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Self-Assessment of Agreements Under Article 81 EC: Is There a Need for More Commission Guidance?

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On July 24, 2008, the Commission launched a public consultation on the functioning of Council Regulation n. 1/2003[1] (the "Regulation") that sets out the rules for the Commission's enforcement of EC Treaty antitrust rules. The Regulation, which took effect on May 1, 2004, aims at simplifying and strengthening antitrust enforcement through a series of far-reaching measures. Four years after entering into force, the Commission is now looking for views from "stakeholders" (e.g., businesses, courts, industry associations, and consumer associations) on all aspects of the Regulation's practical implementation, with a view to publishing a report on the functioning of the Regulation by May 2009.

This article addresses one of most crucial measures introduced by the Regulation, namely the abolition of the obligation to notify the Commission of restrictive agreements. We submit that more guidance from the Commission may be required to reduce the possible negative effects for businesses (and society as a whole) deriving from the lack of a body of recent Commission precedents on the application of competition rules and in particular, of Article 81 EC, to complex horizontal and vertical agreements.

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[1]Council Regulation 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. 1–25).

Similar considerations to those developed in the present article may also apply to Article 82 EC cases, especially if the Commission was to finally decide to "export" an "Article 81(3)"-type assessment to the field of abuse of dominance with a view to balancing a specific conduct's pro- and anticompetitive effects.[2]

I. DIRECT APPLICABILITY OF ARTICLE 81(3) EC

Among the most important changes brought about by the Regulation is the switch to a directly applicable exception system. According to Article 1 of the Regulation, conduct caught by Article 81(1), which satisfies the conditions of Article 81(3), shall not require prior Commission clearance. Thus, the previous notification system and the Commission's monopoly on granting exemptions from the application of Article 81(1) have been replaced by a system based on the principle of "legal exception."

Various measures have been put into place to address the risk of legal uncertainty that may have followed the abolition of the notification system:

- First, the Commission tried to clarify the application of Article 81(3) by publishing a number of block exemption regulations applicable to different types of agreements.[3]

[2] *See* Commissioner Kroes's speech, *Exclusionary abuses of dominance—the European Commission's enforcement priorities*, Fordham University Symposium, September 25, 2008.

[3] Commission Regulation No. 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements (OJ L 123, 27.04.2004, p. 11-17); Commission Regulation 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. 8–16). In the years preceding the adoption of the Regulation, other block exemption regulations were adopted: Commission Regulation 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. 21-25); and Commission Regulation 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, 1.08.2002, p. 30-41).

- Second, the Commission published a notice on the application of Article 81(3) with a view to setting out the Commission's interpretation of the conditions for exception under Article 81(3) and establishing an analytical framework for its application.[4]
- Third, pursuant to Recital 38 of the Regulation, the Commission was enabled to give informal guidance to parties where a case gives rise to "*genuine uncertainty*." However, in its *Notice on Informal Guidance*,[5] the Commission has emphasized both that such guidance would be provided only when the legal issues are novel or unresolved and of Community interest and that national courts and authorities are not bound by its guidance letters.
- Fourth, Article 10 of the Regulation granted the Commission the power to adopt a decision finding that Article 81 EC is not applicable to cases "where the Community public interest relating to the application of Art. 81 […] so requires."

II. SHORTCOMINGS OF THE CURRENT SYSTEM

The changes introduced by the Regulation have had major practical implications. Since its introduction, companies have been required to "self-assess" that any agreement they want to enter into is compatible with antitrust rules—without being able to seek comfort from the Commission on the outcome of their self-assessment. Moreover, to the extent that, according to the Regulation, the party that would like to benefit from an individual exception pursuant to Article 81(3) needs to prove that the four exemption

[4]Notice—Guidelines on the application of Article 81(3) of the Treaty (OJ C 101, 27.4.2004, p. 97-118).

[5]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 (OJ C 101, 27.4.2004 p. 78-80).

conditions are satisfied, companies have also been required to gather adequate evidence supporting the conclusions reached in their self-assessment. The Regulation has thus placed more responsibilities on businesses and their advisers.

Nonetheless, the current system of enforcement of Article 81 EC provided for by the Regulation appears to have worked relatively well and it seems unlikely that radical changes will be introduced following the Commission's consultation. In fact, Commission guidelines and block exemption regulations generally constitute satisfactory working tools for businesses and their advisors.

We think, however, that the business and legal community would benefit from further guidance from the Commission with respect to the application to Article 81 EC to those agreements that do not fall within the scope of one of the existing block exemption regulations and require a "fully-fledged" Article 81(1) / Article 81(3) assessment.

