

Competition Law Forum

REFORM OF REGULATION 1/2003: CORRECTING THE CURRENT LACK OF EFFECTIVE COMMUNICATION

Submission to the European Commission in relation to its Consultation on
Regulation 1/2003

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I. INTRODUCTION

Regulation 1/2003¹ is the centrepiece of the European Commission's ('Commission') project to 'modernise' the enforcement of the EC competition rules. Adopted on 16 December 2002 and in force since 1 May 2004, it was feted as 'the most comprehensive antitrust reform undertaken since 1962'.² Indeed, for former Commissioner Monti, its entry into force represented the 'big bang' in modern EC antitrust enforcement.³ At first glance, such commentary does not appear to suffer from exaggeration. Regulation 1/2003 did indeed bring with it many long-awaited, important reforms. To illustrate, the fundamental changes produced by this instrument included: the abolition of the notification regime that applied to restrictive agreements; the establishment of the direct applicability of Article 81(3) EC; the creation of the European Competition Network ('ECN'); the clarification of the relationship between Articles 81 and 82 EC and their national counterparts; and the provision of more robust investigative powers for the Commission. But while Regulation 1/2003 made significant changes to the procedural rules for the application of the EC competition rules throughout the Community, it did not affect the actual substance of either Article 81 EC or Article 82 EC.⁴ This limited scope is reflected in the goals of Regulation 1/2003: reducing administrative and business costs and focusing on key infringements of the EC competition rules.⁵

Over five years have passed since the adoption of Regulation 1/2003. Since its adoption a substantial number of academic publications have analysed both the nature and the (potential) effect of this instrument, some coming to different conclusions on these

* The British Institute of International and Comparative Law launched the Competition Law Forum ('CLF') in January 2003, with the aim of facilitating discussion and recommendations on the most pressing competition law issues. The Forum is comprised of leading practitioners, economists, representatives of industry, consumer groups, regulators and academics, selected on the basis of their contribution to the area of competition law and policy. For further information, please see <www.competitionlawforum.org> or contact its Director, Dr Philip Marsden, at <p.marsden@biicl.org> or (ph.) 44 207 862 5151. This paper is a direct result of the discussion engendered at a Competition Law Forum meeting held in London on 11 September 2008 entitled 'Reform of Regulation 1/2003'. It was written by the CLF Working Group on Regulation 1/2003: Francesco Liberatore (Mayer Brown), Dr Philip Marsden (CLF), Frances Murphy (Mayer Brown), and Peter Whelan (CLF and Cambridge University). This submission is not attributable to any individual member or consultative member of the CLF, to their organisations or to the CLF as a whole.

¹ Council of Ministers, *Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty*, (2003) Official Journal L1/1 ('Regulation 1/2003').

² European Commission, *32nd Report on Competition Policy*, SEC(2003) 467 FINAL, at paragraph 15.

³ M. Monti, 'EU Competition Policy after May 2004', SPEECH/03/489, Fordham Annual Conference on International Antitrust Law and Policy New York, 24 October 2003.

⁴ L. Garzanti, J. Gudofsky and J. Moffat, 'Dawn of a New Era? Powers of Investigation and Enforcement under Regulation 1/2003' (2004) 72 *Antitrust Law Journal* 159, at 161. Cf. J. Venit, 'Brave New World: The Modernization and Decentralization of Enforcement under Articles 81 and 82 of the EC Treaty' [2003] *Common Market Law Review* 545, at 575.

