OPINION OF ADVOCATE GENERAL MAZÁK
delivered on 7 December 2010 [1]

1. In the present case, the Sąd Najwyższy (Polish Supreme Court) seeks an interpretation of Article 5 of Council Regulation (EC) No 1/2003. [2] The case concerns the limits on the procedural autonomy of the Member States in the context of the system for enforcing Community competition law (now European Union (EU) competition law) under Regulation No 1/2003, the regulation which overhauled the previous system under Council Regulation No 17. [3] At issue is the manner in which a national competition authority (NCA) can bring to an end an administrative procedure where, by applying EU competition law in parallel with national law, it finds that the practice of a particular undertaking does *not* infringe the prohibition of abuse of a dominant position under Article 102 TFEU.

I — Legal framework

A — *EU law*

2. Under Article 5 of Regulation No 1/2003, the NCAs of the Member States are to have the power to apply Articles 101 and 102 TFEU in individual cases. Article 5 of the regulation goes on to provide as follows:

'For this purpose, acting on their own initiative or on a complaint, [the NCAs] may take the following decisions:

— requiring that an infringement be brought to an end,

— ordering interim measures,

— accepting commitments,

— imposing fines, periodic penalty payments or any other penalty provided for in their national law.

1 — Original language: English.

2 — The questions are referred in the context of an appeal brought by the President of the Polish National Competition Authority (Prezes Urzędu Ochrony Konkurencji i Konsumentów; 'the Polish NCA') against a judgment of the Sąd Apelacyjny w Warszawie (Warsaw Appeal Court). Regulation of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 [EC] (now Articles 101 and 102 TFEU) (OJ 2003 L 1, p. 1).

3 — Regulation of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87).

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' (emphasis added).

3. Article 10 of Regulation No 1/2003 provides that, where the EU public interest relating to the application of Articles 101 TFEU and 102 TFEU so requires, the European Commission, acting on its own initiative, may by decision find that Article 101 TFEU is not applicable to an agreement, a decision by an association of undertakings or a concerted practice, either because the conditions of Article 101(1) TFEU are not fulfilled, or because the conditions of Article 101(3) TFEU are satisfied. The Commission may likewise make such a finding with reference to Article 102 TFEU.

4. The Commission Notice on cooperation within the Network of Competition Authorities [4] states that '[t]he Commission is particularly well placed if one or several agreement(s) or practice(s) … have effects on competition in more than three Member States' (paragraph 14) and that '[m]oreover, the Commission is particularly well placed to deal with a case if it is closely linked to other [EU] provisions which may be exclusively or more effectively applied by the Commission, if the [EU] interest requires the adoption of a Commission decision to develop [EU] competition policy when a new competition issue arises or to ensure effective enforcement' (paragraph 15).

B — *National law*

5. Article 11 of the Polish Law on competition and consumer protection, [5] in the version in force at the material time, provides:

'(1) [The Polish NCA] shall give a decision stating that a practice does not restrict competition if [it] does not establish that a breach has been committed of the prohibitions laid down in Articles 5 and 8.

(2) [The Polish NCA] shall give a decision under paragraph (1) even if an agreement fulfils the requirements of Article 7(1) but is not covered by a regulation of the Council of Ministers under Article 7.

4 — OJ 2004 C 101, p. 43.

5 — Ustawa z dnia 15 grudnia 2000 r. o ochronie konkurencji i konsumentów (consolidated version in *Dziennik Ustaw* 2005, No 244, item 2080).

(3) The burden of proving the circumstances referred to in paragraph (2) rests on the trader or trade association.'

II — Facts and the questions referred

6. Telekomunikacja Polska SA was suspected of having infringed Article 8 of the Polish Law on competition and consumer protection, as well as Article 102 TFEU. [6] At the end of the procedure, the Polish NCA found that the conduct did not constitute an abuse and adopted a decision under national law finding that the undertaking had not acted in restraint of competition, whereas, under Article 102 TFEU, the Polish NCA held that there were no grounds for action on its part. A third party — Tele2 Polska sp. zoo, now Netia SA w Warszawie — brought judicial proceedings against that decision. The Sąd Okręgowy — Sąd Ochrony Konkurencji i Konsumentów (District Court — Court for Competition and Consumer Protection), by a judgment subsequently upheld by the Warsaw Appeal Court, annulled the contested decision, holding that the Polish NCA should have adopted a decision of a declaratory nature to the effect that there was no restrictive practice under Article 102 TFEU, since it had adopted a decision to that effect under national law.

7. The Polish NCA brought an appeal on a point of law, arguing that Article 5 of Regulation No 1/2003 is a rule governing the jurisdiction of the NCAs, limiting their decision-making abilities and in accordance with which they have no power to adopt such a decision. Instead, the Polish NCA had adopted a decision that brought the matter to an end in a different way, which did not entail pronouncing on the merits. Article 5 of the regulation lists four types of substantive decision and then, at the end, provides for a decision of a procedural nature: NCAs 'may likewise decide that there are no grounds for action on their part'. The Commission is empowered to adopt a decision stating that Article 102 TFEU does not apply to a certain practice — but not the NCAs.

8. The referring court considers, first, that this case concerns the limits placed on the procedural autonomy of NCAs and that NCAs should not be allowed to adopt a decision declaring that there was no restrictive practice, because a decision of that nature is not among the types of decision listed in the second paragraph of Article 5 of Regulation No 1/2003. Secondly, the referring court suggests that the last sentence of Article 5 of Regulation No 1/2003, read in conjunction with the second paragraph of Article 5 and

6 — The order for reference merely states that it concerned the application of an exclusivity clause to the use of Telekomunikacja Polska's publicly accessible telephone services on the national market for access to telephone landline connection services provided in accordance with the principles of accessibility and carrier pre-selection.

other provisions of that regulation, could nevertheless be construed in such a way as to allow an NCA to adopt a decision along the lines of the decision in question. Against that background, the referring court has decided to stay the proceedings and to refer the following questions to the Court:

'(1) Is Article 5 of [Regulation No 1/2003] to be interpreted as meaning that [an NCA] cannot take a decision stating that a practice does not restrict competition under Article [102 TFEU] in a case in which it has found, after conducting a procedure, that the undertaking did not breach the prohibition of abuse of a dominant position under that Treaty provision?

(2) If the answer to the first question is in the affirmative: in a situation in which, under national competition law — if it should be established that the practice of an undertaking does not infringe the prohibition in Article [102 TFEU] — [an NCA] may bring antitrust proceedings to an end only by taking a decision which states that the practice does not restrict competition, is the [last] sentence of Article 5 of [Regulation No 1/2003]... to be interpreted as constituting a direct legal basis for [the NCA] to "decide that there are no grounds for action on [its] part"?'

9. The Polish [7] and Czech Governments, the Commission and the EFTA Surveillance Authority have submitted written observations. At the hearing on 21 September 2010, all those parties, with the exception of the Czech Government, presented oral argument.