In our experience, the most complex issues relating to the self-assessment of agreements under Article 81 EC arise from: (i) the concrete application of the "balancing test" between an agreement's likely anti- and pro-competitive effects passed on to customers; and (ii) the assessment of the "indispensability" of restrictions to competition arising from an agreement needed to achieve its projected efficiencies. In particular, we note that:

- With respect to the "balancing test," based on the existing Commission guidelines, (as well as on Court and Commission precedents), reaching a conclusion as to whether a specific agreement would likely fall within the scope

of Article 81(1) is a complex, but feasible exercise. The actual quantification of the agreement's likely anticompetitive effects, however, starts to raise greater difficulties. Similarly, while it is generally possible to identify the likely qualitative and quantitative efficiencies deriving from an agreement, it is often very difficult to quantify the efficiencies that are actually passed on to customers and, even more so, to balance the agreement's anticompetitive effects with its qualitative and quantitative efficiencies.

- Moreover, even if a company was satisfied that the agreement it intends to enter into complies with the positive conditions laid down by Article 81(3),[6] this would not be itself sufficient to merit an individual exemption pursuant to Article 81(3) since the conditions provided for therein are cumulative. The company would also have to engage in the rather speculative exercise of assessing whether the restrictions of competition included in the agreement are necessary to achieve the relevant efficiencies or whether the same efficiencies could be achieved by less restrictive means (as well as ensure that the agreement does not result in an elimination of competition in the relevant market).[7]
- Finally, from an evidentiary viewpoint, given the Commission's recent trend towards the use of detailed quantitative and economic evidence, at least in the

[6]Namely, (a) the agreement must contribute to improving the production or distribution of goods or contribute to promoting technical or economic progress, and (b) consumers must receive a fair share of the resulting benefits.

[7]See the so-called negative conditions of Article 81(3), *i.e.*, the restrictions must be indispensable to the attainment of these objectives, and the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.

merger control and the abuse of dominance areas,[8] it would appear likely that, at least in more complex cases, an Article 81 EC self-assessment would have to be based on sound and detailed evidence to withstand the Commission's scrutiny in the event of a later investigation or challenge.

Given the complexity of the issues at stake, we do not think that the existing general instruments (guidelines and block exemption regulations) provide a sufficient level of guidance to companies and their advisors. While guidelines are drafted, by definition, in general terms and cannot capture issues raised in a wide range of specific circumstances, antitrust cases are often extremely fact-specific and even the most detailed set of guidelines can not address all possible scenarios.

Moreover, until now, the Commission has not used the tools made available to it by the Regulation to compensate for the lack of legal certainty following the abolition of the notification system. In fact, to the best of our knowledge, the Commission has not adopted any decision pursuant to Article 10 of the Regulation nor has it published any guidance letter. This is all the more surprising since the Commission itself recognized that a system of an ex ante notification brings about benefits in terms of legal certainty, which are lost under the new system.[9]

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[8]See NICHOLAS LEVY, *Evidentiary issues in EU merger control*, paper presented at Fordham Competition Law Institute's 35th Annual Conference, September 25, 2008.

[9]See judgment of the Court of First Instance of May 2, 2006, case T-328/03, *O2 (Germany) GmbH & Co. vs. Commission*, [2006] ECR II-1231. The parties appealed an exemption decision issued under the "old" notification system. The Commission contested the applicant's interest in bringing the action on the ground that the exemption decision "which grants [the applicant] an exemption which is binding on national authorities and courts, provides [the applicant] with legal certainty which would be lost if the annulment sought were granted, for the Commission would not be able to issue a new decision, since [the Regulation] brought to an end the system of prior notification of agreements for the purpose of exemption" (para. 42.)

The current state of legal uncertainty as to the application of Article 81 EC to certain types of agreements may have negative effects for businesses (and for society as a whole). In particular:

- First, especially in more complex cases, economic and legal advisors are rarely able to provide a business with clear-cut advice as to the compatibility of a certain agreement with Article 81 EC. Only the Commission can provide this level of legal certainty. In such cases, entering into complex cooperation or distribution agreements is rarely a completely risk-free decision from an antitrust perspective. It is for the company, based on the advice received and its risk-averseness, to decide whether or not to proceed with a specific agreement and, if so, on what terms. Thus, depending on the company's risk tolerance level, the current situation may lead to certain potentially anticompetitive agreements being entered into and to other likely pro-competitive agreements being abandoned.
- Second, a company's reluctance to enter into agreements entailing a certain degree of antitrust risk (even in the presence of sound legal and economic arguments supporting the pro-competitiveness of the agreement) in the absence of more precise, if not individualized, guidance from the agencies, may be compounded by the increased risk of damage claims. Moreover, with some exceptions, national courts rarely have the expertise required to carry out complex economic assessments and do not constitute the most suitable fora to defend the compatibility of an agreement with Article 81 EC vis-à-vis increasingly

sophisticated and well-advised private plaintiffs.

