenih primerih ne uporabi:

1. Kot nezdružljivi s skupnim trgom so prepovedani vsi sporazumi med podjetji, sklepi podjetniških združenj in usklajena ravnanja, ki bi lahko prizadeli trgovino med državami članicami in katerih cilj oziroma posledica je preprečevanje, omejevanje ali izkrivljanje konkurence na skupnem trgu, zlasti tisti, ki:
a) neposredno ali posredno določajo nakupne ali prodajne cene ali druge pogoje poslovanja;
b) omejujejo ali nadzorujejo proizvodnjo, trge, tehnični razvoj ali naložbe;
c) določajo razdelitev trgov in virov nabave;
d) uvajajo neenake pogoje za primerljive posle z drugimi trgovinskimi partnerji in jih tako postavljajo v podrejen konkurenčni položaj;
e) pogojujejo sklepanje pogodb s tem, da sopogodbeniki sprejmejo dodatne obveznosti, ki po svoji naravi ali glede na trgovinske običaje nimajo nikakršne zveze s predmetom takšnih pogodb.

2. Vsi sporazumi ali sklepi, ki jih ta člen prepoveduje, so nični.

3. V naslednjih primerih se lahko določi, da se določbe odstavka 1 ne uporabljajo za:

– sporazume ali skupine sporazumov med podjetji,

[2] Člen 83 PES pooblašča Svet EU, da sprejme ustrezne sekundarne akte za uveljavitev načel iz 81. in 82. člena PES. Člena 84 in 85 PES sta urejala delovanje nacionalnih organov in Komisije do sprejetja ustreznih aktov iz 83. člena PES. Člen 86 PES pa zadeva javna podjetja in sicer 1. odstavek 86. člena določa, da države članice v primeru javnih podjetij in podjetij, ki so jim države članice podelile posebne ali izključne pravice, ne bodo uvajale niti obdržale v veljavi ukrepov, ki so v nasprotju z določili PES, zlasti s tistimi iz členov 12 ter 81-89. Drugi odstavek 86. člena pa obravnava podjetja, pooblaščena za opravljanje storitev splošnega gospodarskega pomena, ter podjetja, ki imajo značaj dohodkovnega monopola, in določa, da se morajo tovrstna podjetja sicer ravnati po pravilih PES, zlasti po pravilih o konkurenci, vendar le, kolikor uporaba takšnih pravil pravno ali dejansko ne ovira izvajanja posebnih nalog, ki so takim podjetjem dodeljene, ob tem pa razvoj trgovine ne sme biti prizadet v takšnem obsegu, ki bi bil v nasprotju z interesi Skupnosti.

[3] Po Amsterdamski pogodbi, ki spreminja Pogodbo o Evropski uniji, pogodbe o ustanovitvi Evropskih skupnosti in nekatere z njimi povezane akte (97/C 340/01), so bili členi PES preštevilčeni. Prej 85. in 86. člen sta od takrat 81. in 82. člen.

– *sklepe ali skupine sklepov podjetniških združenj,*
– *usklajeno ravnanje ali skupine usklajenih ravnanj, ki prispevajo k izboljšanju proizvodnje ali distribucije blaga oziroma k pospeševanju tehničnega ali gospodarskega napredka, pri čemer zagotavljajo potrošnikom pravičen delež doseženih koristi, in ki:*

a) zadevnim podjetjem ne določajo omejitev, ki za doseganje teh ciljev niso nujne;
b) takšnim podjetjem glede znatnega dela zadevnih izdelkov ne dajejo možnosti izključitve konkurence.

2.1.1. Podjetje, podjetniško združenje

Pojem podjetja in podjetniškega združenja iz 81. člena v PES ni definiran, sta pa ga ob obravnavi konkretnih primerov do potankosti razložila Komisija in ECJ. Tako zajema najširšo paleto oblik organiziranosti, tj. vsako enoto, ki se ukvarja z gospodarsko aktivnostjo ne glede na njen pravni status, način financiranja in namen ustvarjanja dobička: gospodarske družbe, posamezniki, gospodarska združenja itd. V ta obseg pa ne sodijo države in javna podjetja, kadar izvajajo javne in ne gospodarske naloge, stranke kolektivnih pogodb in zaposleni v podjetjih ter tudi ne podružnice oz. enote, tudi agenti, ki so odvisni od družbe matere oz. principala in nimajo svoje avtonomije, v pojem podjetniškega združenja redko sodijo združenja delodajalcev in trgovinske zbornice, saj se praviloma ne ukvarjajao z ekonomsko aktivnostjo.[4] Ni torej pomembna narava enote, temveč narava aktivnosti, s katerimi se enota ukvarja.

2.1.2. Sporazumi in usklajena ravnanja med podjetji, sklepi podjetniških združenj

Sporazumi in usklajena ravnanja podjetij ter sklepi podjetniških združenj so lahko horizontalne ali vertikalne narave. Horizontalni oz. kartelni, ki predstavljajo največjo grožnjo za konkurenco, so tisti sporazumi, katerih stranke so podjetja, ki delujejo na isti produkcijski ravni (npr. dogovor med več proizvajalci), vertikalni pa so na drugi strani tisti, katerih stranke so podjetja, ki so v komplementarnem razmerju, so na različnih ravneh produkcijske verige (npr. dogovor med dobaviteljem in trgovcem).[5]

Da bi se zajelo čim več oblik kartelnih in vertikalnih dogovorov, se že po 81. členu PES kot prepovedani štejejo ne samo formalni sporazumi med podjetji in sklepi podjetniških združenj, temveč tudi skrajno neformalna usklajena ravnanja podjetij. Interpretacija prepovedanih

[4] Glej odločbo Komisije 86/398 *Polypropylene* in skupnostnih sodišč T-7/89 *SA Hercules Chemicals NV v. Commission*, C-22/98 *Criminal proceedings against Becu*, C-73/95P *Viho Europe BV v. Commission*, 22/71 *Béguelin Import v. GL Import-Export*, C-266/93 *Bundeskartellamt v. Volkswagen AG and VAG Leasing GmbH*, T-145/89 *Baustahlgewebe GmbH v. Commission*, C-67/96 *Albany International BV v. Stichting Bedrijfspensionenfonds Textielindustrie*, C-41/90 *Höfner and Elser v. Macroton GmbH*, C-244/94 *Fédération Française des Sociétés d'Assurance v. Ministère de l'Agriculture et de la Pêche* idr.

[5] Nekateri avtorji pojem kartelnega sporazuma raztezajo tudi na vertikalne sporazume.

sporazumov in ravnanj je po praksi Komisije in skupnostnih sodišč tudi pri tej predpostavki zelo široka in zajema tako pisne kot ustne sporazume (kadar je objektivno mogoče govoriti o konsenzu med strankami glede vsebine sporazuma), formalno in neformalno zavezujoče sklepe podjetniških združenj ter tudi zgolj neformalne sestanke in druge "gentlemanske" oblike izmenjevanja podatkov o delovanju podjetij; vendar je treba ob tako širokem pojmovanju prepovedanih oblik kartelov paziti, da mednje ne zajamemo povsem racionalnega in dovoljenega ter med seboj nepovezanega obnašanja podjetij.[6]

2.1.3. Cilj ali učinek preprečevanja, omejevanja ali izkrivljanja konkurence

Prvi odstavek 81. člena PES zahteva, da mora imeti sporazum oz. usklajeno ravnanje - da bi bilo prepovedano - cilj ali učinek preprečevati, omejevati ali izkrivljati konkurenco na Skupnem trgu. V primeru popolne, čiste, atomistične konkurence bi bil odgovor na to vprašanje nagativen, ker pa gre v realnosti v največjem številu primerov za nepopolno konkurenco, je odgovor na vprašanje o učinku na konkurenco zelo pomemben.

V skladu s prakso ECJ za ugotovitev kršitve 81. člena zadostuje, da ima sporazum cilj, namen (*object*) preprečevati, omejevati ali izkrivljati konkurenco, in sploh ni treba ugotavljati njegovega učinka (*effect*). Protikonkurenčni cilj sporazuma bo jasno razviden v primeru najbolj škodljivih kartelnih sporazumov (ti so tako že *per se* nezakoniti),[7] pri drugih pa ne bo nujno razpoznaven in bo zato treba dokazati njegov protikonkurenčni učinek; če obstaja tak učinek, je nepomembno, kakšen je namen sporazuma.[8] V primeru ugotavljanja učinka sporazuma (do česar pride, če se ne da ugotoviti protikonkurenčnega namena sporazuma) je treba - ob primerjavi stanja v primeru obstoja sporazuma s stanjem, ko sporazuma ne bi bilo - glede na okoliščine primera proučiti, ali je učinek opazen ali ne. Nekatere vrste sporazumov pa so že *prima facie* nezakonite, nekatere so kot take celo primeroma navedene v točkah a) do e) 1. odstavka 81. člena PES. Pri presoji obravnavane predpostavke se v številnih primerih pred skupnostnima sodiščema postavlja vprašanje, ali je že pri presoji 1. odstavka 81. člena PES prostor za tehtanje pozitivnih in negativnih učinkov sporazuma

[6] Glej odločbe Komisije 86/398 *Polypropylene*, 89/190 *PVC*, 85/202 *Woodpulp* in skupnostnih sodišč C-137/92P *Commission v. BASF AG*, T-305/94 *NV Limburgse Vinyl Maatschappij v. Commission*, 41, 44&45/69 *ACF Chemiefarma NV v. Commission*, C-199/92 *Huls AG v. Commission*, 48/69 *ICI v. Commission*, 172/80 *Gerhard Züchner v. Bayerische Vereinsbank AG*, 40-48, 50, 54-56, 111, 113&114/73 *Cooperatiëve Verenigning 'Suiker Unie' UA v. Commission*, 89, 104, 114, 116-17, 125-9/85 *A. Ahlstrom Oy v. Commission*, T-36/91 *Imperial Chemical Industries plc v. Commission*, T-11/89 *Shell International Chemical Company Ltd. v. Commission*, T-143/89 *Ferriere Nord SpA v. Commission*, T-142/89 *Usines Gustave Boël SA v. Commission*, T-41/96 *Bayer AG v. Commission*, T-202, 204, 207/98 *Tate & Lyle plc, British Sugar plc and Napier Brown & Co. Ltd. v. Commission*, C-49/92P *Commission v. ANIC Partecipazioni SpA* idr. Glej Craig, deBurca, EU Law, str. 940-950.

[7] Kot take se štejejo npr. skupna določitev cen in delitev trga.

[8] Glej primere skupnostnih sodišč 56/65 *Société Technique Minière v. Machinenbau Ulm GmbH*, 56, 58/64 *Etablissements Consten SARL and Grundig-Verkaufs-GmbH v. Commission*, 45/85 *Verband der Sachversicherer eV v. Commission*, T-77/92 *Parker Pen Ltd. v. Commission*, C-219/95P *Ferriere Nord SpA v. Commission*, 23/67 *Brasserie de Haecht SA v. Wilkin*, 5/69 *Völk v. Vervaecke*, T-7/93 *Langnese-Iglo GmbH v. Commission*, C-234/89 *Delimitis v. Henninger Bräu*.

na konkurenco (t.i. *rule of reason*), ali pa je to mogoče zgolj ob presoji kriterijev za izjeme iz 3. odstavka 81. člena PES.[9]

V skladu z doktrino *de minimis* določeni sporazumi majhnega obsega oz. nepomembnega vpliva - t.i. sporazumi majhnega pomena - sploh niso zajeti v prepovedi iz 1. odstavka 81. člena PES. Definira jih Sporočilo o sporazumih majhnega pomena, ki bistveno ne omejujejo konkurence po členu 81(1) Pogodbe o ustanovitvi Evropske skupnosti (*de minimis*).[10] Tako se za sporazume majhnega pomena po novem sporočilu štejejo tisti horizontalni sporazumi, pri katerih skupni tržni delež v sporazumu udeleženih podjetij ne presega 10 % na trgih, na katerih so stranke dejanski ali potencialni konkurentje, in ne 15 % na relevantnih trgih, na katerih si stranke ne konkurirajo.[11] V primeru, ko na trgu obstajajo paralelne mreže podobnih sporazumov, ki povzročajo kumulativni protikonkurenčni učinek, pa je kot novost določen prag 5 %.[12] To pa ne pomeni, da so sporazumi nad navedenimi pragovi avtomatično prepovedani, v teh primerih je treba namreč v vsaki konkretni zadevi posebej presojati učinek na konkurenco - če je ta neznaten, kljub doseganju pragu ne bo šlo za prepovedano ravnanje. Sporočilo navaja tudi, da se za *de minimis* sporazume praviloma štejejo sporazumi med majhnimi in srednje velikimi podjetji. Na drugi strani pa vsebuje sporočilo seznam vertikalnih in horizontalnih sporazumov, ki kljub morebitnemu nedoseganju določenih pragov v nobenem primeru ne morejo biti majhnega pomena - to so že zgoraj omenjene *hardcore* omejitve, ki so *per se* nezakonite, saj se šteje, da imajo protikonkurenčni cilj.[13]

2.1.4. Potencialni učinek na trgovanje med državami članicami

Določbe členov 81 in 82 PES zadevajo obnašanje podjetij (horizontalne in vertikalne dogovore ter druga podobna ravnanja, tudi ravnanja podjetij s prevladujočim položajem), *ki ima lahko učinek na trgovanje med državami članicami*. Določba 81(1) PES namreč prepoveduje konsenzualna dejanja v obliki sporazumov med podjetji, sklepov podjetniških združenj in usklajenih ravnanj, *ki bi lahko prizadela trgovino med državami članicami* in katerih cilj oz. učinek je preprečevanje, omejevanje

[9] O 3. odstavku 81. člena glej več spodaj. Glej predvsem primera T-374-75, 384, 388/94 *European Night Services v. Commission* in T-112/99 *Métropole Télévision (M6), Suez-Lyonnaise des Eaux, France Telecom, and Television Française 1 SA /TFI) v. Commission*, v katerih CFI zavrne argument *rule of reason*.

[10] Notice on Agreements of Minor Importance which do not Appreciably Restrict Competition under Article 81(1) (*de minimis*) [2001] OJ C368/13. Povezava z besedilom je na spletni strani http://ec.europa.eu/comm/competition/antitrust/deminimis/. Opozoriti je treba, da je prejšnje sporočilo zajemalo tako kriterij učinka na konkurenco kot kriterij učinka na trgovanje, zaradi razmejitve dveh med seboj različnih kriterijev, ki sta bila pogosto napačno zamenjevana, je bil koncept učinka na trgovanje iz novega sporočila izpuščen in je predmet posebnega sporočila.

[11] V primerih, ko je težko okvalificirati položaj, je treba po sporočilu uporabiti pravilo 10 %.

[12] Po prejšnjem sporočilu je bil prag za horizontalne sporazume 5 %, za vertikalne 10 %, mreže sporazumov s kumulativnim protikonkurenčnim učinkom pa sploh niso mogle biti izvzete iz prepovedi.

[13] Le v redkih primerih se bo kljub temu presojalo konkretne okoliščine primera in se morda ugotovilo, da kljub *per se* nezakonitosti protikonkurenčnega cilja vendarle ni. Sporočilo je za vertikalne sporazume seznam prevzelo iz Uredbe 2790/1999 o skupinski izjemi za vertikalne sporazume, za horizontalne sporazume pa iz Uredbe 2658/2000 o skupinski izjemi za sporazume o specializaciji. Več o skupinskih izjemah glej spodaj tč. 2.5.3.

ali izkrivljanje konkurence na Skupnem trgu, 82. člen PES pa prepoveduje enostranska dejanja v obliki zlorabe prevladujočega položaja enega ali več podjetij na Skupnem trgu ali njegovem znatnem delu, *kolikor bi zloraba lahko prizadela trgovino med državami članicami*. Le v primeru obstoja potencialnega učinka na trgovanje med državami članicami podleže sporazum oz. dejanje 81. oz. 82. členu PES. Poudariti je treba, da sta učinek na trgovanje med državami članicam, ki je obravnavan tukaj, in cilj oz. učinek na konkurenco, ki je bil obravnavan v prejšnji točki, dve različni predpostavki 1. odstavka 81. člena PES in morata biti, da se 1. odstavek 81. člena PES lahko uporabi, izpolnjeni kumulativno.

ECJ je v zvezi z obravnavano predpostavko 81. člena PES postavilo širok test, po katerem je predpostavki zadoščeno, kolikor je mogoče z zadostno mero verjetnosti na podlagi palete objektivnih pravnih in dejanskih kriterijev predvideti, da lahko sporazum predstavlja neposredno ali posredno, dejansko ali potencialno grožnjo svobodnemu trgovanju med državami članicami na način, ki lahko škoduje dosegu cilja skupnega trga[14] - ob tem je treba poudariti, da se dokazovanje dejanskega vpliva ne zahteva, saj zadošča dokaz potencialnega vpliva na trgovanje med državami članicami.[15] Kriterij učinka na trgovino je jurisdikcijski kriterij, saj definira domet uporabe skupnostnega konkurenčnega prava – konkurečno pravo Skupnosti namreč ni uporabno v primerih ravnanj podjetij, ki ne morejo v znatni meri negativno vplivati na trgovanje med državami članicami (*the non-appreciable affectation of trade rule* – pravilo *NAAT*).[16] V takem primeru se uporabi drugo relevantno pravo, kar pa je glede na širok domet definicije učinka na trgovanje redkost. Dejstvo, da so npr. v primeru presoje po 81. členu PES stranke sporazuma iz ene države članice ali celo izven Skupnosti, še ne pomeni, da sporazum ne more imeti učinka na trgovanje med državami članicami[17] - enako velja tudi za v prejšnji točki obravnavani učinek na konkurenco.[18]

Komisija je za lažje razumevanje termina izdala Smernice o konceptu učinka na trgovanje, vsebovanem v 81. in 82. členu Pogodbe o ustanovitvi Evropske skupnosti.[19] Koncept učinka na

[14] Glej primera ECJ 56/65 *STM v. Machinenbaum Ulm GmbH* in 58/64 *Etablissements Consten SARL and Grundig-Verkaufs-GmbH v. Commission.*

[15] Pojem »trgovanje« je širok in v skladu s prakso Komisije in skupnostnih sodišč zajema vse gospodarske aktivnosti, od proizvodnje do storitev, tudi bančnih, zavarovalnih in finančnih ter tudi vse vrste transporta.

[16] To je povedalo ECJ v primeru 22/71 *Béguelin Import v. GL Import-Export*: »The ability of the agreement or practice to affect trade between Member States must be appreciable.«

[17] Glej sodbe skupnostnih sodišč 8/72 *Veereniging van Cementhandelaren v. Commission,* 246/86 *Société Cooperative des Asphalteurs Belges (BELASCO) v. Commission*, T-66/89 *Publishers Association v. Commission (No. 2)*.

[18] Glej odločbe Komisije 85/618 *Siemens/Fanuc*, 74/634 *Franco-Japanese Ballbearings Agreement* in 85/202 *Woodpulp*.

[19] Commission Notice - Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (2004/C 101/07) (Text with EEA relevance). Povezava z besedilom je na spletni strani http://ec.europa.eu/comm/competition/antitrust/legislation/trade.html. Obravnavane smernice se omejujejo izključno na vprašanje učinka na trgovanje in ne tudi na vprašanje učinka na konkurenco na Skupnem trgu, ki predstavlja drugi sestavni del določbe 81. člena PES in je predmet drugega sekundarnega akta - Sporočila o sporazumih majhnega pomena, ki bistveno ne omejujejo konkurence po členu 81(1) Pogodbe o ustanovitvi Evropske skupnosti (*de minimis*), ki je obravnavano zgoraj. Prav tako smernice ne zadevajo koncepta učinka na trgovino na področju državnih pomoči (1. odstavek 87. člena PES). Čeprav sta oba pojma vsebovana v definiciji, je treba poudariti, da nista nujno soodvisna, saj lahko npr. nek sporazum učinkuje na trgovino, pa ne omejuje konkurence.

trgovino in njegov domet je že dodobra razjasnjen v številnih odločbah skupnostnih sodišč in obravnavane smernice so namenjene predstavitvi v sodnih odločbah sprejetih meril in načel za presojo učinka na trgovanje in s tem služijo kot pomagalo nacionalnim organom pri presoji konkretnih ravnanj podjetij.[20] Tako je npr. razloženo, da mora biti sporazum oz. ravnanje kot celota zmožen učinkovati na trgovino med državami članicami[21] in ni pomembno, da morebiti kakšen od delov sporazuma nima te lastnosti; prav tako ni pomembno, kakšno vlogo v prepovedanem sporazumu igra eno od vpletenih podjetij, pomembno je le, kakšen učinek ima sporazum kot celota. Natančno so razdelane in razložene vse ključne sestavine koncepta, tj. trgovanje med državami članicami,[22] možnost negativnega vpliva na trgovanje,[23] znatnost vpliva na trgovanje[24] itd., predstavljena pa je tudi uporaba tega koncepta učinka na trgovino v primeru različnih, v praksi najpogosteje se pojavljajočih vrst kartelnih sporazumov in zlorab prevladujočega položaja,[25] navedeni so tudi vodilni primeri obeh skupnostnih sodišč. Obravnavane smernice vsekakor predstavljajo dobrodošel dokument za vsebinsko presojo primerov, ki se znajdejo na mizah odvetnikov, sodnikov, delavcev Komisije in nacionalnih organov za varstvo konkurence.

[20] Smernice seveda ne vežejo nacionalnih sodišč in uradov za varstvo konkurence, vendar gre pričakovati visoko pogostnost njihove uporabe tudi s strani teh organov.

[21] Kot obrazloženo v primerih skupnostnih sodišč 193/83 *Windsurfing International Inc v. Commission*, T-77/94 *Vereniging van Groothandelaren in Bloemkwekerijprodukten*. Enako velja tudi v primeru zlorabe prevladujočega položaja, kot razloženo v primeru 85/76 *Hoffmann-La Roche & Co. AG v. Centrafarm Vertriebsgesellschaft Pharmazeutischer*.

[22] Pojem "trgovanje" je širok pojem in zajema vse čezmejne gospodarske aktivnosti, tudi ustanavljanje družb, ter ni omejen na zgolj tradicionalno izmenjavo blaga in storitev čez mejo. Tako je mnenje ECJ v primerih C-309/99 *Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten*, C-41/90 *Höfner and Elser v. Macroton GmbH* idr. Za uporabo besedne zveze "med državami članicami" pa zadostuje, da obstaja učinek na trgovanje med vsaj dvema državama članicama, vendar se ne zahteva, da obstaja učinek na trgovanje na celotnem območju držav, pomembno je le, da je znaten. Poudariti je treba, da pojem obravnavanega krajevnega opredeljevanja ni povezan s pojmom relevantnega geografskega trga, saj lahko obstaja učinek na trgovanje tudi takrat, ko je relevantni trg zgolj nacionalen.

[23] Na podlagi objektivnih faktorjev mora biti z zadostno stopnjo verjetnosti predvidljivo, da ima sporazum lahko vpliv na trgovanje med državami članicami. Tako ECJ v zadevi 172/80 *Züchner (Gerhard) v. Bayerische Vereinsbank AG*.

[24] Zgolj samo učinek še ne zadostuje za izpolnitev pogoja učinka na trgovanje, učinek mora imeti določeno stopnjo. Stopnja znatnosti se v skladu s prakso ECJ presoja predvsem glede na položaj in pomembnost vpletenih podjetij na trgu zadevnih produktov. V primeru 19/77 *Miller International Schallplatten GmbH v. Commission* je npr. ECJ ugotovilo, da gre za neznatnost, če promet podjetij predstavlja 5% delež na trgu, vendar po praksi ECJ tržni delež ni edini relevantni pokazatelj položaja (npr. v 100-103/80 *Musique Difusion Francaise v. Commission*, kjer je bil tržni delež zgolj 3%, a je bil učinek znaten zaradi visokega prometa v primerjavi s prometom konkurentov). Poudariti je treba, da je treba vsak primer presojati posebej in upoštevati vse njegove okoliščine ter da je težko določiti nek splošen prag za delitev znatnega učinka od neznatnega, to pa je vendarle deloma storila Komisija v dodatku k svojemu Priporočilu 96/280/EC o srednje velikih in majhnih podjetjih, dogovori med katerimi načeloma nimajo učinka na trgovanje med državami članicami, v splošnem pa podaja opisne kriterije za presojo učinka prav v obravnavanih smernicah - po mnenju Komisije imajo sporazumi načeloma neznaten učinek, če so kumulativno izpolnjeni naslednji pogoji: (a) skupni tržni delež vpletenih podjetij na katerem koli relevantnem trgu v ES, ki ga zadeva sporazum, ne presega 5%, ter (b) v primeru horizontalnih sporazumov skupni letni skupnostni promet blaga, ki ga zadeva sporazum, ne presega 40 milijonov €, v primeru vertikalnih dogovorov pa skupni letni skupnostni promet dobavitelja izdelkov, ki so predmet sporazuma, ne presega 40 milijonov €, podani pa so še nekateri pogoji za odstopanje od navedenega pravila ter pravila za izračunavanje pragov in določanje relevantnega trga.

[25] Seznam ni zaprt. Kriterij je treba presojati v vsakem primeru posebej.

2.1.5. Izjeme po določbi 81(3) PES

Določba 81(1) PES se lahko za določeno ravnanje ne uporablja oz. se ravnanje, ki je sicer prepovedano po 1. odstvaku 81. člena PES, izvzame iz prepovedi ob izpolnjevanju predpostavk iz 3. odstavka 81. člena PES.[26] To je takrat, ko gre za sporazume ali skupine sporazumov med podjetji, sklepe ali skupine sporazumov podjetniških združenj, usklajeno ravnanje ali skupine usklajenih ravnanj, ki prispevajo k izboljšanju proizvodnje ali distribucije blaga oziroma k pospeševanju tehničnega ali gospodarskega napredka, pri čemer zagotavljajo potrošnikom pravičen delež doseženih koristi, in ki zadevnim podjetjem ne določajo omejitev, ki za doseganje teh ciljev niso nujne, in ki takšnim podjetjem glede znatnega dela zadevnih izdelkov ne dajejo možnosti izključitve konkurence. Oba pozitivna pogoja (pri prvem pozitivnem alternativno ena od obeh možnosti) in oba negativna pogoja morajo biti izpolnjeni kumulativno.

Da bi se posamezno, po 1. odstavku 81. člena PES prepovedano dejanje lahko izvzelo iz prepovedi, ga je bilo treba do 1. maja 2004, tj. do uvedbe reforme izvajanja antitrustovskih pravil, ki je natančneje predstavljena spodaj, obvezno priglasiti Komisiji, ki je odločila o podelitvi t.i. posamične izjeme (*individual exemption*). V novem, reformiranem sistemu priglasitev ni več potrebna in podjetja lahko sama presojajo in se sklicujejo na izpolnjevanje pogojev iz 3. odstavka 81. člena PES, prav tako pa imajo novo pristojnost za ugotavljanje predpostavk iz te določbe poleg Komisije tudi nacionalni organi – uradi za varstvo konkurence in sodišča.
Poleg presojanja izpolnjevanja pogojev v posamičnem primeru se na podlagi 3. odstavka 81. člena PES lahko izda tudi t.i. skupinske izjeme (*block exemptions*), tj. izjeme, ki se nanašajo na določeno kategorijo sporazumov, ki po mnenju Komisije ne predstavljajo prepovedanih ravnanj. Komisija za določeno vrsto sporazumov (npr. vertikalnih sporazumov, sporazumov o specializaciji, raziskavah in razvoju, tehnologiji) je in tudi po reformi še vedno izdaja uredbe o skupinskih izjemah, v katerih določi kategorijo sporazumov, za katere velja, da izpolnjujejo pogoje iz 3. odstavka 81. člena PES in jih zato glede njih sploh ni treba preverjati (tudi pred reformo jih ni bilo treba priglasiti Komisiji).

Do individualne presoje po kriterijih iz 3. odstavka 81. člena PES torej pride šele, če sporazum predstavlja kršitev 1. odstavka 81. člena PES in če glede njega ne obstaja skupinska izjema.

Da bi Komisija nacionalne organe natančneje seznanila z novo vsebino v njihovi pristojnosti, tj. z vsebino 3. odstavka 81. člena PES, in jim predstavila, kako bo primere po 81. členu oziroma natančneje, izjeme po 3. odstavku 81. člena PES reševala sama, ter jih s tem usmerila k pravilni uporabi teh določb, je izdala Smernice o uporabi člena 81(3) Pogodbe o ustanovitvi Evropske

[26] Pri *de minimis* pravilu, ki je obravnavano zgoraj, pa sporazum že v osnovi sploh ne krši 1. odstavka 81. člena PES.

skupnosti.[27] Poleg nacionalnih organov so smernice lahko v veliko pomoč podjetjem, saj ta po novem sistemu svojih sporazumov ne morejo več priglasiti Komisiji in čakati na odobritev posamične izjeme po 3. odstavku 81. člena PES, temveč morajo sama pretehtati, ali je sporazum, ki ga sklepajo, skladen z 81. členom PES ali ne, oziroma, ali kljub vsebini, ki ni skladna s 1. odstavkom 81. člena PES, sporazum zadostuje pogojem iz 3. odstavka 81. člena PES. Tako so v smernicah najprej razloženi pomen, vsebina in uporaba določb 81. člena PES, nato pa je natančno analizirana določba 3. odstavka 81. člena PES in v njej vsebovani štirje kriteriji, proučitev katerih da odgovor na vprašanje, ali je določen sporazum, ki je sicer prepovedan po 1. odstavku 81. člena PES, morebiti vendarle dovoljen na podlagi 3. odstavka istega člena. Razlaga vsebuje tudi ilustrativne hipotetične primere in sklicevanje na ključno sodno prakso, ki sta jo v zvezi z 81. členom PES oblikovali ECJ in CFI, kar je lahko v ogromno pomoč vsem, ki bodo morali uporabiti obravnavano določbo.