III — Appraisal

A — *Principal arguments of the parties*

10. The Commission and the EFTA Surveillance Authority submit essentially that Article 5 of Regulation No 1/2003 does not allow an NCA to adopt a decision of a declaratory nature to the effect that Articles 101 and 102 TFEU are inapplicable. Only the Commission has that power. Inter alia, to allow an NCA to declare that Articles 101 and 102 TFEU are inapplicable — to the extent that it can be guaranteed that the conduct of an undertaking is lawful — would, apart from requiring considerable administrative resources, be likely to dissuade victims of conduct which they suspect of being unlaw-

7 — The Polish Government's observations apparently reflect the position of the Polish NCA.

ful from bringing individual actions against the perpetrator and from thus contributing to the private enforcement of EU competition law (whereas Regulation No 1/2003 is meant to endorse private enforcement). As regards the second question, the Commission argues that Article 5 of Regulation No 1/2003 is directly applicable. The EFTA Surveillance Authority contends that in a situation such as that of the case before the referring court, where it is considered that the conditions for a prohibition decision are not met, Articles 3(1) and 5 of Regulation No 1/2003 oblige an NCA to apply Article 102 TFEU by bringing its administrative procedure to an end with a finding that there are no grounds for action on its part.

11. The Polish Government submits that Article 5 of Regulation No 1/2003 lists exhaustively the powers of the NCAs. The last sentence of Article 5 is no basis for a declaratory decision stating there was no restrictive practice. In response to the second question, the Polish Government submits that the measure by which an NCA closes a procedure concerning a suspected competition infringement — once it has established that there are no grounds for action on its part — should take the form of a procedural decision to close the case without it being necessary to rule on the substance.

12. Contrary to the other parties, the Czech Government argues that Article 5 of Regulation No 1/2003 does allow an NCA to adopt a decision finding that there was no restrictive practice. Regulation No 1/2003 does not establish any hierarchy between the Commission and the NCAs — it is based on a relationship of horizontal cooperation. It would be contrary to the purpose of Article 5 of Regulation No 1/2003 if an NCA were competent to adopt a decision finding that Article 102 TFEU had been infringed, but not if it were competent to declare that there had been no infringement. The Czech Government contends that the relevant provisions of the Polish Law on competition and consumer protection do not endanger any of the objectives of Articles 101 and 102 TFEU.

B — *Assessment*

Preliminary remarks on the new 'legal exception' system of enforcement

13. Regulation No 1/2003,[8] which is also called 'the Modernisation regulation',

8 — As regards the interpretation of Regulation No 1/2003, see Case C-429/07 *X* [2009] ECR I-4833, and the following pending cases: Case C-439/08 *VEBIC* (Opinion of Advocate General Mengozzi delivered on 25 March 2010, the judgment being scheduled for delivery on 7 December 2010), and Case C-360/09 *Pfleiderer* v *Bundeskartellamt* (my Opinion will be delivered on 16 December 2010). As for the General Court, concerning Article 11(6) of Regulation No 1/2003, see Case T-339/04 *France Télécom* v *Commission* [2007] ECR II-521, and Case T-340/04 *France Télécom* v *Commission* [2007] ECR II-573 (upheld on appeal in Case C-202/07 P *France Télécom* v *Commission* [2009] ECR I-2369).

introduced sweeping changes in the way EU competition law is enforced. Among the innovations introduced, the notification to the Commission of agreements for exemption under what is now Article 101(3) TFEU has been abolished [9] — to be replaced with the legal exception system [10] — and now NCAs as well as national courts are far more closely associated with the application of EU competition rules. [11]

14. The decentralisation of the enforcement of EU competition law goes further than simply requiring NCAs and national courts to apply Articles 101 and 102 TFEU. To enable the decentralisation to be properly implemented, Regulation No 1/2003 provides for at least three distinct mechanisms: (i) the conferral of power on NCAs and the national courts, with a resultant decrease in the Commission's direct enforcement activity; [12] (ii) the requirement for the NCAs and the national courts

9 — Interestingly, while the two main objectives of the decentralisation of the enforcement of EU competition law — the reduction of the Commission's workload and the involvement of the NCAs and the national courts in that enforcement — remain the same, the components of that policy, as set out in Regulation No 1/2003, differ from those which featured in the Commission's Proposal of 2000 — which provided that 'Article [3 of the Proposed Regulation] stipulates that when an agreement or practice is capable of affecting trade between Member States *only* [EU] competition law applies' (emphasis added) (Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 [EC] and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87; COM(2000) 582 final, p. 12). Cf. Tosato, G.L., and Bellodi, L. (eds.), *EU Competition Law, Volume I, Procedure*, Claeys & Casteels, 2006, p. 218.

10 — In the previous system, Article 81 EC was characterised by the formulation of a rule of prohibition (Article 81(1)) and its effects (voidness — Article 81(2)), tempered by the exercise of the Commission's power to grant exemptions from the rule (Article 81(3)). Under Regulation No 1/2003, an individual exemption of an agreement from the prohibition in Article 101(1) TFEU is no longer dependent on its notification to the Commission. Now agreements caught by Article 101(1) TFEU which satisfy the conditions of Article 101(3) are not to be prohibited, no prior decision to that effect being required — Article 101(3) is treated as a directly applicable legal exception. Cf. Kerse, C.S., and Khan, N., *EC Antitrust Procedure*, Fifth Edition, Sweet & Maxwell, London, 2005, p. 15.

11 — See, inter alia, recitals 6, 7 and 15 in the preamble to Regulation No 1/2003 and Articles 5 and 6 of that regulation. Under Regulation No 17, NCAs only rarely prosecuted infringements of Articles 81 EC and 82 EC, not least because national law empowered NCAs to apply Articles 81(1) EC and 82 EC in only about half of the Member States and even where they were empowered to do so the Commission's power to grant exemptions discouraged NCAs from taking up Article 81(1) EC cases. If an NCA started prosecuting an infringement of Article 81(1) EC, the undertakings could decide to notify their agreement or practice to the Commission, which, because of its legal obligation to act upon the notification, could thus be forced to initiate a procedure, thus taking away the NCA's competence. Cf. Wils, W.P.J., 'Community report', in Cahill, D., and Cooke, J.D., *The Modernisation of EU Competition Law Enforcement in the EU*, Cambridge, FIDE 2004, p. 679 et seq. See also Gippini Fournier, E., 'Community report', in Koeck, H.F., and Karollus, M.M., (eds.), *The Modernisation of European Competition Law*, Nomos, FIDE 2008.

12 — As a result, the Commission has been able to focus much more on key priorities such as cartels and sector inquiries (whereby the Commission seeks to identify sectors where the rules on competition may not be working properly).

to apply Articles 101 and 102 TFEU within a system regulating the relationship between national and EU law; and, last but not least, (iii) arrangements to facilitate cooperation and control of the work of the NCAs and the national courts in order to safeguard a uniform and coherent application of the EU competition rules. [13] As we will see below, a consequence of the important role which NCAs (and the national courts) play in the functioning of the new system is that, under Regulation No 1/2003, they are subject to strict rules as regards both the powers conferred on them and the exercise of those powers. [14]

The first question

15. By its first question, the referring court is asking, essentially, whether Article 5 of Regulation No 1/2003 precludes an NCA from taking a negative decision on the merits when applying Article 102 TFEU.

16. As the EFTA Surveillance Authority rightly suggested, in principle, the questions referred only with regard to Article 102 TFEU should equally apply to the competence of NCAs to adopt negative decisions on the merits pursuant to Article 101 TFEU. In my view, therefore, the answers to the questions referred should cover both Articles 101 and 102 TFEU.

