

# EU Internal Market Law

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## Session No 16 “Public and Private enforcement of EU competition law”

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The modernization of the enforcement  
system of EU competition law

- Old “pre-2004 system” → Regulation No 17 of 6 February 1962
- New “post-2004 system” → Regulation (EC) No 1/2003 : it applies starting from May 1<sup>st</sup>, 2004, replacing Regulation No 17

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## The modernization of the enforcement system of EU competition law

- The old system was strongly centralised → the Commission played a primary role
- The new system is characterised by
  - a) Decentralisation
  - b) Privatisation
- This difference mainly depends on a change of Art 101(3) regime

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## Art 101(3) TFEU

A legal exception to the prohibition of anti-competitive agreements laid down by Art 101(1)

- any such agreement, though restricting the competition, may be considered as lawful, provided that the conditions in para. 3 are cumulatively met
- regime of inapplicability (or exemption) of the prohibition

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## Criteria under Art 101(3)

- Two positive criteria → the agreement
  - (1) contributes to improving the production or distribution of goods or to promoting technical or economic progress, and
  - (2) allows consumers a fair share of the resulting benefit
- Two negative criteria → the agreement does not:
  - (1) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
  - (2) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question

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### a) '**block**' exemptions

- Applicable to categories of agreements → Regulations of the Commission adopted under powers delegated by the Council (Art 103 TFEU):
  - a) Vertical agreements
  - b) Specialisation
  - c) Research and development
  - d) Technology transfer
- No change from the previous system

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### b) '**individual**' (= for a single agreement) exemptions → **pre-2004** system

#### system of notification → centralisation

- NCAs and national courts did not have the power to grant individual exemptions, which was reserved to the Commission
- Any new agreement in respect of which the parties sought application of Art 101 (3) must be notified to the Commission

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### b) Individual exemptions (**post-2004**)

#### Directly applicable exception system → decentralisation

- NCAs and national courts have the power to apply not only Arts 101(1) and 102 but also Art 101(3)
- Individual exemptions are no longer granted solely by the Commission → no longer need to previous notification of the agreements to the Commission

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## Public antitrust enforcement (post-2004 system)

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## European Competition Network (ECN)

Regulation No 1/2003 → a system of decentralised enforcement

- Commission and NCAs apply EU competition rules "in close cooperation" (Art 11), by forming a network of public authorities (ECN)
- The new system has considerably enhanced the enforcement of the EU competition rules → much wider application → more cases dealt with
- BUT differences in national laws lead to uneven enforcement of the EU competition rules → it distorts competition in the internal market and undermines the enforcement system

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## Draft Directive of 22.3.2017

- The problem: uneven enforcement of the EU competition rules by NCAs
- The aim: to complement Regulation (EC) No 1/2003 → empowering the NCAs to be effective enforcers will mean that the full potential of the decentralised system of enforcement is realised
- The content: (i) independence and resource of NCAs; (ii) a core minimum effective powers to investigate and to take decisions; fines (parent liability); harmonisation of leniency programmes; mutual assistance

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### Commission's (and NCAs') powers

- Public authorities may act on a complaint or on their own initiative
- Powers to investigate upon the Commission:
  - a) To require undertakings to provide all "necessary" information (Art 18 Reg: "**disclosure**")
  - b) To inspect premises (Art 20)
  - c) But access to documents protected by professional privilege may be denied → confidentiality of communication with lawyers

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### Commission's (and NCAs') powers

- Commission (but also NCAs) may take the following decisions:
  - i) Requiring that an infringement be brought to an end ('stop and cease' decision), imposing for this purpose any "behavioural or structural remedies which are proportionate..." (Art 7 Reg)
  - ii) Accepting binding commitments given by undertakings (Art 9 Reg)
  - iii) Imposing fines (Art 23 Reg)

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### The ECN in operation

- Principle of allocation:
  - a) Commission typically investigates anticompetitive practices or agreements that have effects on competition in 3 or more MSs or where it is useful to set a Europe-wide precedent → initiation by the Commission of proceedings shall relieve NCAs of their competence (Art 11.6 Reg)
  - b) Preference for a single, well-placed authority as often as possible, but there could be parallel proceedings in up to 3 MSs → NCAs are usually well placed to act where competition is substantially affected in their territory
- Mutual assistance between public authorities

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