2.2. Prepovedana zloraba prevladujočega položaja - 82. člen PES

82. člen PES (pred preštevilčenjem z Amsterdamsko pogodbo člen 86) predstavlja osnovo ureditve drugega temeljnega področja antitrusta, ki je poleg kartelov in podobnih ravnanj ter poleg koncentracij tudi temeljno področje konkurenčnega prava. Čeprav v zgodovini obravnavanih primerov pred Komisijo ni bil deležen toliko pozornosti kot 81. člen, je bilo v zvezi z njim s strani Komisije in skupnostnih sodišč vendarle izdanih veliko izredno pomembnih odločb.

82. člen PES prepoveduje enostranska dejanja v obliki zlorabe prevladujočega položaja enega ali več podjetij na Skupnem trgu ali njegovem znatnem delu, kolikor bi lahko prizadela trgovino med državami članicami, ter našteva nekatere tovrstne primere:

Kot nezdružljiva s skupnim trgom je prepovedana vsaka zloraba prevladujočega položaja enega ali več podjetij na skupnem trgu ali njegovem znatnem delu, kolikor bi lahko prizadela trgovino med državami članicami.

Takšna zloraba je zlasti:

a) neposredno ali posredno določanje nepoštenih nakupnih ali prodajnih cen ali drugih nepoštenih pogojev poslovanja;
b) omejevanje proizvodnje, trgov ali tehničnega razvoja na škodo potrošnikov;
c) uporaba neenakih pogojev za primerljive posle z drugimi trgovinskimi partnerji, ki slednje postavlja v podrejen konkurenčni položaj;
d) sklepanje pogodb, ki sopogodbenikom narekujejo sprejetje dodatnih obveznosti, ki po svoji

[27] Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08) (Text with EEA relevance). Povezava z besedilom je na spletni strani http://ec.europa.eu/comm/competition/antitrust/legislation/art_teu.html.

naravi ali glede na trgovinske običaje nimajo nikakršne zveze s predmetom takšnih pogodb.

Čeprav 82. člen PES ne vsebuje ekvivalenta 2. odstavku 81. člena PES, so vse določbe, ki so posledica zlorabe - enako kot prepovedani sporazumi po 81. členu PES - nične.

2.2.1. Relevantni trg

Za presojo prevladujočega položaja je treba najprej vedeti, na katerem trgu sploh ugotavljamo tržno moč podjetja. Šele ko ugotovimo obseg relevantnega trga produktov in relevantno ozemlje ter določimo časovno obdobje, ki nas v konkretnem primeru zanima, lahko začnemo s presojo, ali ima podjetje na relevantnem produktnem in geografskem trgu prevladujoč položaj.

Določitev relevantnega trga produktov (oz. storitev) je ena od ključnih predpostavk za presojo prevladujočega položaja. Prevladujoč položaj se namreč ugotavlja na točno določenem trgu produktov, zato ga je treba v vsakem primeru posebej najprej natančno definirati. Od obsega produktnega trga bo v veliki meri odvisno, ali bo imelo podjetje prevladujoč položaj ali ne – ožji trg produktov povečuje možnost ugotovitve prevladujočega položaja. Komisija in ECJ sta skozi svojo prakso razvila test za ugotavljanje produktnega trga. Gre za test zamenljivosti produktov – koliko je obravnavani produkt zamenljiv z drugimi,[28] ki ga je moč reševati z vidika ponudbe ali z vidika povpraševanja. V slednjem primeru je treba proučiti križno elastičnost zadevnega produkta: ta je visoka, kadar povečanje cene enega produkta (npr. piščančjega mesa) povzroči preusmeritev kupca na drug produkt (npr. na puranje meso, gosje meso) – v tem primeru sta oba produkta del enega trga. Ker je v nekaterih primerih težko ugotavljati križno elastičnost, so v pomoč nekateri drugi faktorji, kot npr. cena obeh produktov (zvišanje cene dragega vina v večini ne bo preusmerilo kupcev tega k vina k cenenemu vinu, temveč k drugemu dragemu vinu, ki se ni dodatno podražilo) ali njune fizične karakteristike (primerjava gostote, svežine, vsebnosti vode pri različnih vrstah sadja).[29] Z vidika ponudbe pa se zamenljivost ugotavlja glede na to, kako hitro oziroma ali sploh lahko podjetje proizvodnjo enega produkta prilagodi proizvodnji drugega – hitreje ko to lahko stori, večja je zamenljivost produktov.

[28] Po Sporočilu o definiciji relevantnega trga iz leta 1997: "A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use."

[29] Vodilni primeri ECJ s področja ugotavljanja relevantnega trga produktov so: 27/76 *United Brands Company and United Brands Continentaal BV v Commission*, 322/81 *Nederlandsche Banden-Industrie Michelin NV v. Commission*, 2/78 *Hugin Kassaregister AB and Hugin Cash Registers Limited v. Commission*, 66/86 *Ahmed Saaed,* C-53/92P *Hilti v. Commission*, C-333/94P *Tetrapak International SA v. Commission*.

V zvezi z določenim produktom se lahko prevladujoč položaj ugotavlja tudi samo v določenem časovnem obdobju (npr. v primeru sezonskega sadja samo v poletnih mesecih) in tudi določitev tega obsega je pomembna za presojo ravnanja podjetja.[30]

Ko je ugotovljen relevantni produktni trg, je treba v vsakem konkretnem primeru posebej določiti še relevantni geografski trg, tj. območje, na katerem se bo presojal obstoj prevladujočega položaja v zvezi z relevantnim produktom.[31] Kolikor se ga ne da določiti (določi pa se lahko kot območje celotne Skupnosti, ene države članice ali pa zgolj dela države članice), se po praksi Komisije in ECJ šteje, da je to kar področje celotne ES.[32]

Za potrebe ugotavljanja relevantnega produktnega in geografskega trga je Komisija leta 1997 izdala Sporočilo o definiciji relevantnega trga,[33] v katerem je v pomoč podjetjem predstavila svoj vidik ugotavljanja relevantnega trga. Bistvenega pomena je t.i. *SSNIP* test (*small but significant and non-transitory increase in prices*), prevzet iz ameriškega prava koncentracij, po katerem je relevantni trg najširši obseg produktov in območja, glede katerega velja, da bi se monopolistu še splačalo malce (*small*) in trajno (*non-transitory*) zvišati ceno (*increase in price* - običajno je to 5-10 %), tako da ta majhen dvig ne bi povzročil bistvenega (*significant*) znižanja prihodka zaradi tega, ker bi se kupci preusmerili k drugim produktom ali dobaviteljem na drugih območjih; gre torej za vprašanje, ali bi se stranke določenega podjetja zaradi trajnega dviga cen določenega produkta preusmerile k razpoložljivim substitutom (v luči produktnega trga) ali k drugim dobaviteljem (v luči geografskega trga) do te mere, da za podjetje ne bi bilo smotrno izvesti dviga cen - v tem primeru se nadomestne produkte in območja doda k relevantnemu trgu do obsega, pri katerem bi se tak dvig cen podjetju splačal.[34] Vendar je treba opozoriti, da *SSNIP* test na področju 82. člena PES ni vedno ustrezen; v primeru, ko ima preiskovano podjetje zaradi svojega prevladujočega položaja že monopolne cene (na osnovi *SSNIP* testa pa se šele ugotavlja obstoj prevlsdujočega položaja), dvig že tako visokih cen povzroči veliko večjo preusmeritev potrošnikov

[30] Glej primer ECJ 27/76 *United Brands Company and United Brands Continentaal BV v Commission.*

[31] Po Sporočilu o definiciji relevantnega trga iz leta 1997: "The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas". Glej tudi odločbi Komisije 88/511 *Napier Brown-British Sugar* in 82/861 *British Telecommunications*.

[32] Glej primer ECJ C-53/92P *Hilti AG v. Commission*.

[33] Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law [1997] OJ C 372. Besedilo je objavljeno na spletni strani http://ec.europa.eu/comm/competition/antitrust/relevma_en.html. Uporablja se tako na področju 82. člena PES kot tudi koncentracij, pri katerih je enako treba ugotoviti oba relevantna trga.

[34] V sporočilu je naveden ilustrativen primer z vodo različnih okusov: ali vode različnih okusov predstavljajo en trg ali več trgov? Po *SSNIP* testu bi do odgovora prišli na sledeč način: vprašali bi se, ali bi potrošniki v primeru trajnega povečanja cene vode okusa A za 5-10 % začeli piti vodo drugih okusov; če bi se zadostno število potrošnikov preusmerilo k pitju vode z okusom B do te mere, da se prodaja vode A po zvišani ceni zaradi zmanjšanja prodaje podjetju ne bi več izplačala, potem bi ugotovili, da trg sestavljata vsaj vodi okusa A in B, če bi enako ugotovili tudi z drugimi okusi, bi se trg še povečal. Ko dvig cene ne bi več bistveno vplival na prodajo vode določenih okusov, bi bil to relevantni trg.

k substitutom kot sicer in je zato določitev relevantnega trga na tej podlagi preširoka - govorimo o t.i. *Cellophane Fallacy*.[35]

Določitev relevantnega trga je poleg 82. člena PES potrebna tudi v primerih presoje koncentracij (predvsem na tem področju je upošteven *SSNIP* test) ter tudi pri ugotavljanju nekaterih predpostavk iz 81. člena PES.

2.2.2. Ekonomska moč na trgu – prevladujoč (dominanten) položaj

Šele ko sta ugotovljena relevantna trga, lahko začnemo s presojo, ali ima na teh trgih podjetje prevladujoč položaj. Test za presojo prevladujočega položaja je podalo ECJ v znanih primerih *United Brands* in *Hoffmann La Roche*:[36] prevladujoč položaj se nanaša na ekonomsko moč podjetja, ki mu omogoča preprečevati učinkovito konkurenco na relevantnem trgu tako, da ima moč obnašati se v pretežni meri neodvisno od svojih konkurentov, strank, potrošnikov; na obstoj prevladujočega položaja kažejo različni faktorji, med katerimi je zelo pomemben obstoj zelo visokega tržnega deleža – kakšna številka zadostuje za obstoj prevladujočega položaja, je odvisno od okoliščin konkretnega primera in je težko abstraktno določljiva.[37] Poleg tržnega deleža je za ugotavljanje prevladujočega položaja pomembna tudi možnost vstopa konkurentov na trg, razmerje med tržnimi deleži preiskovanega podjetja in njegovimi konkurenti idr.

Prevladujoč položaj na relevantnem trgu ima lahko zgolj eno podjetje, lahko pa tudi več podjetij skupaj. Za razliko od 81. člena PES, ki zadeva sporazume ali usklajena ravnanja dveh ali več podjetij, je glavna tarča 82. člena PES obnašanje, tj. zloraba prevladujočega položaja enega samega podjetja brez povezave - sporazuma s kakšnim drugim podjetjem. Primeri kolektivne oz. skupne prevlade - *joint dominance* oz. *collective dominance*,[38] so prav tako zajeti v definiciji 82. člena, a niso takega pomena kot sporazumi oz. usklajena ravnanja več podjetij po 81. členu PES, lahko pa primer zlorabe skupne prevlade hkrati predstavlja tudi kršitev 81. člena PES. O skupni prevladi glede na prakso ECJ govorimo takrat, ko so podjetja med seboj tako ekonomsko (horizontalni in celo vertikalno) povezana, da se odločajo za enako obnašanje na trgu neodvisno od svojih konkurentov, strank in potrošnikov. Za skupno prevlado gre brez dvoma takrat, ko ima prevladujoč

[35] T.i. celofanska zabloda - napaka, ki jo je v primeru v zvezi z embalažo s celofanom (*United States v. EI du Pont de Nemour and Co.*) naredilo Vrhovno sodišče ZDA v petdesetih letih prejšnjega stoletja. V takih primerih je treba dominanco presojati predvsem po drugih kriterijih in ne po tržem deležu. Več o tem glej Whish, Competition Law, str. 30-32.

[36] Primera ECJ 27/76 *United Brands Company and United Brands Continentaal BV v Commission*, 85/76 *Hoffmann-La Roche & Co. AG v. Centrafarm Vertriebsgesellschaft Pharmazeutischer*.

[37] Ob obstoju drugih faktorjev je v primeru 27/76 *United Brands* zadoščal 40-45 % delež, v primeru 85/76 *Hoffmann-La Roche* 43 % delež ni zadoščal, saj so druge okoliščine kazale na neobstoj prevlade, zgolj 50 % delež brez obstoja dodatnih faktorjev pa je zadoščal v primeru C-62/86 *Akzo Chemie BV v. Commission*.

[38] Glej primere skupnostnih sodišč T-68, 77-78/89 *Re Italian Flat Glass: Societa Italiana Vetro v. Commission*, C-393/92 *Municipality of Almelo v. NV Energiebedrijf Ijsselmij*, C-140-142/94 *DIP SpA v. Commune di Bassano del Grappa*, C-395-396/96P *Compagnie Maritime Belge Transports SA, Compagnie Maritime Belge SA, and Dafra Lines A/S v. Commission*.

položaj več podjetij, ki pripadajo isti gospodarki enoti oz. skupini, vprašljiva pa je možnost skupne prevlade več med seboj neodvisnih podjetij, ki delujejo paralelno.

2.2.3. Zloraba prevladujočega položaja

Poudariti je treba, da prevladujoč položaj *per se* ni prepovedan, šele zloraba takega položaja lahko predstavlja prepovedano dejanje. Obnašanje podjetja s tržno močjo in ne zgolj obstoj tržne moči je torej predmet zanimanja konkurenčnega prava, vendar pa je meja med obema postavkama zelo tanka, njena določitev v vsakem konkretnem primeru pa naloga organov za varstvo konkurence in sodišč.

2. odstavek 82. člena PES primeroma navaja najbolj tipične in pogoste položaje zlorabe prevladujočega položaja (predatorske cene, pretirane cene, diskriminatorne cene, popusti in rabati z namenom vezave kupcev, zavrnitev dostopa do pomembnih naprav oz. območij, zavrnitev poslovanja idr.),[39] seveda pa je treba zlorabo enako kot ostale predpostavke ugotavljati v vsakem primeru posebej.[40]

2.2.4. Možen vpliv na trgovanje med državami članicami

82. člen PES prepoveduje enostranska dejanja v obliki zlorabe prevladujočega položaja enega ali več podjetij na Skupnem trgu ali njegovem znatnem delu, kolikor bi zloraba lahko prizadela trgovino med državami članicami. Kriterij učinka na trgovino je pomemben tudi na področju kartelov in je, kot je že bilo obrazloženo zgoraj, urejen v Smernicah o konceptu učinka na trgovanje, vsebovanem v 81. in 82. členu Pogodbe o ustanovitvi Evropske skupnosti, ki jih je izdala Komisija.

Omeniti je treba, da za razliko od 81. člena PES 82. člen PES ne govori o učinku na konkurenco, kar pomeni, da se lahko 82. člen PES uporabi tudi v primeru, ko zloraba prevladujočega položaja nima vpliva na konkurente, ampak zgolj na potrošnike.

[39] Več o tem glej Goyder, EC Competition Law, str. 282-323.

[40] Glej primere skupnostnih sodišč 6&7/73 *Instituti Chemioterapico Italiano SpA and Commercial Solvents v. Commission*, 27/76 *United Brands Company and United Brands Continentaal BV v Commission*, T-69, 70, 76/89 *RTE, ITP, BBC v. Commission*, C-7/97 *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG*, 85/76 *Hoffmann-La Roche & Co. AG v. Commission*, C-62/86 *Akzo Chemie BV v. Commission*, C-395-396/96P *Compagnie Maritime Belge Transports SA, Compagnie Maritime Belge SA, and Dafra Lines A/S v. Commission.*

2.2.5. Izjeme

Za razliko od področja kartelov, ki v 3. odstavku 81. člena PES določa izjeme od prepovedi iz 1. odstavka 81. člena, 82. člen PES takih izjem ne vsebuje, saj se je smatrala zloraba prevladujočega položaja na začetku za brezizjemno kršitev konkurence. Kasneje pa je ECJ razvilo koncept objektivne opravičljivosti in sorazmernosti z namenom omiliti (pre)strogo prepoved iz 82. člena PES. Kolikor obstaja opravičljiv razlog za obnašanje podjetja s prevladujočim položajem in je obnašanje hkrati tudi sorazmerno, ne bo podleglo prepovedi iz 82. člena.[41]

3. Reformirani sistem izvajanja skupnostnih določb antitrusta

3.1. Predstavitev reforme

Člen 83 PES pooblašča Svet EU, da za uveljavitev načel iz določb členov 81 in 82 PES sprejme ustrezne uredbe ali direktive:

1. Ustrezne uredbe ali direktive za uveljavitev načel iz členov 81 in 82 sprejme Svet s kvalificirano večino na predlog Komisije in po posvetovanju z Evropskim parlamentom.

2. Uredbe ali direktive iz odstavka 1 se sprejmejo zlasti za:
a) zagotovitev upoštevanja prepovedi iz členov 81(1) in 82 z določitvijo glob in periodičnih denarnih kazni;
b) določitev podrobnosti uporabe člena 81(3) ob upoštevanju potrebe po zagotovitvi učinkovitega nadzora, pa tudi po čim večji poenostavitvi upravljanja;
c) opredelitev področja uporabe določb členov 81 in 82 v različnih gospodarskih panogah, če je to potrebno;
d) opredelitev nalog Komisije in Sodišča pri uporabi predpisov iz tega odstavka;
e) določitev razmerja med nacionalnimi zakonodajami in določbami, ki jih vsebuje ta oddelek ali ki so bile sprejete v skladu s tem členom.

Na tej osnovi je Svet leta 1962 na predlog Komisije in po posvetovanju z Evropskim parlamentom sprejel Uredbo 17/62.[42] Ta je postavila sistem izvajanja določb 81. in 82. člena PES, ki je brez vpeljave bistvenih novosti preživel kar petdeset let in je bil v skladu s spremenjenimi okoliščinami v Evropski uniji potreben modernizacije.

[41] Glej npr. primer ECJ 27/76 *United Brands Company and United Brands Continentaal BV v Commission*.

[42] "Regulation No. 17", "First regulation implementing Articles 85 and 86 of the Treaty", OJ P13, 21.02.1962. Večkrat je bila amandmirana in sicer z uredbami 59/62, 118/63, 2822/71, 1216/99 ter štirimi akti pridružitve iz let 1972, 1979, 1985 in 1994.

28. aprila 1999 je tako Komisija sprejela Belo knjigo o modernizaciji pravil za implementacijo členov 85 in 86 Pogodbe o ustanovitvi Evropske skupnosti,[43] ki je pomenila najpomembnejši dokument konkurenčne politike Komisije v zadnje pol stoletja in je nadaljevala trend modernizacije, začet že z istega leta izdano Skupinsko uredbo o vertikalnih oblikah omejevanja konkurence.[44] Bela knjiga je ponudila paleto možnosti za reformiranje dotedanjih pravil, ki naj bi omogočile konkurenčni politiki imeti bolj pomembno vlogo pri oblikovanju evropske gospodarske in politične prihodnosti. V večini so predlogi padli na plodna tla, vendar niso bile vse njene rešitve sprejete z odobravanjem. 16. decembra 2002 je Svet EU, upoštevajoč številne razprave o vsebini Bele knjige ter Osnutek uredbe Komisije z dne 27. septembra 2000,[45] soglasno sprejel novo Uredbo 1/2003,[46] ki s svojimi 45 členi predstavlja radikalno prestrukturiranje in s tem poenostavitev sistema izvajanja konkurenčnopravnih določb členov 81 in 82 PES.[47] Nova uredba se je začela uporabljati sočasno z zadnjo širitvijo Evropske unije, torej 1. maja 2004.[48]

Besedilo uredbe v slovenskem jeziku je objavljeno na spletni strani http://europa.eu.int/eur-lex/sl/dd/reg/sl_register_0810.html, povezave na različice v tujih jezikih pa so na spletni strani http://ec.europa.eu/comm/competition/antitrust/legislation/regulation.html.

Sestavljena je iz naslednjih poglavij:

Poglavje I: Načela (členi 1-3)
Poglavje II: Pristojnosti (členi 4-6)
Poglavje III: Odločbe Komisije (členi 7-10)
Poglavje IV: Sodelovanje (členi 11-16)
Poglavje V: Pooblastilo za preiskavo (členi 17-22)
Poglavje VI: Sankcije (členi 23-24)
Poglavje VII: Zastaranje (členi 25-26)
Poglavje VIII: Zaslišanja in poslovna skrivnost (členi 27-28)
Poglavje IX: Pravila o izjemah (člen 29)
Poglavje X: Splošne določbe (členi 30-33)
Poglavje XI: Prehodne in končne določbe ter spremembe (členi 34-45).

[43] T.i. "Modernizacijska Bela knjiga", OJC 132/1 (1999) (Commission).

[44] Block Exemption on Vertical Restraints, Regulation 2790/1999, (1999) OJ L 326/21, ki sedaj skupaj ureja izjeme na področju vertikalnih omejitev, ki so bile prej urejene v več uredbah o skupinskih izjemah.

[45] Predlog uredbe Komisije COM(2000)582final 2000/0243/CNS.

[46] Council regulation (EC) No 1/2003 of 16th December 2002 on the implementation of the rules on competition laid down in articles 81 and 82 of the Treaty (2003 OJ L1/1 (2003) 4 CMLR 551).

[47] Poleg Uredbe 17/62 (z izjemo njene določbe 8(3)) ukinja tudi Uredbo No.141. Naslednje uredbe pa nova uredba amandmira: No.3975/87/EEC, No.4056/86/EEC, No.2988/74/EEC, No.1017/68/EEC, No.19/65/EEC, No.2821/71/EEC, No.3976/87/EEC, No.1534/91/EEC, No.479/92/EEC.

[48] Objavljena je bila 4.1.2003, v veljavo je stopila dvajseti dan po objavi, torej 24.1.2003.

Nacionalna sodišča poleg poglavja o načelih zadevajo predvsem naslednji členi:

- 6. člen o pristojnosti nacionalnih sodišč za uporabo 81. in 82. člena PES,
- 15. člen o sodelovanju nacionalnih sodišč s Komisijo in nacionalnim organom za varstvo konkurence,
- 16. člen o enotni uporabi 81. in 82. člena PES.

Ključne spremembe, ki jih je prinesla nova Uredba 1/2003, so:

(i) odprava sistema priglasitve sporazumov za pridobitev posamične izjeme po 3. odstavku 81. člena PES (podjetja morajo sedaj sama presojati naravo svojih sporazumov, ki jih ne morejo več priglasiti Komisiji v predhodno odobritev),
(ii) decentralizacija uporabe določbe 3. odstavka 81. člena PES (ne le Komisija, tudi nacionalni organi za varstvo konkurence so po novem pristojni za presojo kriterijev iz 3. odstavka 81. člena PES),
(iii) večje sodelovanje Komisije in nacionalnih organov za varstvo konkurence v t.i. *European Competition Network* (*ECN*) ter sodelovanje Komisije in nacionalnih organov za varstvo konkurence z nacionalnimi sodišči preko instituta *amicus curiae*,
(iv) povišanje kazni in širitev pristojnosti Komisije pri odkrivanju nezakonitih dejanj.

V sklopu ureditve novega sodelovanja reforma v veliki meri poleg dela Komisije zadeva tudi delo nacionalnih organov za varstvo konkurence in nacionalnih sodišč, ki so odslej pristojni uporabljati 81. člen PES v celoti in ne le njegovih prvih dveh odstavkov. Do sedaj je bilo namreč odločanje o posamičnih izjemah po 3. odstavku 81. člena PES pridržano Komisiji in podjetja so morala za pridobitev posamične izjeme svoje sporazume obvezno priglasiti Komisiji, saj so bili lahko le tako izvzeti iz prepovedi 1. odstavka 81. člena na podlagi proučitve njihovih vplivov. V takem, centraliziranem sistemu avtorizacije, je torej posamične izjeme lahko podeljevala le Komisija in brez njene zelene luči se podjetja niso smela sklicevati na 3. odstavek 81. člena. Poudariti je treba, da priglasitev ravnanja ni bila obvezna, to je bila zgolj možnost podjetij, ki niso bila prepričana o vsebini svojih sporazumov oz. položaja, da so le-tega priglasila Komisiji in od nje zahtevala bodisi t.im. *negative clearance*, ki je pomenil ugotovitev Komisije, da sploh ne gre za kršitev 81. oz. 82. člena PES, bodisi t.im. *individual exemption*, tj. izvzetje ravnanja iz kršitve 81. člena na podlagi kriterijev iz 3. odstavka 81. člena PES. Od podjetij se je enako kot sedaj tudi v prejšnjem sistemu že v osnovi zahtevalo, da ne kršijo določb 81. in 82. člena PES. Priglasitev pa je bila le njihova opcija, vendar če so se želela sklicevati na 3. odstavek 81. člena PES, so morala dejanje praviloma priglasiti, saj je bila zgolj Komisija pristojna odločati o kriterijih iz te določbe in v primeru izpolnjevanja podeliti posamično izjemo. Nacionalni organi so morali zato v primeru sklicevanja na 3. odstavek 81. člena ustaviti postopek in počakati na odločitev Komisije, kar je bilo zelo zamudno. Prvi in 2. odstavek 81. člena so smeli torej nacionalni organi uporabljati že po stari

Uredbi 17/62 (razen v primeru, ko je postopek o zadevi začela Komisija). Zaradi monopola Komisije nad podeljevanjem izjem je Komisijo zasul plaz priglasitev (v večini primerov v zvezi z za evropsko konkurenčno politiko nepomembnimi sporazumi), ki jih ni uspela niti začeti obravnavati, kaj šele rešiti, in zato je Komisija sama dala pobudo za prenehanje svojega monopola z namenom posvetiti se pomembnim nalogam, kot so boj z najbolj problematičnimi protikonkurečnimi ravnanji, razvoj konkurenčne politike in zagotavljanje enotne uporabe pravil konkurence. Z reformo je bil zato uveljavljen sistem neposredne uporabe izjem, tj. t.i. *directly applicable exception system*, na mesto sistema vnaprejšnje avtorizacije izpolnjevanja kriterijev za podelitev posamične izjeme je stopil sistem naknadne kontrole prepovedanih dejanj. Od podjetij pa se zahteva, da sama *ab initio* presodijo, ali kršijo 81. oz. 82. člen PES oz. ali njihovi sporazumi, ki bi bili sicer prepovedami po 1. odstavku 81. člena, morda izpolnjujejo pogoje iz 3. odstavka 81. člena PES. Tega odgovora sedaj od Komisije ne dobijo več.

Prvi člen nove Uredbe 1/2003 tako določa:

1. Sporazumi, sklepi in usklajena ravnanja, zajeti v členu 81(1) Pogodbe, ki ne izpolnjujejo pogojev iz člena 81(3) Pogodbe, se prepovejo brez zahteve po predhodni odločbi.

2. Sporazumi, sklepi in usklajena ravnanja, zajeti v členu 81(1) Pogodbe, ki izpolnjujejo pogoje iz člena 81(3) Pogodbe, se ne prepovejo brez zahteve po predhodni odločb.

3. Zloraba prevladujočega položaja iz člena 82 Pogodbe se prepove brez zahteve po predhodni odločbi.[49]

V novem sistemu torej ni več ločene obravnave 1. in 3. odstavka 81. člena PES. Kolikor se podjetje sklicuje na 3. odstavek 81. člena, namreč organ, ki zadevo rešuje, presoja izpolnjevanje predpostavk iz obeh določb hkrati in ne čaka več na odgovor Komisije, ki je imela do sedaj monopol nad podeljevanjem posamičnih izjem.

V povezavi s tem je pomemben 2. člen uredbe, ki določa pravilo dokaznega bremena:

V vseh nacionalnih postopkih ali postopkih Skupnosti za uporabo členov 81 in 82 Pogodbe kršitve iz člena 81(1) ali člena 82 Pogodbe dokazuje stranka ali organ, ki kršitev domneva. Podjetje ali podjetniško združenje, ki uveljavlja ugodnost iz člena 81(3) Pogodbe, nosi dokazno breme, da so pogoji iz navedenega odstavka izpolnjeni.

[49] Zaradi jasnejšega razumevanja te in tudi ostalih določb uredbe je priporočljivo brati besedilo v angleškem jeziku. Prvi člen se glasi: "Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which do not satisfy the conditions of Article 81(3) of the Treaty shall be prohibited, no prior decision to that effect being required. 2. Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which satisfy the conditions of Article 81(3) of the Treaty shall not be prohibited, no prior decision to that effect being required. 3. The abuse of a dominant position referred to in Article 82 of the Treaty shall be prohibited, no prior decision to that effect being required."

Pomembna je tudi vzpostavitev razmerja med skupnostnimi in nacionalnimi konkurenčnimi pravili. Tretji člen nove uredbe določa, da kadarkoli nacionalni organi za dejanje, ki vpliva na meddržavno trgovanje, uporabljajo nacionalno konkurenčno pravo, so dolžni obenem uporabljati tudi 81. oz. 82. člen PES. Kolikor je dejanje glede na določila 81. člena PES dovoljeno, ne sme biti prepovedano po strožji nacionalni zakonodaji, medtem ko lahko država članica v primerjavi z določbo 82. člena PES uporablja strožja nacionalna pravila:

1. Kadar organi, pristojni za konkurenco v državah članicah, ali nacionalna sodišča uporabljajo nacionalno zakonodajo o konkurenci za sporazume, sklepe podjetniških združenj ali za usklajena ravnanja v smislu člena 81(1) Pogodbe, ki lahko vplivajo na trgovanje med državami članicami v smislu navedene določbe, uporabljajo za te sporazume, sklepe ali usklajena ravnanja tudi člen 81 Pogodbe. Kadar organi, pristojni za konkurenco v državah članicah, ali nacionalna sodišča uporabljajo nacionalno zakonodajo o konkurenci za zlorabo, ki je prepovedana s členom 82 Pogodbe, uporabljajo tudi člen 82 Pogodbe.

2. Uporaba nacionalne zakonodaje o konkurenci ne sme voditi k prepovedi sporazumov, sklepov podjetniških združenj ali usklajenih ravnanj, ki lahko vplivajo na trgovanje med državami članicami, a ne omejujejo konkurence v smislu člena 81(1) Pogodbe, ali izpolnjujejo pogoje iz člena 81(3) Pogodbe, ali jih ureja Uredba o uporabi člena 81(3) Pogodbe. Državam članicam ta uredba ne sme preprečevati, da na svojem ozemlju sprejmejo in uporabljajo strožjo nacionalno zakonodajo, ki preprečuje ali preganja enostransko ravnanje, v katero so vpletena podjetja.