17. The referring court considers that there can be no doubt that a decision under national competition law [15] finding that a particular practice does not restrict competition does not fall within the category of decisions listed in the second sentence of Article 5 of Regulation No 1/2003.

18. However, the referring court does harbour doubts as to whether the Polish NCA can take such a decision under Article 102 TFEU, given that the last sentence of Article 5 of Regulation No 1/2003 confers on the NCAs the power to decide that there are no grounds

13 — The vital importance of that objective is highlighted by the fact that enforcement of the EU competition rules has been vastly stepped up since the entry into force of Regulation No 1/2003: by the end of March 2009, *as many as 1 000 cases* have been pursued, in a wide variety of sectors, by the members of the European Competition Network (ECN) on the basis of the EU competition rules. Cf. Communication from the Commission to the European Parliament and Council — Report on the functioning of Regulation No 1/2003, COM(2009) 206 final, 29 April 2009, p. 7.

14 — See Tosato, G.L., and Bellodi, L., cited in footnote 9, p. 219.

15 — That is to say, under Article 11 of the Polish Law on competition and consumer protection.

for action on their part where the conditions for prohibition are not met.

19. First of all, it is necessary to consider the relevant provisions of Regulation No 1/2003. Under Article 3 of that regulation, [16] the NCAs are obliged to apply Articles 101 and 102 TFEU where the practices of an undertaking suspected of breaching prohibitions under national competition law might affect trade between Member States. Regulation No 1/2003 presupposes that the NCAs apply Articles 101 and 102 TFEU in accordance with the procedural rules of their Member State; and the latter must, if necessary, complete their internal legislation to adapt it to the new system. [17]

20. Indeed, as regards that general principle, the Court held in *Otto* [18] that 'the application of Articles [101 and 102 TFEU] by the national authorities is, in principle, governed by national procedural rules. Subject to the observance of [EU] law, and in particular its fundamental principles, it is therefore a matter for national law to define the appropriate procedural rules in order to guarantee the rights of the defence of the persons concerned. Such guarantees may differ from those which apply in [EU] proceedings.'

21. Next, Article 5 of Regulation No 1/2003 states that the NCAs are to have the power to apply Articles 101 and 102 TFEU in individual cases and, for this purpose, acting on their own initiative or on a complaint, they 'may take' the following decisions: (i) requiring that an infringement be brought to an end; (ii) ordering interim measures; (iii) accepting commitments; and (iv) imposing fines, periodic penalty payments or any other penalty provided for in their national law. It concludes that where, on the basis of the information in their possession, the conditions for prohibition are not met, NCAs may likewise decide that there are no grounds for action on their part.

22. The question thus arises whether the list of decisions that NCAs may take (set out in Article 5 of Regulation No 1/2003) is exhaustive. The Polish Government and the Commission consider that it is indeed exhaustive,

16 — Cf., for instance, Lucey, C., 'Unforeseen consequences of Article 3 of EU Regulation 1/2003', ECLR, 2006, 27(10), pp. 558-563.

17 — Article 35 of Regulation No 1/2003. Tosato, G.L., and Bellodi, L., cited in footnote 9, report at p. 32 (footnote 101) that in Italy, Article 54(5) of Law 52 of 6 February 1996, had already conferred the power to apply Article 81(1) EC and Article 82 EC on the Italian NCA. In addition, it is interesting that in the United Kingdom, the NCA(s) did not have jurisdiction before the reform to apply EU competition law.

18 — Case C-60/92 [1993] ECR I-5683, paragraph 14. See also Case C-242/95 *GT-Link* [1997] ECR I-4449, paragraphs 23 to 26.

a view which the legal literature would appear to support. [19]

23. In any event, suffice it to state that, strictly speaking, Article 5 is not exhaustive at least in so far as it is not the only provision laid down in Regulation No 1/2003 under which decisions may be taken by NCAs: there is also Article 29 (2) ('Withdrawal in individual cases'), under which the NCAs are empowered to withdraw the benefit of a Block Exemption Regulation (BER) under certain conditions. [20]

24. In fact, as the referring court rightly points out, where — after conducting a procedure in which the EU rules on competition and national competition law are applied in parallel — the NCA concludes that the practice of the undertaking under investigation does not infringe the prohibition of abuse of a dominant position, the NCA must, as a general rule, by dint of the principle of procedural autonomy, deliver a corresponding decision as provided for under national law. Under the Polish legal system, that corresponding decision would be the decision provided for under Article 11 of the Law on competition and consumer protection stating that a practice does not restrict competition.

25. However, it is important to stress that the fact remains that limits may be imposed upon the principle of procedural autonomy, not least because one of the objectives of Regulation No 1/2003 must be achieved — that is, uniform application of Articles 101 and 102 TFEU throughout the Member States (recital 1 in the preamble to Regulation No 1/2003). In my view, Article 5 of Regulation No 1/2003 constitutes such a limitation, specifying the types of decision that the NCAs may take.

19 — See, inter alia, Faull, J., and Nikpay, A., *The EC law of competition*, Oxford University Press, 2007, p. 113: Article 5 lays down an exhaustive list because, when applying Article 101 or Article 102 TFEU, NCAs cannot take any decision other than those listed therein; in particular, NCAs cannot take inapplicability decisions; only the Commission can. See also Langen, E., and Bunte, H.-J. (eds.), *Kommentar zum deutschen und europäischen Kartellrecht — Band 2*, 11th Edition, Luchterhand, 2010, p. 752 et seq.; Loewenheim, U., Meessen, K.M., and Riesenkampff, A., *Kartellrecht — Band 1 Europäisches Recht — Kommentar*, C.H. Beck Verlag, Munich, 2005, p. 740; Hirsch, G., Montag, F., and Säcker, F.J., *Competition Law: European Community Practice and Procedure*, Sweet & Maxwell, London, 2008, p. 1579 et seq.; and Kerse, C.S., and Khan, N., cited in footnote 10, p. 261: it is unclear (i) whether the list is intended to be exhaustive and (ii) what is the effect of the last sentence of Article 5; the latter, it has been suggested, means that NCAs do not have the power to adopt inapplicability decisions; the intention seems to be to seek to stop NCAs taking such decisions, in particular decisions finding Article 101(1) TFEU inapplicable.

20 — Essentially, the relevant NCA may, where agreements, decisions by associations of undertakings or concerted practices to which a Commission BER applies have effects which are incompatible with Article 101(3) TFEU in the territory of a Member State which has all the characteristics of a distinct geographic market, withdraw the benefit of the BER in respect of that territory.

26. While it is evident that Regulation No 1/2003 does not harmonise national procedural laws, [21] the fact remains that a number of important issues have been regulated at EU level — indeed especially the content of the decisions which can be adopted by NCAs.

27. In my view, had the EU legislature intended the NCAs to be able to take a decision that a practice does not restrict competition (as provided for under the Polish Law on competition and consumer protection), it would have clearly and specifically included that type of decision in the list set out in Article 5 of Regulation No 1/2003 (or, at least, in another part of the regulation, as is the case with the Article 29(2) decision). That argument is all the more relevant since the EU legislature was aware of this very issue and, in fact, the issue was even the subject of contention during the legislative process leading up to Regulation No 1/2003 (see points 39 to 41 below).

