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# **The Silent Revolution Beyond Regulation 1/2003**

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Christophe Lemaire & Jérôme Gstalter  
Ashurst LLP and University of Paris I Panthéon Sorbonne

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### I. REGULATION 1/2003: A NEW BEGINNING

Regulation 1/2003 entered into force in 2004 and has been described as a "Copernican revolution."<sup>1</sup> In fact, it has not only deeply changed the relations between national and EC laws but also the relations among Competition authorities. This regulation provides a decentralized enforcement of Articles 81 and 82 EC and sets up a European Competition Network ("ECN"). Its purpose is inter alia to prevent contradictory decisions among its members, to allow allocation of cases among competition authorities, and to provide new areas of cooperation, such as exchanges of information and assistance for investigations.

Currently, the European Commission is about to assess the five years' implementation of this Regulation. To this end, it launched a public consultation on July 24, 2008. It is expected that the answers to this consultation will show some problems in the functioning of the ECN and more generally in the implementation of Regulation

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\*Christophe Lemaire is a Senior Lecturer, University of Paris I Panthéon Sorbonne (Sorbonne Affaires) and Attorney with Ashurst LLP, [Christophe.Lemaire@ashurst.com](mailto:Christophe.Lemaire@ashurst.com). Jérôme Gstalter is a PhD student, University of Paris I Panthéon Sorbonne (Sorbonne Affaires), [Jerome.Gstalter@ashurst.com](mailto:Jerome.Gstalter@ashurst.com)

<sup>1</sup>M. Wathelet, Le nouveau règlement "concurrence": révolution copernicienne?, in Le nouveau règlement d'application du droit communautaire de la concurrence: un défi pour les juridictions françaises, Dalloz, Paris, 2004, p. 21.

1/2003.<sup>2</sup> However, we assume that this regulation did not raise critical problems and that the main challenges are located outside the scope of this regulation.

Since the entry into force of Regulation 1/2003, European competition authorities have become under the obligation to implement the same substantive rules—Articles 81 and 82 EC—when behavior has an effect on trade among Member States. By contrast, procedural rules and the national institutional framework remain, for the vast majority of time, in the hands of each Member State, according to the principle of institutional and procedural autonomy. The only limits to this autonomy enjoyed by Member States are those resulting from the principles of effectiveness and equivalence as set out by the European Court of Justice.

However, one cannot envisage that the juxtaposition of 27 procedural and substantive laws for the implementation of a single Community rule will not raise questions, comparisons, and an informal move towards a point of convergence.

Indeed, the ECN provides a very good framework for such a process. The Commission Notice on cooperation within the ECN made clear that the ECN was not only a place where cooperation should take place to allocate cases, exchange information, and assist each other for investigations, but also "a forum for discussion" and a "basis for the creation and maintenance of a common competition culture in Europe."<sup>3</sup>

Therefore, the following developments will not deal with the Copernican revolution described above. Our aim is to depict a more "silent revolution" which has run

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<sup>2</sup>See, *The Modernisation of European Competition Law, Initial Experiences with Regulation 1/2003*, FIDE XXIII Congress Linz 2008, vol. 2, Nomos, 2008 and in particular the French Report from L. Idot and Ch. Lemaire, p. 79.

<sup>3</sup>Official Journal C 101, 27.04.2004, p. 43-53, (§ 1).

for five years on topics that Regulation 1/2003 has voluntarily chosen not to tackle: institutional and procedural issues. In these two areas, a movement of convergence is at work. To illustrate this movement in this short paper, we will first show what kind of influence Regulation 1/2003 has had on institutional design at national level (II). We will then focus on the procedural convergence which is taking place within the ECN (III), before drawing some concluding remarks (IV).

## **II. INFLUENCE OF REGULATION 1/2003 ON INSTITUTIONAL DESIGN**

It is very hard to argue that there exists a common model of institutional framework for competition authorities in Europe. Moreover, Regulation 1/2003 does not compel Member States to adopt a specific institutional framework in order to implement Articles 81 and 82 EC. It only provides, in its Article 35, that Member States shall designate

...the competition authority or the authorities responsible for the application of Article 81 and 82 of the Treaty in such a way that the provisions of this regulation are effectively complied with.

