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I. INTRODUCTION

Regulation 1/2003, the cornerstone of the modernization of the European antitrust enforcement rules and procedures, entered into force on May 1, 2004.[1] The prime objective of Regulation 1/2003 was to bring about a more effective enforcement system by enabling the Commission to concentrate its resources on the prosecution and punishment of anticompetitive practices rather than the *ex ante* screening of notified agreements.

Most notably, Regulation 1 abandoned the notification system, authorized and directed national competition agencies to apply Articles 81 and 82, and transformed Article 81(3)—which includes the conditions under which restrictive agreements are exempted from the prohibition of Article 81(1)—into a directly applicable provision. The regulation abolished the exclusive competence of the Commission to balance pro-competitive and anticompetitive aspects in the analysis of agreements under Article 81. Importantly, these changes placed a significantly higher burden on businesses and their advisors to assess, on their own, the legality of potentially restrictive agreements under EC competition rules. Indeed, under the new system, notification of agreements to the

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[1] Commission 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 Treat, OJ 2003 L1/1, 04.01.2003.

Commission to obtain an exemption or modify the arrangement to meet the Commission's concerns is no longer possible. Overall, Regulation 1 brought the European enforcement system much closer to the U.S. system

Some four years after the entry into force of Regulation 1, the question arises whether the new European system of *self –assessment* works and how it could be improved.[2] This contribution seeks to highlight some preliminary considerations of a practical nature with an emphasis on the phenomenon of companies' self–assessment. Our perspective is that of in-house antitrust counsel to an international high-tech company.

The *decentralization* of the European Union's antitrust enforcement rules is a key element under Regulation 1. The new regime, however, also includes mechanisms for cooperation between the Commission and national competition agencies and courts and enhanced Commission investigative and remedial powers. It also provides for declaratory decisions in relation to past infringements, interim measures, "commitment decisions" to close a case without a finding of infringement in light of commitments proposed by the parties, and the power to issue "clearance" or "exemption" decisions finding that the conditions of Articles 81 and 82 are not met. Obviously, these elements of the new procedural framework affect the way in which companies are able to evaluate the legality

[2]This contribution coincides with the consultation that the EC Commission has recently launched on the functioning of Regulation 1. See http://ec.europa.eu/comm/competition/antitrust/legislation/regulations.html

of their agreements. For instance, clearance decisions within the meaning of Article 10 may potentially compensate for the loss of guidance in individual cases.[3]

It was clear that, at the time Regulation 1 was adopted, the state of the enforcement of European competition law was alarming. In particular, the Commission's monopoly on the application of Article 81(3) and the system of prior notification and administrative authorization had resulted in a significant backlog of notifications, overuse of informal "comfort letters," and a diversion of resources away from the investigation and prosecution of cartels. Moreover, the analytical framework underlying Articles 81 and 82 was rudimentary, at best. As a result, the enforcement system preceding the regime under Regulation 1 was marked by significant over-and under-enforcement, as well as excessive inefficiencies.

While a number of key elements of the new enforcement regime require critical reflection, we believe that Regulation 1 introduced a number of significant improvements in the enforcement of the EC competition rules. Although it is difficult to isolate the precise impact of Regulation 1, it also appears that the regulation has had a positive impact on the Commission's workload as the number of open cases decreased from 805 in 2002 to 225 in 2007, while there has been a remarkable increase in the number of cartel investigations and decisions. Currently, the Commission is producing an average of 5-8 cartel decisions each year.

[3]See infra, text accompanying note 13. The procedure under Article 10 resembles to some extent the Business Review Letter Procedure of the U.S. Department of Justice as delineated in 28 C.F.R. Section 50.6.

II. THE INTERFACE BETWEEN SELF-ASSESSMENT, SUBSTANTIVE RULES, AND POLICY GUIDANCE

Successful implementation of a system of self-assessment requires a meaningful degree of guidance with respect to the scope and interpretation of the law. Generally speaking, competition agencies may provide guidance on the substance of the law by means of guidelines in the form of interpretative notices, exemplary decisions, and the like, as well as through dialogues with enforcement officials. The latter is particularly important if the substantive rules are unclear and if the agencies charged with the application of those rules have significant discretionary power. The fact that, to date, civil enforcement actions are scarce and generate relatively few authoritative decisions underscores the need for policy guidance through those other means.

