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Stephen Kinsella & Anouck Meier
Sidley Austin LLP

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# Decentralization or the Law of Unintended Consequences

**Stephen Kinsella & Anouck Meier***

There is an old saying that you should "be careful what you wish for." When the overhaul of European antitrust procedure, in the shape of Regulation 1/2003, was first mooted, it seemed to offer a number of potential advantages: for businesses, a lifting of the shackles of prior vetting of their behavior and, for the Commission, the alleviation of the burden of having to turn the pages on so many unnecessary notifications. Five years on, the Commission is carrying out the scheduled review of the success of Regulation 1. To that end it has solicited comments from its "customers." There are signs that it may have already prejudged the outcome of the consultation in remarks that express satisfaction at how the Regulation has worked—stating that antitrust enforcement was both "strengthened and simplified." It seems timely to question whether that satisfaction is in fact merited.

In the run up to the Regulation, many of us expressed concern that the system of notifications was to be abandoned entirely. We questioned assertions by some officials that the system was being abused by companies notifying practices that they knew would never meet the criteria for exemption, in the hope of somehow sneaking these past the regulator (or at least delaying court proceedings). That charge always appeared to lack credibility, given that any exemption would only be as good as the accuracy of the

*Stephen Kinsella OBE is a partner in and Anouck Meier is a lawyer in Sidley Austin's Brussels office, focusing on EU and UK competition law and EU regulatory law. The views expressed in this article are exclusively those of the authors and do not necessarily reflect those of Sidley Austin LLP and its partners.



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notification on which it was based. Neither was it exactly a vote of confidence in the quality of some of the Commission's own work. Certainly, it was clear that in many instances time was being wasted in consideration of files that either raised no real issue or had little chance of approval. But that seemed largely to reflect a continued and widespread lack of understanding of the rules of the game, the appropriate response to which might be more guidance on those rules rather than a complete abandonment of the game.

Admittedly, within the first five years after passing Regulation 17/62 (the predecessor to Regulation 1/2003), the Commission received 40,000 notifications. However, throughout the 1990s, the number of notifications to the Commission averaged approximately 200 a year, falling to under 100 a year in the 2000s despite a considerable expansion in the size of the European Union. The introduction of a new type of block exemptions, granting firms more latitude in adapting agreements to their commercial needs, reduced DG Comp's workload even further. In the overwhelming majority of the cases dealt with, negative clearances were given, and only a handful of actual exemption decisions were made. By the turn of the century, any suggestion that a well-run DG Comp could not keep up with the pace of notifications was clearly an overstatement.

In response to widespread concerns regarding a loss of legal certainty, the Commission introduced its Informal Guidance Notice to still allow for parties to request a view from the Commission in exceptional cases. Where cases give rise to "genuine uncertainty" because they present novel or unresolved questions for the application of



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Articles 81 or 82, individual undertakings may take recourse to a request for informal guidance. It was stressed that this procedure was to be confined to exceptional cases, and not to provide a back door to the type of fail-safe notifications that were to be consigned to the past. Quite how exceptional was not clear at the time—since the enactment of Regulation 1/2003, despite the expansion of the EU and the growing complexity of commercial life, it appears that not one company has succeeded in persuading the Commission that its practices need such clarification.

The main thrust of the new regime was to be self-assessment. Companies and their lawyers (and increasingly their economists) were to take responsibility for verifying whether their behavior infringed the competition rules and, if it did, whether it might nevertheless generate sufficient consumer welfare to merit an individual exemption. Meanwhile, on a parallel (and to some of us contradictory) track, the ability of companies to make such an assessment with the assistance of their in-house counsel continued to be resisted by the Commission, which maintained the need to deny them the benefit of legal privilege. The costs of compliance were therefore bound to rise. At the same time, the costs of getting the assessment wrong were rising also, and at a greater rate, as the Commission imposed ever higher fines and simultaneously encouraged the growth of private damages actions. And it was not as though the law was standing still either. The Commission continued to innovate in its approach to EU antitrust law, extending interpretations in difficult areas such as rebates and refusal to supply—admittedly areas in which exemption would not have been available if Article 82 applied but nevertheless



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prime candidates for notification and clarification.

A final level of complexity came from the increased activism of the various national competition authorities. Encouraged by the Commission to behave more autonomously in the enforcement of EU as well as national laws, many of them staffed up and began launching their own investigations. In the first nine months of 2008, 95 percent of the cases investigated within the European Competition Network were NCA cases, whereas in 2004, the workload of the NCAs only represented two thirds of all cases. Companies which in the past could have brandished an EU-wide exemption or at least a comfort letter now found themselves having to provide multiple explanations of the same practices but in several languages to officials with different priorities and different concerns. It was hardly surprising that many began to express a certain nostalgia for the old notification system and Form AB.

From the perspective of improved enforcement, it is self-evident that the absence of notifications leads to a corresponding lack of information as to what is happening in the market. We all know from informal feedback from officials that the lack of notifications has gradually choked off what had been an invaluable source of information about how markets work, particularly in relation to new technologies and online services. This is another factor which makes it more difficult to assess the true impact of this deregulation or decentralization. To adopt the language often used by economists, are there more Type 1 errors (failure to unearth anticompetitive practices that would have surfaced under a notification regime) or Type 2 errors (deterring companies from



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pursuing welfare-enhancing practices that they would have contemplated with the protection of notification but would shy away from in the world of self-assessment)?

It was striking that the Commission itself acknowledged the value of a notification system in a 2006 court case, in which the parties were dissatisfied with the limited extent of an exemption and appealed to the CFI. The Commission argued that the parties should not have complained as the exemption granted did at least provide them with "legal certainty which would be lost if the annulment sought was granted" given that Regulation 1/2003 had since brought an end to the system of prior notification and exemption by decision.

Interestingly, while Form AB may have been consigned to the scrap heap, the enforcement culture might not have changed so dramatically. Statistics suggest that the workload of DG Competition these days is still largely driven by notifications, albeit in relation to mergers and cartels. There are some genuine own-initiative investigations and one cannot dismiss the huge effort going into the sectoral inquiries, but most of the resources that were previously devoted to analyzing Form ABs are now, equally reactively, responding to Form COs and leniency requests. There is little evidence of proactive investigation of the sorts of practices that were previously likely to be notified. It could be that commercial practice has changed dramatically in the past five years and that restrictive licensing and distribution practices have been abandoned. Certainly if companies were risk averse in the past, their inability now to obtain some clearance or comfort from a one-stop shop may have had a chilling effect on innovation.



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Personal experience suggests that the Modernization Regulation has not lived up to at least one of the goals canvassed in the prior White Paper: alleviating administrative burdens on firms without sacrificing legal certainty. That objective might have been served better by moving gradually to a more limited notification system rather than abandoning notification entirely. To address the legal certainty issue at least partially, it would now be appropriate for the Commission to make an explicit commitment to accept notifications of novel cases and publish rulings thereon for the benefit and guidance of all.



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