Then the Regulation specifies that the designated authorities may include courts and also that Member States may allocate different powers and functions to those different national authorities, whether administrative or judicial.

Nevertheless, when looking at the "family portrait" of the members of the ECN in 2004, national competition authorities ("NCAs") represented by two officials at the head of two different administrative bodies were residual and therefore attracted a lot of attention. The President of the French *Conseil de la concurrence* made it clear that the

implementation of a single law combined with the entry into the ECN would crystallize the singularity of the French dual system. He questioned its relevance.<sup>4</sup>

Nowadays, we clearly observe from the "family portrait" that dual authority systems are about to disappear for the benefit of a single competition authority merging all powers. For example, as a consequence of a law enacted on September 1, 2007, the two former Spanish Competition Authorities merged into one single authority. The adoption of this new law was clearly intended to adapt Spanish competition law to the modern era. In the next few months the same kind of phenomenon will occur in France since the Law for the Modernization of the Economy, adopted in August 2008, will lead to the creation of a single competition authority in charge of both antitrust (including investigation process and decision) and merger control.<sup>5</sup>

These changes were probably facilitated by the influence of Regulation 1/2003 and the creation of the ECN does not seem irrelevant. The ECN is a forum for sharing experience and for permanent benchmarking in terms of efficiency. In this arena, dual authority systems are isolated and have not proven their ability to be more efficient than the single authority systems.

### **III. PROCEDURAL CONVERGENCE: THE HIDDEN SIDE OF REGULATION**

#### **1/2003**

The entry into force of Regulation 1/2003 in May 2004 generated a spill-over effect on procedural rules dedicated to the implementation of Articles 81 and 82 EC.

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<sup>4</sup>See B. Lasserre, *Le Conseil de la concurrence dans le réseau communautaire*, CONCURRENCES n° 3-2005, available at <http://www.conseil-concurrence.fr/doc/reseau.pdf>

<sup>5</sup>See *Ashurst Competition Newsletter*, October 2008, [http://www.ashurst.com/doc.aspx?id\\_Content=3964](http://www.ashurst.com/doc.aspx?id_Content=3964)

Since 2004, each year has seen the emergence of new areas for procedural convergence within the EU. For this reason, a chronological description, evading any kind of hierarchy, seems an appropriate way to describe this process.

*A. 2005: Protection of Business Secrets*

Let us start with a typical French example related to the protection of business secrets before competition authorities. The changes which intervened in the protection of business secrets may illustrate a kind of top-down (from the EU to the national level) convergence. In this field, convergence has not been imposed on Member States. Nevertheless, the French example shows that the protection of business secrets at the European level has influenced its evolution in France.

The French approach to file access began with the principle of equality of access to the files of both the undertaking under examination and the complainant. It meant that, by contrast with the EU procedure, all parties to an antitrust procedure had access to the same documents and one party could not oppose access to the file for another party on the basis of the existence of business secrets. The only way to protect business secrets was the withdrawal of the evidence from the file, which of course had adverse effects on the examination of the case by the authority. While this system did not raise major problems before Regulation 1/2003, the situation changed after May 1, 2004. Such a system could have raised difficulties in a network in which the European Commission and NCAs have the power, on the basis of Article 12 of Regulation 1/2003, to provide, on a voluntary basis, one another with and use in evidence any matter of fact or of law, including

confidential information. It was clear that some Competition Authorities, including the European Commission, could have been reluctant to transfer evidence to the French *Conseil de la concurrence* since it was not able to offer the same level of protection of business secrets than the authority sending the documents. This situation could have limited the effectiveness of Article 12.

Taking into account these potential adverse effects, the procedure of access to files has been modified in France and the rights of the complainant have been limited in consideration of the protection of business secrets. The new French regime is now close to the EU regime.<sup>6</sup>

In this specific case, French law was amended spontaneously and unilaterally in order to fully benefit from the network and to prevent a situation where the *Conseil de la concurrence* would have been isolated. The other fields of convergence listed below have a more collective dimension.