The radical reform of the European antitrust enforcement rules under Regulation 1 has gone hand-in-hand with a greater appreciation of the need for economic analysis under Articles 81 and 82. In fact, the call for "a more economic approach" under EC antitrust law has been persistent and key economic concepts have gradually been incorporated in most legislative instruments under European law, albeit not always in a consistent manner. For instance, the 1999 and 2004 EC block exemptions on vertical restraints and technology transfer agreements have been premised on the existence of market power. Similarly, the 2004 Notice on the application of Article 81(3) takes as a starting point that, for a restriction of competition within the meaning of Article 81(1) to exist, the agreement must lessen consumer surplus. Since this increasing focus on

economic analysis is in tension with the objectives of legal certainty and predictability, the current state of play is less than satisfactory. This is so because in many cases it is open to debate how much economic evidence would be required and whether, despite that type of evidence, the Commission would not simply resort to a (modified) per se analysis of the conduct at hand.

The fact is that in Europe important parts of the law remain blurred. This is partly because the concept of the "more economic approach" itself is too vague to provide any meaningful direction. The uncertainty pertains to a number of well-known areas. For instance, the application of Article 82 to price- and non-price exclusionary conduct remains clouded, especially in light of case law of the Community Courts that suggests a (modified) *per se* standard of analysis,[4] while the 2005 Discussion Paper on this type of conduct has given rise to considerable debate and has not yet been followed up by other policy statements. Moreover, important decisions that could shed light on the application of Article 82 are not yet published.[5]

Similarly, while the EC Notice on the application of Article 81(3) sets out in general terms how the parties to an agreement should evaluate static and dynamic efficiency gains, it is unclear how the Commission itself would apply that analytical framework in a specific case. For instance, while in *Leegin* the U.S. Supreme Court has mandated a rule of reason analysis for resale price maintenance,[6] the Commission appears to take a conservative view holding that the time may not yet be ripe to take

[4]See for instance Case C-95/04, British Airways v Commission, 2007 ECR 233.

[5]See for instance Case COMP/ 38.113 Prokent- Tomra

[6]Leegin Creative Leather Products, Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007)

resale price maintenance off the list of "hardcore" restrictions included in Article 4 of the block exemption on vertical restraints. In addition, it is argued that resale price maintenance may already now, in exceptional circumstances, be "essential" in the meaning of the EC Notice on Article 81(3) and thus be permitted, despite the fact that the Commission itself has held on a number of occasions that those restraints are not essential to bring about the claimed efficiencies and, as a consequence, do not meet the requirements of Article 81(3).[7] Clearly, in these and other cases, self-assessment would be made much easier if there would be a practical and effective way to procure guidance. In this respect it is only a modest consolation that some national agencies are significantly more liberal in offering informal guidance.

In addition, although the quality of the interpretative notices under EC law has undoubtedly improved over time, some policy guidelines are notoriously difficult to apply in the context of a "self-assessment" exercise. This applies for instance to the provisions on "exploitation" included in the block exemption on research and development agreements.[8] Again, this suggests that self-assessment would benefit from more practical ways and opportunities to obtain guidance on the substance of the law.

[7]See for instance Commission Decision of 22 December 1976 relating to a proceeding under Article 85 of the EEC Treaty (IV/24.510 - GERO-fabriek) and Commission Decision of 5 July 2000 relating to a proceeding under Article 81 of the EC Treat (Case COMP.F.1/36.516 – Nathan Bricolux).

[8]Commission Regulation (EC) No 2659/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements , Official Journal L 304, 05.12.2000, p. 7

III. THE INTERFACE BETWEEN SELF–ASSESSMENT AND PROCEDURAL RULES

As touched upon above, Regulation 1 introduced a number of information, consultation, and coordination mechanisms governing the relationship between the Commission and the agencies and courts of the Member States. These mechanisms aim to contribute to the uniform application of European antitrust law in the post-2004 decentralized world. While those provisions are not of a substantive nature, they nonetheless seek to avoid conflicting outcomes and, in doing so, increase legal certainty and help companies assess the legality of their arrangements.

Unfortunately, the coordination mechanisms are less than perfect. First, particularly in the newer Member States of the European Union, such as Romania, judicial and administrative agencies have not yet properly absorbed the principle of direct applicability of EU antitrust law. Second, there is evidence that in the first years of application of Regulation 1, EC and national competition law continue to be interpreted differently and that in some instances national agencies arrive at different results when dealing with substantially the same matter. As a result, there are reports of practices that were initially condemned by one national agency, but subsequently exempted by another competition agency,[9] as well as conduct that was initially exempted by one agency and later condemned by another.[10]

[9]For instance, in *Visa International*, the non-discrimination rule was first condemned by the Swedish and Dutch agencies and later found to be compatible with the European competition rules by the Commission.

[10]For instance, in the *Michelin II* decision, the Commission found that Michelin's rebate system infringed Article 82, while that same system had been reviewed and approved by the French competition agency. See report of the Global Competition Law Centre, available at http://www.coleurop.be/news/1412

Other areas where procedural rules affect the ability of companies to assess on their own the legality of their arrangements are those that have attracted commitment decisions under Article 9 of Regulation 1 or that lend themselves to guidance letters within Article 10 of the regulation. Unfortunately, to date, the scope of Article 9 is subject to significant debate,[11] while the Commission has not yet taken any guidance decision under Article 10 of Regulation 1.

