EC Regulation 1/2003: views on its functioning

Prepared by the Commission on Competition

Introduction

Regulation 1/2003 and the related measures brought about a comprehensive modernization of the rules for the implementation of Articles 81 and 82 of the EC Treaty. The first four years of experience with the new rules allow a preliminary assessment of the new system. ICC thanks the European Commission, which is going to prepare a report on the functioning of Regulation 1/2003, for the opportunity to provide its views. By virtue of its cross-sectoral and international membership, ICC has a privileged viewpoint on the experience of these four years across the various Member States.

The modernization reform eliminated an obsolete notification system and established the premises for a more decentralized application of Community competition rules by national competition authorities and national courts. The overall assessment of the new rules is positive. However, ICC respectfully submits that improvements of the current regime are possible, with reference both to the mechanisms aimed at ensuring legal certainty and a uniform application of EC rules, as well as the protection of the rights of the parties concerned.

Part 1 - Direct applicability of Article 81(3)

1. *To your knowledge, how has the application of Article 81(3) in accordance with Article 1 of Regulation 1/2003 worked in practice? Have you encountered any particular issues in relation to the direct applicability of Article 81(3) EC that you would like to highlight? In your reply, please provide details / references for any cases referred to where possible and specify whether these issues related to: (i) the assessment made under Article 81(1) EC; (ii) the application of the four conditions of Article 81(3) EC; (iii) the burden of proof rule in Article 2 of Regulation 1/2003; or (iv) any other matter.*

Regulation 1/2003 made Article 81(3) directly applicable, like Article 81(1) and Article 82. Therefore, in the new system the application of both Articles 81 and 82 is based on self-assessment by undertakings and their advisors. In this context, the issue of the need for legal certainty is often raised.

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The block exemption regulations and the notices by the Commission on the substantive criteria for the application of Article 81 provide guidance which may help companies and national enforcers. In particular, the Commission notices illustrate how to evaluate agreements under Article 81(1) and give indications as to their compatibility with Article 81(3) when the criteria of the block exemptions are not met. Given the importance of regulations and notices in the system, their content should be regularly updated and progressively clarified.

The Notice on Article 81(3), which plays a crucial role, indicates two fundamental principles: 1) agreements should be assessed under Article 81(1) taking into account their economic impact on the market; 2) in the assessment of agreements under Article 81(1), competition authorities and courts should adopt an ex ante view, in order to attach due importance to the incentives for undertakings. The more focused interpretation of the prohibition contained in Article 81(1) resulting from these principles may reduce the practical relevance of an assessment under Article 81(3) both by competition authorities and by national courts. This approach would also contribute to avoid the risk that practices not covered by block exemption regulations (but not blacklisted) are considered automatically contrary to Article 81(1) without any assessment of their actual or potential impact on competition. This was the case, for instance, of a decision by the Spanish NCA, where the refusal of a car manufacturer to conduct an independent expert mediation in a dispute with a wholesaler, not covered by the applicable block exemption regulation, was *ipso facto* considered restrictive of competition (*Mazda case*).

Indeed, there is not much evidence of the application of Article 81(3) by NCAs and national courts. Some cases which might have been assessed under Article 81(3) have been concluded with commitment decisions. This was notably the case for several decisions in the banking sector, including decisions on interchange fees regarding payment cards.

As for the burden of proof, Article 2 of Regulation 1/2003 sets uniform rules for all enforcers (Commission, national competition authorities and national courts). The burden of proving an infringement of the prohibition contained in Article 81(1) and Article 82 rests on the party or authority alleging the infringement, whereas the undertaking claiming the benefit of Article 81(3) bears the burden of proving that the four requirements of that paragraph are satisfied. Recital 5 recalls the general principle under which it is for the party invoking the benefit of a defence against a finding of an infringement to demonstrate that the conditions for applying such defence are satisfied.