3. Brez poseganja v splošna načela in druge določbe prava Skupnosti se odstavka 1 in 2 ne uporabljata v primerih, pri katerih organi, pristojni za konkurenco, in sodišča v državah članicah uporabljajo nacionalni zakon o nadzoru združevanja podjetij, niti ne preprečujeta uporabe določb nacionalnega prava, katerih cilji se pretežno razlikujejo od cilja členov 81 in 82 Pogodbe.

Zaradi številnih novosti in nejasnosti reformiranega sistema izvajanja skupnostnih konkurenčnih pravil je bil za učinkovito uporabo in uveljavitev v praksi potreben sprejem številnih drugih sekundarnih zavezujočih (*hard law*) in nezavezujočih (*soft law*) aktov, ki natančno razlagajo pomen posameznih določb Uredbe 1/2003 in uredbo s tem predstavljajo v bolj čisti sliki, kar je v veliko pomoč tako podjetjem in njihovim odvetnikom kot nacionalnim uradom za varstvo konkurence in sodiščem ter ne nazadnje tudi Komisiji sami. Reforma je namreč celo med strokovno javnost vnesla negotovost in tako zahtevala nadaljnje pojasnjevanje, utemeljevanje in prepričevanje s strani Komisije. Ta se je za dosego cilja približati novosti vsem subjektom, ki jih tematika zadeva, poslužila najrazličnejših metod, predvsem pa je izdala celo vrsto pomožnih sekundarnih pravnih virov. Gre za raznovrstno paleto dokumentov v obliki uredb, sporočil in smernic (usmeritev), ki natančneje urejajo posamezne, predvsem problematične tematske sklope in so kljub temu, da so večidel nezavezujoči, zelo pomembni za pravilno razumevanje Uredbe 1/2003

in same vsebine 81. in 82. člena PES. Tudi pred sprejemom Uredbe 1/2003, torej v času veljave starih aktov, ki so urejali področje antitrusta, so že obstajali nekateri pomožni pojasnjevalni akti,[50] prav zaradi pomembnih preobratov, ki jih je prinesel nov režim, pa je bilo treba obstoječe akte nadgraditi ter sprejeti nekaj povsem novih dokumentov:

(i) Uredba Komisije (ES) št. 773/2004 z dne 07.04.2004 o postopanju Komisije v zvezi s členoma 81 in 82 Pogodbe o ustanovitvi Evropske skupnosti[51]
(ii) Sporočilo Komisije Evropskih skupnosti o obravnavi prijav s strani Komisije Evropskih skupnosti po 81. in 82. členu Pogodbe o ustanovitvi Evropske skupnosti[52]
(iii) Smernice o konceptu učinka na trgovanje, vsebovanem v 81. in 82. členu Pogodbe o ustanovitvi Evropske skupnosti[53]
(iv) Smernice o uporabi člena 81(3) Pogodbe o ustanovitvi Evropske skupnosti[54]
(v) Sporočilo Komisije Evropskih skupnosti o neformalnih smernicah glede aktualnih vprašanj v zvezi s členoma 81 in 82 Pogodbe o ustanovitvi Evropske skupnosti, ki se pojavljajo v posameznih primerih (usmeritvena pisma)[55]

[50] Npr. Uredba Komisije Evropskih skupnosti (EC) št. 2659/2000 z dne 29.11.2000 o uporabi določbe 81(3) Pogodbe o ustanovitvi Evropske skupnosti za kategorije raziskovalnih in razvojnih sporazumov, Uredba Komisije Evropskih skupnosti (EC) št. 1400/2002 z dne 31.7.2002 o uporabi določbe 81(3) Pogodbe o ustanovitvi Evropske skupnosti za kategorije vertikalnih sporazumov in usklajenih ravnanj v sektorju motornih vozil, Uredba Komisije Evropskih skupnosti (EC) št. 772/2004 z dne 27.4.2004 o uporabi določbe 81(3) Pogodbe o ustanovitvi Evropske skupnosti za kategorije sporazumov o prenosu tehnologije, Smernice glede uporabe člena 81 Pogodbe o ustanovitvi Evropske skupnosti za horizontalne kooperacijske sporazume (2001/C 3/02), Smernice o vertikalnih omejitvah (2000/C 291/01), Sporočilo Komisije Evropskih skupnosti o sporazumih majhnega pomena, ki bistveno ne omejujejo konkurence po členu 81(1) Pogodbe o ustanovitvi Evropske skupnosti (*de minimis*) (2001/C 368/07).

[51] Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (Text with EEA relevance). Sprejeta je bila 07.04.2004, v Uradnem listu EU je bila objavljena 27.04.2004, tj. istočasno kot sporočilo o obravnavi prijav s strani Komisije, veljati pa je začela 01.05.2004. Ima 20 členov. Povezava z besedilom je na spletni strani http://ec.europa.eu/comm/competition/antitrust/legislation/impl_reg.html.

[52] Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty (2004/C 101/05) (Text with EEA relevance), Official Journal C 101, 27/04/2004. Povezava z besedilom je na spletni strani http://ec.europa.eu/comm/competition/antitrust/legislation/complaints.html. Komisija želi s svojim sporočilom opogumiti in pozvati vse posameznike in podjetja, ki so bili prizadeti z ravnanjem podjetij, ki so kršila 81. ali 82. člen PES, k posredovanju podatkov o kršitvah 81. ali 82. člena PES pristojnim organom, tj. Komisiji, nacionalnim organom za varstvo konkurence in/ali nacionalnim sodiščem. Zato so v sporočilu opisane vse možnosti reagiranja na kršitev antitrustovskih pravil, ki so na voljo pravnim in fizičnim osebam v novem sistemu, sporočilo pa se posebej osredotoča na opis postopka obravnavanja prijav na Komisiji in tako natančneje obravnava in pojasni vsebino Uredbe 773/2004. Komisija ni dolžna obravnavati vsake prijave in glede na kriterija teže primera ter pomembnosti za definiranje skupnostne konkurenčne politike sama izbira, katere primere bo obravnavala, pri tem pa mora paziti na primere, ki so v njeni izključni pristojnosti.

[53] Obravnavane so zgoraj v tč. 2.1.4.

[54] Obravnavane so zgoraj v tč. 2.1.5.

[55] 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/C 101/06). Povezava z besedilom je na spletni strani http://ec.europa.eu/comm/competition/antitrust/legislation/guide.html. Kljub prednostim nove ureditve preskok iz sistema priglasitve in potrditve zmanjšuje pravno gotovost podjetij in povečuje njihovo odgovornost, saj morajo v naprej sama paziti, da njihovi dogovori niso v nasprotju s konkurenčnimi pravili oz. da izpolnjujejo pogoje za izvzetje iz prepovedi. Da zaradi novosti ne bi prihajalo do neenotnosti v uporabi določb 81. člena PES ter da bi se podjetja pri presoji, ali kršijo 81. člen ali ne, vendarle lahko

(vi) Sporočilo Komisije Evropskih skupnosti o sodelovanju Komisije Evropskih skupnosti in nacionalnih sodišč[56]
(vii) Sporočilo Komisije Evropskih skupnosti o sodelovanju znotraj Mreže uradov za varstvo konkurence[57]
(viii) Osnutek amandmiranega Sporočila o imuniteti pred kaznimi in znižanju kazni v kartelnih primerih (t.i. *Leniency Notice*)[58]
(ix) Obvestilo Komisije o pravilih za vpogled v spis Komisije v zadevah na podlagi členov 81 in 82 Pogodbe ES, členov 53, 54 in 57 Sporazuma EGP in Uredbe Sveta (ES) št. 139/2004.[59]

Obravnavani akti sicer ne vežejo nacionalnih sodišč in uradov za varstvo konkurence, vendar gre pričakovati visoko pogostnost njihove uporabe. Vsekakor so dobrodošlo, če ne celo nujno pomagalo za razumevanje vsebine skupnostnih antitrustovskih določil ter za razumevanje novega, reformiranega sistema izvajanja pravil antitrusta., ki ga zaokrožujejo s svojimi tehnično natančnimi in konkretnimi navodili in predlogi. Brez njih bi bila uredba več ali manj votla črka na papirju brez posebne uporabne vrednosti za nacionalne organe in še posebej za podjetja in posameznike. Zagotovo bo za optimalno izvajanje konkurenčnih pravil potrebno sprejeti še kakšen akt, Komisija

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oprla na zanesljivo mnenje, naj bi Komisija kljub temu, da je bil cilj reforme zmanjšati število zadev na Komisiji, ter kljub temu, da že sama uredba vsebuje mehanizme za zagotavljanje pravne varnosti, pomagala podjetjem pri presoji značilnosti njihovih dejanj. V primerih, ko bo tudi na podlagi vseh izdanih smernic, odločb Komisije in skupnostnih sodišč, uredb, sporočil in drugih aktov, ki služijo podjetjem v pomoč pri presoji njihovih ravnanj, obstajala precejšnja negotovost o njihovi naravi, torej ko bo šlo za nova ali še ne rešena vprašanja, se bodo lahko posamezna podjetja obrnila na neformalno pomoč h Komisiji, ki bo za podjetje izdala t.i. *guidance letter* (usmeritveno pismo).

[56] Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (2004/C 101/03). Povezava z besedilom je na spletni strani http://ec.europa.eu/comm/competition/antitrust/legislation/courts.html.

[57] Commission Notice on cooperation within the Network of Competition Authorities (2004/C 101/03) (Text with EEArelevance). Povezava z besedilom je na spletni strani http://ec.europa.eu/comm/competition/antitrust/legislation/network.html. Oktobra 2002 je bila vzpostavljena Mreža organov za varstvo konkurence (*European Competition Network ECN),* ki jo sestavljajo Komisija Evropskih skupnosti in organi za varstvo konkurence iz 25 držav članic. Sporočilo, ki je nadomestilo staro sporočilo iz leta 1997, je namenjeno sistematičnemu in učinkovitemu sodelovanju znotraj mreže. Podaja kriterije za določitev najprimernejšega organa za obravnavo konkretnega primera – to bo bodisi Komisija bodisi kateri od nacionalnih organov za varstvo konkurence ali pa celo več nacionalnih organov za varstvo konkurence skupaj.

[58] Commission notice on immunity from fines and reduction of fines in cartel cases (2002/C 45/03) - pripravljajo se spremembe sporočila. Povezava z besedilom in osnutki sprememb sporočila so na spletnih straneh http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52002XC0219(02):EN:HTML in http://ec.europa.eu/comm/competition/antitrust/legislation/leniency.html. Gre za postopek sodelovanja Komisije in podjetij, ki so sicer udeležena v kartelu, pa si želijo z razkritjem podatkov o vsebini kartela zagotoviti imuniteto pred kaznimi oz. znižanje kazni, ki bi jih sicer doletele v primeru odkritja in kaznovanja. K dosedanjemu identičnemu sporočilu iz leta 2002 bo, če bo sprememba odobrena, dodan dodatek o postopku varovanja izjav oz. podatkov, ki jih Komisiji podajo v kartelu udeležena podjetja z namenom pridobiti imuniteto pred kaznijo ali znižanje kazni.

[59] Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004. Povezava z besedilom je na spletni strani http://ec.europa.eu/comm/competition/antitrust/legislation/access.html. Dokument obravnava pravico preiskovanih podjetij do vpogleda v spis Komisije, omogoča jim, da se izjavijo o nasprotovanjih Komisije, zagotavlja jim torej okvir za izvrševanje pravice do obrambe, kar je za podjetja izjemnega pomena.

je v zadnjih letih na tem področju izredno aktivna in upati gre, da bo v kratkem postavljen celoten in učinkovit sistem nadzorovanja prepovedanih kartelov in drugih vrst sporazumov oz. ravnanj ter prevladujočih položajev.

3.2. Delovanje nacionalnih sodišč v novem sistemu

Že od samega začetka v šestdesetih letih je Komisija iz vrste razlogov promovirala uveljavljanje konkurenčnih zadev na sodiščih držav članic, s čimer naj bi se javnopravno uveljavljanje preko Komisije in organov za varstvo konkurence dopolnilo z zasebnopravnim.

V praksi je bilo postopkov v zvezi z 81. členom PES pred nacionalnimi sodišči izredno malo. Razlog za to je bila poleg atraktivnosti prijav protikonkurenčnih ravnanj na Komisijo[60] predvsem nemožnost obravnavanja primera na nacionalnem sodišču v smislu celotnega 81. člena PES in s tem povezana odložitev zadeve v primeru, da je prišlo do priglasitve Komisiji, s čimer se je pogosto celo načrtno zaustavljalo postopke pred nacionalnimi sodišči. Dodaten element naj bi bilo tudi nepoznavanje parametrov skupnostnega prava konkurence s strani nacionalnih sodišč, kar se zdi tudi danes glavno vodilo posredovanja Komisije in organov za varstvo konkurence v nacionalne postopke, predvsem postopke pred sodišči novih članic.

Že leta 1993 je Komisija z namenom razbremeniti svoje delo na osnovi takratnega 5. člena PES in nekaterih zgoraj omenjenih primerov izdala Sporočilo o sodelovanju z nacionalnimi sodišči,[61] ki je nacionalnim sodiščem ponudilo navodila v pomoč pri uporabi določb 1. odstavka 81. in 82. člena PES. Tako je bilo že takrat jasno zapisano, da morajo nacionalna sodišča pri odločanju vedno upoštevati pred tem sprejete odločitve Komisije. Komisija se je zavezala sodiščem pomagati z dejanskimi ekonomskimi podatki, s katerimi bi razpolagala, in s podatki o stanju postopkov, ki jih vodi. Sodiščem naj bi na njihovo zahtevo nudila tudi svetovanje pri uporabi konkurenčnopravnih določb, kar pa se je le malokrat zgodilo tudi zaradi odpora sodišč po tovrstni pomoči. Nadalje naj bi Komisija tudi prednostno obravnavala zadeve, ki so bile zaradi potrebe po njeni odločitvi prekinjene pred nacionalnimi sodišči, da bi se tam lahko čim prej zaključile.

Kot že omenjeno, so z Uredbo 1/2003 nacionalna sodišča pridobila nove pristojnosti. Pristojnost nacionalnih sodišč za uporabo skupnostnih konkurenčnopravnih določb je določena v 6., najkrajšem, a zelo neposrednem členu Uredbe 1/2003:
Nacionalna sodišča so pristojna za uporabo členov 81 in 82 Pogodbe.

[60] Podjetja so s svojimi prijavami izredno otežila delo Komisije, ki je še tako nepomembne prijave obravnavala prednostno in s tem zanemarjala resnično pomembne zadeve. V primeru T-24/90 *Automec v. Commission* pa je CFI dejalo, da sme Komisija odreči postopanje v določeni zadevi, ki nima zadostnega pomena za Skupnost.

[61] Commission Notice on cooperation between national courts and the Commission applying Article 85 and 86 of the EC Treaty z dne 13.02.1993 ([1993] OJ C39/6).

Že preambula Uredbe 1/2003 v 7. paragrafu predstavi položaj nacionalnih sodišč pri izvajanju konkurenčnopravnih določb:

Nacionalna sodišča imajo pri uporabi pravil konkurence Skupnosti bistveno vlogo. V pravnih sporih med posamezniki ščitijo osebne pravice v skladu s pravom Skupnosti, na primer z določanjem odškodnin oškodovancem. Nacionalna sodišča dopolnjujejo naloge nacionalnih organov, pristojnih za konkurenco. Zato jim mora biti v celoti dovoljena uporaba členov 81 in 82 Pogodbe.

Do uporabe skupnostnih konkurenčnih pravil lahko pride v različnih sodnih postopkih – upravnem, kazenskem, pravdnem.[62] Reforma se osredotoča predvsem na slednje, saj teh zaradi že zgoraj opisanih razlogov v času veljave starega sistema ni bilo veliko. To so v največji meri postopki, v katerih toženec zatrjuje ničnost določenega sporazuma zaradi kršitve člena 81 ali 82 PES (v tem primeru se skupnostno pravo konkurence uporablja kot »shield«, torej ščit, obramba pred različnimi zahtevki sopogodbenika), ter postopki za povračilo škode, ki je nastala zaradi kršitve 81. ali 82. člena PES (v tem primeru se skupnostno pravo konkurence uporablja kot »sword«, torej meč, sredstvo za prenehanje protikonkurenčnih ravnanj oz. za povračilo škode). Pri tem je treba zopet opozoriti na prednost in bistvo nove uredbe, ki daje nacionalnim sodiščem pristojnost za odločanje o celem 81. členu in odpravlja možnost strank, da zavlečejo postopek s prijavo sporazuma Komisiji.

Osmi paragraf preambule pa razloži, kako naj bi nacionalna sodišča uporabljala skupnostno konkurenčno pravo:

Za zagotavljanje učinkovitega izvajanja pravil konkurence Skupnosti in pravilnega sodelovanja po tej uredbi morajo organi, pristojni za konkurenco, in sodišča v državah članicah uporabljati člena 81 in 82 Pogodbe, kadar uporabljajo nacionalno zakonodajo o konkurenci v sporazumih in ravnanjih, ki lahko vplivajo na trgovino med državami članicami…

Poleg določb 1. odstavka 81. člena in 82. člena PES ter skupinskih izjem nacionalna sodišča sedaj uporabljajo tudi določbo 3. odstavka 81. člena PES. Imajo torej možnost uporabe 81. člena PES kot celote, določen sporazum lahko spoznajo za veljavnega ali neveljavnega po pretehtanju v luči prav vseh določb 81. člena. Možnost uporabe 81. člena v celoti naj bi odpravila probleme dolgotrajnosti postopkov zaradi priglasitev sporazumov Komisiji in pomenila prednost predvsem za stranke, ki naj bi na ta način praviloma hitreje dočakale konec postopkov pred sodišči.[63] Komisija in pristojni nacionalni organi bodo tako lahko združeno izvajali skupnostna konkurenčna pravila, pri čemer bo

[62] Kdaj bo sodišče pristojno za odločanje o konkurenčni zadevi, zavisi od jurisdikcijskih pravil, pri čemer je pomembna Uredba Sveta (ES) št. 44/2001 z dne 22. decembra 2000 o pristojnosti in priznavanju ter izvrševanju sodnih odločb v civilnih in gospodarskih zadevah, ki je uporabna za vse konkurenčne primere civilne in gospodarske narave.

[63] Načeloma zato, ker se bo v primeru postavitve predhodnega vprašanja na skupnostno sodišče postopek precej podaljšal.

potrebno zagotoviti njihovo enotno uporabo in zato tesno sodelovanje vseh konkurenčnopravnih akterjev.

Snovalci novega sistema so se zavedali, da bo odločanje po 3. odstavku 81. člena za nacionalna sodišča tako starih kot novih članic predstavljalo precej zahtevno nalogo,[64] dodatno bojazen pred napačno in nekonsistentno uporabo pravil konkurence pa so videli predvsem v sodiščih desetih novih članic, ki so šele dodobra shodila na poti uporabe skupnostnega prava. Uredba 1/2003 zato vsebuje številne ukrepe za zagotovitev ustrezne in konsistentne uporabe konkurenčnih pravil v obliki sodelovanja Komisije, nacionalnih organov za varstvo konkurence in nacionalnih sodišč. Tovrstno sodelovanje Komisije z nacionalnimi sodišči v PES za razliko od predhodnih vprašanj kot sodelovanja skupnostnih sodišč z nacionalnimi sodišči, ni izrecno predvideno, a ga je moč izpeljati iz 10. člena PES. Ta namreč države članice zavezuje k sprejemanju vseh ustreznih ukrepov, splošnih ali posebnih, da bi zagotovile izpolnjevanje obveznosti, ki izhajajo iz PES ali so posledica ukrepov institucij Skupnosti, ter k vzdržanju od vseh ukrepov, ki bi lahko ogrozili doseganje ciljev PES. Ta dolžnost držav članic, s katero se olajšuje izpolnjevanje nalog Skupnosti, se imenuje *a duty to co-operate*, torej dolžnost sodelovanja, pod katero lahko podredimo tudi zahteve iz Uredbe 1/2003. ECJ v določbah 10. člena PES vidi celo zahtevo po medsebojnem sodelovanju med institucijami Unije in državami članicami, torej ne le dolžnosti držav, temveč tudi skupnostnih institucij.

Potrebo po medsebojnem sodelovanju organov izvajanja skupnostnih konkurenčnopravnih pravil pojasni že preambula Uredbe 1/2003 v 21. paragrafu:
Enotnost pri uporabi pravil konkurence zahteva tudi vzpostavitev oblik sodelovanja med sodišči držav članic in Komisijo. To velja za vsa sodišča držav članic, ki uporabljajo člena 81 in 82 Pogodbe, ne glede na to, ali uporabljajo ta pravila v pravnih sporih med zasebnimi strankami ali pa delujejo kot organi, pristojni za konkurenco, oziroma kot pritožbena sodišča. Zlasti morajo nacionalna sodišča imeti možnost, da Komisijo zaprosijo za informacije ali njeno mnenje v zadevah, ki se tičejo uporabe zakonodaje Skupnosti o konkurenci. Komisija in organi, pristojni za konkurenco v državah članicah, morajo imeti tudi možnost, da predložijo pisne ali ustne ugotovitve sodiščem, ki uporabljajo člena 81 in 82 Pogodbe. Te pripombe je treba predložiti v okviru nacionalnih proceduralnih pravil in ravnanj, vključno s tistimi, ki varujejo pravice strank. Zato je treba sprejeti ukrepe, ki zagotavljajo, da so Komisija in organi, pristojni za konkurenco v državah članicah, stalno dobro obveščeni o postopkih, ki tečejo pred nacionalnimi sodišči.

Sodelovanje nacionalnih sodišč s Komisijo in nacionalnimi organi za varstvo konkurence je urejeno v 15., 16., 20, in 21. členu Uredbe 1/2003. Prva dva urejata medsebojno pomoč nacionalnih sodišč, organov za varstvo konkurence in Komisije pri izvajanju skupnostnih konkurenčnopravnih

[64] Celo nekateri pravniki so v odgovoru na predlagano decentralizacijo priznali, da so pogosto težko dali primeren nasvet v zvezi z določbo 81(3) PES. Na drugi strani pa Komisija trdi, da so parametri te določbe že zadovoljivo izkristalizirani in zato posebnih težav pri uporabi ne bi smelo biti.

določb, 20. člen v paragrafih 6-8 ter 21. člen pa urejata sodelovanje nacionalnih sodišč pri preiskovalnih dejanjih Komisije.

Natančneje pa je bolj ali manj skope določbe Uredbe 1/2003 - v delu, ki zadeva sodelovanje nacionalnih sodišč s Komisijo - konkretiziralo in pojasnilo Sporočilo o sodelovanju Evropske komisije in nacionalnih sodišč,[65] ki je bilo objavljeno 27.04.2004 in je nadomestilo v osnovi zelo podobno sporočilo iz leta 1993.

Sestavljeno je iz štirih delov:

- prvi del v paragrafih 1 in 2 definira področje, ki ga sporočilo ureja;
- drugi del se v paragrafih 3-14 osredotoča na uporabo 81. in 82. člena PES in sicer najprej pojasni pristojnost nacionalnih sodišč za uporabo obeh skupnostnih konkurenčnopravnih določb ter ostalih skupnostnih določb z neposrednim učinkom in tudi za uporabo odločb obeh skupnostnih sodišč, v nadaljevanju predstavi postopkovne vidike uporabe skupnostnega konkurenčnega prava s strani nacionalnih sodišč, nazadnje pa razloži položaje vzporedne ter zaporedne uporabe skupnostnega konkurenčnega prava s strani Komisije in nacionalnih sodišč;
- paragrafi 15-41 tretjega dela sporočila predstavljajo konkretizacijo 15. člena Uredbe 1/2003 in torej zadevajo sodelovanje nacionalnih sodišč in Komisije, predvsem pa je poudarjena neodvisnost nacionalnih sodišč, ki se kaže v nezavezujoči naravi sodelovanja, kot varovalko neodvisnosti pa določa obveznost Komisije, da objavlja postopke sodelovanja v svojem letnem poročilu in na svoji uradni spletni strani;
- zadnji, četrti del pa v paragrafih 42 in 43 vsebuje končne določbe.

Sporočilo za razliko od uredbe nima zavezujoče pravne narave, temveč gre za *soft-law*, ki služi nacionalnim sodiščem pri uporabi komunitarnih konkurenčnopravnih določb. Kljub temu gre pričakovati, da ga bodo poleg Komisije same enako kot večino ostalega »mehkega« prava upoštevala tudi nacionalna sodišča.

Obravnavano sporočilo zadeva zgolj sodelovanje Komisije z nacionalnimi sodišči in se sodelovanja nacionalnih organov za varstvo konkurence ne dotika. Vprašanja tovrstnega sodelovanja bo morala

[65] Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC z dne 27.04.2004 (2004/C 101/04). Besedilo sporočila je objavljeno na spletni strani http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/c_101/c_10120040427en00540064.pdf.

zato urediti vsaka država članica posebej, nekatere so to že storile in sicer v obliki pomožnih razlagalnih aktov, priporočil, ki jih je izdal domači organ za varstvo konkurence.[66]

3.2.1. Postopkovni vidiki uporabe skupnostnega konkurenčnega prava s strani nacionalnih sodišč

Procesne pogoje za izvrševanje skupnostnega konkurenčnega prava s strani nacionalnih sodišč in sankcije, ki jih sodišča lahko izrekajo v primeru kršitev, v veliki meri urejajo nacionalna pravila, nekatera vprašanja pa vendarle ureja skupnostno pravo, ki v tem delu prevlada nad nacionalnim; slednjega nacionalno sodišče v primeru, da nasprotuje skupnostnemu, zato ne sme uporabiti. Pa tudi v primeru, ko skupnostno pravo določenega vprašanja ne ureja in se zato uporabi nacionalno pravo, mora uporaba nacionalnega prava ustrezati temeljnim načelom Skupnosti:

- nacionalno pravo mora v primeru kršitve skupnostnega prava zagotavljati sankcije, ki so učinkovite, sorazmerne in preventivne[67]
- kadar kršitev skupnostnega prava posamezniku povzroči škodo, mora imeti ta pod določenimi pogoji možnost, da na nacionalnem sodišču zahteva odškodnino[68]
- pravila o postopku in sankcijah, ki jih nacionalna sodišča uporabljajo za izvrševanje skupnostnega prava, ne smejo preveč oteževati ali dejansko omejevati izvrševanja (načelo učinkovitosti)[69] in ne smejo biti manj ugodna od pravil za izvrševanje ekvivalentnega nacionalnega prava (načelo ekvivalence).[70]

Kolikor nacionalna pravila nasprotujejo navedenim načelom, jih nacionalno sodišče ne sme uporabiti.

[66] Na Nizozemskem npr. so nizozemskemu uradu za varstvo konkurence - natančneje njegovemu predsedniku - podelili *amicus curiae* pristojnost v sec. 89h Zakona o konkurenci (v zvezi z upravnimi postopki) in sec. 44a Zakona o pravdnem postopku (v zvezi s pravdnimi postopki). Nizozemski urad za varstvo konkurence pa je za konkretizacijo pravice predsednika urada izdal *Amicus Curiae Guidelines* o izvrševanju svoje naloge *amicus curiae* pred nizozemskimi sodišči. Smernice obravnavajo pravno podlago za sodelovanje, pojasnijo, kdaj bo urad sodeloval v postopkih pred nacionalnimi sodišči (predvidoma predvsem v civilnih pritožbenih postopkih; zaintervencijo ga zaprosijo bodisi sodišče bodisi katera od strank; , pri čemer je v luči namena sodelovanja, tj. varovanja javnega interesa, posebej poudarjena njegova neodvisnost in nepristranskost; o svoji odločitvi, ki mora temeljiti tudi na upoštevanju delovnega stroška intervencije glede na druge, primarne naloge urada, bo najprej pisno obvestil sodišče; v primeru poravnave strank bo prenehal s sodelovanjem itd.), kako bo postopal z gradivom, ki ga bo od sodišč pridobil za potrebe priprave mnenja (to naj bi podal v štirih tednih; gradivo mora takoj vrniti nazaj, hranil pa bo kopijo mnenja in gradiva; gradivo sme uporabiti samo za potrebe priprave mnenja), kako bo ravnal v primeru, ko bo kot *amicus curiae* postopala Komisija (v tem primeru urad ne bo sodeloval), kakšen je status njegove intervencije, na kakšen način bobo mnenja urada objavljena (na spletni strani urada in na intranetu *ECN* v skladu s pravili o zaupnosti in šele po objavi relevantne sodne odločbe) idr. Besedilo nizozemskih smernic je objavljeno na spletni strani http://www.nmanet.nl/Images/14_27829_tcm16-75171.pdf#search=%22amicus%20curiae%20netherlands%20%22.

[67] Glej primer ECJ 68/88 *Commission v. Greece*.

[68] Glej primere ECJ C-453/99 *Courage and Crehan*, joined cases C-6/90 and C-9/90 *Francovich*, C-271/91 *Marshall v Southampton and South West Hampshire Area Health Authority*, joined cases C-46/93 and C-48/93 *Brasserie du Pecheur and Factortame* idr.

[69] Glej primere ECJ 33/76 *Rewe*, 45/76 *Comet*, 79/83 *Harz*.

[70] Glej primere ECJ 33/76 *Rewe*, 199/82 *San Giorgio*, C-231/96 *Edis*.