21 — Esteva Mosso, C., *Regulation 1/2003 — Five years on, 16th St. Gallen International Competition Law Forum 2009* (2010), p. 247: 'Regulation No 1/2003 accommodates well the diversity of institutional and procedural environments in the EU. However, we have seen some spontaneous convergence towards the model of the regulation. A large number of Member States have abolished the notification systems, some have adopted similar enforcement powers, or new decision types. But important divergences remain: on fines; criminal penalties; the liability of associations of undertakings; situations in which action is time-barred; the standard of proof applicable; and the conditions for imposing commitments.' Lemaire, Ch., *Premier bilan de l'application du règlement no 1/2003*, Petites affiches, 17 December 2009, No 251, p. 38 et seq., submits that beyond substantive rules, where convergence stems largely from the obligation to apply EU law and from the convergence rule, it is certainly in the area of procedural rules and penalties that developments have been most important and interesting. Such developments were not foreseen during the negotiations relating to Regulation No 1/2003, since the Member States rejected the introduction of questions such as leniency or other procedural rules. The principle of institutional and procedural autonomy was intended to play a full role. And yet, apparently, a veritable convergence is taking place. Cf. Jones, A., and Sufrin, B., *EC Competition Law*, Oxford, 2004, p. 1161: regarding Article 5 of Regulation No 1/2003, it may be that experience with the decentralised system will show that some degree of harmonisation is necessary to enable the ECN to function properly (the Commission's Notice on cooperation within the Network was deliberately left flexible and may well need to be revised). Brokelmann, H., 'Enforcement of Articles 81 and 82 EC under Regulation 1/2003: The case of Spain and Portugal', *World Competition*, 29(4): 535-554, 2006, p. 553, submits that the new enforcement regime, especially Articles 3(2) and 16(2) of Regulation No 1/2003, exerts a strong harmonising influence over the interpretation of national competition law.

28. The fact that NCAs are not meant to have power to adopt such a decision is also clear from the Explanatory Memorandum accompanying the Commission's Proposal. In that document, the Commission stressed that the 'proposal is based on the premiss that [NCAs] will apply Articles [101 and 102 TFEU] in accordance with their respective national procedural rules. It is not necessary for the implementation of the reform to embark on a full-scale harmonisation of national

procedural laws. [22] On the other hand, it is necessary to regulate at [EU] level a limited number of issues that have a direct impact on the proper functioning of the proposed system.' The Commission added that what is 'necessary to stipulate [is] the content of the decisions that [NCAs] may adopt in the application of Articles [101 and 102 TFEU] (see Article 5 of the proposed Regulation), in order to ensure a full and effective implementation of the directly applicable exception system. No competition authority forming part of the [ECN] can be empowered to adopt constitutive exemption decisions when applying the [EU] competition rules.'

29. As was rightly pointed out by the EFTA Surveillance Authority, while Regulation No 1/2003 empowers the NCAs to adopt 'positive' decisions on the merits, [23] it manifestly does not make that competence to bring infringements to an end by applying (also) Article 102 TFEU symmetrical by conferring competence on NCAs to adopt 'negative' decisions on the merits. There is nothing in Article 5, or in any other provision of Regulation No 1/2003 for that matter, that specifically confers on NCAs the competence to declare formally that there was no breach of Article 102 TFEU in an individual case. Rather, it is clear that an NCA may decide only 'that there are no grounds for action' on its part (see the last sentence of Article 5 of Regulation No 1/2003).

30. I consider (as do the Polish Government, the Commission and the EFTA Surveillance Authority) that any other reading would risk creating situations in which, by virtue of the principle of *ne bis in idem*, a negative decision by one NCA might prevent the Commission, or other NCAs, from subsequently establishing an infringement of Article 101 TFEU. [24]

22 — It is arguable that the Commission did not seek full-scale harmonisation of national procedural laws, one of the reasons for omitting to do so being that it did not wish to jeopardise the Modernisation reform *per se*, and limited it to the unification of substantive law instead. Cf. recital 35 in the preamble to Regulation No 1/2003: "[t]his Regulation recognises the wide variation which exists in the public enforcement systems of Member States' and the Joint Statement by the Council and the Commission on the functioning of the network of competition authorities, entered in the Council minutes (doc. 15435/02 ADD 1 of 10 December 2002), points 6 to 8: "Member States accept that their enforcement systems differ but nonetheless mutually recognise the standards of each other's system as a basis for cooperation.'

23 — In particular, cease-and-desist orders, accepting commitments and setting fines as provided for under national law.

24 — As regards that principle in the context of EU competition law, see, inter alia, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375; Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123; Case C-308/04 P *SGL Carbon* v *Commission* [2006] ECR I-5977; and Case C-328/05 P *SGL Carbon* v *Commission* [2007] ECR I-3921. As for the General Court, see Case T-223/00 *Kyowa Hakko Kogyo and Kyowa Hakko Europe* v *Commission* [2003] ECR II-2553. Concerning the concept of 'the same acts' in the context of that principle, see Case C-436/04 *Van Esbroeck* [2006] ECR I-2333. As regards that principle and Regulation No 1/2003, in particular, see pending Case C-17/10 *Toshiba Corporation and Others*.

31. It may be remarked that such limits to NCA competence with regard to negative decisions would also appear to be in line with the Commission's decision-making practice. In individual antitrust cases where the Commission investigation has not produced sufficient evidence to prove to the requisite legal standard that a breach of EU competition law has occurred, the case is closed without the Commission adopting a negative decision on the merits, or in fact issuing any reasoned decision addressed to the parties to the alleged infringement. [25]

32. Moreover, the referring court rightly refers to a systematic interpretation of Regulation No 1/2003. Article 5 is to be found in Chapter II of that regulation, which is entitled 'Powers'. Article 4 of that chapter concerns the powers of the Commission, Article 5 the powers of the NCAs and Article 6 the powers of the national courts. Whereas Articles 4 and 6 simply confirm in general terms the powers of the Commission and of the national courts under Articles 101 and 102 TFEU, Article 5 confines the jurisdiction of the NCAs to the application of Articles 101 and 102 TFEU and sets out expressly the manner in which the NCAs are to apply Articles 101 and 102 TFEU in individual cases (that is, by adopting which types of decision). [26]

33. In my view, the literal interpretation of Article 5 of Regulation No 1/2003 proposed in the preceding points is not only quite straightforward, but it is also supported by other provisions of that regulation. Indeed, importantly, the wording of Article 5 needs to be compared with that of Article 10.

34. Under Article 10, which is entitled 'Finding of inapplicability', where the EU public interest relating to the application of Articles 101 and 102 TFEU so requires, the

25 — Notwithstanding rejection of complaints decisions pursuant to Article 7(2) of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101 and 102 TFEU] (OJ 2004 L 123, p. 18).