The issue of the burden of proof in the new system deserves careful consideration. When an administrative authority is given an active role in the public interest in ascertaining the relevant facts, a formalistic interpretation of the rule on the burden of proof entailing a completely passive attitude by the authority with respect to evidence which may support a defence, raises serious doubts. More generally, ICC respectfully reminds the Commission that in the modernization regime the assessment of an agreement under Article 81(3) does not take place within a notification framework anymore: in a prosecutorial system, aimed at deterrence, the rule contained in Article 2 may conflict with the fundamental principles concerning the rights of defence, including the presumption of innocence. The need to exploit the information in possession of the parties might be satisfied by a rule whereby the authority alleging the

infringement has to provide *prima facie* evidence that the four conditions of Article 81(3) are not met; the defendant will then have the task to provide convincing factual evidence that the agreement is permissible under Article 81(3).

2. *In your experience, how have companies and their legal advisors addressed the assessment of agreements, decisions and practices under Article 81(3) EC after the entry into application of Regulation 1/2003? How do you evaluate the impact of direct applicability on undertakings?*

In the new regime, the ways in which a company and its legal advisors interact with the Commission and national competition authorities are new; they require a more strategic view and imply greater responsibilities for the companies' lawyers.

The notices and Community case-law are not always sufficient to remove all doubts on the compatibility of an agreement or conduct with Community rules. As a result of the elimination of the notification system, there are fewer precedents to rely upon.

Informal discussions with the officials of the Directorate-General of Competition (DG Comp) and NCAs play a crucial role, since they represent an efficient and rapid source of help and clarification, but are not sufficient.

In particular, notable uncertainties surround the assessment of cooperative practices involving investments by companies. A greater use of safe harbors might be useful in this area.

The formal instruments for guidance by the Commission in individual cases provided by the modernization package have not been used yet. No positive decision under Article 10 of the Regulation, which would contribute to form a body of precedents, has been adopted so far. Moreover, DG Comp has not issued any guidance letters under the procedure set out in the Commission Notice on Informal Guidance. The cumulative conditions required to justify a guidance letter are probably too strict. ICC respectfully suggests that they should be reconsidered. Some relief, in this context, has been given in Germany to small and medium enterprises (SMEs). In cases with no cross border effects, a transitional provision in force between 2005 and mid-2009 gives SMEs the right to claim a decision by the NCA that there are no grounds to take any action. However, the SME has to be able to demonstrate a significant legal or economic interest in such a decision.

Moreover, given the increased importance of self-assessment in the new regime, in-house lawyers should be allowed to discuss with the management of the company, without undue constraints, the compatibility with competition rules of a given agreement or conduct. Some Member States (including UK, Netherlands, Belgium, Portugal) already recognize legal professional privilege for advice from in-house lawyers, if certain conditions are met.

In the *Akzo Nobel* judgement, the CFI has adopted a restrictive approach to the scope of legal professional privilege in Commission proceedings for the application of Articles 81 and 82 of the Treaty: an independent lawyer is defined, in negative terms, as one not bound to his client by a relationship of employment. This interpretation creates significant obstacles to the efficient self-assessment of the compatibility of business conduct with Community rules. The obligation on

the company to ask for the support of an outside lawyer, cooperating with the internal legal department, when assessing the compatibility of its conduct with competition rules, represents an artificial and potentially burdensome constraint if compared with a scenario where the undertaking is free to organize the self-assessment process in the way it deems more efficient. An appeal against the Akzo judgement is pending before the Court of Justice.

ICC respectfully suggests that the Commission should consider drafting a legislative proposal regulating the subjective scope of legal professional privilege in the application of Articles 81 and 82, based on a "positive" definition of "independent lawyer". Legal professional privilege should cover communications between a client and outside or in-house counsel, containing or seeking legal advice, provided that the legal counsel is properly qualified and is subject to, and complies with, adequate rules of professional ethics and discipline which are laid down and enforced in the general interest by a professional association.

In any case, a *bona fide* self-assessment should be taken into consideration by the Commission and national competition authorities when imposing fines.

Part 2 - Relationship between EC Competition Law and National Competition Law

1. *In your experience, how were the obligations to apply EC competition law and the convergence rule complied with by NCAs and courts? Please explain your answer.*

In some Member States, the application of Articles 81 and 82 by the national competition authority has become the standard instrument of antitrust law. In Italy, for instance, the average percentage of formal proceedings closed yearly by the national competition authority on the basis of Community rules on total proceedings rose from 9% in the period 1999-2001 to 80% in the period 2006-2007; the sole application of national rules plays an increasingly residual role.