⁵ European Commission, *32nd Report on Competition Policy*, *op. cit.*, at paragraph 16.

issues. Riley, for example, has argued that far from being the comprehensive reform that the Commission claims, Regulation 1/2003 is in fact a *centralising* instrument and not a *decentralising* one.⁶ Others have argued that by adopting this regulation the Commission has ‘relinquish[ed] its role as primary enforcement mechanism for competition law’ in favour of ‘a wider and more active participation’ of national competition authorities (‘NCAs’) and national courts.⁷ Importantly, some commentators have emphasised that, whatever the nature of Regulation 1/2003, its success depends on its effective implementation by the Commission, the NCAs and the national courts, and in particular on ‘the degree of cooperation’ that is exercised between these three stakeholders.⁸

It is probable that the Commission’s current consultation on the operation of Regulation 1/2003 will result in more commentary on the actual effects of the reform, as opposed to its inherent nature, and that cooperation and the formal and informal structures that provide for it will be considered by a significant number of contributors. For our part, we would like to draw attention to a specific requirement of cooperation, namely ‘communication’. But in focusing on this aspect of cooperation, we do not wish to consider the interaction of the Commission, the NCAs and the national courts. Rather, our focus is directly on the interaction between the Commission, on the one hand, and market players and the public, on the other. Specifically, and in the context of the operation of Regulation 1/2003, the current lack of effective communication between these entities (and its impact on the transparency and consistency of the modernised regime) is highlighted. Two dynamics are considered in turn: (i) communication expressed by the Commission; and (ii) communication received by the Commission. The former is given a more detailed treatment.

II. COMMUNICATION EXPRESSED BY THE COMMISSION

In implementing the enforcement framework under Regulation 1/2003, the Commission must communicate effectively with not only the NCAs and the national courts but also the relevant market players and the public. There are a number of situations arising from the enforcement of the EC competition rules under Regulation 1/2003 where effective communication by the Commission appears to be lacking. The Commission should consider these areas and attempt to improve the expression of its views and positions. In this short paper, four important areas that require a more effective communicative response from the Commission are considered; they concern:

- (i) the willingness of the Commission to provide informal guidance;
- (ii) the (lack of) publicity concerning the Commission’s position as revealed during the informal guidance process;
- (iii) the purpose of sector inquiries and the (non-) culpability of the undertakings that are targeted for dawn raids during a sector inquiry; and
- (iv) the work of the ECN.

Willingness to Provide Guidance

According to the orthodox view of the process of modernisation, both the abolition of the notification regime and the introduction of the direct applicability of Article 81(3) EC would allow the Commission to ‘decentralise’ competition enforcement and enable it to concentrate on the most serious forms of anticompetitive behaviour. From 1 May 2004 onwards, market actors who have concluded a restrictive agreement within the scope of Article 81(1) EC

⁶ A. Riley, ‘EC Antitrust Modernisation: The Commission Does Very Nicely – Thank You! Part 1: Regulation 1 and the Notification Burden’ (2003) 24(11) *European Competition Law Review* 604; and A. Riley, ‘EC Antitrust Modernisation: The Commission Does Very Nicely – Thank You! Part 2: Between the Idea and the Reality: Decentralisation under Regulation 1’ (2003) 24(12) *European Competition Law Review* 657.

⁷ D. Gerber and P. Cassinis, ‘The “Modernisation” of European Community Competition Law: Achieving Consistency in Enforcement: Part 1’ (2006) 27(1) *European Competition Law Review* 10.

⁸ L. Garzanti, J. Gudofsky and J. Moffat, *op. cit.*, at 161.

automatically benefit from an exemption under Article 81(3) EC – provided of course that its criteria are met – without having to obtain an exemption decision from the Commission. In other words, from 1 May 2004 undertakings would henceforth have to ‘self-assess’, and decide, with legal advice if necessary, whether they have concluded an agreement that complies with EC competition law. They cannot apply to the Commission for a comfort letter or an exemption decision.