3.2.2. Paralelna uporaba skupnostnega konkurenčnega prava s strani nacionalnih sodišč in Komisije

Inštrument za preprečitev nasprotujočih si odločb v isti zadevi in s tem inštrument za enotno uporabo skupnostnega prava je v zvezi z odločbami Komisije in sodišč vsebovan v 1. odstavku 16. člena nove uredbe, ki vsebuje prepoved nacionalnim sodiščem sprejeti odločitev, ki bi bila v nasprotju z odločitvijo, ki jo je o določeni zadevi že sprejela Komisija. Če nacionalno sodišče dvomi v zakonitost odločbe Komisije, ki bi jo moralo v konkretnem primeru upoštevati, ne sme kar tako sprejeti drugačne odločbe, temveč lahko postavi predhodno vprašanje na ECJ o skladnosti odločbe Komisije s skupnostnim pravom, ali pa postopa po 230. členu PES in počaka na ugotovitev skupnostnega sodišča o veljavnosti odločbe Komisije.[71]

Prav tako morajo biti sodišča pozorna na primere, ki jih je že začela, pa še ne zaključila Komisija. Kadar nacionalno sodišče v določeni zadevi odloča pred Komisijo, naj bi se izogibal sprejetju odločbe, ki bi bila v nasprotju s pričakovano odločitvijo Komisije;[72] v ta namen lahko nacionalno sodišče povpraša Komisijo, ali je v zvezi z določenim sporazumom že začela postopek, in če, kako postopek napreduje;[73] v luči pravne varnosti pa lahko nacionalno sodišče prekine postopek in počaka do odločitve Komisije,[74] slednja naj bi take zadeve obravnavala prednostno.

3.2.3. *Amicus curiae* sodelovanje po Uredbi 1/2003

Amicus curiae sodelovanje, tj. postopek »prijateljevanja« Komisije in domačega organa za varstvo konkurence z nacionalnim sodiščem, je urejen v 1., 3. in 4. odstavku 15. člena Uredbe 1/2003 in zadeva dve obliki pomoči nacionalnim sodiščem: prvič, pomoč Komisije sodišču na njegovo prošnjo, ter drugič, pomoč sodišču brez njegove prošnje in na lastno iniciativo Komisije ali domačega organa za varstvo konkurence.

3.2.3.1. Pomoč Komisije na prošnjo nacionalnega sodišča

Prvi odstavek ureja dolžnost Komisije pomagati nacionalnemu sodišču v obliki posredovanja podatkov ali mnenj o uporabi 81. in 82. člena PES in določa:

V postopkih za uporabo člena 81 in člena 82 Pogodbe lahko sodišča držav članic zaprosijo Komisijo, da jim pošlje informacije, s katerimi razpolaga, ali svoje mnenje o vprašanjih glede uporabe pravil konkurence Skupnosti.

[71] Glej primere ECJ C-344/98 *Masterfoods*, 314/85 *Foto-Frost*, T-65/98 *Van den Berg Foods v EC Commission.* Več o tem glej tudi Blanco, EC Competition procedure, str. 80.

[72] Nacionalni uradi za varstvo konkurence naj po Uredbi 1/2003 v takih primerih postopka spoh ne bi začeli.

[73] Glej primere ECJ 48/72 *Brasserie de Haecht*, C-234/89 *Delimitis*, joined cases C-319/93, C-40/94 in C-224/94 *Dijkstra*.

[74] Glej primera ECJ C-344/98 *Masterfoods*, C-234/89 *Delimitis*.

3.2.3.1.1. Posredovanje podatkov

Nacionalna sodišča imajo torej možnost, da v primeru odločanja po 81. ali 82. členu PES zaprosijo Komisijo za posredovanje podatkov, ki bi jih Komisija morebiti imela na voljo v zvezi z uporabo teh dveh členov. Tako jo bodo lahko npr. zaprosila za posredovanje določenih dokumentov ali pa podatkov procesne narave o tem, ali je Komisija že začela postopati v določenem primeru, ali je o tem morebiti že sprejela odločitev oz. približno kdaj jo bo sprejela ipd. Svojo prošnjo oziroma zahtevo lahko pošljejo na poštni ali elektronski naslov Generalnega direktorata za konkurenco v Bruslju:

- poštni naslov: European Commission, Directorate General for Competition, B-1049 Brusseles, Belgium

- elektronski naslov: comp-amicus@cec.eu.int.

Oblika prošnje ni predpisana, pričakuje pa se, da bo nacionalno sodišče pred podajo prošnje zaslišalo stranke postopka.[75]

Komisija se je v sporočilu o sodelovanju z nacionalnimi sodišči za potrebe učinkovitosti tovrstnega sodelovanja zavezala, da si bo prizadevala sodiščem posredovati zahtevane podatke v enem mesecu od prejema zahteve. Odvetnikom se zdi to predolga doba, ki je povrh vsega še neobvezujoča, in so si še pred sprejemom sporočila prizadevali, da bi bila doba odvisna tudi od potrebe vsakokratnega primera pred nacionalnim sodiščem. Kolikor bo za oblikovanje odgovora Komisija potrebovala dodatna pojasnila od nacionalnega sodišča ali bo morala kontaktirati tiste, ki jih posredovanje podatkov zadeva, bo rok tekel od prejema teh dodatnih informacij.

Za razliko od posredovanja podatkov s strani Komisije nacionalnim organom za varstvo konkurence, ki je natančno urejeno v 12. členu nove uredbe, je posredovanje podatkov nacionalnim sodiščem v uredbi zajeto le v eni povedi. Pri posredovanju podatkov nacionalnim sodiščem mora Komisija sicer upoštevati zahtevo po varovanju podatkov, saj že 287. člen PES na splošno določa, da uslužbenci institucij Skupnosti tudi po prenehanju opravljanja svojih dolžnosti ne smejo razkrivati zaupnih podatkov niti poslovnih skrivnosti. Ta zahteva ne preprečuje posredovanja tovrstnih podatkov nacionalnim sodiščem,[76] temveč nalaga Komisiji skrb za njihovo varovanje v okviru sodelovanja. Komisija se bo morala tako pred posredovanjem zaupnih podatkov in poslovnih skrivnosti nacionalnim sodiščem prepričati, ali ta zagotavljajo varovanje tovrstnih podatkov. Če zagotovila o tem Komisija ne bo dobila, podatkov ne bo posredovala, pri čemer je

[75] Po analogiji s priporočilom v Smernicah ECJ o predhodnih vprašanjih po členu 234 PES.

[76] Člen 10 PES torej prevlada nad ozkim branjem člena 287 PES.

treba omeniti, da ni nikjer razloženo, kaj se šteje kot zadostno varovalo oz. zagotovilo. Če pa bo do posredovanja zaupnih podatkov oziroma poslovnih skrivnosti prišlo, bo Komisija označila zaupne dele in dele, ki se lahko razkrijejo. Ob tem se v adversarnih postopkih postavlja vprašanje pomena tovrstnih zaupnih podatkov: če jih ni v spisu, če jih torej stranki ne moreta videti, jih sodišče ne sme uporabiti.

Poleg razloga varovanja zaupnih podatkov lahko Komisija odreče posredovanje podatkov tudi v nekaterih drugih primerih in sicer iz pomembnega razloga varovanja interesov Skupnosti ali pa zato, da bi se izognila nasprotovanju ciljem, ki jih prav z varovanjem določenih podatkov zasleduje.[77]

Zanimivo je tudi, da v uredbi ni predvideno, da bi nacionalna sodišča tovrstne podatke razen od Komisije lahko dobila tudi od nacionalnih organov za varstvo konkurence. Razlog je morda v tem, da bi se preprečilo hkratno pridobivanje podatkov o isti zadevi od dveh različnih virov, pa tudi Komisija bo na podlagi delovanja Evropske mreže za konkurenco razpolagala s številnimi podatki organov za varstvo konkurence.

3.2.3.1.2. Posredovanje mnenj o uporabi skupnostnega konkurenčnega prava

Poleg podatkov lahko nacionalna sodišča po 1. odstavku 15. člena Komisijo zaprosijo tudi za njeno mnenje o uporabi skupnostnega prava v obliki odgovora na vprašanje nacionalnega sodišča, ko ta naleti na problem v odločanju na podlagi skupnostnih konkurenčnih pravil.

V prvi vrsti se bodo še pred aktiviranjem pomoči Komisije nacionalna sodišča seveda lahko naslonila na že izdane odločbe obeh skupnostnih sodišč ali na uredbe, odločbe, sporočila ali smernice same Komisije. V zvezi s poznavanjem prakse institucij Skupnosti se iz odvetniških krogov pojavljajo zahteve po izboljšanju obstoječih spletnih iskalnikov primerov pred Komisijo in skupnostnima sodiščema, kakor tudi po vzpostavitvi baze, iz katere bi nacionalna sodišča in odvetniki redno dobivali sveže podatke o vseh pomembnih dogodkih na temo antitrusta.

Če v tej praksi nacionalna sodišča ne bodo našla zadovoljivega odgovora, se bodo lahko obrnila na Komisijo, ki bo kot *amicus curiae* priskočila na pomoč z mnenjem o ekonomskih, dejanskih ali pravnih vprašanjih. Komisija ima torej nekakšno vlogo strokovnjaka, ki ga sodišče zaprosi za pomoč v zadevi, o kateri samo nima potrebnega znanja. Razen tega, da je tako mnenje za razliko od *preliminary rulings* za nacionalno sodišče nezavezujoče, uredba in sporočilo ne povesta veliko o vsebini in postopkovnih vprašanjih mnenja. Nakazano je zgolj, da naj bi mnenje zajemalo

[77] Tako npr. brez soglasja podjetja Komisija ne bo posredovala podatkov, ki jih je od tega podjetja dobila v okviru programa *leniency*, tj. programa opustitve ali znižanja sankcij, ki omogoča boljše možnosti oz. rešitve za podjetje, ki Komisiji priskrbi relevantne podatke. Več o razkrivanju podatkov glej tudi Uredbo 1049/2001 o javnem dostopu do dokumentov Evropskega parlamenta, Komisije in Sveta.

ekonomske, dejanske in pravne vidike zadeve, ne pa tudi vsebino konkretnega primera pred nacionalnm sodiščem.[78] Za potrebe priprave uporabnega mnenja lahko Komisija od nacionalnega sodišča zahteva dodatne podatke, vendar ne sme imeti kontakta s strankami, ki lahko do poročila Komisije pridejo le v skladu z nacionalnimi postopkovnimi pravili, ki pa morajo upoštevati temeljna načela skupnostnega prava. Slabost sporočila je, da ne razloži, v kakšni obliki in vsebini naj bi nacionalna sodišča postavila zahtevo po pridobitvi mnenja - s tem bi sodišču, pa tudi sebi, olajšala delo, saj bi že takoj dobila vse relevantne podatke;[79] prav tako ne pove, ali lahko stranke sodelujejo pri oblikovanju zahteve za podajo mnenja, kako lahko sodišče mnenje uporabi v postopku itd., temveč se sklicuje na nacionalna postopkovna pravila, ki morajo ustrezati skupnostnim temeljnim načelom. ECJ je podobna mnenja po starem sporočilu opredelilo kot strokovna poročila (*expert records*), za katera morajo veljati nacionalna pravila o takih poročilih, vključujoč pravila o razkritju - pri tem pa se ne sme pozabiti na to, da morajo biti taka nacionalna pravila skladna s skupnostnimi načeli, iz katerih lahko izvedemo pravico strank do opredelitve do mnenja.

Komisija si je enako kot v primeru zgoraj obravnavanega posredovanja podatkov tudi v primeru posredovanja mnenj določila instrukcijski rok in sicer je to v tem primeru štiri mesece od prejema zahteve s strani nacionalnega sodišča oziroma od prejema dodatnih informacij, ki jih potrebuje za izdelavo mnenja.

Zaradi občutljivosti tematike - gre namreč za vmešavanje izvršilne veje oblasti v sodni postopek – ter zato, ker Komisija ni dovolj natančno razložila postopka te vrste sodelovanja,[80] bo zanimivo spremljati, kako pogosto se bodo sodišča prostovoljno zatekla po pomoč h Komisiji.[81] Glede razlage ali veljavnosti skupnostnega konkurenčnega prava bo seveda nacionalno sodišče lahko ubralo tudi drugo pot in na podlagi postopka *preliminary rulings* po 234. členu PES za odgovore zaprosilo eno od obeh skupnostnih sodišč,[82] kar pa bo zaradi izredno dolgega trajanja postopkov in omejenosti na razlago določb manj atraktivno.

[78] Sporočilo je v tem delu zelo skopo in ne daje jasnega odgovora na vprašanje, ali naj poda Komisija zgolj mnenje splošne narave ali lahko poda ekonomsko in pravno analizo na podlagi podatkov sodišča. Več o tem glej Blanco, EC competition procedure, str. 93.

[79] V tem se lahko sledi priporočilu iz Smernic ECJ o predhodnih vprašanjih po členu 234 PES, po katerem naj bi nacionalno sodišče hkrati z zahtevo po predhodnem odločanju na ECJ poslalo dejansko in pravno ozadje primera, razloge, ki so botrovali odločitvi po postavitvi predhodnega vprašanja, povzetek navedb strank – prav slednje bi bilo v postopku podajanja mnenja za Komisijo lahko zelo pomembno z ozirom na to, da za potrebe priprave mnenja ne bo zasliševala strank.

[80] Več o pomembnih, pa ne razjasnjenih vprašanjih glej Blanco, EC Competition procedure, str. 94-95.

[81] Po sporočilu iz leta 1993 je bilo npr. na Komisijo poslanih 10 prošenj leta 2001, 7 leta 2000, 5 leta 1999, 4 leta 1998, 1 leta 1997 itd

[82] Omeniti je treba, da organi za varstvo konkurence te druge možnosti nimajo in bo zanje možnost obrniti se na Komisijo še toliko bolj pomembna.

3.2.1.2. Pomoč Komisije in domačega organa za varstvo konkurence nacionalnemu sodišču na lastno pobudo

Najbolj problematično določbo Uredbe 1/2003 predstavljata 3. in 4. odstavek 15. člena, ki urejata dajanje mnenj nacionalnim sodiščem na lastno pobudo Komisije ali domačega organa za varstvo konkurence:

3. Organi, pristojni za konkurenco v državah članicah, lahko nacionalnim sodiščem svoje države članice po uradni dolžnosti pisno predložijo pripombe o vprašanjih glede uporabe člena 81 ali člena 82 Pogodbe. Sodiščem svoje države članice lahko dajo svoja mnenja tudi ustno z dovoljenjem zadevnega sodišča. Kadar skladna uporaba člena 81 ali člena 82 Pogodbe tako zahteva, lahko Komisija na lastno pobudo pisno predloži svoje opombe sodiščem držav članic. Svoje pripombe z dovoljenjem zadevnega sodišča lahko da tudi ustno. Zgolj za pripravo svojih pripomb lahko organi, pristojni za konkurenco v državah članicah, in Komisija zahtevajo od zadevnega sodišča države članice, da jim pošlje ali zagotovi pošiljanje vseh dokumentov, ki so potrebni za oceno primera.

4. Ta člen ne posega v pooblastila za dajanje pripomb pred sodišči, ki so dodeljena organom, pristojnim za konkurenco v državah članicah, v skladu s pravom države članice.

Z vidika nacionalnega procesnega prava je od vseh najbolj problematičen prav 3. odstavek 15. člena nove uredbe, ki predstavlja *amicus curiae* vlogo Komisije in domačega oz. domačih organov za varstvo konkurence v ožjem smislu. Nacionalnim organom za varstvo konkurence in Komisiji namreč omogoča, da nacionalnim sodiščem po lastni iniciativi sporočajo svoja stališča o zadevah, ki se navezujejo na uporabo 81. in 82. člena PES. Z dovoljenjem nacionalnega sodišča jih lahko celo ustno predstavijo. Do tega bo prihajalo v primerih, ko bo po stališču Komisije ali organov za varstvo konkurence to potrebno zaradi koherentne uporabe 81. in 82. člena PES, skladno s čimer bodo stališča omejena na ekonomsko in pravno analizo dejstev določenega primera pred nacionalnim sodiščem. Ustne predstavitve bodo zaradi zahteve po pridobitvi dovoljenja v vsakem posamičnem primeru verjetno redkejše od pisnih, vendar ob tem ne gre pozabiti na dolžnost držav članic iz 10. člena PES, kar pomeni, da bodo težko našle razlog za zavrnitev tovrstnega ustnega sodelovanja Komisije ali organa za varstvo konkurence. Poleg tega ECJ - izhajajoč iz 10. člena PES - vmešavanje Komisije v delo nacionalnih sodišč prej kot pravico smatra za njeno dolžnost v obliki pomoči nacionalnim sodiščem, 10. člen PES zavezuje tudi nacionalne urade za varstvo konkurence.

Za potrebe priprave svojih stališč bodo Komisija in organi za varstvo konkurence od nacionalnega sodišča lahko zahtevali kopije dokumentov, ki pa jih bodo smeli uporabiti le za pripravo mnenja v zvezi s konkretno zadevo.

Ob tem je treba omeniti še 4. odstavek 15. člena nove uredbe, po katerem določbe 15. člena ne omejujejo nacionalnih organov za varstvo konkurence v sodelovanju z nacionalnimi sodišči, kolikor imajo ti po nacionalni zakonodaji v razmerju do sodišč večje pristojnosti. V zvezi s tem je treba poudariti, da nova uredba nacionalne organe za varstvo konkurence, ki smejo podati svoje mnenje sodišču, omejuje le na organe države članice, v kateri poteka postopek, in ne omogoča sodelovanja organov za varstvo konkurence iz drugih držav članic.

Komisija naj bi prav s posredovanjem podatkov in svojih mnenj igrala pravo vlogo *amicus curiae*. To možnost je imela že po starem sistemu, a jo je le redko uporabila, zaradi česar se (še vedno) postavlja vprašanje, kako učinkovit bo/je do sedaj malo znani institut. Komisija je mnenja, da se bo sodelovanje zaradi bolj natančne in kakovostne ureditve instituta na osnovi Uredbe 1/2003 povečalo in se razvilo v uspešno interakcijo. Glede na to, da je bil eden poglavitnih razlogov za reformo konkurence v ES prevelika obremenitev Komisije, se zdi, da razen v res izjemnih primerih do sodelovanja ne bo prihajalo prav pogosto, saj sicer sprememba sistema izvajanja antitrustovskih pravil sploh ne bi bila potrebna. Upoštevati je treba seveda tudi, da je Skupnost sestavljena iz 25 članic z 20 uradnimi jeziki, kar za Komisijo predstavlja morje težko obvladljivih primerov. Ne nepomembno je namreč tudi vprašanje jezikovnih ovir, tako pri pregledovanju sodb nacionalnih sodišč s strani Komisije kot pri samem sodelovanju Komisije v postopku pred nacionalnim sodiščem, pri čemer ne gre pozabiti tudi na visoke stroške, ki lahko pri tem nastanejo.

Uredba in sporočilo ne povesta nič o tem, v kateri fazi postopka naj bi se Komisija in urad za varstvo konkurence vključila v postopek, iz sporočila pa gre vendarle razbrati, da naj bi bilo to v pritožbenem postopku, saj v delu, ki govori o dolžnosti nacionalnih sodišč sporočiti Komisiji vse svoje odločbe, ki zadevajo uporabo 81. ali 82. člena PES (obravnavana je spodaj), razloži, da je namen te dolžnosti seznaniti Komisijo s tovrstnimi postopki in ji s tem omogočiti, da poda svoje mnenje. Vključitev šele fazi pritožbe je smiselna zato, ker z morebitno napačno uporabo skupnostnega konkurenčnega prava na prvi stopnji ni še »nič zamujeno« in Komisija še vedno lahko doseže sprejem pravilne odločitve, vendar pa ne gre pozabiti, da lahko do pritožbe tudi ne pride, zaradi česar bi bilo ustrezno, da bi uredba določila, da mora sodišče takoj po začetku prvostopenjskega postopka o njem obvestiti Komisijo. Takega določila sedaj v uredbi in sporočilu ni, zahteva se zgolj poročanje o že sprejeti pravnomočni odločbi.

Že pred uveljavitvijo novega sistema so se porajala tudi vprašanja, kako zagotoviti, da Komisija in domači organ za varstvo konkurence ne bi prešla meja »prijateljevanja« s sodiščem in primerov jemala v svoje roke, ko za to ne bi bila upravičena. Nacionalna sodišča naj bi bila vendarle neodvisna in v sistemih ločenosti sodne veje oblasti od izvršilne je posredovanje Komisije ali

organa za varstvo konkurence v sodnih postopkih zelo vprašljivo. Komisija v svojem novem sporočilu o sodelovanju z nacionalnimi sodišči sicer zagotavlja, da bo ne glede na obliko sodelovanja spoštovala neodvisnost nacionalnih sodišč. Ohranjanje neodvisnosti sodišč naj bi se sicer v največji meri kazalo v tem, da nacionalna sodišča na pomoč, ki jo nudita Komisija in organ za varstvo konkurence v postopkih, niso vezana. Pomembno je, da se nacionalna sodišča tega zavedajo, vendar morajo upoštevati tudi že omenjeno dolžnost sodelovanja iz 10. člena PES, ki od njih zahteva ustrezno ukrepanje. Predvideti gre, da bodo *amicus curiae* posredovanja dobrodošla predvsem pri sodiščih tistih držav članic, ki se do sedaj še niso resneje soočila s konkurenčnim pravom, medtem ko jih v državah z visoko razvito konkurenčno kulturo in sodno prakso ne bodo sprejeli z navdušenjem, pa tudi Komisija in organ za varstvo konkurence se verjetno v delo sodišč z dolgoletnimi izkušnjami na področju prava konkurence ne bosta »mešala«.[83]

Kot navaja v svojem novem sporočilu o sodelovanju s sodišči, naj bi Komisija o opisanem sodelovanju objavljala tudi povzetke v vsakoletnem Poročilu o konkurečni politiki,[84] prav tako naj bi svoja mnenja naredila dostopna na spletu, kar bo še dodatno razširilo spekter inštrumentov, ki se jih nacionalna sodišča lahko poslužijo tekom svojega odločanja.

Amicus curiae poročilo mora biti strogo omejeno le na zagotavljanje primerne uporabe skupnostnih določb konkurenčnega prava in bo zadevalo le vidike primera, ki to zahtevajo. *Amicus curiae* sodelovanje naj bi v ta namen potekalo le med Komisijo oz. organom za varstvo konkurence in nacionalnim sodiščem in ne tudi s strankami postopka,[85] kar je pri podjetjih sprožilo nezadovoljstvo, saj se jim za oblikovanje pravilnega mnenja Komisije zdi primerno, da bi ta poslušala tudi njih, in tovrstnega postopanja ne vidijo kot poseg v neodvisnost in nepristranskost Komisije.[86]

S strani mnogih je bil ves čas prisoten dvom, da nacionalni predpisi vseh držav članic ne bodo dovoljevali *amicus curiae* sistema.[87] Na tem mestu je treba poudariti, da je *amicus curiae* institut urejen v uredbi, uredbe pa imajo neposredno uporabo in jih morajo nacionalna sodišča zato upoštevati neposredno brez kakršnih koli vmesnikov. Torej sodišča *amicus curiae* sistem v ožjem

[83] Na Irskem npr. se je do sedaj pojavil en primer pred High Court (*Calor Teoranta v. Tervas Limited and others*), v katerem je oktobra 2003 organ za varstvo konkurence podal prošnjo za predstavitev svojega mnenja, vendar do tega zaradi prekinitve postopka (zaradi čakanja na odločitev organa za varstvo konkurence o konkurenci na relevantnem trgu) ni prišlo. Glej spletno stran http://www.oecd.org/dataoecd/6/18/35111063.pdf#search=%22guidance%20on%20amicus%20curiae%20netherlands%20competition%20authority%22.

[84] Commission's Annual Report on Competition Policy.

[85] Po starem sporočilu o sodelovanju Komisije z nacionalnimi sodišči se je Komisija zavezala svoje mnenje posredovati vsem udeležencem ostopka, medtem ko sedaj mnenje pošlje zgolj sodišču, ta pa ga (ker to zahtevajo že temeljna načela skupnostnega prava) posreduje naprej.

[86] Več o tem glej Blanco, EC Competition Procedure, str. 85.

[87] Nekatere države (npr. Portugalska) vendarle poznajo *amicus curiae* podobne načine sodelovanja. Več o pojmu in pomenu *amicus curiae* glej Vlahek, Dva instituta pred slovenskimi sodišči: *amicus curiae* in *preliminary rulings*, str. 1320-1321.

smislu ne glede na svoja postopkovna pravila morajo omogočiti. Ker Uredba 1/2003 postopka podajanja stališč nacionalnim sodiščem natančneje ne določa, bodo upoštevna nacionalna postopkovna pravila, seveda pod pogojem, da so skladna z določbami uredbe. Kolikor primernih postopkovnih pravil, ki bi omogočila sodelovanje skladno z zahtevami uredbe, še ni, jih morajo države članice sprejeti.[88] V nasprotnem primeru bi države članice zopet lahko kršile svojo dolžnost sodelovanja iz 10. člena PES. Kjer države članice takih postopkov še niso uredile, naj bi, kot je zapisano v novem sporočilu Komisije o sodelovanju s sodišči, nacionalno sodišče sámo v konkretnem primeru presodilo, kakšen postopek je primeren za tovrstno sodelovanje, pri čemer morajo upoštevati načela skupnostnega prava, vključujoč temeljne pravice strank.[89] Nacionalna sodišča bodo torej lahko soočena z neposredno uporabljivo uredbo, ki zahteva *amicus curiae* sodelovanje in je podlaga zanj, uredbe Skupnosti pa morajo nacionalna sodišča spoštovati enako kot svojo ustavo in zakone. Namesto izoblikovanja postopka *amicus curiae* v vsakem konkretnem primeru bi bilo potrebno postopek urediti v predpisih držav članic - urediti bi bilo treba npr. stroške sodelovanja, trenutek, do katerega sodelovanje v postopku sploh lahko poteka,[90] morebitno prijavo sodelovanja ipd.

Trenutno instituta *amicus curiae* ne ureja noben od naših zakonov niti ga ne moremo podrediti h kateremu od že obstoječih institutov v naših postopkovnih pravilih. Predstavnik Komisije ali Urada RS za varstvo konkurence v vlogi a*micus curiae* po novi uredbi namreč ni: stranski intervenient, izvedenec, stranka, sospornik, zastopnik javnega interesa, opredelili bi ga lahko kvečjemu po ZUS kot »drugo osebo, če tako določa zakon« (v primeru *amicus curiae* določa to uredba).[91]

Zaradi tega bi bilo morda kljub temu, da sodelovanje z *amicus curiae* zahteva že sama uredba (ki je neposredno uporabna in torej niti ne terja ureditve notranjih postopkovnih pravil), smotrno *amicus curiae* sodelovanje po 1. in 3. odstavku 15. člena nove uredbe natančneje urediti na splošno že v Zakonu o sodiščih, enako kot je bilo to z zadnjo novelo urejeno na področju *preliminary rulings*. Prav postopek po 1. odstavku 15. člena, po katerem Komisija v vlogi *amicus curiae* ne deluje na lastno iniciativo, temveč le na prošnjo sodišča, se zelo približa tistemu po 234. členu PES, le da v slednjem primeru ne gre za iskanje opore pri Komisiji, temveč pri skupnostnih sodiščih ter da

[88] Ob tem se ne sme pozabiti, da tovrstno natančnejše urejanje postopka v domači zakonodaji predstavlja izjemo od prepovedi, da se vsebine uredb ne sme prenašati v domači pravni red.

[89] Tukaj so temeljne pravic strank izrecno omenjene, medtem ko v delu o mnenju Komisije na zahtevo sodišča o njih sporočilo ne govori. V zvezi z obravnavanim mnenjem na lastno pobudo Komisije oz. nacionalnega urada za varstvo konkurence naj bi zajemale pravico strank imeti dostop do mnenja in podati komentarje nanj. Sodišča morajo spoštovati predvsem tudi načelo ekvivalence, v skladu s katerim podaja mnenja s strani Komisije oz. urada ne sme biti težja od podaje ekvivalentnih drugih mnenj v postopku, in učinkovitosti, v skladu s katerim podaja mnenja ne sme biti nesorazmerno otežkočena ali onemogočena.

[90] Trenutek vključitve Komisije in urada bo odvisen od nacionalnih pravil držav članic, lahko tudi od vrste postopka znotraj iste države članice, pri čemer je prezgodnja ali prepozna intervencija neustrezna. Več o tem glej Blanco, EC Competition Procedure, str. 97-98.

[91] Več o tem glej Vlahek, Dva instituta pred slovenskimi sodišči: *amicus curiae* in *preliminary rulings*, str. 1333-1334.

mnenje Komisije za razliko od *preliminary ruling* ne zavezuje. Zaradi specifičnosti postopkov - gre namreč za institut na področju zgolj konkurenčnega prava - pa bi bilo sistem *amicus curiae* sodelovanja najbrž najbolj ustrezno urediti v specialnih zakonih, tj. v ZPOmK, ZPP in drugih, v katerih lahko pride do obravnavanega sodelovanja.

3.2.4. Pomoč nacionalnih sodišč Komisiji

3.2.4.1. Posredovanje podatkov Komisiji s strani nacionalnih sodišč

Sodelovanje nacionalnih sodišč s Komisijo omogoča 2. odstavek 15. člena Uredbe 1/2003, ki za razliko od zgoraj obravnavanega 1. odstavka 15. člena nacionalnim sodiščem ne dopušča le možnosti sodelovanja, temveč jim nalaga dolžnost posredovati Komisiji kopijo vsake pisne odločbe, ki se nanaša na 81. oziroma 82. člen PES:

2. Države članice Komisiji posredujejo kopije vseh pisnih sodb nacionalnih sodišč o uporabi člena 81 ali člena 82 Pogodbe. Posredujejo jih takoj, ko je celotna pisna sodba vročena strankam.

Takšna odločba mora biti torej posredovana brez vsakršne zamude takoj po prejemu pisne odločbe s strani strank. S tem naj bi se povečala javna razprava o odločitvah sodišč, druga nacionalna sodišča ter organi za varstvo konkurence se tako seznanijo s primeri, ki jih rešujejo nacionalna sodišča, Komisija pa lahko na osnovi seznanitve s primerom sprejme odločitev, ali bo s svojimi stališči po 3. odstavku 15. člena kot *amicus curiae* sodelovala v morebitnem nadaljevanju nacionalnega postopka. Za razliko od 1. odstavka 15. člena, kjer se podatki pridobivajo od Komisije, Komisija pri 2. odstavku istega člena, kjer gre za posredovanje podatkov Komisiji, v sporočilu ne omenja varovanja zaupnih podatkov.