26 — The provisions of Article 5 are important since, in a certain way, they harmonise the NCAs' powers to apply Articles 101 and 102 TFEU. In this way, should the Commission close the file on a complaint or not initiate proceedings with respect to a particular case, it can be sure that the NCAs have sufficient powers to apply EU competition law effectively. See Tosato, G.L., and Bellodi, L., cited in footnote 9, p. 220. The authors argue that Regulation No 1/2003 gives NCAs some flexibility as to the requirement to take action. However, Article 5 implies that the NCAs are required to open an investigation where, to paraphrase that provision, 'on the basis of the information in their possession the conditions for prohibition are met'. That rule is necessary, because of the flexibility allowed to the Commission and the NCAs in deciding whether to open a formal procedure and take a decision on a specific case. This could limit the protection of the rights of individuals granted by Articles 101(1) and 102 TFEU, especially in cases where, although the infringement of EU competition law is obvious, the case is not sufficiently important from an economic point of view to warrant the individual going to court. In order to reduce that risk, the last sentence of Article 5 requires the NCAs to take action if certain conditions are met.

Commission, acting on its own initiative, may by decision find that Article 101 TFEU is not applicable to an agreement, a decision by an association of undertakings or a concerted practice, either because the conditions of Article 101 (1) TFEU are not fulfilled, or because the conditions of Article 101 (3) TFEU are satisfied. The Commission may likewise make such a finding with reference to Article 102 TFEU. [27] Article 10 decisions are instrumental in ensuring the coherent application of EU competition law because of the effect they have on the other enforcement bodies. [28]

35. It follows that, in Regulation No 1/2003, the EU legislature conferred on the Commission exclusive competence to adopt negative decisions on the merits (inapplicability decisions).

36. That interpretation is supported by recital 14 in the preamble to Regulation No 1/2003, which states that in exceptional cases where the public interest of the European Union so requires, it may also be expedient for the Commission to adopt a decision of a declaratory nature finding that the prohibition in Article 101 or Article 102 TFEU does not apply, with a view to clarifying the law and ensuring its consistent application throughout the European Union, in particular with regard to new types of agreements or practices that have not been settled in the existing case-law and administrative practice. As regards the requirement that it only be

27 — Kerse, C.S., and Khan, N., cited in footnote 10, pp. 108 and 109, have pointed out that while the Commission has issued a detailed Notice on Informal Guidance, there is no similar instruction on inapplicability, notwithstanding the fact that the latter procedure leads to a formal decision (Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 [EC] that arise in individual cases (guidance letters) (OJ 2004 C 101, p. 78)). In addition, an Article 10 decision covers the old 'negative clearance' and 'exemption', although a declaration under Article 10 would appear to be something more than the former but less than the latter. The declaration of inapplicability may contain a statement as to whether Article 101(3) TFEU is satisfied (unlike 'negative decisions') but it would not apply only for a fixed period of time (unlike exemptions). Schwarze, J., and Weitbrecht, A., *Grundzüge des europäischen Kartellverfahrensrechts — Die Verordnung (EG) Nr. 1/2003*, Nomos, 2004, p. 133, argue that Article 10 of Regulation No 1/2003 is a 'relic' of the old system and that therefore the legal exception system has not been fully implemented. Langen, E., and Bunte, H.-J., cited in footnote 19, p. 799, argue that positive decisions are difficult to understand and out of place (ein schwer fassbarer Fremdkörper) in a legal exception system. Cf. also Klees, A., *Europäisches Kartellverfahrensrecht*, Carl Heymanns Verlag, 2005, p. 184.

28 — Gauer, C., Dalheimer, D., Kjolbye, L., and De Smijter, E., 'Regulation No 1/2003: a modernised application of EC competition rules', *Competition Policy Newsletter*, Number 1 — Spring 2003, p. 3 et seq. However, Article 10 decisions are not intended to be a replacement for the exemption decisions of the old system or to function as an instrument to 'bless' individual agreements in the absence of any issue of coherent application or policy. Ortiz Blanco, L. (ed.), *European Community Competition Procedure*, Second Edition, Oxford, 2006, argues that the legal nature of inapplicability decisions is open to debate. It is not easy to differentiate them from a decision to reject a complaint and they are both declaratory and binding (on NCAs and national courts) in nature. They are declaratory because they do not 'create' rights, unlike the former exemption decisions under Article 81(3) EC. Cf. also Montag, F., and Rosenfeld, A., 'A solution to the problems? Regulation 1/2003 and the Modernisation of Competition Procedure', ZWeR, 2/2003, p. 115 et seq.

used in exceptional cases, it is arguable that this reflects one of the objectives of Regulation No 1/2003, which is to pave the way for a transition to self-assessment. [29]

37. Furthermore, Regulation No 1/2003 required the Commission to prepare a Report on the functioning of Regulation No 1/2003 by 1 May 2009, that is to say, five years after its entry into force. In a working paper accompanying that report, [30] the Commission states that it had not yet adopted any decision under Article 10, a point which it confirmed also at the hearing in September 2010. Moreover, the use of the term '[EU] public interest' in that provision rules out the possibility that such decisions could legitimately be adopted in the interests of individual companies, the aim being to prevent that instrument from being used as a replacement for the exemption decision under the old system. Article 10 is confined to exceptional cases, and is designed to clarify the law and to ensure its consistent application throughout the European Union, [31] and specifically: (i) to 'correct' the approach of an NCA; or (ii) to send a signal to the ECN about how to approach a certain case. Interestingly, the Commission explains in the report that in practice, however, such an *ex ante* means of ensuring consistency has largely been overtaken by the extensive efforts of the ECN in promoting the coherent application of the EU competition rules. The extent to which the ECN has proved to be a successful forum for the discussion of general policy issues was apparently not anticipated at the time when Regulation No 1/2003 was adopted. Thus the Commission has had no reason to proceed under Article 10, since its use has so far been rendered unnecessary.

38. Indeed, in my view, the EU legislature deliberately and expressly provided that decisions declaring a practice lawful should be adopted: (i) only by the Commission; (ii) where the EU public interest so requires and only where it relates to the application of Articles 101 and 102 TFEU; (iii) where the

29 — Hirsch, G., Montag, F., and Säcker, F.J., cited in footnote 19, p. 1614, argue that since such a system necessarily engenders a higher degree of legal uncertainty, the Commission should interpret the conditions for the adoption of positive decisions more generously.

30 — Commission Staff Working Paper accompanying the Report on the functioning of Regulation No 1/2003 (cited in footnote 13). The report was a stock-taking exercise, the aim of which was to assess how the Modernisation reform has worked during this period, and it involved wide public consultation.

31 — Indeed, one of the main fears voiced during the adoption of Regulation No 1/2003 was that the empowerment of NCAs and national courts to apply EU competition law in full would endanger the consistent application of those rules.

Commission is acting *ex officio*; and (iv) only in exceptional cases. [32]

39. In that connection, it may be interesting to consider here the Commission's White Paper on Modernisation of the Rules Implementing Articles [81 EC] and [82 EC] of 28 April 1999, which was the precursor to the modernisation provided for under Regulation No 1/2003. [33] The 'findings of inapplicability' were first proposed in the White Paper, which was the result of discussion within the Commission that started in 1997 with a small working group looking at the problems presented by the notification system under Regulation No 17. [34] The Commission received many observations on the White Paper and in 2000 eventually presented its Proposal.