Some businesses may claim that self-assessment was already a reality prior to 1 May 2004, and therefore that Regulation 1/2003 did not change in any fundamental manner their way of operating. This, though, is certainly not the case with, for example, liner conferences, which until recently were exempt from the operation of the EC competition rules.⁹ Moreover, while specific guidance has been provided by the Commission on these types of contracts,¹⁰ and indeed on the general application of Article 81(3),¹¹ it does not follow that further informal guidance would not be required in a given case.¹² In any event, there is always the possibility that with any type of contract or conduct or indeed with any type of market a novel issue may arise where guidance is necessary and has not been provided. Indeed, the best form of guidance is fact-specific. Such guidance may be required in relation to not only Article 81 but also Article 82, despite the fact that the entirety of the latter provision has always been directly applicable. Regulation 1/2003 does acknowledge this fact: individual undertakings may seek informal guidance from the Commission.¹³ A Commission notice details the cumulative conditions that must be fulfilled before a request for informal guidance will be considered.¹⁴ In short, such a request must involve an issue that is not clarified by the current EC legal framework and for which guidance would be useful (e.g. due to the economic importance of the goods or services concerned).¹⁵ Moreover, when the Community public interest so requires, the Commission may adopt a formal finding that Article 81 is inapplicable to a given agreement.¹⁶

The problem with this framework is not necessarily structural or legal. Rather, it is one of perception. To date there have only been few requests for informal guidance and there have been no formal findings of inapplicability. The experience of practitioners appears to be that the Commission is very reluctant to provide informal or formal guidance. It is difficult to say precisely how representative the experience is. Nevertheless, it has given root to a widely held impression that informal or formal guidance will be difficult to obtain. This may go somewhat to explaining the reason behind the low figures concerning requests for such guidance. The task for the Commission here is to convince the business community that it is serious about giving guidance and the legal certainty that such guidance provides. The impression of reluctance needs to be dispelled, otherwise the Commission will risk further perpetuating any legal uncertainty that prevails absent guidance. This risk is particularly active when complex matters outside the cartel context are involved. The Commission needs to be more alert to the need for clarity and, where confusion exists,

⁹ See Council of Ministers, *Council Regulation (EEC) No. 4056/86 of 22 December 1986*, OJ L 378, 31.12.1986, p. 4.

¹⁰ See European Commission, *Guidelines on the Application of Article 81 of the EC Treaty to Maritime Transport Services*, Brussels, 1/7/2008, SEC(2008) 2151 final.

¹¹ Alongside the reform of the rules implementing Articles 81 and 82 brought about by Regulation 1/2003, the Commission has also conducted a review of block exemption regulations, Commission notices and guidelines, with a view to further assist self-assessment by economic operators: see, e.g., European Commission, *Guidelines on the Application of Article 81(3)* [2004] OJ C101.

¹² With the abolition of the notification regime came the loss of Article 81(3) exemption decisions and therefore an inevitable degree of legal uncertainty. The adoption of the *Guidelines on the Application of Article 81(3)* attempted to improve the situation; but the usefulness of these specific guidelines has been questioned by practitioners.

¹³ It is probably more correct to say that Regulation 1/2003 does not preclude such informal advice: Regulation 1/2003, at Recital 38.

¹⁴ See European Commission, *Commission Notice on Informal Guidance relating to Novel Questions concerning Articles 81 and 82 of the EC Treaty that Arise in Individual Cases (Guidance Letters)*, 2004/C 101/06.

¹⁵ *Ibid.*, at paragraph 8. See also *ibid.* at paragraphs 9 and 10.

¹⁶ *Ibid.*, at Article 10.

should help undertakings to come to a decision regarding their contractual arrangements. Above all, the Commission needs to be acutely aware that when guidance is needed and not provided a chilling effect on private economic activity may occur, resulting in a reduction in overall levels of consumer welfare. Given the increasingly high levels of fines that have been levied by the Commission in recent years, it is conceivable that companies would rather avoid concluding border-line agreements, even if their potential benefits could outweigh their anti-competitive effects, for fear of being fined.