Komisija je na uradni spletni strani EU uredila bazo, ki zajema vse posredovane, pred nacionalnimi sodišči potekajoče primere, ki zadevajo uporabo 81. in 82. člena PES. Zbirka odločb se nahaja na naslednji podstrani direktorata za konkurenco:
http://europa.eu.int/commission/competition/antitrust/national_courts/index_en.html:

National court judgments

Austria	Estonia	Hungary	Luxembourg	Slovak Republic
Belgium	Finland	Ireland	Malta	Slovenia
Cyprus	France	Italy	Netherlands	Spain
Czech Republic	Germany	Latvia	Poland	Sweden
Denmark	Greece	Lithuania	Portugal	United Kingdom

National Court Cases Database (Articles 81 & 82 of the EC Treaty) Article 15(2) of Regulation 1/2003 requires Member States to forward to the Commission a copy of any written judgment of national Courts deciding on the application of Articles 81 or 82 of the EC Treaty. The non-confidential versions of these judgments are listed in this database. You will find judgments in the original language, classified according to the Member State of origin. Within every Member State, the judgments are in a chronological order.
Please click on the relevant Member States.

[Antitrust - Other documents] - [Antitrust cases] - [Europa/Competition/Competition rules applying to undertakings] -
[Published in the Official Journal on Antitrust]

Do 07.09.2006 je bilo Komisiji po obravnavanem postopku posredovanih kar 114 odločb in sicer s strani sodišč naslednjih držav članic:

država članica	**število posredovanih odločb**
Nemčija	27
Francija	24
Španija	22
Nizozemska	15
Avstrija	9
Belgija	7
Velika Britanija	3
Portugalska	2
Švedska	3
Danska	1
Litva	1
Luksemburg	0
Latvija	0
Estonija	0
Finska	0
Slovaška	0
Slovenija	0
Češka	0
Madžarska	0
Irska	0
Malta	0
Ciper	0
Italija	0
Poljska	0
Grčija	0
skupaj	**114**

Kot je razvidno iz tabele, je izmed novih držav članic do sedaj sodno odločbo posredovala zgolj Litva, pa tudi sodišča nekaterih starih držav članic bodisi še niso reševala bodisi samo še niso posredovala podatkov o tovrstnih primerih.

Odločbe so objavljene tako, da se s klikom na državo članico po časovnem zaporedju sprejetja prikažejo vse odločbe, posredovane s strani te države članice. O vsaki odločbi so navedeni naslednji podatki oziroma vsaj nekateri najpomembnejši od njih:

- datum sprejetja odločbe
- ime in kraj sodišča, ki je izdalo odločbo
- referenčna številka zadeve
- vrsta postopka
- sektor, ki ga primer zadeva
- stopnja odločbe.

Kolikor se po nacionalnih pravilih odločba sme javno objaviti, je poleg drugih podatkov o odločbi tudi navedba strank in povezava na besedilo odločbe. Objavljeni so prepisi (skeni) odločb v jeziku države članice sprejema, prevodov v druge jezike žal ni.

Primeri navedb podatkov o posredovani sodni odločbi:

Judgment date:	07.03.2006
Court name:	Juzgado de lo mercantil no. 1
Court town:	Madrid
Reference number :	
Parties:	Estaser El Mareny / Repsol
Type of proceeding :	Private litigation
Sector	Retail sale of automotive fuel
Decision:	First instance - non-confidential versionn

Judgment date:	21 December 2005
Court name:	High Court of Justice - Chancery Division
Court town:	London
Parties:	Attheraces Ltd &anr v. The British Horse racing Board
Sector:	Betting
Decision:	First Instance

Judgment date:	10.05.2005
Court name:	OLG als Kartellgericht
Court town:	Vienna
Reference number :	26 Kt 29
Type of proceeding:	Private Litigation
Sector	Post Services
Parties:	Confidential
Decision:	First instance-Confidential version

Judgment date:	07.03.2006
Court name:	Juzgado de lo mercantil no. 1
Court town:	Madrid
Reference number :	
Parties:	Estaser El Mareny / Repsol
Type of proceeding :	Private litigation
Sector	Retail sale of automotive fuel
Decision:	First instance - non-confidential versionn

Judgment date:	07.02.2006
Court name:	Cour de Cassation
Court town:	Paris
Parties:	TRANSDEV, KEOLIS & CONNEX
Type of proceeding :	Judicial review of NCA decision
Sector	Public transport
Decision:	Appeal

Judgment date:	18.08.2004
Court name:	Konkurrenceankenævnet (Competition Appeal Tribunal)
Court town:	Copenhagen
Parties:	Bogbranchens Fællesråd vs. Konkurrencerådet (National Competition Authority)
Decision:	Book Publisher Decision

Judgment date:	14.12.2005
Court name:	Vilniaus Apygardos Teismas
Court town:	Vilnius
Reference number :	2- 1068- 52/ 05
Parties:	Tew Baltija / Kauno m. savivaldybes administracijos direktorius (Director of administration of the municipality of the city of Kaunas)
Type of proceeding :	Vivil case
Sector	Public procurement for the assignment of concessions in the sector of waste collection
Decision:	First instance

3.2.4.2. Vloga nacionalnih sodišč pri preiskovalnih dejanjih Komisije

Preiskovalne pristojnosti Komisije so v novi uredbi urejene v 20. in 21. členu. Gre za preiskavo prostorov podjetij (v tem primeru morda po nacionalnem pravu Komisija za pomoč nacionalnega izvršilnega ali drugega organa v primeru, ko podjetje nasprotuje preiskavi, potrebuje odobritev nacionalnega sodišča), ter tudi za preiskavo drugih prostorov (za kar pa se že po obravnavani uredbi zahteva odobritev nacionalnega sodišča še pred dejanjem Komisije).

Dvajseti člen Uredbe 1/2003 ureja pregled prostorov preiskovanega podjetja in določa:

6. Kadar uradniki in druge spremljevalne osebe, ki jih je Komisija pooblastila, ugotovijo, da podjetje nasprotuje pregledu, ki je bil odrejen v skladu s tem členom, jim zadevna država članica ponudi potrebno sodelovanje in, če je to potrebno, zagotovi tudi podporo policije ali drugega ustreznega izvršilnega organa, da jim omogoči izvedbo pregleda.

7. Če se za sodelovanje, ki ga navaja odstavek 6, po nacionalnih pravilih zahteva odobritev pravosodnega organa, se vloži prošnja za tako odobritev. Prošnja za takšno odobritev se lahko vloži tudi kot previdnostni ukrep.

8. Kadar se zaprosi za odobritev iz odstavka 7, nacionalno sodišče nadzoruje, da je odločba Komisije pristna in da predvideni prisilni ukrepi niso niti enostranski niti pretirani glede na predmet pregleda. Pri nadzoru sorazmernosti prisilnih ukrepov lahko nacionalno sodišče Komisijo neposredno ali prek organa, pristojnega za konkurenco v državi članici, prosi za podrobne razlage zlasti v zvezi z razlogi, ki jih ima Komisija za sum kršitve členov 81 in 82 Pogodbe, pa tudi v zvezi z resnostjo domnevne kršitve in naravo vpletenosti zadevnega podjetja. Vendar pa nacionalno sodišče ne more dvomiti o potrebnosti pregleda niti ne sme zahtevati zagotovitve informacij, ki so v spisu Komisije. Nadzor zakonitosti odločbe Komisije je pridržan za Sodišče.

Enaindvajseti člen pa zadeva pregled drugih prostorov in določa:

1. Če obstaja utemeljen sum, da se poslovne knjige in druga poslovna dokumentacija, ki so povezani s poslovanjem in predmetom pregleda ter so lahko pomembni za dokazovanje resne kršitve določb člena 81 ali člena 82 Pogodbe, hranijo v drugih prostorih, prevoznih sredstvih ali na drugem zemljišču, vključno z domovi vodstva podjetij, članov nadzornega ali upravnega organa, pa tudi drugih sodelavcev zadevnih podjetij in podjetniških združenj, lahko Komisija z odločbo odredi, da se opravi pregled v teh prostorih, prevoznih sredstvih ali na tem zemljišču.

2. Odločba navaja predmet in namen pregleda, določa datum začetka in navaja pravico, da zoper odločbo lahko Sodišče vloži pritožbo. Zlasti navaja razloge, ki so Komisijo privedli do zaključka,

da obstaja sum v smislu odstavka 1. Komisija sprejme odločbe po posvetovanju z organom, pristojnim za konkurenco v državi članici, na ozemlju katere se bo opravljal pregled.

3. Odločba, ki je izdana v skladu z odstavkom 1, se ne more izvajati brez predhodne odobritve nacionalnega sodišča zadevne države članice. Nacionalno sodišče preverja pristnost odločbe Komisije in nadzoruje, da predvideni prisilni ukrepi niso niti enostranski niti pretirani zlasti glede na resnost domnevne kršitve, na pomembnost dokaznega gradiva, ki ga išče, na vpletenost zadevnega podjetja in na upravičeno verjetnost, da se poslovne knjige in poslovna dokumentacija v zvezi s predmetom pregleda hranijo v prostorih, za katere se zahteva dovoljenje. Nacionalno sodišče lahko Komisijo neposredno ali prek organa, pristojnega za konkurenco v državi članici, prosi za podrobno razlago tistih elementov, ki so potrebni za nadzor sorazmernosti predvidenih prisilnih ukrepov. Vendar pa nacionalno sodišče ne more dvomiti o potrebnosti pregleda niti ne sme zahtevati, da mu zagotovijo informacije, ki so v spisu Komisije. Nadzor zakonitosti odločbe Komisije je pridržan Sodišču.

Prav določbe teh dveh členov predstavljajo največjo spremembo na področju preiskovalnih dejanj. Predstavniki Komisije imajo poleg že do sedaj dovoljenih ukrepov tudi možnost zapečatiti omare ali cele pisarne z namenom, da dokazi ne bi izginili ali se uničili. Pristojni so tudi ustno spraševati o kakršnih koli dejstvih, povezanih s preiskavo, medtem ko je bil do sedaj poglavitni namen preiskave pridobitev in kopiranje dokumentov, spraševalo pa se je lahko le v zvezi s preiskovanimi dokumenti. Nadalje imajo predstavniki Komisije po 21. členu v skladu z odločbo Komisije in potrditvijo nacionalnega sodišča ter po posvetovanju z nacionalnim organom za varstvo konkurence pristojnost preiskati tudi vse druge prostore, zemljišča in prevozna sredstva, vključujoč tudi domove direktorjev, managerjev in zaposlenih v preiskovanem podjetju, če je verjetno, da so tam strokovni dokumenti, ki bi dokazovali resno kršitev konkurenčnih pravil. Praksa skupnostnih sodišč in Komisije namreč kaže, da so ti z namenom prikriti dokaze najbolj pogosto spravljeni prav v domovih. V medijih je bila ta določba označena kot podelitev prevelike moči Komisiji. Večina avtorjev, ki se tega vprašanja v svojih razpravah dotika, se ne strinja s tako velikimi pooblastili Komisije in jih resno skrbi ne le nelegitimnost možnosti novih ravnanj v preiskavi, temveč tudi to, da so določbe celo v nasprotju z Evropsko Konvencijo o človekovih pravicah. Ta v 6. členu sicer zahteve za spoštovanje temeljnih pravic, o katerih je govora tu, veže na kazenske postopke, a po mnenju Evropskega sodišča za človekove pravice[92] in ECJ naj bi kljub temu, da gre pri preiskovanju protikonkurenčnih dejanj formalno za administrativne postopke, prišla v poštev prav zaradi dejanske kazenske narave preiskav. Ta del reforme je bil tudi s strani zainteresirane javnosti najbolj kritiziran.

Treba je poudariti, da je nacionalno sodišče pristojno zgolj za presojo sorazmernosti in avtentičnosti odločbe Komisije, ne pa tudi za presojo njene potrebnosti in veljavnosti, kar je

[92] To sodišče sicer ni ena od institucij EU, a so se vse države članice podredile njegovi jurisdikciji.

pridržano ECJ. Nacionalno sodišče prav tako ne more od Komisije za potrebe svoje presoje zahtevati podatkov iz dosjeja Komisije. Je pa obseg nadzora nacionalnega sodišča nad preiskovanjem Komisije nekoliko večji na področju 21. člena, torej preiskave drugih prostorov – poleg presoje resnosti kršitve in stopnje udležbe preiskovanega podjetja lahko upošteva tudi pomen konkretnega iščočega dokaza in razumno verjetnost, da se dokazi, ki jih Komisija išče, res nahajajo v prostoru, ki ga želi Komisija preiskati.

Komisija v svojem sporočilu o sodelovanju z nacionalnimi sodišči v luči lojalnega sodelovanja na podlagi 10. člena PES poziva sodišča, da odločbe v zvezi z obravnavanimi vprašanji sprejmejo v ustreznem času, tako da je Komisiji omogočeno učinkovito opravljanje preiskave.

3.2.5. Pomoč skupnostnih sodišč nacionalnim sodiščem

Najpomembnejši instrument za pravilno in konsistentno uporabo pravil Skupnosti, tudi konkurenčnopravnih, predstavlja institut *preliminary rulings*. Gre za institut predhodnih vprašanj, urejen v 234. členu PES. Nacionalnim sodiščem omogoča, da na ECJ oz. po Pogodbi iz Nice[93] zaenkrat zgolj kot možnost na papirju tudi na CFI naslovijo vprašanja, ki zadevajo razlago ali veljavnost skupnostnih aktov. Nacionalnim sodnikom so lahko tovrstni odgovori v veliko pomoč pri odločanju, zato je institut predhodnih vprašanj z vstopom postal zelo aktualen tudi za sodišča novih članic. Za razliko od na povsem sveže urejenih postopkov sodelovanja med Komisijo, nacionalnimi sodišči ter nacionalnimi organi za varstvo konkurence predhodna vprašanja sicer ne predstavljajo novosti in bodo, razen manjših sprememb, v osnovi potekala enako kot doslej. Vendar pa bodo zaradi neizkušenosti in soočenja z ogromnim naborom novih pravil sodišča v novih državah članicah predvidoma še posebej potrebovala »svetovanje« s skupnostne ravni. Vprašanje je, koliko bodo sodniki pri nas institut uporabljali v konkurenčnopravnih primerih, sploh z ozirom na to, da se zdi, da takih primerov pri nas zaenkrat ni niti vsaj v bližnji prihodnosti ne bo veliko.

Postopek predhodnih vprašanj ureja 234. člen PES,[94] ki določa, da je ECJ pristojno za predhodno odločanje o vprašanjih glede razlage PES (torej tudi glede razlage 81. in 82. člena PES), veljavnosti in razlage aktov institucij Skupnosti (npr. odločb Komisije v konkurenčnopravnih zadevah) in Evropske centralne banke ter razlage statutov organov, ustanovljenih z aktom Sveta EU, kolikor je v teh statutih to predvideno. Tovrstna vprašanja se lahko pojavijo nacionalnim sodnikom pri njihovem odločanju v konkretni zadevi. Kaj vse spada pod pojem »sodišče« (»*court or tribunal*«) iz 234. členua PES, je v svoji bogati praksi natančno razložilo ECJ, ki je za presojo lastnosti organa postavilo jasne kriterije: telo je ustanovljeno z zakonom, je stalen in ne zgolj začasen organ, ima zavezujočo pristojnost, deluje po pravilih adversarnega postopka, uporablja pravna pravila in je

[93] Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts z dne 10.03.2001 (2001/C 80/01).

[94] 35. in 68. člen PES, ki se tudi nanašata na predhodna vprašanja, za področje konkurence ne prideta v poštev.

neodvisno - slednji kriterij je najpomembnejši in razen adversarnosti morajo biti kumulativno podani vsi kriteriji, da se lahko telo podredi definiciji organa iz 234. člena PES.[95] Slovenska sodišča so za razliko od organov za varstvo konkurence (med njimi torej tudi slovenskega Urada za varstvo konkurence),[96] zagotovo zajeta v ta pojem. Tudi Sporočilo o sodelovanju Komisije z nacionalnimi sodišči pri uporabi 81. in 82. člena PES kot kriterij za presojo, na katera sodišča se nanaša nov sistem izvajanja antitrusta, postavlja kriterij, enak temu za uporabo 234. člena PES.[97]

Kadar sodišče v državi članici meni, da je treba glede vprašanja sprejeti odločitev, ki mu bo omogočila izreči sodbo, lahko v skladu z 2. odstavkom 234. člena PES to vprašanje predloži v odločanje ECJ,[98] kadar pa je takšno vprašanje postavljeno v postopku, ki teče pred sodiščem, zoper odločitev katerega po nacionalnem pravu ni pravnega sredstva, je to sodišče po 3. odstavku 234. člena PES zadevo dolžno predložiti.[99] Ali bo v primeru obstoja vprašanja nacionalno sodišče le-to moralo nasloviti na eno od skupnostnih sodišč, je seveda odvisno od nacionalnih postopkovnih pravil, ki bodo skladno z upoštevanjem prakse ECJ o tem vprašanju povedala, ali je zoper odločbo sodišča na voljo kakšno pravno sredstvo ali ne. V praksi ECJ se je namesto t.i. abstraktne metode, uveljavila t.i. funkcionalna ali konkretna metoda, po kateri je sodišče, ki mora obligatorno postaviti predhodno vprašanje tisto, ki je v konkretnem primeru zadnja instanca. V zadnjem času pa se zaradi prevelikega obsega predhodnih vprašanj pojavljajo tudi ideje o odpravi obveznega postavljanja predhodnih vprašanj po 3. odstavku 234. člena PES.

ECJ izdaja odločitve po postopku *preliminary rulings* od samega začetka obstoja Skupnosti. Po Pogodbi iz Nice pa je, kot že navedeno, pristojnost odločanja po postopku predhodnih vprašanj dobilo tudi CFI, kateremu je bilo po dosedanji določbi 1. odstavka 225. člena PES to izrecno prepovedano. Enaintrideseti paragraf Pogodbe iz Nice pa spreminja dosedanji 225. člen PES in v novem 3. odstavku določa, da ima CFI pristojnost obravnavanja in odločanja po postopku predhodnih vprašanj v zadevah, določenih v Statutu ECJ.[100] Zaenkrat te zadeve še niso določene. Kolikor bi bilo CFI mnenja, da nanj naslovljen primer zahteva načelno odločitev, ki bi vplivala na enotno ali konsistentno uporabo skupnostnega prava, bo lahko zadevo naslovilo na ECJ. Odločbe

[95] Glej primere ECJ 246/80 *Broekmuellen*, 102/81 *Nordsee*, 61-65 *Vaasen Goebels*, 14/86 *Pretore di Salo*, 43/71 *Politi,* C-393/92 *Almelo*, predvsem pa C-54/96 *Dorsch Consult* in C-516/99 *Schmid.*

[96] Glej primer C-53/03 *Syfait and others v Glaxo SmithKline*.

[97] Ker pa so tudi organi izven te definicije dolžni uporabljati 81. in 82. člen PES, se postavlja vprašanje utemeljenosti omejitve pomoči Komisije zgolj omejenemui krogu organov. Več o tem glej Blanco, EC Competition Procedure, str. 86.

[98] Uporabljena je beseda »may«.

[99] Uporabljena je beseda »shall«, kar pa ne pomeni, da morajo v teh primerih sodišča postavljati vprašanja za vsako ceno; če o določenem problemu, na katerega naleti nacionalni sodnik, že obstaja sodna praksa ali je problem sam jasen, do odstopa vprašanja ne bo prišlo, saj bi ga tudi skupnostno sodišče zavrnilo.

[100] Protocol on the Statute of the Court of Justice annexed to the Treaty on European Union, to the Treaty establishing the European Community and to the Treaty establishing the European Atomic Energy Community, in accordance with Article 7 of the Treaty of Nice, amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed at Nice on 26 February 2001 (OJ C 80 of 10 March 2001), as amended by decisions of the Council of 15 July 2003 (OJ L 188 of 26 July 2003, p. 1) and 19 April 2004 (OJ L 132 of 29 April 2004, pp 1 and 5).

CFI po postopku predhodnih vprašanj so lahko izjemoma, pod pogoji, določenimi v Statutu ECJ, predmet presoje ECJ in sicer v primerih, ko obstaja resna nevarnost ogrozitve enotnosti ali konsistentnosti skupnostnega prava. V teh primerih bo torej ECJ igralo vlogo instančnega in ne prvostopenjskega sodišča.

V Sloveniji je 20.07.2004 začela veljati novela Zakona o sodiščih,[101] ki je uredila oz. bolje rečeno, konkretizirala postopek postavljanja predhodnih vprašanj na ECJ s strani slovenskih sodišč. V 35. členu je tako določila nov 113.a člen Zakona o sodiščih, ki se glasi:

(1) Kadar je odločba sodišča odvisna od rešitve predhodnega vprašanja glede razlage oziroma glede veljavnosti ali razlage prava Evropskih skupnosti, lahko sodišče izda sklep, s katerim predhodno vprašanje odstopi v odločanje Sodišču Evropskih skupnosti, v skladu z mednarodno pogodbo, s katero Republika Slovenija prenaša izvrševanje dela suverenih pravic na institucije Evropske unije.

(2) Kadar je odločba Vrhovnega sodišča ali odločba drugega sodišča, zoper katero stranke v postopku ne morejo vložiti rednega ali izrednega pravnega sredstva, odvisna od predhodne rešitve vprašanja glede razlage oziroma glede veljavnosti ali razlage prava Evropskih skupnosti, je Vrhovno sodišče oziroma drugo sodišče dolžno izdati sklep, v skladu z mednarodno pogodbo iz prejšnjega odstavka, s katerim predhodno vprašanje odstopi v odločanje Sodišču Evropskih skupnosti. Postopek v zadevi, kjer je bil vložen predlog iz prvega ali drugega odstavka tega člena, sodišče s sklepom iz prvega ali drugega odstavka tega člena prekine do prejema predhodne odločbe, s smiselno uporabo določb zakona, ki ureja prekinitev postopka v zadevi, o kateri sodišče odloča. Zoper sklep o prekinitvi ni dovoljeno vložiti rednega ali izrednega pravnega sredstva.

(3) Če je sodišče predhodno vprašanje odstopilo v odločanje Sodišču Evropskih skupnosti, sme s smiselno uporabo določb zakona, ki ureja postopek v zadevi, o kateri sodišče odloča, do prejema odločbe o tem vprašanju opravljati samo tista procesna dejanja in sprejemati samo tiste odločitve, ki ne dopuščajo nobenega odlašanja, če niso vezane na vprašanja, zaradi katerih je sodišče zaprosilo za predhodno odločanje, ali če ne urejajo dokončno pravnega razmerja.
(4) Če sodišče ne sme več uporabljati določbe, ki je bila razlog za njegov odstop predhodnega vprašanja in če predhodna odločba Sodišča Evropskih skupnosti še ni bila sprejeta, mora odstopljeno predhodno vprašanje brez odlašanja umakniti, razen, če obstajajo zakonski razlogi za nadaljevanje postopka.

(5) Predhodna odločba Sodišča Evropskih skupnosti je za sodišče obvezujoča.

(6) Sodišča posredujejo izvod predhodnega vprašanja in odločbe Sodišča Evropskih skupnosti o

[101] ZS-D (Uradni list RS, št. 73/2004).

predhodnem vprašanju brez odlašanja v vednost Vrhovnemu sodišču.

Že na prvi pogled lahko ugotovimo, da določba ureja le naslovitev vprašanj na ECJ in CFI ne omenja. To pa ne pomeni, da naša sodišča nanj ne bi mogla postaviti vprašanja v zadevah, za katere bo pristojno, saj bo njegova pristojnost izvirala iz primarnega prava Skupnosti in zaradi načela primata skupnostnega prava nad pravom držav članic ne bo odvisna od tega, ali ga omenja določba nacionalne zakonodaje. Besedilo novega člena poleg določenih izrazov in nepotrebnih ponavljanj tudi glede nekaterih vsebinskih zadev odstopa od ureditve postopka odstopa predhodnega vprašanja na skupnostno sodišče po PES, zaradi česar je potrebno imeti poleg oz. namesto določb iz Zakona o sodiščih vedno pred očmi besedilo 234. člena PES in sodno prakso ECJ, ki razlaga 234. člen PES.

Najpomembneje je vedeti, da bo predhodna odločba ECJ naše sodišče, ki bo postavilo vprašanje v Luksemburg, zavezovala. Še več, pri svojem odločanju v podobnih primerih jo bodo dolžna upoštevati tudi vsa druga sodišča v prav vseh državah članicah. Če bo nacionalno sodišče potrebovalo določeno razlago v zvezi z 81. ali 82. členom PES, se bo torej moralo zavedati, da ga bo odločitev, ki jo bo prejela od katerega od skuopnostnih sodišč, zavezovala.

Kako pogosto se bodo nacionalna sodišča posluževala instituta predhodnih vprašanj v konkurenčnopravnih zadevah, je težko predvideti. Prvič, postopek predhodnih vprašanj je zamuden, saj oblikovanje odgovora traja v povprečju dve do dve leti in pol, pri tem pa ne gre pozabiti, da je to le ena faza postopka, ki poteka pred nacionalnim sodiščem. Slednje je namreč tisto, ki rešuje konkreten spor, in kolikor se odloči za postavitev predhodnega vprašanja, prekine postopek, ta pa se nadaljuje šele po prejemu odgovora. V razmerah sodnih zaostankov pri nas si lahko predstavljamo, kako dolgo je lahko v primeru uporabe instituta predhodnega odločanja že sicer zamudno odločanje. Na drugi strani pomoč Komisije oz. nacionalnega urada za varstvo konkurence traja bistveno manj časa. Drugič, pri institutu predhodnega odločanja gre praviloma le za pravno razlago določb in ne tudi za presojo dejanskih in ekonomskih vprašanj, kot to velja za mnenja Komisije oz. urada za varstvo konkurence, ki so zato lahko sodniku v večjo pomoč. V veliko večjo pomoč nacionalnim sodiščem so na konkurenčnopravnem področju torej lahko drugi instrumenti, ki jih ponuja nova antitrustovska uredba, tj. sodelovanje nacionalnih sodišč s Komisijo in nacionalnimi organi za varstvo konkurence. Res pa je, da bi se kljub navedenim prednostim slednjega sodelovanja znalo zgoditi, da se bodo neodvisna sodišča raje poslužila pomoči skupnostnih sodišč - sodne veje - in ne pomoči uradov za varstvo konkurence in Komisije. Na odgovor bo treba še počakati.

4. Uspeh izvajanja pravil antitrusta na nacionalnih sodiščih?

Komisija neprestano izraža potrebo po krepitvi dejavnosti izobraževanja sodstva na področju varstva konkurence. Prav ne dovolj podrobno poznavanje tega izredno zapletenega in kompleksnega področja s strani sodnikov poraja v Uniji večji dvom v kvaliteto njihovega dela kot

to velja za organe za varstvo konkurence, ki so za to specializirani, se o tem tudi redno izobražujejo in spremljajo razvoj področja. V Uniji si zato na tem področju prizadevajo tudi za specializacijo sodnikov, kar je še posebej pomembno zaradi predstavljene modernizacije protitrustovskih izvedbenih pravil, ki so na nacionalna sodišča prenesla nove pristojnosti v odločanju, in zaradi predvidevanj, da se bo na tem področju bistveno povečalo zasebno uveljavljanje pravic.[102] To na področju konkurence pri nas do sedaj sicer ni bilo razvito, pričakovati pa gre, da se bo tudi z vse večjo prisotnostjo tujih podjetij na našem trgu, ki so vajena zasebnega uveljavljanja svojih pravic na tem področju, z leti hitro povečevalo, kar bo od sodnikov zahtevalo dobro poznavanje skupnostnega in domačega konkurenčnega prava.

Temeljnih dvom v primernost vsebine reforme izvedbenih pravil antitrusta se je porajal prav zaradi bojazni pred nezmožnostjo nacionalnih organov za prevzem novih nalog, kar naj bi še posebej veljalo za sodišča v novih članicah. Kljub določenim upravičenim skeptičnim pogledom pa reformo spremlja tudi precej varovalk, ki pa vendarle ne prepričajo v toliko, da bi lahko skrb pri izvajanju skupnostnih konkurenčnih pravil lahko šteli za neutemeljeno. Na začetku bo v uporabi skupnostnega konkurenčnega prava v postopkih pred nacionalnimi sodišči predvsem v novih državah članicah zagotovo prihajalo do težav in nekonsistentnosti. Vendar lahko sčasoma tudi na tem področju predvidimo poenotenje uporabe, to pa naj bi pospešili različni mehanizmi, vsebovani tako v primarni kot v sekundarni zakonodaji Skupnosti. Na področju konkurence je poleg vse obstoječe prakse pred skupnostnima sodiščema in Komisijo (ki jo morajo nacionalna sodišča poznati) ter poleg pomembne možnosti postavljanja predhodnih vprašanj na skupnostni sodišči to predvsem novo mreženje med Komisijo, nacionalnimi organi za varstvo konkurence in nacionalnimi sodišči, ki se je kljub skeptičnim pogledom ob uvajanju reforme zaenkrat izkazalo za precej uspešno. Prezreti tudi ne gre sodelovanja sodnikov v okviru Združenja evropskih konkurenčnopravnih sodnikov (*Association of European Competition Judges - AECLJ*) in intenzivnega izobraževanja, ki se že nekaj let tudi v njihovem okviru (ter v okviru *OECD*,[103] *EIF* v okviru z Avstrijske akademije znanosti[104] in drugih projektov) odvija s finančno podporo Komisije.

[102] Razprave, ki so sledile Beli modernizacijski knjigi so predvidevale ustanavljanje specializiranih sodišč, za to so se zavzemali predvsem Evropski parlament, ECOSOC, komantatorji iz vrst industrije in pravne stroke, vendar so le tri države članice podprle ta predlog. Več o tem glej Blanco, EC Competition Procedure, str. 64.

[103] Organizacija za ekonomsko sodelovanje in razvoj. Glej spletno stran http://www.oecd.org/about/0,2337,en_2649_37463_1_1_1_1_37463,00.html.