40. The White Paper suggested that the Commission should not be able to adopt exemption decisions under Article 81 (3) EC anymore, but went on to propose that the Commission should be able to adopt 'individual decisions that are not prohibition decisions', stating that '[w]here a transaction raises a question that is new, it may be necessary to provide the market with guidance regarding the Commission's approach to certain restrictions in it. Positive decisions of this kind would therefore be taken in exceptional cases, on grounds of general interest … they would be of a declaratory nature, and would have the same legal effect as negative clearance decisions have at present'. One group of Member States expressed concerns that there was a risk that such positive decisions would pave the way for a reintroduction of the notification system, since they are difficult to reconcile with a legal exception system. Another group of Member States suggested that NCAs should also be empowered to take such positive decisions. [35]

41. In response to those issues, the Explanatory Memorandum accompanying the Proposal justified inapplicability decisions on

32 — A good argument may be made that the Commission would adopt an Article 10 decision only in situations where it wishes to make a quasi-legislative statement on the applicability of Articles 101 and 102 TFEU. The Commission appears to be more prepared to issue guidance letters, though even here the Notice on Informal Guidance makes it clear that such letters are to be the exception rather than the rule. Cf. Kerse, C.S., and Khan, N., cited in footnote 10, p. 109.

33 — Ehlermann, C.D., 'The Modernisation of EC Antitrust Policy: a Legal and Cultural Revolution', CMLR, 37: 537-590, 2000, labelled it 'the most important policy paper the Commission has ever published in more than 40 years of EC competition policy'.

34 — At the time of the adoption of Regulation No 17, the prohibition on restrictive agreements was revolutionary in Europe. The centralised notification and authorisation system guaranteed that the new provision would be interpreted and applied by the Commission, which was specifically dedicated to 'the new religion'. The notification system also had an educational function, as companies and their lawyers were educated by the Commission through the authorisation process. See Geradin, D. (ed.), *Modernisation and enlargement: Two major challenges for EC competition law*, Intersentia, 2004, pp. 14 and 15.

35 — Cf. Ortiz Blanco, L., cited in footnote 28, p. 211.

the grounds that in the 'directly applicable exception system the main functions of the Commission will be to take action against infringements and to develop competition policy and promote consistent application of the rules by means of general measures such as block exemption regulations and guidelines'. It stated that inapplicability decisions 'can be adopted only at the Commission's own initiative and in the [EU] public interest. These conditions ensure that decisions making a finding of inapplicability cannot be obtained on demand by companies. Such a possibility would seriously undermine the principal aim of the reform, [36] which is to focus the activities of all competition authorities on what is prohibited. In the decentralised system the Commission, as the guardian of the Treaty and the centrally placed authority, has a special role to play in setting competition policy and in ensuring that Articles [101 and 102 TFEU] are applied consistently throughout the single market. To that end it is necessary to empower the Commission to adopt positive decisions if the [EU] public interest so requires. This power allows the Commission to adopt a decision making a finding of inapplicability, in particular in respect of new types of agreements or practices or issues that have not been settled in the existing case-law and administrative practice'.

42. My interpretation of the relevant provisions is also supported by the considerations expressed in recent Opinions of Advocates General and in EU case-law.

43. First, in *T-Mobile Netherlands and Others*, [37] Advocate General Kokott stressed the importance of the uniform application of EU competition law after the adoption of Regulation No 1/2003: 'since 1 May 2004 [38] the competition rules of Articles [101 and 102 TFEU] operate in a decentralised system which is reliant primarily on the cooperation of [NCAs] and courts. [39] In those circumstances, it is of fundamental importance

36 — The Commission was clearly adamant that Article 10 of Regulation No 1/2003 was not to be allowed to be used as a backdoor route for notifications which could jeopardise the main objective of that regulation.

37 — Case C-8/08 [2009] ECR I-4529, points 85 and 86.

38 — That date marks the changeover to the modernised law on antitrust procedure laid down in Regulation No 1/2003 (see the second paragraph of Article 45).

39 — On that point, see, in particular, recitals 4, 6, 7, 8, 21 and 22 in the preamble to Regulation No 1/2003. Even for the period prior to 1 May 2004, the Court had already stressed the obligation to cooperate in good faith, incumbent upon the national courts in the field of competition law. See Case C-344/98 *Masterfoods* v *HB* [2000] ECR I-11369, paragraph 49. (It is also clear from the case-law of the Court that the Member States' duty under Article 5 EC to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from EU law and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts (see, to that effect, Case C-2/97 *IP* v *Borsana* [1998] ECR I-8597, paragraph 26)).

that the uniform application of competition rules in the [European Union] be maintained. Not only the fundamental objective of equal conditions of competition for undertakings on the single market but also the concern for uniform protection of consumer interests in the entire [European Union] would be undermined if in the enforcement of the competition rules of Articles [101 and 102 TFEU] significant disparities occurred between the [NCAs] and co urts of the Member States. For that reason, the objective of a uniform application of Articles [101 and 102 TFEU] is a central theme which runs throughout Regulation No 1/2003.'

44. Secondly, Advocate General Mengozzi pointed out in *X*[40] that 'the concept of coherence or, more precisely, the phrase "coherent application" appears to be sufficiently flexible for situations in which a national court would or might jeopardise the uniform, or even effective, application of [Article 101 or Article 102 TFEU] to be included within the scope of the mechanism provided for in the third sentence of the first subparagraph of Article 15 (3) of Regulation No 1/2003 … Such an approach seems particularly appropriate given that the objectives of Regulation No 1/2003 are to ensure the effective and uniform application of Articles [101 and 102 TFEU]; … in the context of that application, the Commission, in the light of the task of supervision conferred on it by [EU] law, [41] performs a predominant function [42] … [T]he transition from a highly centralised application of Articles 81 EC and 82 EC, as was the case under [Regulation No 17] to an arrangement providing for the decentralised implementation of the [EU] competition rules, as established by Regulation No 1/2003, requires the establishment of mechanisms to ensure the "effective", "efficient", "uniform" and/or "coherent" application of the provisions of Articles [101 and 102 TFEU], in accordance with the various terms used by Regulation No 1/2003 … It is also true that these mechanisms include those relating to cooperation between the courts of the Member States, on the one

40 — Case C-429/07, cited in footnote 8, points 34 and 41.

41 — Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 105, and Case C-76/06 P *Britannia Alloys & Chemicals* v *Commission* [2007] ECR I-4405, paragraph 22.

42 — Indeed, the system under Regulation No 1/2003 makes NCAs responsible for enforcing EU competition law, without in any way diminishing the power or the strategic leadership and supervisory role of the Commission. Cf. Rizzuto, F., "Parallel Competence and the Power of the EC Commission under Regulation No 1/2003 according to the Court of First Instance", ECLR, 2008, 29(5), pp. 286-297. The system is best described as asymmetrical rather than as either disguised centralisation (the Commission lacks the formal power to direct NCAs), or decentralised (the empowerment of NCAs has not taken place at the expense of Commission power). It is asymmetrical and contingent because only the Commission has the power to displace the locus of the investigation and the decision where it considers it pertinent to do so.

hand, and the Commission and the national competition authorities on the other, as laid down in Article 15 of Regulation No 1/2003.'