Publicity and Informal Guidance

The Commission notice states that a non-confidential version of guidance letters will be posted on the Commission's web-site. However, where informal guidance has been provided, it has not been made public by the Commission thus far. Whilst the informal guidance provided may nonetheless be invaluable to the undertaking concerned, such an approach does not help other market players (or indeed NCAs for that matter) that may well be struggling with similar issues. Indeed, it is arguable that the Commission's approach here (i) may lead to a duplication of resources (if a similar request is granted subsequently in relation to a similar agreement/conduct concerning a different undertaking); or (ii) has the potential to lead to inconsistency in the application of the competition law rules by the NCAs or national courts.

Due to the resource constraints it faces the Commission may be reluctant to engage in informal guidance talks in relation to a practice/contract for which it has already provided private guidance, even if the parties are different. To the undertaking that has fulfilled the criteria in the relevant notice but has come second in the queue such an attitude would not be acceptable, and for good reason. If the second (similar) request is granted, there will be a duplication of resources, notwithstanding the fact that a second economic analysis of the given agreement/conduct may not be required – or, at least, may not need to be as rigorous as the first. To avoid such duplication, and to avoid even further duplication concerning possible later (similar) requests, it may be preferable for the Commission to actually publish its informal guidance, whilst at the same time protecting the confidentiality of the business secrets of the undertakings involved. It is accepted that such publication requires the use of scarce Commission resources; but the expenditure on publication has the advantage of communicating openly the position of the Commission and reducing both the number of future (similar) requests for guidance and the inevitable expenditure that is occasioned when such requests are granted.

Another problem with the current approach is the inconsistency that it may generate. Inconsistency may occur when the informal guidance given by the Commission is private in nature and a NCA or national court rules on a similar issue at a later date, and takes a decision that runs counter to the thinking of the Commission. It should be noted that this issue is not necessarily abstract, although any evidence supporting it is necessarily anecdotal. Legal counsel have indeed reported to us that such a situation has occurred in relation to the concept of margin-squeezing. Such problems could well be avoided through the use of the ECN, but such a solution would only benefit the NCAs; undertakings considering adopting a given behaviour or concluding an agreement would still remain ignorant of the Commission's thinking. Therefore due to its very nature, taking a public position will be more effective than simply revealing its thinking within the ECN (which clearly has not been sufficient to avoid inconsistency) or its *amicus curiae* role.

For the above reasons, publicity of its positions/opinions may well need to be considered by the Commission. Such publicity could be achieved through (i) notice of its enforcement stance in the EC Competition Policy Newsletter; (ii) adopting and publishing more informal guidance letters; and (iii) adopting more non-infringement decisions. It is imperative for the Commission to consider the views of market actors concerning publicity. It goes without saying that a system that allows for such publicity should protect the rights and legitimate interests of these market players (e.g. by protecting confidential information),

otherwise the number of requests for informal guidance may fall despite their importance for providing legal certainty and consistency.

Sector Inquiries and Dawn Raids

Prior to the entry into force of Regulation 1/2003, the Commission benefited from a wide discretion to undertake sector-wide investigations into markets it suspected were not functioning as they ought to be.¹⁷ Presently, by virtue of Article 17 of Regulation 1/2003, the Commission may conduct an inquiry into a particular sector of the economy or particular types of agreements across various sectors when the trend of trade between Member States, the rigidity of prices, or other circumstances suggest a distortion or restriction of competition within the common market.¹⁸ Article 17(2) of Regulation 1/2003 expressly gives the Commission a wide range of additional investigative powers to conduct sector inquiries. Consequently, as well as being able to request information from undertakings or associations of undertakings, the Commission can also: take statements from consenting natural or legal persons; conduct inspections of undertakings or associations of undertakings; ask NCAs to conduct inspections on its behalf; and impose fines and other penalties for certain behaviour (for instance, failure to provide information or other forms of obstruction of the investigation). Importantly for present purposes, the Commission may also conduct unannounced on-site inspections or ‘dawn raids’ on the undertakings concerned, although it cannot enter non-business premises for the purposes of its inquiry.