In France, the percentage of antitrust cases dealt with under Community rules is lower, representing less than 50% of the total proceedings. In an interesting case of parallel application of EC and French rules, the Conseil de la Concurrence closed a case finding no breach of either the French Commercial Code or Articles 81 or 82, even though the investigation had only concerned EC competition law. The Conseil argued that the practice under investigation, which took place on French territory and to which French law should apply, did not require any further investigation on the basis of national law, since the primacy of Community law imposed the application of the same principles and consequently resulted in the same conclusion. The decision was upheld by the Cour d'Appel de Paris (23 January 2007, *Pharmalab*).

In the UK, the courts and NCAs all apply relevant EC and UK law side by side. There has only been one case where the Office of the Rail Regulator erroneously overlooked the application of EC law but it corrected its position later on (EWS/rail freight matter).

In Spain, the parallel application of national and EC rules by NCAs is common; national courts are used to applying EC competition rules since, until the entry into force of the new Competition Act, they had no power to apply national competition rules (which were of an administrative nature) in private antitrust claims.

In Germany, the parallel application of EC and national cartel rules is also common. Notably there is case law where the German Federal Cartel Office applied the EC rules first and only then made some remarks on the national law referring to its previous EC law findings (23 August 2006, *Deutscher Lotto- und Totoblock*).

In Sweden, in a case where conflict between Article 82 and the national relevant competition law provision was alleged, the national courts refused to allow a request for a preliminary ruling from the ECJ (*Danish State v Port of Ystad* – Case T 2808-05; Case Ö 1823-08).

In new member states, such as Romania (which only became a member on 1 January 2007) the judicial and administrative authorities have not yet properly absorbed the principle of direct applicability of EU legislation. As a result, most of the judges in Romania, especially judges in the rural areas of the country, are not only unfamiliar with the provisions of Regulation 1/2003 but also seem to be reluctant to determine a legal solution on the grounds of Articles 81 and 82 in the EC Treaty.

Furthermore in Romania, whenever a party claims a breach of Articles 81 and 82, the judge may decide that the absence of a preliminary decision issued by the Romanian Competition Council represents grounds for inadmissibility for the claim. This rationale is based on the exclusive jurisdiction of the Romanian Competition Council for all cases relating to anti-competitive behavior, and on the view that this preliminary administrative procedure has to be observed. Lawyers seem also not to be fully aware of the legal possibilities arising from the direct applicability of EU law. In addition, the Competition Council's practice is to always base its decisions on Romanian legislation and not on EU legislation. Its decisions will rely on EU legislation only as a subsidiary argument[1].

2. *Have you been involved in proceedings before NCAs or national courts where the question of relying on EC competition law as the legal basis for enforcement action, the parallel application of both national competition law and Articles 81/82 EC and/or the criterion of effect on trade arose? If so, please specify the nature of the issues encountered and provide details where possible*.

In the period immediately following the adoption of Regulation 1/2003, there were some cases of private enforcement in which national courts interpreted the criterion of effect on trade differently from the Commission and Community case-law. Ongoing training of national judges on Community competition law is essential to the proper functioning of the new system.

[1] See Decision 12/2008 (where the Competition Council refers to Article 81(1) only as a subsidiary argument in the rationale, stressing that the national correspondent provision covers the issue in a sufficient manner), Decision 19/2008 and Decision 15/2008.

The issue of the application of Article 81/82 EC as opposed to that of Article 2/3 of the Italian Competition Act has been constantly raised in a number of private enforcement cases in Italy due to the peculiarity of the Italian system based on a "double track" depending on whether Community or national competition provisions are infringed: whilst the territorially competent Court of Appeal acts a first instance court for any civil action grounded on a breach of national competition law, the civil action brought for an infringement of Community competition law is enforced by the Civil Court of First Instance, the decisions of which may be appealed to the Court of Appeal. The issue gives rise to a number of concerns especially considering the risk for "forum shopping" stemming from the fact that, according to Italian procedural law, jurisdiction of the competent Court is determined by the plaintiff's allegation in the first stage of the proceeding.

In public enforcement, there remain some inconsistencies in the criteria used by national competition authorities to decide whether to apply only national rules or national rules together with Community ones. An example is provided by the decision on abuse of dominance taken by the Spanish competition authority in the 2007 case against Iberdrola, which was based exclusively on national rules.