45. Thirdly, similar points have already been stressed in EU case-law. [43]

46. It should be pointed out that the special character attributed to Article 10 by Regulation No 1/2003 also transpires from the fact that, contrary to Article 5 of that regulation, Article 10 is not meant to cover the closing of a procedure in a specific case. Rather, it is intended to enable the Commission to address novel questions in EU competition law, extrinsic in principle to any given specific investigation.

47. Indeed, it is clear from a reading of Regulation No 1/2003 that — while the underlying idea is that the Commission and the NCAs have parallel [44] competences and that they should form together a network applying EU competition law in close cooperation — the fact remains that the position of the Commission is distinguished from that of the NCAs by virtue of the Commission's power to adopt inapplicability decisions under Article 10 of

43 — See Case T-339/04 *France Télécom* v *Commission*, cited in footnote 8, paragraphs 79 and 84. (With regard to the division of powers between the Commission and the NCAs, it must be observed that Regulation No 1/2003 puts an end to the previous centralised regime and, in accordance with the principle of subsidiarity, establishes a wider association of NCAs, authorising them to implement EU competition law. However, the scheme of the regulation relies on the close cooperation to be built up between the Commission and the NCAs organised as a network, the Commission being given responsibility for determining the detailed rules for such cooperation. The regulation does not call into question the general power that the Commission is acknowledged to enjoy by the case-law. The Commission in effect has very wide powers of investigation under Regulation No 1/2003 and retains a leading role in the investigation of infringements.) See also Case T-340/04 *France Télécom* v *Commission*, cited in footnote 8, paragraphs 128, 129 and 132 (upheld on appeal in Case C-202/07 P *France Télécom* v *Commission*, cited in footnote 8).

44 — It is settled case-law that EU competition law and national competition law apply in parallel, since they consider restrictive practices from different points of view. Whereas Articles 101 and 102 TFEU regard them in the light of the obstacles which may result for trade between Member States, national law proceeds on the basis of considerations peculiar to it and considers restrictive practices only in that context (see, inter alia, Case 14/68 *Wilhelm and Others* [1969] ECR 1, paragraph 3; Joined Cases 253/78 and 1/79 to 3/79 *Giry and Guerlain and Others* [1980] ECR 2327, paragraph 15; Case C-137/00 *Milk Marque and National Farmers' Union* [2003] ECR I-7975, paragraph 61; and Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619, paragraph 38). It may be pointed out that that case-law concerns the legal situation as it stood before the entry into force of Regulation No 1/2003.

Regulation No 1/2003,[45] and the rule laid down in Article 11 (6) of that regulation, under which the initiation by the Commission of proceedings relieves the NCAs of their competence to deal with the same case, as well as the rule laid down in Article 16 (2) of that regulation, under which NCAs cannot take a decision which would run counter to an earlier decision by the Commission concerning the same agreement or practice. These three differences all relate to the Commission's specific role in clarifying the law and ensuring its consistent application throughout the EU, as provided for in Article 105 (1) TFEU (formerly Article 85 (1) EC).[46]

48. I consider (as do the Polish Government and the Commission) that the argument that NCAs are not empowered to take inapplicability decisions is consistent with the objective seeking the uniform application of EU competition law and is supported by the fact that a finding of inapplicability is not one of the types of decision listed in Article 11 (4) of Regulation No 1/2003, which provides that, before the adoption of a decision, the NCAs are to inform the Commission (clearly with reference only to the types of decision listed in Article 11 (4) which can have an effect on the uniformity of application of EU competition law).[47] If it were otherwise, the Commission would have no possibility of ensuring the uniform application of EU competition law

45 — It is arguable that this power is somewhat similar to the power conferred by Articles 2 and 6 of Regulation No 17 to adopt negative clearances and individual exemptions. However, it differs in important respects. Under Regulation No 1/2003, the Commission acts on its own initiative and in the EU public interest and is therefore not bound to act upon request. Moreover, such findings are by their nature declaratory and do not create rights, as was the case with individual exemptions. Finally, Article 16 of Regulation No 1/2003, read in conjunction with Article 1(3) of that regulation, requires NCAs and national courts not to take decisions which conflict with Article 10 decisions. That was not the case with negative clearances. By restricting themselves to declaring that Community (now EU) law was inapplicable to the case in question, negative declarations left the NCAs and courts free to apply national competition law (*Giry and Guerlain and Others*, cited in footnote 44). Cf. Tosato, G.L., and Bellodi, L., cited in footnote 9, p. 40. On the other hand, Loewenheim, U., Meessen, K.M., and Riesenkampff, A., cited in footnote 19, p. 740, take the view that Article 5 has no counterpart in Regulation No 17. They also submit that Regulation No 1/2003 does not lay down a compulsory catalogue of decisions (Entscheidungskatalog) for NCAs, but leaves that to the national legislature.

46 — Cf. Wils, W.P.J., cited in footnote 11, p. 682.

47 — The fact that a particular NCA has found that there are no grounds for action on its part does not prevent other NCAs or national courts from finding otherwise and prohibiting the agreement or practice. The fact that Article 11(4) only covers negative decisions is therefore not an indication that over-enforcement is perceived as a greater problem than under-enforcement. It is merely recognition of the fact that, in the system created by Regulation No 1/2003, negative decisions always win (it would have been otherwise if NCAs had been empowered to adopt constitutive exemption decisions). The only exceptions are Article 10 decisions adopted by the Commission, so that all that is required is a system that prevents the adoption by NCAs of unwarranted negative decisions. Once adopted and implemented, negative decisions are difficult to unscramble. See Faull, J., and Nikpay, A., cited in footnote 19, p. 158.

and/or of opening proceedings under Article 11 (6) of Regulation No 1/2003, [48] in a case where there was a risk of a non-uniform application of EU competition law.

49. In my view, it follows from the above considerations that Article 5 of Regulation No 1/2003 reflects a compromise devised by the EU legislature following a lengthy legislative procedure.

50. It is apparent from my analysis that the NCAs are not empowered to take inapplicability decisions in the context of Articles 101 and 102 TFEU. [49] Indeed, it matters little that national procedural law allows for such a negative decision with regard to the prohibitions under national competition law. The principle of procedural autonomy does not legitimise an extension of the powers of NCAs regarding the decisions they can adopt under Regulation No 1/2003.

51. Indeed, I agree with the referring court that Article 5 of Regulation No 1/2003 should be construed as meaning that the words 'decide that there are no grounds for action on their part' clearly signify the pronouncement of a decision that differs from one stating that there is no breach of Article 102 TFEU. As we have seen, the EU legislature has deliberately not provided for the possibility of the NCAs delivering decisions stating that there is no breach of Article 102 TFEU. It is also made clear in the Explanatory Memorandum accompanying the proposal for Regulation No 1/2003, as far as the powers of the NCAs are concerned, that in cases such as the present one — where the NCA establishes that an undertaking's practice has not infringed Article 102 TFEU — it can 'close the proceedings' or 'reject the complaint' by a decision finding that there are no grounds for action (p. 16 of the Proposal) and that 'no [NCA] forming part of the network can be empowered to

48 — The initiation by the Commission of proceedings for the adoption of a decision under Chapter III of Regulation No 1/2003 ('Commission decisions') is to relieve the NCAs of their competence to apply Articles 101 and 102 TFEU. If an NCA is already acting on a case, the Commission is not to initiate proceedings until it has consulted with the NCA.