In previous sector inquiries (e.g., telecoms, energy, financial services), the Commission has issued information requests and only subsequently carried out dawn raids on the ground of suspicion of anti-competitive arrangements on the part of individual companies. Earlier on this year, however, the Commission launched a sector inquiry into the pharmaceutical sector with several dawn raids.¹⁹ Many commentators from the industry and the legal community alike criticised these dawn raids as being arbitrary and disproportionate measures.²⁰ Against this background, we submit the following observations.

A sector inquiry is a useful tool for the Commission. On the one hand, with the ability to launch sectoral inquiries, the Commission can develop a more proactive approach to its enforcement role: it may initiate an investigation in order to establish the anticompetitive practices responsible for a perceived market failure. On the other hand, by using the mechanism of a sector inquiry, the Commission can obtain a much broader view of the markets potentially affected by anticompetitive behaviour than it would by concentrating solely on individual agreements. Once it has established a firm understanding of the dynamics of the market – and the inefficiencies and/or anticompetitive practices that may be present – it can take further action if necessary under the competition rules, by launching separate individual proceedings.

That said, practitioners have questioned whether the Commission is using the tool of sector inquiries effectively; and have suggested that specific safeguards should be in place to ensure that the use of dawn raids in this context is proportionate.

As regards the scope of sector inquiries, the Commission may want to consider whether the focus of sector inquiries is competition law enforcement or the study of a given market. If it is the latter, some practitioners feel that an open and transparent dialogue between the Commission directorate-generals, the NCAs and the industry would be more effective for the Commission to update its knowledge of evolving sectors than dawn raids and lengthy data requests, which otherwise risk taking up a lot of resources both from the Commission and the industry.

¹⁷ Regulation 17/1962, OJ Spec Ed, 1959-62, 87, OJ 1962, 204, at Article 12(1).

¹⁸ See generally P. Marsden and P. Whelan, ‘When Markets Are Failing (Part I)’ (2007) 6(1) *Competition Law Insight* 6; and P. Marsden and P. Whelan, ‘When Markets Are Failing (Part II)’ (2007) 6(2) *Competition Law Insight* 6.

¹⁹ See Commission press release IP/08/49 of 16/01/2008.

²⁰ See, e.g., H. Andersson and E. Legnerfalt, ‘Dawn Raids in Sector Inquiries – Fishing Expeditions in Disguise’ (2008) 29(8) *European Competition Law Review* 439.

As regards the use of dawn raids, there is the very real question of whether it is ever appropriate for a sector inquiry to be commenced by way of a dawn raid. A dawn raid signals a real suspicion on the part of the Commission of misfeasance. When the Commission has such suspicions it might be said that the only proper course of action available to it is an infringement investigation. In the case of infringement investigations, companies and market sector observers fully understand and appreciate that there will be occasion when dawn raids are appropriate. The same understanding does not extend to dawn raids in sector inquiries, and we would say, nor should it. In the event, however, the Commission maintains its view that dawn raids can be an appropriate way of commencing a sector inquiry, we would suggest to the Commission adopting additional safeguards to ensure that the sector inquiry procedures are proportionate and transparent. In particular, dawn raids not only cause an internal disruption of normal business and are an unsettling experience for the employees of the companies subject to the raids; they can also cause a significant reputational damage externally.²¹ It is thus clear that dawn raids are extremely intrusive measures. Accordingly, the recourse to dawn raids by the Commission should respect the general principle of Community law affording protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of any person or company.²² In particular, it is submitted that, in launching a dawn raid, the Commission should at the very least give a reasonable indication of:

- (i) the essential features of the suspected infringement, the nature of the involvement of the undertaking investigated, and the evidence providing grounds for suspecting such infringement on the part of the undertaking concerned;
- (ii) the additional evidence sought, the matters to which the investigation must relate, and the powers conferred on the Community investigators; and
- (iii) the ground for suspecting that the evidence sought would be concealed or disposed of in the event of prior notice.