[104] Gre za projekt pri Inštitutu za raziskovanje evropske integracije (*Institut für Europäische Integrations Forschung*, *EIF*) z naslovom Konkurenčno pravo EU, Implementacija in uporaba pravil konkurenčnega prava ES v Avstriji, Češki republiki, na Madžarskem, Poljskem in v Sloveniji. Poleg naloge izobraževanja sodnikov iz zadevnih držav članic je naloga projekta tudi ta, da na spletni strani http://www.oeaw.ac.at/eif/competition/index.htm v jezikih zadevnih držav članic predstavi relevantno vsebino reforme antitrusta, zbere relevantne dokumente in kontakte ter s tem olajša delo nacionalnih sodnikov.

Kakšno bo delovanje sodišč v državah članicah na področju antitrusta na dolgi rok, bomo lahko ugotavljali šele čez nekaj let. Vsekakor imajo nacionalna sodišča na voljo dovolj instrumentov, s katerimi si lahko pomagajo pri uporabi skupnostnih pravil antitrusta, res pa je, da je področje antitrusta vsebinsko zahtevno področje, ki terja natančno pravno in ekonomsko analizo in s tem sodnika, ki ga tematika antitrusta zanima in se želi soočiti z njo.

5. LITERATURA IN VIRI O SKUPNOSTNEM PRAVU KONKURENCE

Vodilne knjige tujih in domačih avtorjev o pravu konkurence v ES (ki zajemajo obsežno analizo 81. in 82. člena PES ter nekatere tudi že reformo izvajanja pravil iz teh členov) so:

- Blanco, European Community Competition Procedure, Second Edition, Oxford University Press, 2006
- Cahill, The Modernisation of EU Competition Law Enforcement in the European Union, Cambridge University Press, 2004
- Jones in Sufrin, EC Competition Law, Text, Cases and Materials, First Edition, Oxford University Press, 2001
- Whish, Competition Law, Lexis Nexis, 2003
- Goyder, EC Competition Law, Oxford University Press, 2003
- Dabbah, EC and UK Competition Law, Cambridge University Press, 2004
- Pitofsky, Goldschmidt, Wood, Trade Regulation: Cases and Materials, 5th Ed., University Casebook Series, 2003
- Craig in deBurca, EU Law, Text, Cases and Materials, Oxford University Press, 2003
- Grilc, Pravo Evropske Unije, druga knjiga, Pravna fakulteta in Cankarjeva založba, 2001.

Reforma antitrusta pa je posebej obravnavana v naslednjih prispevkih:

- Grilc, Konkurenčno pravo EU po reformi - evolucija, redefinicija ali stagnacija?, Zbornik znanstvenih razprav, letnik 64 (2004), str. 157-179
- Grilc, Reforma konkurenčnega prava v EU, Zbornik znanstvenih razprav, letnik 60, št. 2, (2000), str. 51-75
- Grilc, Vsebina in pomen reforme konkurenčnega prava EU za slovensko pravo, Podjetje in delo, letnik 30, št. 6/7, str. 1288-1299
- Podobnik, Reforma in Komisija ter Sodišče prve stopnje, Podjetje in delo, letnik 30, št. 6/7, str. 1300-1306
- Vlahek, Dva nova instituta pred slovenskimi sodišči: *amicus curiae* in *preliminary rulings*, Podjetje in delo, letnik 30, št. 6-7 (2004), str. 1317-1338.
- Vlahek, Reforma antitrusta v Evropski uniji, Podjetje in delo, letnik 30, št. 2 (2004), str. 230-272.

Vsi relevantni akti, sodne odločbe in drugi dokumenti v zvezi s skupnostnim konkurenčnim pravom so objavljeni na podstrani o konkurenci uradne spletni strani Unije (www.europa.eu.int): http://ec.europa.eu/comm/competition/index_en.html (žal podstran v slovenskem jeziku še ne obstaja):

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6. PRILOGI

6.1. Priloga 1: Uredba Sveta Št. 1/2003 z dne 16. decembra 2002 o implementaciji pravil konkurence iz členov 81 in 82 PES

(Acts whose publication is obligatory)

COUNCIL REGULATION (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

(Text with EEA relevance)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 83 thereof,
Having regard to the proposal from the Commission (1),
Having regard to the opinion of the European Parliament (2),
Having regard to the opinion of the European Economic and Social Committee (3),

Whereas:
(1) In order to establish a system which ensures that competition in the common market is not distorted, Articles 81 and 82 of the Treaty must be applied effectively and uniformly in the Community. Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 81 and 82 (*) of the Treaty (4), has allowed a Community competition policy to develop that has helped to disseminate a competition culture within the Community. In the light of experience, however, that Regulation should now be replaced by legislation designed to meet the challenges of an integrated market and a future enlargement of the Community.
(2) In particular, there is a need to rethink the arrangements for applying the exception from the prohibition on agreements, which restrict competition, laid down in Article 81(3) of the Treaty. Under Article 83(2)(b) of the Treaty, account must be taken in this regard of the need to ensure effective supervision, on the one hand, and to simplify administration to the greatest possible extent, on the other.
(3) The centralised scheme set up by Regulation No 17 no longer secures a balance between those two objectives. It hampers application of the Community competition rules by the courts and competition authorities of the Member States, and the system of notification it involves prevents the Commission from concentrating its resources on curbing the most serious infringements. It also imposes considerable costs on undertakings.
(4) The present systemshould therefore be replaced by a directly applicable exception systemin which the competition authorities and courts of the Member States have the power to apply not only Article 81(1) and Article 82 of the Treaty, which have direct applicability by virtue of the case-law of the Court of Justice of the European Communities, but also Article 81(3) of the Treaty.
(5) In order to ensure an effective enforcement of the Community competition rules and at the s time the respect of fundamental rights of defence, this Regulation should regulate the burden of proof under Articles 81 and 82 of the Treaty. It should be for the party or the authority alleging aninfringement of Article 81(1) and Article 82 of the Treaty to prove the existence thereof to the required legal standard. It should be for the undertaking or association of undertakings invoking the benefit of a defence against a finding of an infringement to demonstrate to the required legal standard that the conditions for applying such defence are satisfied. This Regulation affects neither national rules on the standard of proof nor obligations of competition authorities and courts of the Member States to ascertain the relevant facts of a case, provided that such rules and obligations are compatible with general principles of Community law.
(6) In order to ensure that the Community competition rules are applied effectively, the competition authorities of the Member States should be associated more closely with their application. To this end, they should be empowered to apply Community law.
(7) National courts have an essential part to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements. The role of the national courts here complements that of the competition authorities of the Member States. They should therefore be allowed to apply Articles 81 and 82 of the Treaty in full.
(8) In order to ensure the effective enforcement of the Community competition rules and the proper functioning of the cooperation mechanisms contained in this Regulation, it is necessary to oblige the competition authorities

and courts of the Member States to also apply Articles 81 and 82 of the Treaty where they apply national competition law to agreements and practices which may affect trade between Member States. In order to create a level playing field for agreements, decisions by associations of undertakings and concerted practices within the internal market, it is also necessary to determine pursuant to Article 83(2)(e) of the Treaty the relationship between national laws and Community competition law. To that effect it is necessary to provide that the application of national competition laws to agreements, decisions or concerted practices within the meaning of Article 81(1) of the Treaty may not lead to the prohibition of such agreements, decisions and concerted practices if they are not also prohibited under Community competition law. The notions of agreements, decisions and concerted practices are autonomous concepts of Community competition law covering the coordination of behaviour of undertakings on the market as interpreted by the Community Courts. Member States should not under this Regulation be precluded from adopting and applying on their territory stricter national competition laws which prohibit or impose sanctions on unilateral conduct engaged in by undertakings. These stricter national laws may include provisions which prohibit or impose sanctions on abusive behaviour toward economically dependent undertakings. Furthermore, this Regulation does not apply to national laws which impose criminal sanctions on natural persons except to the extent that such sanctions are the means whereby competition rules applying to undertakings are enforced.
(9) Articles 81 and 82 of the Treaty have as their objective the protection of competition on the market. This Regulation, which is adopted for the implementation of these Treaty provisions, does not preclude Member States from implementing on their territory national legislation, which protects other legitimate interests provided that such legislation is compatible with general principles and other provisions of Community law. In so far as such national legislation pursues predominantly an objective different from that of protecting competition on the market, the competition authorities and courts of the Member States may apply such legislation on their territory. Accordingly, Member States may under this Regulation implement on their territory national legislation that prohibits or imposes sanctions on acts of unfair trading practice, be they unilateral or contractual. Such legislation pursues a specific objective, irrespective of the actual or presumed effects of such acts on competition on the market. This is particularly the case of legislation which prohibits undertakings from imposing on their trading partners, obtaining or attempting to obtain from them terms and conditions that are unjustified, disproportionate or without consideration.
(10) Regulations such as 19/65/EEC (1), (EEC) No 2821/71 (2), (EEC) No 3976/87 (3), (EEC) No 1534/ 91 (4), or (EEC) No 479/92 (5) empower the Commission to apply Article 81(3) of the Treaty by Regulation to certain categories of agreements, decisions by associations of undertakings and concerted practices. In the areas defined by such Regulations, the Commission has adopted and may continue to adopt so called 'block' exemption Regulations by which it declares Article 81(1) of the Treaty inapplicable to categories of agreements, decisions and concerted practices. Where agreements, decisions and concerted practices to which such Regulations apply nonetheless have effects that are incompatible with Article 81(3) of the Treaty, the Commission and the competition authorities of the Member States should have the power to withdraw in a particular case the benefit of the block exemption Regulation.
(11) For it to ensure that the provisions of the Treaty are applied, the Commission should be able to address decisions to undertakings or associations of undertakings for the purpose of bringing to an end infringements of Articles 81 and 82 of the Treaty. Provided there is a legitimate interest in doing so, the Commission should also be able to adopt decisions which find that an infringement has been committed in the past even if it does not impose a fine. This Regulation should also make explicit provision for the Commission's power to adopt decisions ordering interim measures, which has been acknowledged by the Court of Justice.
(12) This Regulation should make explicit provision for the Commission's power to impose any remedy, whether behavioural or structural, which is necessary to bring the infringement effectively to an end, having regard to the principle of proportionality. Structural remedies should only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. Changes to the structure of an undertaking as it existed before the infringement was committed would only be proportionate where there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking.
(13) Where, in the course of proceedings which might lead to an agreement or practice being prohibited, undertakings offer the Commission commitments such as to meet its concerns, the Commission should be able to adopt decisions which make those commitments binding on the undertakings concerned. Commitment decisions should find that there are no longer grounds for action by the Commission without concluding whether or not there has been or still is an infringement. Commitment decisions are without prejudice to the powers of competition authorities and courts of the Member States to make such a finding and decide upon the case. Commitment decisions are not appropriate in cases where the Commission intends to impose a fine.
(14) In exceptional cases where the public interest of the Community so requires, it may also be expedient for the Commission to adopt a decision of a declaratory nature finding that the prohibition in Article 81 or Article 82 of the Treaty does not apply, with a view to clarifying the law and ensuring its consistent application throughout

the Community, in particular with regard to new types of agreements or practices that have not been settled in the existing case-law and administrative practice.
(15) The Commission and the competition authorities of the Member States should form together a network of public authorities applying the Community competition rules in close cooperation. For that purpose it is necessary to set up arrangements for information and consultation. Further modalities for the cooperation within the network will be laid down and revised by the Commission, in close cooperation with the Member States.
(16) Notwithstanding any national provision to the contrary, the exchange of information and the use of such information in evidence should be allowed between the members of the network even where the information is confidential. This information may be used for the application of Articles 81 and 82 of the Treaty as well as for the parallel application of national competition law, provided that the latter application relates to the same case and does not lead to a different outcome. When the information exchanged is used by the receiving authority to impose sanctions on undertakings, there should be no other limit to the use of the information than the obligation to use it for the purpose for which it was collected given the fact that the sanctions imposed on undertakings are of the same type in all systems. The rights of defence enjoyed by undertakings in the various systems can be considered as sufficiently equivalent. However, as regards natural persons, they may be subject to substantially different types of sanctions across the various systems. Where that is the case, it is necessary to ensure that information can only be used if it has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority.
(17) If the competition rules are to be applied consistently and, at the same time, the network is to be managed in the best possible way, it is essential to retain the rule that the competition authorities of the Member States are automatically relieved of their competence if the Commission initiates its own proceedings. Where a competition authority of a Member State is already acting on a case and the Commission intends to initiate proceedings, it should endeavour to do so as soon as possible. Before initiating proceedings, the Commission should consult the national authority concerned.
(18) To ensure that cases are dealt with by the most appropriate authorities within the network, a general provision should be laid down allowing a competition authority to suspend or close a case on the ground that another authority is dealing with it or has already dealt with it, the objective being that each case should be handled by a single authority. This provision should not prevent the Commission from rejecting a complaint for lack of Community interest, as the case-law of the Court of Justice has acknowledged it may do, even if no other competition authority has indicated its intention of dealing with the case.
(19) The Advisory Committee on Restrictive Practices and Dominant Positions set up by Regulation No 17 has functioned in a very satisfactory manner. It will fit well into the new system of decentralised application. It is necessary, therefore, to build upon the rules laid down by Regulation No 17, while improving the effectiveness of the organisational arrangements. To this end, it would be expedient to allow opinions to be delivered by written procedure. The Advisory Committee should also be able to act as a forumfor discussing cases that are being handled by the competition authorities of the Member States, so as to help safeguard the consistent application of the Community competition rules.
(20) The Advisory Committee should be composed of representatives of the competition authorities of the Member States. For meetings in which general issues are being discussed, Member States should be able to appoint an additional representative. This is without prejudice to members of the Committee being assisted by other experts from the Member States.
(21) Consistency in the application of the competition rules also requires that arrangements be established for cooperation between the courts of the Member States and the Commission. This is relevant for all courts of the Member States that apply Articles 81 and 82 of the Treaty, whether applying these rules in lawsuits between private parties, acting as public enforcers or as review courts. In particular, national courts should be able to ask the Commission for information or for its opinion on points concerning the application of Community competition law. The Commission and the competition authorities of the Member States should also be able to submit written or oral observations to courts called upon to apply Article 81 or Article 82 of the Treaty. These observations should be submitted within the framework of national procedural rules and practices including those safeguarding the rights of the parties. Steps should therefore be taken to ensure that the Commission and the competition authorities of the Member States are kept sufficiently well informed of proceedings before national courts.
(22) In order to ensure compliance with the principles of legal certainty and the uniform application of the Community competition rules in a system of parallel powers, conflicting decisions must be avoided. It is therefore necessary to clarify, in accordance with the case-law of the Court of Justice, the effects of Commission decisions and proceedings on courts and competition authorities of the Member States. Commitment decisions adopted by the Commission do not affect the power of the courts and the competition authorities of the Member States to apply Articles 81 and 82 of the Treaty.

(23) The Commission should be empowered throughout the Community to require such information to be supplied as is necessary to detect any agreement, decision or concerted practice prohibited by Article 81 of the Treaty or any abuse of a dominant position prohibited by Article 82 of the Treaty.
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.
(24) The Commission should also be empowered to undertake such inspections as are necessary to detect any agreement, decision or concerted practice prohibited by Article 81 of the Treaty or any abuse of a dominant position prohibited by Article 82 of the Treaty. The competition authorities of the Member States should cooperate actively in the exercise of these powers.
(25) The detection of infringements of the competition rules is growing ever more difficult, and, in order to protect competition effectively, the Commission's powers of investigation need to be supplemented. The Commission should in particular be empowered to interview any persons who may be in possession of useful information and to record the statements made. In the course of an inspection, officials authorised by the Commission should be empowered to affix seals for the period of time necessary for the inspection. Seals should normally not be affixed for more than 72 hours. Officials authorised by the Commission should also be empowered to ask for any information relevant to the subject matter and purpose of the inspection.
(26) Experience has shown that there are cases where business records are kept in the homes of directors or other people working for an undertaking. In order to safeguard the effectiveness of inspections, therefore, officials and other persons authorised by the Commission should be empowered to enter any premises where business records may be kept, including private homes. However, the exercise of this latter power should be subject to the authorisation of the judicial authority.
(27) Without prejudice to the case-law of the Court of Justice, it is useful to set out the scope of the control that the national judicial authority may carry out when it authorises, as foreseen by national law including as a precautionary measure, assistance from law enforcement authorities in order to overcome possible opposition on the part of the undertaking or the execution of the decision to carry out inspections in non-business premises. It results from the case-law that the national judicial authority may in particular ask the Commission for further information which it needs to carry out its control and in the absence of which it could refuse the authorisation. The case-law also confirms the competence of the national courts to control the application of national rules governing the implementation of coercive measures.
(28) In order to help the competition authorities of the Member States to apply Articles 81 and 82 of the Treaty effectively, it is expedient to enable themto assist one another by carrying out inspections and other fact-finding measures.
(29) Compliance with Articles 81 and 82 of the Treaty and the fulfilment of the obligations imposed on undertakings and associations of undertakings under this Regulation should be enforceable by means of fines and periodic penalty payments. To that end, appropriate levels of fine should also be laid down for infringements of the procedural rules.
(30) In order to ensure effective recovery of fines imposed on associations of undertakings for infringements that they have committed, it is necessary to lay down the conditions on which the Commission may require payment of the fine from the members of the association where the association is not solvent. In doing so, the Commission should have regard to the relative size of the undertakings belonging to the association and in particular to the situation of small and medium-sized enterprises. Payment of the fine by one or several members of an association is without prejudice to rules of national law that provide for recovery of the amount paid from other members of the association.
(31) The rules on periods of limitation for the imposition of fines and periodic penalty payments were laid down in Council Regulation (EEC) No 2988/74 (1), which also concerns penalties in the field of transport. In a system of parallel powers, the acts, which may interrupt a limitation period, should include procedural steps taken independently by the competition authority of a Member State. Toclarify the legal framework, Regulation (EEC) No 2988/74 should therefore be amended to prevent it applying to matters covered by this Regulation, and this Regulation should include provisions on periods of limitation.
(32) The undertakings concerned should be accorded the right to be heard by the Commission, third parties whose interests may be affected by a decision should be given the opportunity of submitting their observations beforehand, and the decisions taken should be widely publicised. While ensuring the rights of defence of the undertakings concerned, in particular, the right of access to the file, it is essential that business secrets be protected. The confidentiality of information exchanged in the network should likewise be safeguarded.
(33) Since all decisions taken by the Commission under this Regulation are subject to review by the Court of Justice in accordance with the Treaty, the Court of Justice should, in accordance with Article 229 thereof be given unlimited jurisdiction in respect of decisions by which the Commission imposes fines or periodic penalty payments.

(34) The principles laid down in Articles 81 and 82 of the Treaty, as they have been applied by Regulation No 17, have given a central role to the Community bodies. This central role should be retained, whilst associating the Member States more closely with the application of the Community competition rules. In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, this Regulation does not go beyond what is necessary in order to achieve its objective, which is to allow the Community competition rules to be applied effectively.
(35) In order to attain a proper enforcement of Community competition law, Member States should designate and empower authorities to apply Articles 81 and 82 of the Treaty as public enforcers. They should be able to designate administrative as well as judicial authorities to carry out the various functions conferred upon competition authorities in this Regulation. This Regulation recognises the wide variation which exists in the public enforcement systems of Member States. The effects of Article 11(6) of this Regulation should apply to all competition authorities. As an exception to this general rule, where a prosecuting authority brings a case before a separate judicial
(36) As the case-law has made it clear that the competition rules apply to transport, that sector should be made subject to the procedural provisions of this Regulation. Council Regulation No 141 of 26 November 1962 exempting transport from the application of Regulation No 17 (1) should therefore be repealed and Regulations (EEC) No 1017/68 (2), (EEC) No 4056/86 (3) and (EEC) No 3975/87 (4) should be amended in order to delete the specific procedural provisions they contain.
(37) 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.
(38) Legal certainty for undertakings operating under the Community competition rules contributes to the promotion of innovation and investment. Where cases give rise to genuine uncertainty because they present novel or unresolved questions for the application of these rules, individual undertakings may wish to seek informal guidance from the Commission. This Regulation is without prejudice to the ability of the Commission to issue such informal guidance,

HAS ADOPTED THIS REGULATION:

CHAPTER I
PRINCIPLES

Article 1
Application of Articles 81 and 82 of the Treaty
1. Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which do not satisfy the conditions of Article 81(3) of the Treaty shall be prohibited, no prior decision to that effect being required.
2. Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which satisfy the conditions of Article 81(3) of the Treaty shall not be prohibited, no prior decision to that effect being required.
3. The abuse of a dominant position referred to in Article 82 of the Treaty shall be prohibited, no prior decision to that effect being required.

Article 2
Burden of proof
In any national or Community proceedings for the application of Articles 81 and 82 of the Treaty, the burden of proving an infringement of Article 81(1) or of Article 82 of the Treaty shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of Article 81(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled.

Article 3
Relationshipbetween Articles 81 and 82 of the Treaty and national competition laws
1. Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81(1) of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Article 81 of the Treaty to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article 82 of the Treaty, they shall also apply Article 82 of the Treaty.
2. The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty, or which fulfil the conditions of Article 81(3) of the Treaty or which are covered by a Regulation for the application of Article 81(3) of the

Treaty. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.
3. Without prejudice to general principles and other provisions of Community law, paragraphs 1 and 2 do not apply when the competition authorities and the courts of the Member States apply national merger control laws nor do they preclude the application of provisions of national law that predominantly pursue an objective different fromthat pursued by Articles 81 and 82 of the Treaty.

CHAPTER II
POWERS

Article 4
Powers of the Commission
For the purpose of applying Articles 81 and 82 of the Treaty, the Commission shall have the powers provided for by this Regulation.

Article 5
Powers of the competition authorities of the Member States
The competition authorities of the Member States shall have the power to apply Articles 81 and 82 of the Treaty in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions:
— requiring that an infringement be brought to an end,
— ordering interimm easures,
— accepting commitments,
— imposing fines, periodic penalty payments or any other penalty provided for in their national law.
Where on the basis of the information in their possession the conditions for prohibition are not met they may likewise decide that there are no grounds for action on their part.

Article 6
Powers of the national courts
National courts shall have the power to apply Articles 81 and 82 of the Treaty.

CHAPTER III
COMMISSION DECISIONS

Article 7
Finding and termination of infringement
1. Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 81 or of Article 82 of the Treaty, it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. If the Commission has a legitimate interest in doing so, it may also find that an infringement has been committed in the past.
2. Those entitled to lodge a complaint for the purposes of paragraph 1 are natural or legal persons who can show a legitimate interest and Member States.

Article 8
Interim measures
1. 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 interimm easures.
2. A decision under paragraph 1 shall apply for a specified period of time and may be renewed in so far this is necessary and appropriate.

Article 9
Commitments
1. Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the

undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission.
2. The Commission may, upon request or on its own initiative, reopen the proceedings:
(a) where there has been a material change in any of the facts on which the decision was based;
(b) where the undertakings concerned act contrary to their commitments; or
(c) where the decision was based on incomplete, incorrect or misleading information provided by the parties.

Article 10
Finding of inapplicability
Where the Community public interest relating to the application of Articles 81 and 82 of the Treaty so requires, the Commission, acting on its own initiative, may by decision find that Article 81 of the Treaty is not applicable to an agreement, a decision by an association of undertakings or a concerted practice, either because the conditions of Article 81(1) of the Treaty are not fulfilled, or because the conditions of Article 81(3) of the Treaty are satisfied. The Commission may likewise make such a finding with reference to Article 82 of the Treaty.

CHAPTER IV
COOPERATION

Article 11
Cooperation between the Commission and the competition authorities of the Member States
1. The Commission and the competition authorities of the Member States shall apply the Community competition rules in close cooperation.
2. The Commission shall transmit to the competition authorities of the Member States copies of the most important documents it has collected with a view to applying Articles 7, 8, 9, 10 and Article 29(1). At the request of the competition authority of a Member State, the Commission shall provide it with a copy of other existing documents necessary for the assessment of the case.
3. The competition authorities of the Member States shall, when acting under Article 81 or Article 82 of the Treaty, inform the Commission in writing before or without delay after commencing the first formal investigative measure. This information may also be made available to the competition authorities of the other Member States.
4. No later than 30 days before the adoption of a decision requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption Regulation, the competition authorities of the Member States shall inform the Commission. To that effect, they shall provide the Commission with a summary of the case, the envisaged decision or, in the absence thereof, any other document indicating the proposed course of action. This information may also be made available to the competition authorities of the other Member States. At the request of the Commission, the acting competition authority shall make available to the Commission other documents it holds which are necessary for the assessment of the case. The information supplied to the Commission may be made available to the competition authorities of the other Member States. National competition authorities may also exchange between themselves information necessary for the assessment of a case that they are dealing with under Article 81 or Article 82 of the Treaty.
5. The competition authorities of the Member States may consult the Commission on any case involving the application of Community law.
6. The initiation by the Commission of proceedings for the adoption of a decision under Chapter III shall relieve the competition authorities of the Member States of their competence to apply Articles 81 and 82 of the Treaty. If a competition authority of a Member State is already acting on a case, the Commission shall only initiate proceedings after consulting with that national competition authority.

Article 12
Exchange of information
1. For the purpose of applying Articles 81 and 82 of the Treaty the Commission and the competition authorities of the Member States shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information.
2. Information exchanged shall only be used in evidence for the purpose of applying Article 81 or Article 82 of the Treaty and in respect of the subject-matter for which it was collected by the transmitting authority. However, where national competition law is applied in the same case and in parallel to Community competition law and does not lead to a different outcome, information exchanged under this Article may also be used for the application of national competition law.
3. Information exchanged pursuant to paragraph 1 can only be used in evidence to impose sanctions on natural persons where:

— the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of Article 81 or Article 82 of the Treaty or, in the absence thereof,
— the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority. However, in this case, the information exchanged cannot be used by the receiving authority to impose custodial sanctions.

Article 13
Suspension or termination of proceedings
1. Where competition authorities of two or more Member States have received a complaint or are acting on their own initiative under Article 81 or Article 82 of the Treaty against the same agreement, decision of an association or practice, the fact that one authority is dealing with the case shall be sufficient grounds for the others to suspend the proceedings before them or to reject the complaint. The Commission may likewise reject a complaint on the ground that a competition authority of a Member State is dealing with the case.
2. Where a competition authority of a Member State or the Commission has received a complaint against an agreement, decision of an association or practice which has already been dealt with by another competition authority, it may reject it.

Article 14
Advisory Committee
1. The Commission shall consult an Advisory Committee on Restrictive Practices and Dominant Positions prior to the taking of any decision under Articles 7, 8, 9, 10, 23, Article 24(2) and Article 29(1).
2. For the discussion of individual cases, the Advisory Committee shall be composed of representatives of the competition authorities of the Member States. For meetings in which issues other than individual cases are being discussed, an additional Member State representative competent in competition matters may be appointed. Representatives may, if unable to attend, be replaced by other representatives.
3. The consultation may take place at a meeting convened and chaired by the Commission, held not earlier than 14 days after dispatch of the notice convening it, together with a summary of the case, an indication of the most important documents and a preliminary draft decision. In respect of decisions pursuant to Article 8, the meeting may be held seven days after the dispatch of the operative part of a draft decision. Where the Commission dispatches a notice convening the meeting which gives a shorter period of notice than those specified above, the meeting may take place on the proposed date in the absence of an objection by any Member State. The Advisory Committee shall deliver a written opinion on the Commission's preliminary draft decision. It may deliver an opinion even if some members are absent and are not represented. At the request of one or several members, the positions stated in the opinion shall be reasoned.
4. Consultation may also take place by written procedure. However, if any Member State so requests, the Commission shall convene a meeting. In case of written procedure, the Commission shall determine a time-limit of not less than 14 days within which the Member States are to put forward their observations for circulation to all other Member States. In case of decisions to be taken pursuant to Article 8, the timelimit of 14 days is replaced by seven days. Where the Commission determines a time-limit for the written procedure which is shorter than those specified above, the proposed time-limit shall be applicable in the absence of an objection by any Member State.
5. The Commission shall take the utmost account of the opinion delivered by the Advisory Committee. It shall inform the Committee of the manner in which its opinion has been taken into account.
6. Where the Advisory Committee delivers a written opinion, this opinion shall be appended to the draft decision. If the Advisory Committee recommends publication of the opinion, the Commission shall carry out such publication taking into account the legitimate interest of undertakings in the protection of their business secrets.
7. At the request of a competition authority of a Member State, the Commission shall include on the agenda of the Advisory Committee cases that are being dealt with by a competition authority of a Member State under Article 81 or Article 82 of the Treaty. The Commission may also do so on its own initiative. In either case, the Commission shall inform the competition authority concerned. A request may in particular be made by a competition authority of a Member State in respect of a case where the Commission intends to initiate proceedings with the effect of Article 11(6). The Advisory Committee shall not issue opinions on cases dealt with by competition authorities of the Member States. The Advisory Committee may also discuss general issues of Community competition law.

Article 15
Cooperation with national courts

1. In proceedings for the application of Article 81 or Article 82 of the Treaty, courts of the Member States may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the Community competition rules.
2. Member States shall forward to the Commission a copy of any written judgment of national courts deciding on the application of Article 81 or Article 82 of the Treaty. Such copy shall be forwarded without delay after the full written judgment is notified to the parties.
3. Competition authorities of the Member States, acting on their own initiative, may submit written observations to the national courts of their Member State on issues relating to the application of Article 81 or Article 82 of the Treaty. With the permission of the court in question, they may also submit oral observations to the national courts of their Member State. Where the coherent application of Article 81 or Article 82 of the Treaty so requires, the Commission, acting on its own initiative, may submit written observations to courts of the Member States. With the permission of the court in question, it may also make oral observations. For the purpose of the preparation of their observations only, the competition authorities of the Member States and the Commission may request the relevant court of the Member State to transmit or ensure the transmission to them of any documents necessary for the assessment of the case.
4. This Article is without prejudice to wider powers to make observations before courts conferred on competition authorities of the Member States under the law of their Member State.

Article 16
Uniform application of Community competition law
1. When national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated. To that effect, the national court may assess whether it is necessary to stay its proceedings. This obligation is without prejudice to the rights and obligations under Article 234 of the Treaty.
2. When competition authorities of the Member States rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions which would run counter to the decision adopted by the Commission.