### ***B. 2006: The Convergence of the Leniency Regimes***

There is little doubt that the leniency procedure within the EU is the best example of the convergence of both national and EU procedural rules.

Regulation 1/2003 did not deal with leniency and it decentralized the implementation of Article 81. This situation raised several difficulties as regards the effectiveness of leniency procedures. The first concern was based on the need for undertakings to file multiple applications before the European Commission and before each NCA which had the potential jurisdiction to apply EU law in a given case, since

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<sup>6</sup>See Ordinance 2004-1173 of 4 November 2004 replacing article L.463-4 in the French Commerce Code; see also Decree 2005-1668 of 27 December 2005.

Regulation 1/2003 did not provide certainty on the allocation of a case within the ECN and since there was no mutual recognition for a leniency decision within the ECN. The second major concern resulted from divergence among leniency regimes throughout the EU. Moreover, in 2004, a limited number of NCAs had a leniency procedure in their "toolbox." These differences in the leniency regimes among Member States would have generated a disincentive on potential applicants to come forward.

As a consequence, an initiative in favor of coordination took place within the ECN and led to the adoption of the "*ECN Model Leniency Program*" in September 2006. The Model Program aims at solving the problems enumerated above by setting out a common framework applicable to leniency for whichever European competition authority examines the case.

The ECN Model is not legally binding. However ECN members "commit to use their best efforts, within the limits of their competence, to align their respective programs with the ECN Model Program." Indeed, the effects of this soft law instrument were far from negligible. It promoted convergence on the conditions of eligibility and the conditions of immunity from fines. It introduced inter alia a summary application mechanism with NCAs in precise circumstances. Last but not least, it led to the introduction of leniency procedures in the vast majority of Member States and to the modification of some existing leniency procedures in other jurisdictions. For example, the European Commission adopted a new notice after a public consultation in December 2006. A few weeks later the *Conseil de la concurrence* also adopted its revised leniency



program. Most of the programs adopted after the publication of the ECN Model Program are in line with it.

*C. 2007/2008: The Adoption of a Settlement Procedure at EU Level*

When considering alternative or accessory procedures to sanctions implemented before competition authorities in Europe, three procedures can be listed: leniency, commitment, and settlement.

Two of these procedures can be excluded from the analysis at this stage. We have already dealt with leniency, and the commitment procedure does not really fit with the process of "soft convergence." This procedure was implemented informally by the European Commission before the adoption of Regulation 1/2003. The latter formalized the commitment procedure before the Commission and listed it as one of the categories of decisions that the NCA shall have the power to adopt when applying Articles 81 and 82 EC.

When dealing with settlement procedures, it should be noted that this topic emerged only recently at European level. While this procedure has been implemented for several years within some Member States, like France and Germany, it was absent from the Commission's arsenal. In 2007 the Commission made public its proposal to introduce a settlement procedure at the EU level and the final text was adopted in 2008.<sup>7</sup>

There is little doubt that the recent introduction of a settlement procedure in European Law has been influenced by the existence of similar procedures in some Member States. Furthermore, the existence of this kind of procedure in some Member

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<sup>7</sup>See Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases.

States has fed an intense debate and led to benchmarking during the consultation phase opened by the Commission. Some amendments to the draft proposed by the Commission are probably the result of benchmarking and of problems experienced before some NCAs. The adoption by the Commission of this procedure illustrates another aspect of the convergence process.

***D. 2008: Adoption of "Principles for Convergence" on Pecuniary Sanctions by the ECA***

A more recent example of this trend toward convergence of procedural rules in EU Member States occurred in the field of pecuniary sanctions for infringements of antitrust law. In this regard, European Competition Authorities ("ECAs")<sup>8</sup> set up a working group in May 2006.<sup>9</sup> The conclusions of this working group resulted in the publication of "principles for convergence" in May 2008.

One could wonder why these principles were discussed within the ECA and not the ECN. In the absence of any answer in the document published, one could note that the ECA was founded before the ECN and has a wider scope. It is also a forum where, despite the ECN, the European Commission has no specific powers or leadership. ECA could therefore be seen as a more "multilateral" forum.