On the basis of these principles, the circumstances in which the Commission may commence a sector inquiry with dawn raids must necessarily be very exceptional. In view of such exceptional circumstances, the Commission should moreover adopt the practice of a clear and prompt communication to consumers/investors informing them that a dawn raid in the context of a sector inquiry does not imply a finding of infringement of EC competition rules or even the suspicion of an infringement on the part of the raided companies.

The ECN

As a direct result of the entry into force of Regulation 1/2003, the Commission and the NCAs cooperate with one another through the ECN.²³ This network is an official forum for discussion and cooperation in the application and enforcement of EC competition law and policy.²⁴ It performs three very important functions: the efficient allocation of cases;

²¹ In this regard, the Commission needs to appreciate the negative impact that such dawn raids can have on reputation and on share prices. It has been argued that a dawn raid has 'a strong and statistically significant effect on the firm's share price, with its cumulative average abnormal return being approximately -2%': G. Langus and M. Motta, 'The Effect of EU Antitrust Investigations and Fines on a Firm's Valuation', CEPR Discussion Paper No. DP6176, March 2007.

²² Case C-99/00, *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities* [2002] ECR I-09011.

²³ See Regulation 1/2003, at Recital 15 and Chapter IV (in particular Articles 11 and 12). On cooperation under the ECN, see e.g. D. Schnichels, 'The Network of Competition Authorities: How Will It Work in Practice?' in D. Geradin (ed), *Modernisation and Enlargement: Two Major Challenges for EC Competition Law* (Antwerp, Intersentia, 2004), at 99-121.

²⁴ See European Commission, *Commission Notice on Cooperation within the Network of Competition Authorities*, 2004/C 101/03, Brussels, 24 April 2004, at paragraph 1.

assistance concerning fact-finding; and coordination in order to ensure consistency in the application of the EC competition rules. There is a strong, reasonable argument that the ECN, as currently designed, is compatible with the requirements of the European Convention on Human Rights and of the Charter of Fundamental Human Rights of the EU.²⁵ Furthermore, according to officials at least, there have not been any major problems with case allocation or fact-finding assistance. As for any inconsistencies in the application of EC competition law, these need to be understood in the context in which they occur. There have been many decisions resulting from the work of the ECN, and there have been relatively few inconsistencies. All of that said, practitioners feel nonetheless that the ECN is not sufficiently transparent in the way in which it works. More transparency concerning the work of the ECN would be welcome as it would result in a more consistent application of EC competition law. Moreover, transparency would also play an instrumental function in ensuring that citizens, and perhaps more evidently, the business community, maintain their respect for both competition law and the institutions that enforce them. It is understood that part of the success of the ECN has been the confidential nature of its proceedings, and the value of transparency therefore should not be overstated. Nevertheless it does not follow that the current veil of secrecy should be maintained. In short, there is scope for developing further transparency concerning the ECN without jeopardising its current effectiveness. It appears that the Commission is open to the idea of increasing transparency in this context, in particular as regards the topics the ECN discusses at any given time as well as the issues underlying such topics. It is hoped that publicity of its work may be established in future through the use of the EC Competition Policy Newsletter or a newly created ECN Policy Newsletter.

III. COMMUNICATION RECEIVED BY THE COMMISSION

The Commission is not the only entity whose effective communication can help improve the operation of the enforcement framework that exists at EU level. In particular, those active on the market have a significant role to play. Not only can these parties act as complainants – and in fact should be encouraged to complain when they have legitimate concerns – but they can also help: (i) to keep the Commission educated on innovative, cutting-edge business practices that help to not only increase profits for the undertakings involved but also ultimately improve consumer welfare in a given market; and (ii) to prioritise the Commission's work. The extent to which market actors can fulfil these roles depends on the specifics of the enforcement framework. Changes to this framework, as occurred with the adoption of Regulation 1/2003, can have a significant impact on the ability of these parties to fulfil such roles.