CHAPTER V
POWERS OF INVESTIGATION

Article 17
Investigations into sectors of the economy and into types of agreements
1. Where the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market, the Commission may conduct its inquiry into a particular sector of the economy or into a particular type of agreements across various sectors. In the course of that inquiry, the Commission may request the undertakings or associations of undertakings concerned to supply the information necessary for giving effect to Articles 81 and 82 of the Treaty and may carry out any inspections necessary for that purpose. The Commission may in particular request the undertakings or associations of undertakings concerned to communicate to it all agreements, decisions and concerted practices. The Commission may publish a report on the results of its inquiry into particular sectors of the economy or particular types of agreements across various sectors and invite comments from interested parties. 2. Articles 14, 18, 19, 20, 22, 23 and 24 shall apply *mutatis mutandis*.

Article 18
Requests for information
1. In order to carry out the duties assigned to it by this Regulation, the Commission may, by simple request or by decision, require undertakings and associations of undertakings to provide all necessary information.
2. When sending a simple request for information to an undertaking or association of undertakings, the Commission shall state the legal basis and the purpose of the request, specify what information is required and fix the time-limit within which the information is to be provided, and the penalties provided for in Article 23 for supplying incorrect or misleading information.
3. Where the Commission requires undertakings and associations of undertakings to supply information by decision, it shall state the legal basis and the purpose of the request, specify what information is required and fix the time-limit within which it is to be provided. It shall also indicate the penalties provided for in Article 23 and indicate or impose the penalties provided for in Article 24. It shall further indicate the right to have the decision reviewed by the Court of Justice.

4. 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.
5. The Commission shall without delay forward a copy of the simple request or of the decision to the competition authority of the Member State in whose territory the seat of the undertaking or association of undertakings is situated and the competition authority of the Member State whose territory is affected.
6. At the request of the Commission the governments and competition authorities of the Member States shall provide the Commission with all necessary information to carry out the duties assigned to it by this Regulation.

Article 19
Power to take statements
1. In order to carry out the duties assigned to it by this Regulation, the Commission may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject-matter of an investigation.
2. Where an interview pursuant to paragraph 1 is conducted in the premises of an undertaking, the Commission shall inform the competition authority of the Member State in whose territory the interview takes place. If so requested by the competition authority of that Member State, its officials may assist the officials and other accompanying persons authorised by the Commission to conduct the interview.

Article 20
The Commission's powers of inspection
1. In order to carry out the duties assigned to it by this Regulation, the Commission may conduct all necessary inspections of undertakings and associations of undertakings.
2. The officials and other accompanying persons authorised by the Commission to conduct an inspection are empowered:
(a) to enter any premises, land and means of transport of undertakings and associations of undertakings;
(b) to examine the books and other records related to the business, irrespective of the medium on which they are stored;
(c) to take or obtain in any formcopies of or extracts fromsuch books or records;
(d) to seal any business premises and books or records for the period and to the extent necessary for the inspection;
(e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers.
3. The officials and other accompanying persons authorised by the Commission to conduct an inspection shall exercise their powers upon production of a written authorisation specifying the subject matter and purpose of the inspection and the penalties provided for in Article 23 in case the production of the required books or other records related to the business is incomplete or where the answers to questions asked under paragraph 2 of the present Article are incorrect or misleading. In good time before the inspection, the Commission shall give notice of the inspection to the competition authority of the Member State in whose territory it is to be conducted.
4. Undertakings and associations of undertakings are required to submit to inspections ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the penalties provided for in Articles 23 and 24 and the right to have the decision reviewed by the Court of Justice. The Commission shall take such decisions after consulting the competition authority of the Member State in whose territory the inspection is to be conducted.
5. Officials of as well as those authorised or appointed by the competition authority of the Member State in whose territory the inspection is to be conducted shall, at the request of that authority or of the Commission, actively assist the officials and other accompanying persons authorised by the Commission. To this end, they shall enjoy the powers specified in paragraph 2.
6. 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 themthe 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.
7. If the assistance provided for in paragraph 6 requires authorisation froma judicial authority according to national rules, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure.
8. Where authorisation as referred to in paragraph 7 is applied for, the national judicial authority shall control that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor

excessive having regard to the subject matter of the inspection. In its control of the proportionality of the coercive measures, the national judicial authority may ask the Commission, directly or through the Member State competition authority, for detailed explanations in particular on the grounds the Commission has for suspecting infringement of Articles 81 and 82 of the Treaty, as well as on the seriousness of the suspected infringement and on the nature of the involvement of the undertaking concerned. However, the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with the information in the Commission's file. The lawfulness of the Commission decision shall be subject to review only by the Court of Justice.

Article 21

Inspection of other premises

1. If a reasonable suspicion exists that books or other records related to the business and to the subjectmatter 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 any other premises, land and means of transport, including the homes of directors, managers and other members of staff of the undertakings and associations of undertakings concerned, the Commission can by decision order an inspection to be conducted in such other premises, land and means of transport.

2. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the right to have the decision reviewed by the Court of Justice. It shall in particular state the reasons that have led the Commission to conclude that a suspicion in the sense of paragraph 1 exists. The Commission shall take such decisions after consulting the competition authority of the Member State in whose territory the inspection is to be conducted.

3. A decision adopted pursuant to paragraph 1 cannot be executed without prior authorisation from the national judicial authority of the Member State concerned. The national judicial authority shall control that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard in particular to the seriousness of the suspected infringement, to the importance of the evidence sought, to the involvement of the undertaking concerned and to the reasonable likelihood that business books and records relating to the subject matter of the inspection are kept in the premises for which the authorisation is requested. The national judicial authority may ask the Commission, directly or through the Member State competition authority, for detailed explanations on those elements which are necessary to allow its control of the proportionality of the coercive measures envisaged. However, the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with information in the Commission's file. The lawfulness of the Commission decision shall be subject to review only by the Court of Justice.

4. The officials and other accompanying persons authorised by the Commission to conduct an inspection ordered in accordance with paragraph 1 of this Article shall have the powers set out in Article 20(2)(a), (b) and (c). Article 20(5) and (6) shall apply *mutatis mutandis*.

Article 22

Investigations by competition authorities of Member States

1. The competition authority of a Member State may in its own territory carry out any inspection or other fact-finding measure under its national law on behalf and for the account of the competition authority of another Member State in order to establish whether there has been an infringement of Article 81 or Article 82 of the Treaty. Any exchange and use of the information collected shall be carried out in accordance with Article 12.

2. At the request of the Commission, the competition authorities of the Member States shall undertake the inspections which the Commission considers to be necessary under Article 20(1) or which it has ordered by decision pursuant to Article 20(4). The officials of the competition authorities of the Member States who are responsible for conducting these inspections as well as those authorised or appointed by themshall exercise their powers in accordance with their national law. If so requested by the Commission or by the competition authority of the Member State in whose territory the inspection is to be conducted, officials and other accompanying persons authorised by the Commission may assist the officials of the authority concerned.

CHAPTER VI

PENALTIES

Article 23

Fines

1. The Commission may by decision impose on undertakings and associations of undertakings fines not exceeding 1 % of the total turnover in the preceding business year where, intentionally or negligently:

(a) they supply incorrect or misleading information in response to a request made pursuant to Article 17 or Article 18(2);
(b) in response to a request made by decision adopted pursuant to Article 17 or Article 18(3), they supply incorrect, incomplete or misleading information or do not supply information within the required time-limit;
(c) they produce the required books or other records related to the business in incomplete form during inspections under Article 20 or refuse to submit to inspections ordered by a decision adopted pursuant to Article 20(4);
(d) in response to a question asked in accordance with Article 20(2)(e),
— they give an incorrect or misleading answer,
— they fail to rectify within a time-limit set by the Commission an incorrect, incomplete or misleading answer given by a member of staff, or
— they fail or refuse to provide a complete answer on facts relating to the subject-matter and purpose of an inspection ordered by a decision adopted pursuant to Article 20(4);
(e) seals affixed in accordance with Article 20(2)(d) by officials or other accompanying persons authorised by the Commission have been broken.
2. The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:
(a) they infringe Article 81 or Article 82 of the Treaty; or
(b) they contravene a decision ordering interimm easures under Article 8; or
(c) they fail to comply with a commitment made binding by a decision pursuant to Article 9.
For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10 % of its total turnover in the preceding business year. Where the infringement of an association relates to the activities of its members, the fine shall not exceed 10 % of the sum of the total turnover of each member active on the market affected by the infringement of the association.
3. In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.
4. When a fine is imposed on an association of undertakings taking account of the turnover of its members and the association is not solvent, the association is obliged to call for contributions from its members to cover the amount of the fine. Where such contributions have not been made to the association within a time-limit fixed by the Commission, the Commission may require payment of the fine directly by any of the undertakings whose representatives were members of the decision-making bodies concerned of the association. After the Commission has required payment under the second subparagraph, where necessary to ensure full payment of the fine, the Commission may require payment of the balance by any of the members of the association which were active on the market on which the infringement occurred. However, the Commission shall not require payment under the second or the third subparagraph from undertakings which show that they have not implemented the infringing decision of the association and either were not aware of its existence or have actively distanced themselves from it before the Commission started investigating the case. The financial liability of each undertaking in respect of the payment of the fine shall not exceed 10 % of its total turnover in the preceding business year.
5. Decisions taken pursuant to paragraphs 1 and 2 shall not be of a criminal law nature.

Article 24
Periodic penalty payments
1. The Commission may, by decision, impose on undertakings or associations of undertakings periodic penalty payments not exceeding 5 % of the average daily turnover in the preceding business year per day and calculated from the date appointed by the decision, in order to compel them:
(a) to put an end to an infringement of Article 81 or Article 82 of the Treaty, in accordance with a decision taken pursuant to Article 7;
(b) to comply with a decision ordering interim measures taken pursuant to Article 8;
(c) to comply with a commitment made binding by a decision pursuant to Article 9;
(d) to supply complete and correct information which it has requested by decision taken pursuant to Article 17 or Article 18(3);
(e) to submit to an inspection which it has ordered by decision taken pursuant to Article 20(4).
2. Where the undertakings or associations of undertakings have satisfied the obligation which the periodic penalty payment was intended to enforce, the Commission may fix the definitive amount of the periodic penalty payment at a figure lower than that which would arise under the original decision. Article 23(4) shall apply correspondingly.

CHAPTER VII
LIMITATION PERIODS

Article 25
Limitation periods for the imposition of penalties
1. The powers conferred on the Commission by Articles 23 and 24 shall be subject to the following limitation periods:
(a) three years in the case of infringements of provisions concerning requests for information or the conduct of inspections;
(b) five years in the case of all other infringements.
2. Time shall begin to run on the day on which the infringement is committed. However, in the case of continuing or repeated infringements, time shall begin to run on the day on which the infringement ceases.
3. Any action taken by the Commission or by the competition authority of a Member State for the purpose of the investigation or proceedings in respect of an infringement shall interrupt the limitation period for the imposition of fines or periodic penalty payments. The limitation period shall be interrupted with effect fromthe date on which the action is notified to at least one undertaking or association of undertakings which has participated in the infringement. Actions which interrupt the running of the period shall include in particular the following:
(a) written requests for information by the Commission or by the competition authority of a Member State;
(b) written authorisations to conduct inspections issued to its officials by the Commission or by the competition authority of a Member State;
(c) the initiation of proceedings by the Commission or by the competition authority of a Member State;
(d) notification of the statement of objections of the Commission or of the competition authority of a Member State.
4. The interruption of the limitation period shall apply for all the undertakings or associations of undertakings which have participated in the infringement.
5. Each interruption shall start time running afresh. However, the limitation period shall expire at the latest on the day on which a period equal to twice the limitation period has elapsed without the Commission having imposed a fine or a periodic penalty payment. That period shall be extended by the time during which limitation is suspended pursuant to paragraph 6.
6. The limitation period for the imposition of fines or periodic penalty payments shall be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice.

Article 26
Limitation period for the enforcement of penalties
1. The power of the Commission to enforce decisions taken pursuant to Articles 23 and 24 shall be subject to a limitation period of five years.
2. Time shall begin to run on the day on which the decision becomes final.
3. The limitation period for the enforcement of penalties shall be interrupted:
(a) by notification of a decision varying the original amount of the fine or periodic penalty payment or refusing an application for variation;
(b) by any action of the Commission or of a Member State, acting at the request of the Commission, designed to enforce payment of the fine or periodic penalty payment.
4. Each interruption shall start time running afresh.
5. The limitation period for the enforcement of penalties shall be suspended for so long as:
(a) time to pay is allowed;
(b) enforcement of payment is suspended pursuant to a decision of the Court of Justice.

CHAPTER VIII
HEARINGS AND PROFESSIONAL SECRECY

Article 27
Hearing of the parties, complainants and others
1. Before taking decisions as provided for in Articles 7, 8, 23 and Article 24(2), the Commission shall give the undertakings or associations of undertakings which are the subject of the proceedings conducted by the Commission the opportunity of being heard on the matters to which the Commission has taken objection. The Commission shall base its decisions only on objections on which the parties concerned have been able to comment. Complainants shall be associated closely with the proceedings.
2. The rights of defence of the parties concerned shall be fully respected in the proceedings. They shall be entitled to have access to the Commission's file, subject to the legitimate interest of undertakings in the protection of their business secrets. The right of access to the file shall not extend to confidential information and internal documents of the Commission or the competition authorities of the Member States. In particular, the right of access shall not extend to correspondence between the Commission and the competition authorities of the Member States, or between the latter, including documents drawn up pursuant to Articles 11 and 14. Nothing

in this paragraph shall prevent the Commission from disclosing and using information necessary to prove an infringement.
3. If the Commission considers it necessary, it may also hear other natural or legal persons. Applications to be heard on the part of such persons shall, where they show a sufficient interest, be granted. The competition authorities of the Member States may also ask the Commission to hear other natural or legal persons.
4. Where the Commission intends to adopt a decision pursuant to Article 9 or Article 10, it shall publish a concise summary of the case and the main content of the commitments or of the proposed course of action. Interested third parties may submit their observations within a time limit which is fixed by the Commission in its publication and which may not be less than one month. Publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 28
Professional secrecy
1. Without prejudice to Articles 12 and 15, information collected pursuant to Articles 17 to 22 shall be used only for the purpose for which it was acquired.
2. Without prejudice to the exchange and to the use of information foreseen in Articles 11, 12, 14, 15 and 27, the Commission and the competition authorities of the Member States, their officials, servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States shall not disclose information acquired or exchanged by them pursuant to this Regulation and of the kind covered by the obligation of professional secrecy. This obligation also applies to all representatives and experts of Member States attending meetings of the Advisory Committee pursuant to Article 14.

CHAPTER IX
EXEMPTION REGULATIONS

Article 29
Withdrawal in individual cases
1. Where the Commission, empowered by a Council Regulation, such as Regulations 19/65/EEC, (EEC) No 2821/71, (EEC) No 3976/87, (EEC) No 1534/91 or (EEC) No 479/92, to apply Article 81(3) of the Treaty by regulation, has declared Article 81(1) of the Treaty inapplicable to certain categories of agreements, decisions by associations of undertakings or concerted practices, it may, acting on its own initiative or on a complaint, withdraw the benefit of such an exemption Regulation when it finds that in any particular case an agreement, decision or concerted practice to which the exemption Regulation applies has certain effects which are incompatible with Article 81(3) of the Treaty.
2. Where, in any particular case, agreements, decisions by associations of undertakings or concerted practices to which a Commission Regulation referred to in paragraph 1 applies have effects which are incompatible with Article 81(3) of the Treaty in the territory of a Member State, or in a part thereof, which has all the characteristics of a distinct geographic market, the competition authority of that Member State may withdraw the benefit of the Regulation in question in respect of that territory.

CHAPTER X
GENERAL PROVISIONS

Article 30
Publication of decisions
1. The Commission shall publish the decisions, which it takes pursuant to Articles 7 to 10, 23 and 24.
2. The publication shall state the names of the parties and the main content of the decision, including any penalties imposed. It shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 31
Review by the Court of Justice
The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed.

Article 32
Exclusions
This Regulation shall not apply to:
(a) international tramp vessel services as defined in Article 1(3)(a) of Regulation (EEC) No 4056/86;

(b) a maritime transport service that takes place exclusively between ports in one and the same Member State as foreseen in Article 1(2) of Regulation (EEC) No 4056/86;
(c) air transport between Community airports and third countries.

Article 33
Implementing provisions
1. The Commission shall be authorised to take such measures as may be appropriate in order to apply this Regulation. The measures may concern, *inter alia*:
(a) the form, content and other details of complaints lodged pursuant to Article 7 and the procedure for rejecting complaints;
(b) the practical arrangements for the exchange of information and consultations provided for in Article
11;
(c) the practical arrangements for the hearings provided for in Article 27.
2. Before the adoption of any measures pursuant to paragraph 1, the Commission shall publish a draft thereof and invite all interested parties to submit their comments within the time-limit it lays down, which may not be less than one month. Before publishing a draft measure and before adopting it, the Commission shall consult the Advisory Committee on Restrictive Practices and Dominant Positions.

CHAPTER XI
TRANSITIONAL, AMENDING AND FINAL PROVISIONS

Article 34
Transitional provisions
1. Applications made to the Commission under Article 2 of Regulation No 17, notifications made under Articles 4 and 5 of that Regulation and the corresponding applications and notifications made under Regulations (EEC) No 1017/68, (EEC) No 4056/86 and (EEC) No 3975/87 shall lapse as fromthe date of application of this Regulation.
2. Procedural steps taken under Regulation No 17 and Regulations (EEC) No 1017/68, (EEC) No 4056/ 86 and (EEC) No 3975/87 shall continue to have effect for the purposes of applying this Regulation.

Article 35
Designation of competition authorities of Member States
1. The Member States shall designate the competition authority or authorities responsible for the application of Articles 81 and 82 of the Treaty in such a way that the provisions of this regulation are effectively complied with. The measures necessary to empower those authorities to apply those Articles shall be taken before 1 May 2004. The authorities designated may include courts.
2. When enforcement of Community competition law is entrusted to national administrative and judicial authorities, the Member States may allocate different powers and functions to those different national authorities, whether administrative or judicial.
3. The effects of Article 11(6) apply to the authorities designated by the Member States including courts that exercise functions regarding the preparation and the adoption of the types of decisions foreseen in Article 5. The effects of Article 11(6) do not extend to courts insofar as they act as review courts in respect of the types of decisions foreseen in Article 5.
4. Notwithstanding paragraph 3, in the Member States where, for the adoption of certain types of decisions foreseen in Article 5, an authority brings an action before a judicial authority that is separate and different from the prosecuting authority and provided that the terms of this paragraph are complied with, the effects of Article 11(6) shall be limited to the authority prosecuting the case which shall withdraw its claim before the judicial authority when the Commission opens proceedings and this withdrawal shall bring the national proceedings effectively to an end.

Article 36
Amendment of Regulation (EEC) No 1017/68
Regulation (EEC) No 1017/68 is amended as follows:
1. Article 2 is repealed;
2. in Article 3(1), the words ‘The prohibition laid down in Article 2’ are replaced by the words ‘The prohibition in Article 81(1) of the Treaty’;
3. Article 4 is amended as follows:
(a) In paragraph 1, the words ‘The agreements, decisions and concerted practices referred to in Article 2’ are replaced by the words ‘Agreements, decisions and concerted practices pursuant to Article 81(1) of the Treaty’;

(b) Paragraph 2 is replaced by the following: ‘2. If the implementation of any agreement, decision or concerted practice covered by paragraph 1 has, in a given case, effects which are incompatible with the requirements of Article 81(3) of the Treaty, undertakings or associations of undertakings may be required to make such effects cease.’
4. Articles 5 to 29 are repealed with the exception of Article 13(3) which continues to apply to decisions adopted pursuant to Article 5 of Regulation (EEC) No 1017/68 prior to the date of application of this Regulation until the date of expiration of those decisions;
5. in Article 30, paragraphs 2, 3 and 4 are deleted.

Article 37
Amendment of Regulation (EEC) No 2988/74
In Regulation (EEC) No 2988/74, the following Article is inserted:
‘Article 7a
Exclusion
This Regulation shall not apply to measures taken under Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (*).

Article 38
Amendment of Regulation (EEC) No 4056/86
Regulation (EEC) No 4056/86 is amended as follows:
1. Article 7 is amended as follows:
(a) Paragraph 1 is replaced by the following:
‘1. *Breach of an obligation*
Where the persons concerned are in breach of an obligation which, pursuant to Article 5, attaches to the exemption provided for in Article 3, the Commission may, in order to put an end to such breach and under the conditions laid down in Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (*) adopt a decision that either prohibits themfromcarrying out or requires themto performcertain specific acts, or withdraws the benefit of the block exemption which they enjoyed.
(b) Paragraph 2 is amended as follows:
(i) In point (a), the words ‘under the conditions laid down in Section II’ are replaced by the words ‘under the conditions laid down in Regulation (EC) No 1/2003’;
(ii) The second sentence of the second subparagraph of point (c)(i) is replaced by the following:
‘At the same time it shall decide, in accordance with Article 9 of Regulation (EC) No 1/2003, whether to accept commitments offered by the undertakings concerned with a view, *inter alia*, to obtaining access to the market for non-conference lines.’
2. Article 8 is amended as follows:
(a) Paragraph 1 is deleted.
(b) In paragraph 2 the words ‘pursuant to Article 10’ are replaced by the words ‘pursuant to Regulation (EC) No 1/2003’.
(c) Paragraph 3 is deleted;
3. Article 9 is amended as follows:
(a) In paragraph 1, the words ‘Advisory Committee referred to in Article 15’ are replaced by the words ‘Advisory Committee referred to in Article 14 of Regulation (EC) No 1/2003’;
(b) In paragraph 2, the words ‘Advisory Committee as referred to in Article 15’ are replaced by the words ‘Advisory Committee referred to in Article 14 of Regulation (EC) No 1/2003’;
4. Articles 10 to 25 are repealed with the exception of Article 13(3) which continues to apply to decisions adopted pursuant to Article 81(3) of the Treaty prior to the date of application of this Regulation until the date of expiration of those decisions;
5. in Article 26, the words ‘the form, content and other details of complaints pursuant to Article 10, applications pursuant to Article 12 and the hearings provided for in Article 23(1) and (2)’ are deleted.

Article 39
Amendment of Regulation (EEC) No 3975/87
Articles 3 to 19 of Regulation (EEC) No 3975/87 are repealed with the exception of Article 6(3) which continues to apply to decisions adopted pursuant to Article 81(3) of the Treaty prior to the date of application of this Regulation until the date of expiration of those decisions.

Article 40
Amendment of Regulations No 19/65/EEC, (EEC) No 2821/71 and (EEC) No 1534/91

Article 7 of Regulation No 19/65/EEC, Article 7 of Regulation (EEC) No 2821/71 and Article 7 of Regulation EEC) No 1534/91 are repealed.

Article 41
Amendment of Regulation (EEC) No 3976/87
Regulation (EEC) No 3976/87 is amended as follows:
1. Article 6 is replaced by the following:
'Article 6
The Commission shall consult the Advisory Committee referred to in Article 14 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (*) before publishing a draft Regulation and before adopting a Regulation.
2. Article 7 is repealed.

Article 42
Amendment of Regulation (EEC) No 479/92
Regulation (EEC) No 479/92 is amended as follows:
1. Article 5 is replaced by the following:
'Article 5
Before publishing the draft Regulation and before adopting the Regulation, the Commission shall consult the Advisory Committee referred to in Article 14 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (*).
2. Article 6 is repealed.

Article 43
Repeal of Regulations No 17 and No 141
1. Regulation No 17 is repealed with the exception of Article 8(3) which continues to apply to decisions adopted pursuant to Article 81(3) of the Treaty prior to the date of application of this Regulation until the date of expiration of those decisions.
2. Regulation No 141 is repealed.
3. References to the repealed Regulations shall be construed as references to this Regulation.

Article 44
Report on the application of the present Regulation
Five years from the date of application of this Regulation, the Commission shall report to the European Parliament and the Council on the functioning of this Regulation, in particular on the application of Article 11(6) and Article 17. On the basis of this report, the Commission shall assess whether it is appropriate to propose to the Council a revision of this Regulation.

Article 45
Entry into force
This Regulation shall enter into force on the 20th day following that of its publication in the *Official Journal of the European Communities*. It shall apply from1 May 2004. This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 16 December 2002.
For the Council
The President
M. FISCHER BOEL

(1) OJ C 365 E, 19.12.2000, p. 284.
(2) OJ C 72 E, 21.3.2002, p. 305.
(3) OJ C 155, 29.5.2001, p. 73.
(*) The title of Regulation No 17 has been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Articles 85 and 86 of the Treaty.
(4) OJ 13, 21.2.1962, p. 204/62. Regulation as last amended by Regulation (EC) No 1216/1999 (OJ L 148, 15.6.1999, p. 5).

(1) Council Regulation No 19/65/EEC of 2 March 1965 on the application of Article 81(3) (The titles of the Regulations have been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 85(3) of the Treaty) of the Treaty to certain categories of agreements and concerted practices (OJ 36, 6.3.1965, p. 533). Regulation as last amended by Regulation (EC) No 1215/1999 (OJ L 148, 15.6.1999, p. 1).
(2) Council Regulation (EEC) No 2821/71 of 20 December 1971 on the application of Article 81(3) (The titles of the Regulations have been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the

original reference was to Article 85(3) of the Treaty) of the Treaty to categories of agreements, decisions and concerted practices (OJ L 285, 29.12.1971, p. 46). Regulation as last amended by the Act of Accession of 1994.
(3) Council Regulation (EEC) No 3976/87 of 14 December 1987 on the application of Article 81(3) (The titles of the Regulations have been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 85(3) of the Treaty) of the Treaty to certain categories of agreements and concerted practices in the air transport sector (OJ L 374, 31.12.1987, p. 9). Regulation as last amended by the Act of Accession of 1994.
(4) Council Regulation (EEC) No 1534/91 of 31 May 1991 on the application of Article 81(3) (The titles of the Regulations have been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 85(3) of the Treaty) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector (OJ L 143, 7.6.1991, p. 1).
(5) Council Regulation (EEC) No 479/92 of 25 February 1992 on the application of Article 81(3) (The titles of the Regulations have been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with
Article 12 of the Treaty of Amsterdam; the original reference was to Article 85(3) of the Treaty) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (Consortia) (OJ L 55, 29.2.1992, p. 3). Regulation amended by the Act of Accession of 1994.

(1) Council Regulation (EEC) No 2988/74 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ L 319, 29.11.1974, p. 1). authority, Article 11(6) should apply to the prosecuting authority subject to the conditions in Article 35(4) of this Regulation. Where these conditions are not fulfilled, the general rule should apply. In any case, Article 11(6) should not apply to courts insofar as they are acting as review courts.

(1) OJ 124, 28.11.1962, p. 2751/62; Regulation as last amended by Regulation No 1002/67/EEC (OJ 306,16.12.1967, p. 1).
(2) Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway (OJ L 175, 23.7.1968, p. 1). Regulation as last amended by the Act of Accession of 1994.
(3) Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 81 and 82 (The title of the Regulation has been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Articles 85 and 86 of the Treaty) of the Treaty to maritime transport (OJ L 378, 31.12.1986, p. 4). Regulation as last amended by the Act of Accession of 1994.
(4) Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector (OJ L 374, 31.12.1987, p. 1). Regulation as last amended by Regulation (EEC) No 2410/92 (OJ L 240, 24.8.1992, p. 18).

(*) OJ L 1, 4.1.2003, p. 1.'
(*) OJ L 1, 4.1.2003, p. 1.'
(*) OJ L 1, 4.1.2003, p. 1.'
(*) OJ L 1, 4.1.2003, p. 1.'

6.1. Priloga 2: Sporočilo Komisije o sodelovanju Komisije in nacionalnih sodišč držav članic pri uporabi členov 81 in 82 PES

Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC
(2004/C 101/04)
(Text with EEA relevance)

I. **THE SCOPE OF THE NOTICE**

1. The present notice addresses the co-operation between the Commission and the courts of the EU Member States, when the latter apply Articles 81 and 82 EC. For the purpose of this notice, the 'courts of the EU Member States' (hereinafter 'national courts') are those courts and tribunals within an EU Member State that can apply Articles 81 and 82 EC and that are authorised to ask a preliminary question to the Court of Justice of the European Communities pursuant to Article 234 EC (1).
2. The national courts may be called upon to apply Articles 81 or 82 EC in lawsuits between private parties, such as actions relating to contracts or actions for damages. They may also act as public enforcer or as review court. A national court may indeed be designated as a competition authority of a Member State (hereinafter 'the national competition authority') pursuant to Article 35(1) of Regulation(EC) No 1/2003 (hereinafter 'the regulation') (2). In that case, the co-operation between the national courts and the Commission is not only covered by the present notice, but also by the notice on the co-operation within the network of competition authorities (3).