From the perspective of self-assessment, the lack of any Article 10 guidance decisions is troubling. Article 10 guidance letters are expressly aimed at providing legal certainty, particularly where cases give rise to genuine uncertainty because they present novel or otherwise unresolved questions. However, in its Notice on informal guidance, the Commission has defined in very restrictive terms the circumstances in which it may be prepared to issue guidance letters.[12] Moreover, the procedure is marked by a number of practical disadvantages, particularly the possibility that the Commission would open proceedings in relation to the facts at issue, the fact that information provided may be used in subsequent proceedings, and the possibility that the Commission will share the information received with national competition agencies. As such, the procedure under

[11] In the period between April 1, 2004 and December 31, 2007 the Commission adopted eleven Article 9 decisions. The main debate relates to the principle of proportionality according to which commitment decisions should not go beyond what is necessary to remove the alleged infringement. See generally, Case T – 170/06, Alrosa v Commission, judgment of 11 July 2007, not yet reported. This principle does not seem to be applied uniformly in all member states.

[12] 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) Official Journal C 101, 27.04.2004, p. 78-80, (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004XC0427(05):EN:NOT). The Commission stresses the discretionary power it has when confronted with a request for a guidance letter and states that it will consider the novelty of the issue raised, the economic importance of the case, and the absence of any proceedings pending before courts or competition agencies.

Article 10 of Regulation 1 creates a disincentive for parties to apply for guidance letters, which in turn does not assist third parties in assessing similar arrangements.

IV. SELF-ASSESSMENT, BURDEN OF PROOF, AND LEGAL PRIVILEGE

A final issue relates to the burden of proof and legal privilege. Under the regime of Regulation 1 parties claiming the benefit of Article 81(3) bear the burden of proof that the conditions of that provision are fulfilled. In practical terms this means that in-house counsel that either opines that Article 81(1) is not applicable or that the conditions of Article 81(3) are met needs to have a well-documented file to be able to build a defense in those cases where the validity of the agreement is challenged in court or by a competition agency. However, as confirmed in the Akzo judgment of 17 September 2007 that same in-house counsel does not enjoy legal privilege.[13] In that judgment, the Court of First Instance ruled in favor of the Commission and rejected the claim of legal professional privilege for communications with an in-house lawyer. The Court of First Instance noted in that respect that the protection accorded to legal privilege only applies to the extent that written communications with the client "emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment."

This position severely hampers the possibilities of in-house counsel to perform self-assessment analyses. In order to conduct a thorough analysis, it is necessary to have discussions with business clients as to the reasons and backgrounds for concluding an agreement. In-house counsel should realize upfront that the Commission does not

[13]Joined Cases T-125/03 R and T-253/03 R, Akzo Nobel v. Commission, judgment of September 17, 2007, not yet published, appeal pending.

consider the minutes of those discussions to be privileged, not even in those situations where that person is a member of the national bar association and is bound by the same codes of ethics and regulations as outside attorneys.[14] This means that in-house counsel may increasingly need the help of outside counsel when assessing the legality of business transactions, even when that would be burdensome, impractical, costly, and entirely artificial.

In our view the increased emphasis on self-assessment under Regulation 1 militates strongly in favor of broadening the scope of legal privilege to protect communications with in-house antitrust counsel.

V. CONCLUSIONS

Self-assessment is a term of art that became fashionable when the Commission embarked on the project that would reshape the administration of European competition law through the adoption of Regulation 1. It refers to the notion that, in the absence of the notification procedure that had been in force in Europe for almost forty years, companies and their advisors should, under the new regime, assess on their own the legality of their business transactions.

Now, almost four years after Regulation 1 entered into force, it appears that, at least from the perspective of in-house counsel, the system is in need of some improvements. This is despite the observation that Regulation 1 has resulted in a generally more efficient and rational system of enforcement. In particular, it is regretted that the Commission has proven to be very restrictive in issuing guidance letters under

[14] Depending on national legislation, legal privilege may be recognised by a national competition authority. This is currently the case in a number of European jurisdictions, including The Netherlands.

Article 10. It also seems that the coordination and consultation mechanisms enshrined in Regulation 1 and that seek to ensure the uniform application of European competition law could be fine-tuned. In addition, it would be helpful if the Commission would intensify its efforts to provide clearer guidelines on the application of Articles 81 and 82. And finally, we note that self-assessment by in-house antitrust counsel would benefit from the legal privilege that under European law is currently reserved for outside counsel.