- Third, while the current system clearly saves Commission resources and, to some extent, has eliminated the bureaucracy associated with the "old" notification system, it is at best uncertain whether it has led to lower costs for businesses. As noted, complex self-assessments of agreements require the review and appraisal of detailed data and information, the collection and processing of which often consume significant management time and resources. Additional assessment by outside counsel and economist may also be relatively costly.
- Fourth, the lack of guidance and ex ante legal certainty grants the Commission greater discretion when investigating agreements (other than hard-core cartels) pursuant to Article 81 EC. This may result in companies being more prone to accept even unnecessarily stringent commitments and to "settle" a case pursuant to Article 9 of the Regulation with a view to avoiding a possible Commission finding of an infringement, than to fight a case until the end, including on appeal before the European Courts (which, in turn, results in fewer Commission decisions pursuant to Article 7 and fewer Court cases).

III. A PRAGMATIC SOLUTION

We think that filling the above-identified guidance "gap" would be beneficial to both the business and legal communities. A body of decisions detailing how, in practice, the Commission applies Article 81(1) and 81(3) to agreements that are not per se anticompetitive would be, in our view, sufficient to achieve this purpose.

The Commission could adopt such decisions under Articles 7 and 10 of the Regulation. For example, the Commission could allow a certain time period (a few months) for companies to informally communicate some of the agreements they have in place and/or they plan to enter into and in relation to which they would like guidance. The Commission could then select a few of these agreements, carry out a full assessment of them under Article 81 EC, and publish the final decision under Article 7 (in case of a finding of incompatibility with Article 81 EC) or 10 (in case of a finding of non-applicability of Article 81).

Ideally(!), such Commission decisions would then be appealed before the CFI by their disgruntled addressees and/or third party competitors or customers and, thus, create a "new" body of case law on the issue.

Alternatively, the Commission could adopt a less stringent interpretation of the instances in which it is prepared to provide informal guidance to undertakings and, most importantly, make its most relevant "informal guidance" publicly available by posting it on its website.

Moreover, any risk of chilling effects for businesses would be further reduced if the Commission were to take a "lenient" approach in the enforcement of Article 81 EC vis-à-vis complex agreements, i.e., agreements entered into by the parties based on a bona fide legal and economic self-assessment of their compatibility with Article 81 EC. The fact that a company carries out a detailed legal and economic assessment of a specific agreement before entering into it shows its commitment to respect antitrust rules.

Thus if, based on the advice received, a company could have bona fide taken the decision to proceed with the relevant agreement (even if such advice did not exclude the existence of some antitrust risk associated with this conduct), such company should benefit from a lenient enforcement by the Commission. This is particularly the case since, as noted, complex agreements entailing a sophisticated legal and economic assessment of anti- and pro-competitive effects are rarely risk-free from an antitrust viewpoint and unduly sanctioning such agreements would also risk having a chilling effect on businesses with respect to likely pro-competitive arrangements.

A lenient approach to the application of Article 81 EC to more complex agreements would essentially consist, in case of a Commission investigation, of having ordinarily recourse to a negotiated solution via commitments pursuant to Article 9 of the Regulation.

Alternatively, if no such negotiated solution can be agreed upon and the Commission concludes that the agreement's anticompetitive effects outweigh its pro-competitive efficiencies, the Commission, while finding that the agreement violates Article 81 EC, should impose no fine (or only a nominal one) on the parties and/or strictly proportionate remedies to eliminate the violation. The Commission's 2006 Fining Guidelines[10] provide for some flexibility in this regard, including the possibility for the Commission to impose a symbolic fine in certain cases.[11]

[10]Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 (OJ C 210, 1.9.2006, p. 2–5).

[11]The 2006 Fining Guidelines: allow the Commission to adapt the basic amount of any fine to the gravity of the infringement by providing for no statutory minimum for the percentage of the undertaking's affected sales to be taken into account as the starting point for the calculation of the fine (para. 21); limit the application of any entry fee to hard-core cartels (para. 25); and do not exclude the applicability of one

A body of precedent developed along the above lines, together with the Commission's existing general guidance instruments (guidelines and block exemption regulations) would, in our opinion, substantially reduce any risk of chilling effects on businesses (and the possible negative effects for society as a whole) resulting from the existing enforcement system of Article 81 EC provided for by the Regulation.

or more mitigating circumstances (e.g., termination of the infringement upon discovery by the Commission, negligence, or cooperation outside the scope of the Leniency Notice; para. 29).