This document specifies that these principles for convergence are "shared by the European Competition Authorities." As a consequence, it is not clear whether there is a need for convergence, as suggested by the title of the document, or simply a need for clarification of existing common principles within the Member States. A press release

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<sup>8</sup>The Association was founded in 2001, which is a forum of discussion for Competition Authorities in the EEA.

<sup>9</sup>French *Conseil de la concurrence*, Press Release of 7 October 2008, "Conclusions du groupe de travail ECA sur les sanctions pécuniaires".

issued by the French *Conseil de la concurrence* on October 7, 2008 brings clarification on this point as it specifies that these convergence principles have not been implemented before every competition authority but the latter considers that these principles contribute to an efficient fining policy. The French *Conseil de la concurrence* has also indicated that it was favorable to the publication of French guidelines on pecuniary sanctions.

These principles for convergence repeal some general considerations about pecuniary sanctions which should have a deterrent effect but should also remain proportionate. The document continues by addressing the question of the maximum statutory fine. Finally, this ECA publication details the criteria that should govern the determination of the fine including both mitigating and aggravating factors. When reading these principles for convergence, it is possible to assert that they are not far from the principles listed by the European Commission in its guidelines of 2006. But one should also note that these new guidelines from the Commission are sometimes far removed from its previous guidelines of 1998 (specifically for the calculation of the basic amount of the fine) and are closer to the guidelines of NCAs (such as the OFT).

A positive look at this initiative leads to the conclusion that these principles succeed in conciliating, on the one hand, the procedural autonomy of each Member State and, on the other hand, the effectiveness of EC law together with the principle of equivalence. They also, to some extent, enhance the predictability of fines and legal security for companies and give them some insurance of equal treatment regardless of the competition authority applying Article 81 or 82 EC. However, some commentators may

have a different view and point out the uselessness of such initiatives and the risk of an increase in the amount of fines throughout the EU (in particular if the methodology followed by the European Commission is taken as an example).

#### **IV. CONCLUDING REMARKS**

Even if the public consultation launched by the Commission seems to focus only on the implementation of Regulation 1/2003, several lessons can be learned from previous developments.

First, one can observe that, even if Regulation 1/2003 leaves procedural rules and institutional questions in the hand of each Member State, 2004 was also the starting point of a movement of convergence in these two areas. Besides the Copernican revolution, a more silent but not insignificant revolution is at work.

Second, the convergence does not have one single point and the procedural rules applied by the European Commission do not necessarily constitute the reference point. The movement towards convergence is more "multilateral." It is first vertical, and this vertical process can be descending (top-down influence from the European Commission to the NCA), similar to the reform of the protection of business secrets in France. But it is also ascending (bottom-up influence from the NCA to the European Commission) similar to the settlement procedure. Then, the movement of convergence is also horizontal, as illustrated by the convergence of the leniency regimes and pecuniary sanctions.

Third, it is interesting to note that the reciprocal influence among authorities does not only take place within the ECN. Some common principles emerged from other

informal and wider organizations like the ECA. In addition, convergence is mainly promoted by "soft law instruments" and not necessarily by legally binding regulations.

This situation shows that, when facing problematic discrepancies among their respective procedural rules, European competition authorities try to find common and pragmatic solutions. Each of the members of the ECN can present to the others the best of its legal tradition. The various options are compared and debated, and, in the end, one or a combination of these options is retained and becomes a common approach. This indicates that, if convergence is certainly needed, it does not require global and theoretical answers or "super-harmonization." The potential conflicting discrepancies can be overcome by a pragmatic and progressive approach, which is the essence of European integration.

If each of the past five years has illustrated one step toward convergence, the question that arises now is "what's next?" Two areas seem to be of particular interest: the level of protection of the legal privilege (where there exist major discrepancies among Member States, and between them and the Commission) and the promotion of compliance programs (where some competition authorities, including the Commission, seem skeptical and indifferent as regards compliance programs, while others, like the OFT in UK and, more recently, the French *Conseil de la concurrence*, are promoting them). Let us listen now whether the silent revolution which is at work will become audible...