II. **THE APPLICATION OF EC COMPETITION RULES BY NATIONAL COURTS**

A. THE COMPETENCE OF NATIONAL COURTS TO APPLY EC COMPETITION RULES

3. To the extent that national courts have jurisdiction to deal with a case (4), they have the power to apply Articles 81 and 82 EC (5). Moreover, it should be remembered that Articles 81 and 82 EC are a matter of public policy and are essential to the accomplishment of the tasks entrusted to the Community, and, in particular, for the functioning of the internal market (6). According to the Court of Justice, where, by virtue of domestic law, national courts must raise of their own motion points of law based on binding domestic rules which have not been raised by the parties, such an obligation also exists where binding Community rules, such as the EC competition rules, are concerned. The position is the same if domestic law confers on national courts a discretion to apply of their own motion binding rules of law: national courts must apply the EC competition rules, even when the party with an interest in application of those provisions has not relied on them, where domestic law allows such application by the national court. However, Community law does not require national courts to raise of their own motion an issue concerning the breach of provisions of Community law where examination of that issue would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in application of those provisions bases his claim (7).
4. Depending on the functions attributed to them under national law, national courts may be called upon to apply Articles 81 and 82 EC in administrative, civil or criminal proceedings (8). In particular, where a natural or legal person asks the national court to safeguard his individual rights, national courts play a specific role in the enforcement of Articles 81 and 82 EC, which is different from the enforcement in the public interest by the Commission or by national competition authorities (9). Indeed, national courts can give effect to Articles 81 and 82 EC by finding contracts to be void or by awards of damages.
5. National courts can apply Articles 81 and 82 EC, without it being necessary to apply national competition law in parallel. However, where a national court applies national competition law to agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States within the meaning of Article 81(1) EC (10) or to any abuse prohibited by Article 82 EC, they also have to apply EC competition rules to those agreements, decisions or practices (11).
6. The regulation does not only empower the national courts to apply EC competition law. The parallel application of national competition law to agreements, decisions of associations of undertakings and concerted practices which affect trade between Member States may not lead to a different outcome from that of EC competition law. Article 3(2) of the regulation provides that agreements,decisions or concerted practices which do not infringe Article 81(1) EC or which fulfil the conditions of Article 81(3) EC cannot be prohibited either under national competition law (12). On the other hand, the Court of Justice has ruled that agreements, decisions or concerted practices that violate Article 81(1) and do not fulfil the conditions of Article 81(3) EC cannot be upheld under national law (13). As to the parallel application of national competition law and Article 82 EC in the case of unilateral conduct, Article 3 of the regulation does not provide for a similar convergence obligation. However, in case of conflicting provisions, the general principle of primacy of Community law requires national courts to disapply any provision of national law which contravenes a Community rule, regardless of whether that national law provision was adopted before or after the Community rule (14).
7. Apart from the application of Articles 81 and 82 EC, national courts are also competent to apply acts adopted by EU institutions in accordance with the EC Treaty or in accordance with the measures adopted to give the Treaty effect, to the extent that these acts have direct effect. National courts may thus have to enforce Commission decisions (15) or regulations applying Article 81(3) EC to certain categories of agreements, decisions or concerted practices. When applying these EC competition rules, national courts act within the framework of Community law and are consequently bound to observe the general principles of Community law (16).
8. The application of Articles 81 and 82 EC by national courts often depends on complex economic and legal assessments (17). When applying EC competition rules, national courts are bound by the case law of the Community courts as well as by Commission regulations applying Article 81(3) EC to certain categories of agreements, decisions or concerted practices (18). Furthermore, the application of Articles 81 and 82 EC by the Commission in a specific case binds the national courts when they apply EC competition rules in the same case in parallel with or subsequent to the Commission (19). Finally, and without prejudice to the ultimate interpretation of the EC Treaty by the Court of Justice, national courts may find guidance in Commission regulations and decisions which present elements of analogy with the case they are dealing with, as well as in Commission notices and guidelines relating to the application of Articles 81 and 82 EC (20) and in the annual report on competition policy (21).

B. PROCEDURAL ASPECTS OF THE APPLICATION OF EC COMPETITION RULES BY NATIONAL COURTS

9. The procedural conditions for the enforcement of EC competition rules by national courts and the sanctions they can impose in case of an infringement of those rules, are largely covered by national law. However, to some extent, Community law also determines the conditions in which EC competition rules are enforced. Those

Community law provisions may provide for the faculty of national courts to avail themselves of certain instruments, e.g. to ask for the Commission's opinion on questions concerning the application of EC competition rules (22) or they may create rules that have an obligatory impact on proceedings before them, e.g. allowing the Commission and national competition authorities to submit written observations (23). These Community law provisions prevail over national rules. Therefore, national courts have to set aside national rules which, if applied, would conflict with these Community law provisions. Where such Community law provisions are directly applicable, they are a direct source of rights and duties for all those affected, and must be fully and uniformly applied in all the Member States from the date of their entry into force (24).

10. In the absence of Community law provisions on procedures and sanctions related to the enforcement of EC competition rules by national courts, the latter apply national procedural law and — to the extent that they are competent to do so — impose sanctions provided for under national law. However, the application of these national provisions must be compatible with the general principles of Community law. In this regard, it is useful to recall the case law of the Court of Justice, according to which:

(a) where there is an infringement of Community law, national law must provide for sanctions which are effective, proportionate and dissuasive (25);

(b) where the infringement of Community law causes harm to an individual, the latter should under certain conditions be able to ask the national court for damages (26);

(c) the rules on procedures and sanctions which national courts apply to enforce Community law

— must not make such enforcement excessively difficult or practically impossible (the principle of effectiveness) (27) and they

— must not be less favourable than the rules applicable to the enforcement of equivalent national law (the principle of equivalence) (28). On the basis of the principle of primacy of Community law, a national court may not apply national rules that are incompatible with these principles.

C. PARALLEL OR CONSECUTIVE APPLICATION OF EC COMPETITION RULES BY THE COMMISSION AND BY NATIONAL COURTS

11. A national court may be applying EC competition law to an agreement, decision, concerted practice or unilateral behaviour affecting trade between Member States at the same time as the Commission or subsequent to the Commission (29). The following points outline some of the obligations national courts have to respect in those circumstances.

12. Where a national court comes to a decision before the Commission does, it must avoid adopting a decision that would conflict with a decision contemplated by the Commission (30). To that effect, the national court may ask the Commission whether it has initiated proceedings regarding the same agreements, decisions or practices (31) and if so, about the progress of proceedings and the likelihood of a decision in that case (32). The national court may, for reasons of legal certainty, also consider staying its proceedings until the Commission has reached a decision (33). The Commission, for its part, will endeavour to give priority to cases for which it has decided to initiate proceedings within the meaning of Article 2(1) of Commission Regulation (EC) No 773/2004 and that are the subject of national proceedings stayed in this way, in particular when the outcome of a civil dispute depends on them. However, where the national court cannot reasonably doubt the Commission's contemplated decision or where the Commission has already decided on a similar case, the national court may decide on the case pending before it in accordance with that contemplated or earlier decision without it being necessary to ask the Commission for the information mentioned above or to await the Commission's decision.

13. Where the Commission reaches a decision in a particular case before the national court, the latter cannot take a decision running counter to that of the Commission. The binding effect of the Commission's decision is of course without prejudice to the interpretation of Community law by the Court of Justice. Therefore, if the national court doubts the legality of the Commission's decision, it cannot avoid the binding effects of that decision without a ruling to the contrary by the Court of Justice (34). Consequently, if a national court intends to take a decision that runs counter to that of the Commission, it must refer a question to the Court of Justice for a preliminary ruling (Article 234 EC). The latter will then decide on the compatibility of the Commission's decision with Community law. However, if the Commission's decision is challenged before the Community courts pursuant to Article 230 EC and the outcome of the dispute before the national court depends on the validity of the Commission's decision, the national court should stay its proceedings pending final judgment in the action for annulment by the Community courts unless it considers that, in the circumstances of the case, a reference to the Court of Justice for a preliminary ruling on the validity of the Commission decision is warranted (35).

14. When a national court stays proceedings, e.g. awaiting the Commission's decision (situation described in point 12 of this notice) or pending final judgement by the Community courts in an action for annulment or in a preliminary ruling procedure (situation described in point 13), it is incumbent on it to examine whether it is necessary to order interim measures in order to safeguard the interests of the parties (36).

III. **THE CO-OPERATION BETWEEN THE COMMISSION AND NATIONAL COURTS**

15. Other than the co-operation mechanism between the national courts and the Court of Justice under Article 234 EC, the EC Treaty does not explicitly provide for co-operation between the national courts and the Commission. However, in its interpretation of Article 10 EC, which obliges the Member States to facilitate the achievement of the Community's tasks, the Community courts found that this Treaty provision imposes on the European institutions and the Member States mutual duties of loyal co-operation with a view to attaining the objectives of the EC Treaty. Article 10 EC thus implies that the Commission must assist national courts when they apply Community law (37). Equally, national courts may be obliged to assist the Commission in the fulfilment of its tasks (38).
16. It is also appropriate to recall the co-operation between national courts and national authorities, in particular national competition authorities, for the application of Articles 81 and 82 EC. While the co-operation between these national authorities is primarily governed by national rules, Article 15(3) of the regulation provides for the possibility for national competition authorities to submit observations before the national courts of their Member State. Points 31 and 33 to 35 of this notice are *mutatis mutandis* applicable to those submissions.

A. THE COMMISSION AS *AMICUS CURIAE*

17. In order to assist national courts in the application of EC competition rules, the Commission is committed to help national courts where the latter find such help necessary to be able to decide on a case. Article 15 of the regulation refers to the most frequent types of such assistance: the transmission of information (points 21 to 26) and the Commission's opinions (points 27 to 30), both at the request of a national court and the possibility for the Commission to submit observations (points 31 to 35). Since the regulation provides for these types of assistance, it cannot be limited by any Member States' rule. However, in the absence of Community procedural rules to this effect and to the extent that they are necessary to facilitate these forms of assistance, Member States must adopt the appropriate procedural rules to allow both the national courts and the Commission to make full use of the possibilities the regulation offers (39).
18. The national court may send its request for assistance in writing to
European Commission
Directorate General for Competition
B-1049 Brussels
Belgium
or send it electronically to comp-amicus@cec.eu.int
19. It should be recalled that whatever form the co-operation with national courts takes, the Commission will respect the independence of national courts. As a consequence, the assistance offered by the Commission does not bind the national court. The Commission has also to make sure that it respects its duty of professional secrecy and that it safeguards its own functioning and independence (40). In fulfilling its duty under Article 10 EC, of assisting national courts in the application of EC competition rules, the Commission is committed to remaining neutral and objective in its assistance. Indeed, the Commission's assistance to national courts is part of its duty to defendthe public interest. It has therefore no intention to serve the private interests of the parties involved in the case pending before the national court. As a consequence, the Commission will not hear any of the parties about its assistance to the national court. In case the Commission has been contacted by any of the parties in the case pending before the court on issues which are raised before the national court, it will inform the national court thereof, independent of whether these contacts took place before or after the national court's request for co-operation.
20. The Commission will publish a summary concerning its co-operation with national courts pursuant to this notice in its annual Report on Competition Policy. It may also make its opinions and observations available on its website.

1. **The Commission's duty to transmit information to national courts**

21. The duty for the Commission to assist national courts in the application of EC competition law is mainly reflected in the obligation for the Commission to transmit information it holds to national courts. A national court may, e.g., ask the Commission for documents in its possession or for information of a procedural nature to enable it to discover whether a certain case is pending before the Commission, whether the Commission has initiated a procedure or whether it has already taken a position. A national court may also ask the Commission when a decision is likely to be taken, so as to be able to determine the conditions for any decision to stay proceedings or whether interim measures need to be adopted (41).
22. In order to ensure the efficiency of the co-operation with national courts, the Commission will endeavour to provide the national court with the requested information within one month from the date it receives the request. Where the Commission has to ask the national court for further clarification of its request or where the Commission has to consult those who are directly affected by the transmission of the information, that period starts to run from the moment that it receives the required information.

23. In transmitting information to national courts, the Commission has to uphold the guarantees given to natural and legal persons by Article 287 EC (42). Article 287 EC prevents members, officials and other servants of the Commission from disclosing information covered by the obligation of professional secrecy. The information covered by professional secrecy may be both confidential information and business secrets. Business secrets are information of which not only disclosure to the public but also mere transmission to a person other than the one that provided the information might seriously harm the latter's interests (43).
24. The combined reading of Articles 10 and 287 EC does not lead to an absolute prohibition for the Commission to transmit information which is covered by the obligation of professional secrecy to national courts. The case law of the Community courts confirms that the duty of loyal co-operation requires the Commission to provide the national court with whatever information the latter asks for, even information covered by professional secrecy. However, in offering its co-operation to the national courts, the Commission may not in any circumstances undermine the guarantees laid down in Article 287 EC.
25. Consequently, before transmitting information covered by professional secrecy to a national court, the Commission will remind the court of its obligation under Community law to uphold the rights which Article 287 EC confers on natural and legal persons and it will ask the court whether it can and will guarantee protection of confidential information and business secrets. If the national court cannot offer such guarantee, the Commission shall not transmit the information covered by professional secrecy to the national court (44). Only when the national court has offered a guarantee that it will protect the confidential information and business secrets, will the Commission transmit the information requested, indicating those parts which are covered by professional secrecy and which parts are not and can therefore be disclosed.
26. There are further exceptions to the disclosure of information by the Commission to national courts. Particularly, the Commission may refuse to transmit information to national courts for overriding reasons relating to the need to safeguard the interests of the Community or to avoid any interference with its functioning and independence, in particular by jeopardising the accomplishment of the tasks entrusted to it (45). Therefore, the Commission will not transmit to national courts information voluntarily submitted by a leniency applicant without the consent of that applicant.

2. **Request for an opinion on questions concerning the application of EC competition rules**
27. When called upon to apply EC competition rules to a case pending before it, a national court may first seek guidance in the case law of the Community courts or in Commission regulations, decisions, notices and guidelines applying Articles 81 and 82 EC (46). Where these tools do not offer sufficient guidance, the national court may ask the Commission for its opinion on questions concerning the application of EC competition rules. The national court may ask the Commission for its opinion on economic, factual and legal matters (47). The latter is of course without prejudice to the possibility or the obligation for the national court to ask the Court of Justice for a preliminary ruling regarding the interpretation or the validity of Community law in accordance with Article 234 EC.
28. In order to enable the Commission to provide the national court with a useful opinion, it may request the national court for further information (48). In order to ensure the efficiency of the co-operation with national courts, the Commission will endeavour to provide the national court with the requested opinion within four months from the date it receives the request. Where the Commission has requested the national court for further information in order to enable it to formulate its opinion, that period starts to run from the moment that it receives the additional information.
29. When giving its opinion, the Commission will limit itself to providing the national court with the factual information or the economic or legal clarification asked for, without considering the merits of the case pending before the national court. Moreover, unlike the authoritative interpretation of Community law by the Community courts, the opinion of the Commission does not legally bind the national court.
30. In line with what has been said in point 19 of this notice, the Commission will not hear the parties before formulating its opinion to the national court. The latter will have to deal with the Commission's opinion in accordance with the relevant national procedural rules, which have to respect the general principles of Community law.

3. **The Commission's submission of observations to the national court**
31. According to Article 15(3) of the regulation, the national competition authorities and the Commission may submit observations on issues relating to the application of Articles 81 or 82 EC to a national court which is called upon to apply those provisions. The regulation distinguishes between written observations, which the national competition authorities and the Commission may submit on their own initiative, and oral observations, which can only be submitted with the permission of the national court (49).
32. The regulation specifies that the Commission will only submit observations when the coherent application of Articles 81 or 82 EC so requires. That being the objective of its submission, the Commission will limit its observations to an economic and legal analysis of the facts underlying the case pending before the national court.

33. In order to enable the Commission to submit useful observations, national courts may be asked to transmit or ensure the transmission to the Commission of a copy of all documents that are necessary for the assessment of the case. In line with Article 15(3), second subparagraph, of the regulation, the Commission will only use those documents for the preparation of its observations (50).
34. Since the regulation does not provide for a procedural framework within which the observations are to be submitted, Member States' procedural rules and practices determine the relevant procedural framework. Where a Member State has not yet established the relevant procedural framework, the national court has to determine which procedural rules are appropriate for the submission of observations in the case pending before it.
35. The procedural framework should respect the principles set out in point 10 of this notice. That implies amongst others that the procedural framework for the submission of observations on issues relating to the application of Articles 81 or 82 EC
(a) has to be compatible with the general principles of Community law, in particular the fundamental rights of the parties involved in the case;
(b) cannot make the submission of such observations excessively difficult or practically impossible (the principle of effectiveness) (51); and
(c) 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).

B. THE NATIONAL COURTS FACILITATING THE ROLE OF THE COMMISSION IN THE ENFORCEMENT OF EC COMPETITION RULES

36. Since the duty of loyal co-operation also implies that Member States' authorities assist the European institutions with a view to attaining the objectives of the EC Treaty (52), the regulation provides for three examples of such assistance: (1) the transmission of documents necessary for the assessment of a case in which the Commission would like to submit observations (see point 33), (2) the transmission of judgements applying Articles 81 or 82 EC); and (3) the role of national courts in the context of a Commission inspection.

1. **The transmission of judgements of national courts applying Articles 81 or 82 EC**

37. According to Article 15(2) of the regulation, Member States shall send to the Commission a copy of any written judgement of national courts applying Articles 81 or 82 EC without delay after the full written judgement is notified to the parties. The transmission of national judgements on the application of Articles 81 or 82 EC and the resulting information on proceedings before national courts primarily enable the Commission to become aware in a timely fashion of cases for which it might be appropriate to submit observations where one of the parties lodges an appeal against the judgement.

2. **The role of national courts in the context of a Commission inspection**

38. Finally, national courts may play a role in the context of a Commission inspection of undertakings and associations of undertakings. The role of the national courts depends on whether the inspections are conducted in business premises or in non-business premises.
39. With regard to the inspection of business premises, national legislation may require authorisation from a national court to allow a national enforcement authority to assist the Commission in case of opposition of the undertaking concerned. Such authorisation may also be sought as a precautionary measure. When dealing with the request, the national court has the power to control that the Commission's inspection decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of the proportionality of the coercive measures, the national court may ask the Commission, directly or through the national competition authority, for detailed explanations in particular on the grounds the Commission has for suspecting infringement of Articles 81 and 82 EC, as well as on the seriousness of the suspected infringement and on the nature of the involvement of the undertaking concerned (53).
40. With regard to the inspection of non-business premises, the regulation requires the authorisation from a national court before a Commission decision ordering such an inspection can be executed. In that case, the national court may control that the Commission's inspection decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard in particular to the seriousness of the suspected infringement, to the importance of the evidence sought, to the involvement of the undertaking concerned and to the reasonable likelihood that business books and records relating to the subject matter of the inspection are kept in the premises for which the authorisation is requested. The national court may ask the Commission, directly or through the national competition authority, for detailed explanations on those elements that are necessary to allow its control of the proportionality of the coercive measures envisaged (54).
41. In both cases referred to in points 39 and 40, the national court may not call into question the lawfulness of the Commission's decision or the necessity for the inspection nor can it demand that it be provided with information in the Commission's file (55). Furthermore, the duty of loyal co-operation requires the national court

to take its decision within an appropriate timeframe that allows the Commission to effectively conduct its inspection (56).

IV. **FINAL PROVISIONS**

42. This notice is issued in order to assist national courts in the application of Articles 81 and 82 EC. It does not bind the national courts, nor does it affect the rights and obligations of the EU Member States and natural or legal persons under Community law.

43. This notice replaces the 1993 notice on co-operation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty (57).

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(1) For the criteria to determine which entities can be regarded as courts or tribunals within the meaning of Article 234 EC, see e.g. case C-516/99 Schmid [2002] ECR I-4573, 34: 'The Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent'.
(2) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1).
(3) Notice on the co-operation within the network of competition authorities (OJ C 101, 27.4.2004, p. 43). For the purpose of this notice, a 'national competition authority' is the authority designated by a Member State in accordance with Article 35(1) of the regulation.
(4) The jurisdiction of a national court depends on national, European and international rules of jurisdiction. In this context, it may be recalled that Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (OJ L 12, 16.1.2001, p. 1) is applicable to all competition cases of a civil or commercial nature.
(5) See Article 6 of the regulation.
(6) See Articles 2 and 3 EC, case C-126/97 Eco Swiss [1999] ECR I-3055, 36; case T-34/92 Fiatagri UK and New Holland Ford [1994] ECR II-905, 39 and case T-128/98 Aéroports de Paris [2000] ECR II-3929, 241.
(7) Joined cases C-430/93 and C-431/93 van Schijndel [1995] ECR I-4705, 13 to 15 and 22.
(8) According to the last sentence of recital 8 of Regulation (EC) No 1/2003, the regulation does not apply to national laws which impose criminal sanctions on natural persons except to the extent that such sanctions are the means whereby competition rules applying to undertakings are enforced.
(9) Case T-24/90 Automec [1992] ECR II-2223, 85.
(10) For further clarification of the effect on trade concept, see the notice on this issue (OJ L 101, 27.4.2004, p. 81).
(11) Article 3(1) of the regulation.
(12) See also the notice on the application of Article 81(3) EC (OJ L 101, 27.4.2004, p. 2).
(13) Case 14/68 Walt Wilhelm [1969] ECR 1 and joined cases 253/78 and 1 to 3/79 Giry and Guerlain [1980] ECR 2327, 15 to 17.
(14) Case 106/77 Simmenthal [1978] ECR 629, 21 and case C-198/01, Consorzio Industrie Fiammiferi (CIF) [2003] 49.
(15) E.g. a national court may be asked to enforce a Commission decision taken pursuant to Articles 7 to 10, 23 and 24 of the regulation.
(16) See e.g. case 5/88 Wachauf [1989] ECR 2609, 19.
(17) Joined cases C-215/96 and C-216/96 Bagnasco [1999] ECR I-135, 50.
(18) Case 63/75 Fonderies Roubaix [1976] ECR 111, 9 to 11 and case C-234/89 Delimitis [1991] ECR I-935, 46.
(19) On the parallel or consecutive application of EC competition rules by national courts and the Commission, see also points 11 to 14.
(20) Case 66/86 Ahmed Saeed Flugreisen [1989] ECR 803, 27 and case C-234/89 Delimitis [1991] ECR I-935, 50. A list of Commission guidelines, notices and regulations in the field of competition policy, in particular the regulations applying Article 81(3) EC to certain categories of agreements, decisions or concerted practices, are annexed to this notice. For the decisions of the Commission applying Articles 81 and 82 EC (since 1964), see http://www.europa.eu.int/comm/competition/antitrust/cases/.
(21) Joined cases C-319/93, C-40/94 and C-224/94 Dijkstra [1995] ECR I-4471, 32.
(22) On the possibility for national courts to ask the Commission for an opinion, see further in points 27 to 30.
(23) On the submission of observations, see further in points 31 to 35.
(24) Case 106/77 Simmenthal [1978] ECR 629, 14 and 15.
(25) Case 68/88 Commission v Greece [1989] ECR 2965, 23 to 25.
(26) On damages in case of an infringement by an undertaking, see case C-453/99 Courage and Crehan [2001] ECR 6297, 26 and 27. On damages in case of an infringement by a Member State or by an authority which is an emanation of the State and on the conditions of such state liability, see e.g. joined cases C-6/90 and C-9/90 Francovich [1991] ECR I 5357, 33 to 36; case C-271/91 Marshall v Southampton and South West Hampshire Area Health Authority [1993] ECR I-4367, 30 and 34 to 35; joined cases C-46/93 and C-48/93 Brasserie du Pęcheur and Factortame [1996] ECR I-1029; case C-392/93 British Telecommunications [1996] ECR I-1631, 39 to 46 and joined cases C-178/94, C-179/94 and C-188/94 to 190/94 Dillenkofer [1996] ECR I-4845, 22 to 26 and 72.
(27) See e.g. case 33/76 Rewe [1976] ECR 1989, 5; case 45/76 Comet [1976] ECR 2043, 12 and case 79/83 Harz [1984] ECR 1921, 18 and 23.
(28) See e.g. case 33/76 Rewe [1976] ECR 1989, 5; case 158/80 Rewe [1981] ECR 1805, 44; case 199/82 San Giorgio [1983] ECR 3595, 12 and case C-231/96 Edis [1998] ECR I-4951, 36 and 37.
(29) Article 11(6), juncto Article 35(3) and (4) of the regulation prevents a parallel application of Articles 81 or 82 EC by the Commission and a national court only when the latter has been designated as a national competition authority.
(30) Article 16(1) of the regulation.
(31) The Commission makes the initiation of its proceedings with a view to adopting a decision pursuant to Article 7 to 10 of the regulation public (see Article 2(2) of Commission Regulation (EC) No 773/2004 of 7 April relating to proceedings pursuant to Articles 81 and 82 of the EC Treaty (OJ C 101, 27.4.2004). According to the Court of Justice, the initiation of proceedings implies an authoritative act of the Commission, evidencing its intention of taking a decision (case 48/72 Brasserie de Haecht [1973] ECR 77, 16).
(32) Case C-234/89 Delimitis [1991] ECR I-935, 53, and joined cases C-319/93, C-40/94 and C-224/94 Dijkstra [1995] ECR I-4471, 34. See further on this issue point 21 of this notice.
(33) See Article 16(1) of the regulation and case C-234/89 Delimitis [1991] ECR I-935, 47 and case C-344/98 Masterfoods [2000] ECR I-11369, 51.
(34) Case 314/85 Foto-Frost [1987] ECR 4199, 12 to 20.
(35) See Article 16(1) of the regulation and case C-344/98 Masterfoods [2000] ECR I-11369, 52 to 59.
(36) Case C-344/98 Masterfoods [2000] ECR, I-11369, 58.

(37) Case C-2/88 Imm Zwartveld [1990] ECR I-3365, 16 to 22 and case C-234/89 Delimitis [1991] I-935, 53.
(38) C-94/00 Roquette Frčres [2002] ECR 9011, 31.
(39) On the compatibility of such national procedural rules with the general principles of Community law, see points 9 and 10 of this notice.
(40) On these duties, see e.g. points 23 to 26 of this notice.
(41) Case C-234/89 Delimitis [1991] ECR I-935, 53, and joined cases C-319/93, C-40/94 and C-224/94 Dijkstra [1995] ECR I-4471, 34.
(42) Case C-234/89 Delimitis [1991] I-935, 53.
(43) Case T-353/94 Postbank [1996] ECR II-921, 86 and 87 and case 145/83 Adams [1985] ECR 3539, 34.
(44) Case C-2/88 Zwartveld [1990] ECR I-4405, 10 and 11 and case T-353/94 Postbank [1996] ECR II-921, 93.
(45) Case C-2/88 Zwartveld [1990] ECR I-4405, 10 and 11; case C-275/00 First and Franex [2002] ECR I-10943, 49 and case T-353/94 Postbank [1996] ECR II-921, 93.
(46) See point 8 of this notice.
(47) Case C-234/89 Delimitis [1991] ECR I-935, 53, and joined cases C-319/93, C-40/94 and C-224/94 Dijkstra [1995] ECR I-4471, 34.
(48) Compare with case 96/81 Commission v the Netherlands [1982] ECR 1791, 7 and case 272/86 Commission v Greece [1988] ECR 4875, 30.
(49) According to Article 15(4) of the regulation, this is without prejudice to wider powers to make observations before courts conferred on national competition authorities under national law.
(50) See also Article 28(2) of the regulation, which prevents the Commission from disclosing the information it has acquired and which is covered by the obligation of professional secrecy.
(51) Joined cases 46/87 and 227/88 Hoechst [1989] ECR, 2859, 33. See also Article 15(3) of the regulation.
(52) Case C-69/90 Commission v Italy [1991] ECR 6011, 15.
(53) Article 20(6) to (8) of the regulation and case C-94/00 Roquette Frčres [2002] ECR 9011.
(54) Article 21(3) of the regulation.
(55) Case C-94/00 Roquette Frčres [2002] ECR 9011, 39 and 62 to 66.
(56) See also ibidem, 91 and 92.
(57) OJ C 39, 13.2.93, p. 6.

ANNEX

COMMISSION BLOCK EXEMPTION REGULATIONS, NOTICES AND GUIDELINES

This list is also available and updated on the website of the Directorate General for Competition of the European Commission: http://europa.eu.int/comm/competition/antitrust/legislation/

A. **Non-sector specific rules**

1. *Notices of a general nature*

— Notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5)
— Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis) (OJ C 368, 22.12.2001, p. 13)
— Notice on the effect on trade concept contained in Articles 81 and 82 of the Treaty (OJ C 101, 27.4.2004, p. 81)
— Guidelines on the application of Article 81(3) of the Treaty (OJ C 101, 27.4.2004, p. 2)

2. *Vertical agreements*

— Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (OJ L 336, 29.12.1999, p. 21)
— Guidelines on Vertical Restraints (OJ C 291, 13.10.2000, p. 1)

3. *Horizontal co-operation agreements*

— Regulation (EC) No 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements (OJ L 304, 5.12.2000, p. 3)
— Regulation (EC) No 2659/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements (OJ L 304, 5.12.2000, p. 7)
— Guidelines on the applicability of Article 81 to horizontal co-operation agreements (OJ C 3, 6.1.2001, p. 2)

4. *Licensing agreements for the transfer of technology*

— Regulation (EC) No 773/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements (OJ L 123, 27.4.2004)
— Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements (OJ C 101, 27.4.2004, p. 2)

B. **Sector specific rules**

1. *Insurance*

— Regulation (EC) No 358/2003 of 27 February 2003 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector (OJ L 53, 28.2.2003, p. 8)

2. *Motor vehicles*

— Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector (OJ L 203, 1.8.2002, p. 30)

3. *Telecommunications and postal services*

— Guidelines on the application of EEC competition rules in the telecommunications sector (OJ C 233, 6.9.1991, p. 2)
— Notice on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services (OJ C 39, 6.2.1998, p. 2)
— Notice on the application of the competition rules to access agreements in the telecommunications sector — Framework, relevant markets and principles (OJ C 265, 22.8.1998, p. 2)
— Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (OJ C 165, 11.7.2002, p. 6)

4. *Transport*

— Regulation (EEC) No 1617/93 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices concerning joint planning and co-ordination of schedules, joint operations, consultations on passenger and cargo tariffs on scheduled air services and slot allocation at airports (OJ L 155, 26.6.1993, p. 18)
— Communication on clarification of the Commission recommendations on the application of the competition rules to new transport infrastructure projects (OJ C 298, 30.9.1997, p. 5)

— Regulation (EC) No 823/2000 of 19 April 2000 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) (OJ L 100, 20.4.2000, p. 24).

KRATICE

CFI - Court of First Instance, Sodišče prve stopnje

ECJ - European Court of Justice, Sodišče Evropskih skupnosti

ES, Skupnost - Evropska skupnost

EU, Unija - Evropska unija

idr. - in drugo

ipd. - in podobno

itd. - in tako dalje

Komisija - Komisija Evropskih skupnosti

npr. – na primer

oz. - oziroma

PES - Pogodba o ustanovitvi Evropske skupnosti

Sec. - Section

skupnostni sodišči - CFI in ECJ

st. - stoletje

Svet EU - Svet Evropkse unije

tj. - to je