The notification regime that existed prior to 1 May 2004 was reasonably effective in facilitating the exercise of these two communicative roles. By notifying the details of the agreements that have been concluded by them, market actors kept the Commission abreast of developments in business practices as well as the particular characteristics of a given market; the communication of the details of a given agreement in effect helped to educate the Commission. Furthermore, by notifying, the undertaking communicated their uncertainty concerning the compatibility of their own agreements with Article 81 EC. Assuming good faith on the part of undertakings active on a market,²⁶ the Commission could be reasonably confident that if an anti-competitive agreement was to be found it would be found among

²⁵ See generally W. Wils, 'The EU Network of Competition Authorities, the European Convention on Human Rights and the Charter of Fundamental Rights of the EU', in C.D. Ehlermann and I. Atanasiu (eds), *European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities* (Oxford, Hart Publishing, 2003).

²⁶ Or simply self-interest: the undertakings wished to avoid a retroactive fine by notifying. This is not to say, however, that the undertakings were not excessively cautious in notifying (obviously innocuous) agreements.

those notified.²⁷ The notification system in effect helped the Commission to prioritise its work and find the proverbial ‘needle in the haystack’ that is an anticompetitive agreement.

But this regime was criticised by many for its inherently inefficient nature. Not only did the regime require undertakings to spend resources on completing and filing the requisite Form A/B every time an agreement that might fall within the scope of Article 81(1) EC was concluded, it also required the Commission to employ its scarce resources responding to these applications. Most of the agreements notified were on the whole innocuous in competition law terms. Fortunately the use of non-binding comfort letters was developed by Commission to help it with its workload. But this practice still absorbed a significant amount of the Commission’s time and effort. The abolition of the notification regime, and the consequent establishment of the direct applicability of Article 81(3) EC, was therefore seen by many as a welcome development, saving both Commission resources and reducing costs for businesses.²⁸ Since modernisation the Commission has been free to concentrate on more pressing issues, such as the existence of hard-core cartels, and this is to be welcomed as it helps to ensure the maximisation of consumer welfare with the EU.

That said, it is submitted that Regulation 1/2003, as it currently operates, has left a gap for the two important communicative roles noted above. In particular, the following negative consequences have been observed:

- (i) with the abolition of the notification system, there has been a reduction in the ability of the Commission to update its knowledge of the markets in the European economy; and
- (ii) with the abolition of the notification system, the Commission has also lost the mechanism whereby undertakings communicate to the Commission what they consider to be *their own* questionable agreements.

Both of these drawbacks need to be addressed if the Commission is to be as effective as possible in prioritising its work and establishing the impact of novel business models/practices on competition in a given market. Whilst neither of these negative consequences is pronounced enough to argue for the re-introduction of the notification regime, and with it the undesirable level of inefficiency, they are nonetheless still significant enough to warrant consideration by the Commission.

In particular, it is incumbent upon the Commission to establish and maintain an effective and dynamic mechanism to keep itself up to date with cutting-edge developments in the market. Regularly consulting with industry obviously helps. So too does the regular employment of industry experts and the use of market consultants when necessary. The Commission cannot assume that it has sufficient experience of the working of a market economy to be lax in its self-educative efforts. Importantly, the Commission must also be prepared to learn from its mistakes, and must undertake regular and rigorous *ex post* assessments of the impact of its decisions (including the imposed remedies) on consumer welfare. The efforts by the Commission to keep its competition policy up to date (in the form of *ex post* publications, assessments and studies) should be proactively pursued and fed into the ECN, so as to ensure the convergent and consistent application of EC competition rules. In the absence of a strong educative commitment the Commission risks producing type II errors and ultimately chilling competitive, consumer-welfare-enhancing behaviour.

There are a number of ways of dealing with the second deficiency. For a start, by striving to establish an optimal sanction, the Commission can (re)invigorate compliance programmes and self-enforcement efforts.²⁹ Second, the Commission can encourage third parties to come forward with information that may help establish a competition violation. While competition law is about protecting competition and not competitors, the views of

²⁷ A notable exception would be cartel agreements.