49 — For the same interpretation, see inter alia, Oliver, P., 'Le règlement 1/2003 et les principes d'efficacité et d'équivalence', *Cahiers de droit européen*, Vol. 41, No 3-4, 2005, p. 366, Loewenheim, U., Meessen, K.M., and Riesenkampff, A., cited in footnote 19, p. 738. For a different interpretation, see Kerse, C.S., and Khan, N., cited in footnote 10, p. 261.

adopt constitutive exemption decisions when applying the [EU] competition rules' (p. 12).

52. It follows from all the foregoing that Article 5 of Regulation No 1/2003 should be interpreted as meaning that a competition authority of a Member State cannot take a decision finding that a practice does not restrict competition under Article 102 TFEU in a case in which it has found, after conducting proceedings, that the undertaking did not breach the prohibition of abuse of a dominant position under that Treaty provision.

The second question

53. By its second question, the referring court asks essentially whether the last sentence of Article 5 of Regulation No 1/2003 can provide a direct legal basis for an NCA to close its proceedings by deciding that there are no grounds for action on its part in a situation such as in the case before the referring court, where the adoption of a negative decision on the merits is provided for only under national law.

54. I mentioned above that, both in *Otto* [50] and in *GT-Link*, [51] the Court held that 'the application of Article [102 TFEU] by the national authorities is, in principle, governed by national procedural rules'. It was in *Otto*, however, that the Court added that '*subject to the observance of [EU] law*, and in particular its fundamental principles, it is therefore a matter for national law to define the appropriate procedural rules in order to guarantee the rights of … defence of the persons concerned. Such guarantees may differ from those which apply in [EU] proceedings.' [52]

55. Thus, the Commission and the EFTA Surveillance Authority are right in arguing that, in a situation such as that under consideration by the referring court, where the conditions for a prohibition decision are not met, Articles 3 (1) and 5 of Regulation No 1/2003 oblige an NCA to apply Article 102 TFEU by

50 — Cited in footnote 18, paragraph 14.
51 — Idem, paragraph 23.
52 — Idem (emphasis added).

bringing its administrative proceedings to an end with a finding that there are no grounds for action on its part. Indeed, it follows from the considerations relating to the first question that, given the importance of ensuring the uniform application of EU competition rules throughout the entire Union, the fact that the competition law of a Member State does not (yet) expressly empower the NCA to adopt such a decision does not alter the obligations incumbent upon Member States under Articles 3 (1) and 5 of Regulation No 1/2003. [53]

56. First of all, Regulation No 1/2003 — like all regulations — is directly applicable in the legal systems of the Member States. [54] Secondly, the principle of primacy [55] requires the referring court not to apply national law which is contrary to EU law but to apply EU law instead. Indeed, the case-law states that a national court which is called upon, within the limits of its jurisdiction, to apply provisions of EU law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently. It is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means. [56] As the EFTA Surveillance Authority rightly pointed out, the same obligation applies *mutatis mutandis* to the NCAs, which also must disapply national rules which are contrary to EU law.

57. Next, it is logical that Article 5 of Regulation No 1/2003 should be directly applicable — it allows all relevant NCAs to have as of 1 May 2004 consistent decision-making

53 — Any authority that applies national competition law in an individual case has a duty to apply Articles 101 and 102 TFEU in the circumstances set out in Article 3(1) of Regulation No 1/2003. Any reasonable reading of the duty to apply Articles 101 and 102 TFEU refers to the exercise of the enforcement powers provided for in Article 5. With or without a formal designation, an authority that is competent to apply national competition law in individual cases is subject to Article 3(1) and, in consequence, must be able to exercise enforcement power, even in the absence of national provisions explicitly conferring these powers upon it, and even in the presence of national provisions to the contrary. See the case of the Belgian NCA, mentioned below. See Gippini Fournier, E., cited in footnote 11, p. 103.

54 — Case 26/62 *van Gend & Loos* [1963] ECR 1.

55 — Case 6/64 *Costa* v *ENEL* [1964] ECR 585.

56 — Case 106/77 *Simmenthal* [1978] ECR 629. Cf. also Case C-341/08 *Petersen* [2010] ECR I-47, paragraph 80.

power, without the need to wait for the implementation of Article 5 in national law. [57]

58. Finally, to give a few concrete examples, it may be noted that the NCAs in Germany, Italy and Belgium have already directly applied Regulation No 1/2003. First, the Bundeskartellamt relied on Article 5 of Regulation No 1/2003 already before the 7th Amendment of the German Law on competition came into force. [58] Secondly, the Autorità Garante della Concorrenza e del Mercato directly applied Article 5 of the regulation and took a decision ordering interim measures which was at the time not provided for under Italian law. [59] That decision was upheld by the TAR del Lazio on 6 December 2005. Finally, the Conseil de la concurrence took the view that it should be able to exercise enforcement power even in the absence of national provisions conferring these powers upon it, and notwithstanding national provisions to the contrary. That was the position in relation to the power to accept commitments, one of the types of decision listed in Article 5, but not provided for under Belgian law. The Conseil de la concurrence inferred an 'Article 9-type' power for itself from the direct effect of Regulation No 1/2003. [60]

59. It follows from all the foregoing considerations that Article 5 of Regulation No 1/2003 is directly applicable and that the NCA may close its proceedings with a procedural decision finding that there are no grounds for action on its part.

57 — For this interpretation see, inter alia, Langen, E., and Bunte, H.-J., cited in footnote 19, p. 753; Klees, A., cited in footnote 27, paragraph 7, point 37; de Bronett, G.-K., *Kommentar zum europäischen Kartellverfahrensrecht: VO 1/2003*, Luchterhand, 2005, paragraph 5, point 1; Schwarze, J., and Weitbrecht, A., cited in footnote 27, paragraph 8, point 11 et seq.

58 — BkartA, B 9 – 55/03, p. 22 — 'Deutsche Post AG'. Cf. Langen, E., and Bunte, H.-J., cited in footnote 19, p. 753.

59 — Autorità Garante Provvedimento n. 14 078 'Merck' of 23 February 2005. Cf. Immenga, U., and Mestmäcker, E.-J., *Wettbewerbsrecht — Band 1. EG / Teil 2*, Beck, 2007, p. 938.

60 — See Cook, C., 'Commitment Decisions: The Law and Practice under Article 9', 29(2) *World Competition* 209 (2006), at footnote 14. Cf. Gippini Fournier, E., cited in footnote 11, p. 104.

IV — Conclusion

60. I am therefore of the opinion that the Court should give the following answers to the questions referred by the Sąd Najwyższy:

'(1) Article 5 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 [EC] (now Articles 101 and 102 TFEU) should be interpreted as meaning that a competition authority of a Member State is not empowered to take a decision stating that a practice does not restrict competition within the meaning of Article 102 TFEU in a case in which it has found, after conducting proceedings, that the undertaking did not breach the prohibition of abuse of a dominant position under that Treaty provision.

(2) Where, on the basis of the information in the possession of a competition authority of a Member State, the conditions for a prohibition decision within the meaning of the first sentence of Article 5 of Regulation No 1/2003 are not met, that competition authority may bring its administrative proceedings to an end by deciding that there are no grounds for action on its part.'