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Ex Post Assessment of Regulation 1/2003

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Ex Post Assessment of Regulation 1/2003

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More than 25 years ago, Christopher Norall and I wrote an article[1] challenging the Commission's approach to the application of Articles 81(1) and (3) EC, calling for the priests of competition law in Brussels to trust the laity more, to share enforcement duties with others, and to be less formalistic in interpreting the rules. It was one of a string of articles which suggested that the Commission could not maintain its monopoly over the grant of exemptions. Its theory that the prohibition of Article 81(1) EC caught everything which might have a remotely discernible effect on competition was understandable for the early days of an untested institution, dubious about the scope of its competence and the reception its theories would receive from courts and businesses. The theory needed to adapt to the realities of an enlarged Europe. After years of hesitation, the Commission wisely chose to share enforcement with national courts and national competition authorities. This was a massive change in course, widely and justly commended.

The biggest success of the reform has been the unexpectedly large surge in cooperation among national competition agencies, and between the competition agencies and the Commission. EC competition law has become a routine part of the business,

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[1] C. Norall & I. Forrester, *The laicisation of Community law: self-help and the rule of reason*, 21 CML REV 11.

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economic, and governmental environment in Europe. There have been some unconvincing and some bad decisions; inconsistent decisions; eccentric national legislation (my favorite being Greek Law No 3373/2005 which kept in force the administrative prior authorization system and brought back compulsory notification for vertical agreements); but many good decisions. Instead of a tiny number of flagship European Commission decisions which were really major new pieces of rule-making, decisions applying the competition rules by competition authorities across the EU have now become commonplace. This is, I suggest, the most important point.

Now that national enforcement is working busily, if not perfectly, the Commission's enforcement behavior is governed by its own choices, not by the imperfections of a system established in 1962. It can choose its own priorities. While I am delighted to observe the large increase in output, a few caveats about overlap and inconsistency are appropriate.

First, Article 3(2) of Regulation 1/2003 still allows Member States to adopt and apply on their territory stricter national laws which prohibit or sanction unilateral conduct, even when such conduct is not prohibited under Community law. However, Regulation 1/2003 refers only to *stricter national laws* and not to *stricter application* of national laws that are identical to Article 82 EC. Once Article 82 EC is applicable, the concurrent application of the equivalent national norm cannot lead to conflicting results. The Commission should therefore reflect on an appropriate amendment of Article 3(2) in order to specify the correct interpretation of that Article.

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A better option would be to exclude the application of national competition law altogether when Community competition law is applicable and thus require national authorities and courts only to apply the latter. Such a pre-emptive solution was proposed by the Commission in September 2000, but at that time it encountered resistance from the Member States, eventually resulting in the current compromise solution of the current Article 3.

Second, since the entry into force of Regulation 1/2003, the Commission has used the extra resources freed up by decentralization to undertake a number of inquiries into different sectors (energy, business insurance, retail banking and, most recently, pharmaceuticals). Individual companies have been investigated, and the Commission has subsequently set out in its final sector report, legislative and policy changes which could enhance competition. The goal of these inquiries has been to restructure the marketplace: achieving that goal may (or may not) have been desirable, but the mechanisms used have, in my view, been rather heavy-handed. In particular, I regret that the administrative equivalent of a violent invasion by the police armed with sledgehammers on the home of a suspect occurred as the means to launch the pharmaceuticals sector inquiry in January 2008. Those investigated were given the impression not of being in a dialogue, but of being swept along by a tide.

Moreover, while firms can of course be required to provide the Commission with information, I question whether broad requests for information constitute the most effective way for the Commission to obtain what it seeks, as it is often unclear to

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companies what is being asked and, as a result, the answer loses value to the requestor. It would therefore be useful if the Commission published guidelines on the conduct of sector inquiries. Since they are used as instruments of achieving market change, there should be clearer standards to justify opening investigations, as well as more constraints on administrative severity during their investigation.

"Justice should not only be done, but should manifestly and undoubtedly be seen to be done": Due process in competition cases

The system by which EC competition decisions are adopted by the Commission is unique, extraordinary, and inadequate. First, decisions are taken by 27 political figures, one from each Member State; 26 of them will never have seen the evidence and will never have heard the legal arguments. The penalties they collectively impose are also vast, far more severe than under criminal law. Political figures in a political college have no business deciding guilt or innocence. This is not a reproach to the honor, skill, or competence of the 27 Commissioners. The U.S. or French Cabinet does not decide antitrust cases, and no political cabinet or council of ministers should do so either.

Next, the hearing at which parties are invited to state their defences is not a hearing as conceived by most lawyers engaged in defending client interests in civil or criminal matters. It is, of course, dignified, orderly, and courteous; presided over by an able and respected senior official. The personal reputation of these men and women is of the highest. Their appointment honors them. But their duties are not the right duties. Instead of deciding on contested factual or legal matters, their principal duty is to ensure

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the hearing is, in a formal way, fair. That is not an unworthy task and they do it well. But the absence of the decision-maker is troubling, and largely reduces the value of the hearing.

Finally, separating case-team investigators and decision drafters would help the administrative oral hearing process. When a Commission case-team has concluded its investigation, it should be required to test and demonstrate its conclusions before an independent decision maker. Moreover, during that hearing, parties should be able to question, under the control of the decision maker, the evidence the Commission puts forward, including those upon whose testimony the case-team seeks to rely. This would be a huge and wholesome modernization of the process.

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