²⁸ See e.g. W. Wils, *Principles of European Antitrust Enforcement* (Oxford, Hart Publishing, 2005), at Chapter 1.

²⁹ With cartels there is of course the leniency programme. But it is conceded that not many (secret) cartels were notified to the Commission under Regulation 17.

third parties (which includes customers as well as competitors) should be given their due attention. What is important here is that the Commission develops and maintains a perception³⁰ that (legitimate) complaints will not be ignored, and that sufficient protection from retaliation for those who do complain is provided. For this reason, as part of the Regulation 1/2003 consultation, the Commission should encourage submissions on the effectiveness of the current (formal and informal) framework applying to third party complainants. Finally, when conduct is indeed questionable, undertakings should be encouraged to seek informal guidance. This point is linked to the previous analysis concerning communication from the Commission. If undertakings, after seeking detailed legal advice, are indeed unsure of the compatibility of a given agreement with EC law, they should have the opportunity to seek guidance on this matter from the Commission. By presenting itself as amenable to such approaches the Commission helps to reduce somewhat one of the negative drawbacks of the abolition of the notification regime. In the absence of such an environment, the undertaking may well conclude the questionable agreement, notwithstanding its desire to keep within the law, and hope that either the Commission does not rule against it at a later date or that if the Commission does so rule that the fine imposed will be minimal. To avoid either case, it is preferable for early communication between the Commission and the relevant undertaking to be encouraged.

IV. CONCLUSION

On the whole, Regulation 1/2003 appears to be working well. The abolition of the notification system in particular has generally reduced the costs on business and has allowed the Commission to focus on more important concerns, such as the enforcement of EC competition rules against cartels. The effective use of sector inquiries has helped the Commission to fulfil its role of enforcing EC competition law. Nevertheless, sector inquiries and infringement investigations should not be confused. The use of dawn raids in the context of a sector inquiry leads to a blurring of the lines. That is unhelpful. Although its work is done behind closed doors, the ECN also appears to be functioning well, particularly as regards case allocation. But concerns have nonetheless still been established, and should not be ignored. In this paper, we have developed the theme of (lack of) effective communication between the Commission on the one hand and market players and the public on the other.

Whilst a degree of communication does currently exist between the Commission and the market players, there is room for improvement. In particular, the Commission needs to convince market players that they will be provided with informal guidance where cases give raise to genuine uncertainty, as well as more formal guidance when the Community public interest so requires. In order to ensure consistency, this guidance - or more precisely the Commission's position underpinning it - should eventually be made public. With dawn raids conducted during the course of a sector inquiry, the Commission should establish a set of minimum safeguards to protect against arbitrary or disproportionate intervention in the sphere of the private activities of any companies. Moreover, it should be obliged to communicate to the general public (which includes actual and potential shareholders) that the implementation of such investigative methods does not imply the existence of unlawful behaviour on the part of the target undertaking. More effective communication of the (important) work of the ECN also needs to be provided, particularly if citizens and the business community are to maintain their respect for both the legal rules and the institutions that enforce them.

The entry into force of Regulation 1/2003 has also had negative effects in terms of the communication of information from market players to the Commission. Notably, with the abolition of the notification regime, the Commission is given less help in finding the proverbial 'needle in the haystack' that is an anticompetitive agreement, and also no longer benefits from the informative effect of the previous Form A/B application. While neither of

³⁰ Regulation 1/2003 already provides a legal basis for the treatment of complainants: Article 7(2).

these negative consequences is pronounced enough to argue for the re-introduction of the notification regime, they are nonetheless still significant enough to warrant consideration by the Commission. In particular, it is incumbent upon the Commission to establish and maintain an effective and dynamic mechanism to keep itself up to date with cutting-edge developments in the market. In the absence of a commitment to establish such a mechanism the Commission risks producing type II errors and ultimately chilling competitive, consumer-welfare-enhancing behaviour.

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