The Spanish NCA has publicly stated its willingness to apply the prohibition of "conscious parallel behavior" - which is a specific kind of restrictive practice *alien* to Article 81 - to practices that affect trade between Member States. No decision has been adopted yet. The risk of an inconsistent application of Article 81 based on this notion should be prevented.

3. *To what extent do you consider that Regulation 1/2003 succeeded in creating a level playing field and those agreements or practices capable of affecting trade between Member States are assessed consistently by the Commission, NCAs and national courts across the EU? Please illustrate any views expressed with concrete examples. In your experience, how do undertakings take account of the existence of provisions in national competition laws that differ from Article 82? Is there evidence that undertakings' EU wide business strategies are affected by the application of such rules? If you consider that that is the case, please provide details*.

ICC encourages the Commission to devote continuous efforts to promote the uniform application of Community rules. In the first years of application of Regulation 1/2003, there is evidence of cases which raised similar issues and were assessed differently, under Community rules, in different Member States.

In several instances, companies have complained about the lack of a consistent definition of the relevant markets in similar cases.

Furthermore, it has been noticed that EC and national cartel rules are assessed differently with respect to the interpretation of the term 'undertaking'. The European Court Justice made clear that *offering* goods and services in a given market is the characteristic feature of an 'undertaking' (judgment of 11 July 2006, *FENIN*) whereas the German Federal Supreme Court argued that the *demand* as such is sufficient to fulfill the criterion (judgment of 12 November 2002, *Ausrüstungsgegenstände für Feuerlöschzüge*).

Another critical area concerns the assessment of exchanges of information under Article 81. In the insurance sector, the same databank was considered legitimate in UK and prohibited in Italy (*Iama* case; the decision by the Italian NCA was later annulled by the Administrative Court of first instance).

In the telecommunications sector, the practice whereby European mobile operators offer their business customers low fixed-to-mobile rates for calls from fixed lines of a company to the mobile lines of the same company (i.e. "internal calls") was considered not abusive in UK and Spain, and abusive in Italy and France. In this last case, the NCA decision was annulled by the Cour d'Appel in 2005, but, following the intervention of the Cour de Cassation in 2006, was confirmed by the Cour d'Appel in 2008.

Other examples of a different assessment of similar cases may be found in the pharmaceutical sector.

The standard of proof for infringements of Community rules used by members of the ECN and accepted by review courts is not homogeneous. The same applies as regards to the legal presumptions for attributing liability to a parent company for its affiliate's behaviour regardless of whether the former was involved or informed of the latter's practices.

Some NCAs appear to regard themselves as almost entirely unconstrained by previous Commission decisions where there are slight factual differences between the situation they are investigating and the situation investigated by the Commission. This can lead to a duplication of NCA investigations, with different NCAs investigating substantially the same national issues.

The principles contained in Commission decisions dealing with a national market but concerning practices that are widespread across markets appear to have very little follow-up, by either the Commission or NCAs, in non-decision markets. ICC believes that the Commission should provide guidance to NCAs as to how Commission precedents are to be treated in NCA investigations. In particular with regard to matters on which the Commission has already adopted a decision, ICC believes the NCA should satisfy itself with identifying whether there are any differences between the cases the Commission investigated and those being investigated at the national level. If there are such differences, the NCA should be obliged to consider the extent to which an approach different from the one adopted by the Commission is necessary and should justify such differences.

Finally, ICC highlights the fact that some national decisions in application of Article 82 follow an approach quite different from the one envisaged in the DG Comp discussion paper of 2006. For instance, the Italian Competition Authority in the *RDB case* challenged the conduct by an allegedly dominant company consisting in a selective price cuts strategy aimed at subtracting sales from rivals, without checking whether efficient competitors would be able to adjust their prices to that price level.

4. *Have you been involved in proceedings before a NCA or a national court where the fact that national competition provisions on unilateral conduct were stricter than Article 82 EC arose? If so, please provide details about the relevant provisions, the issues encountered and specify what the outcome was where possible*.

An example is provided by the German legislation with regards to the specificity of the definition of unilateral abusive conducts. On January 2008, Germany amended the German Act Against Restraints of Competition. The amendment defined the conditions of "abusive pricing" in the energy and food retail sectors.

In some countries, the national rules implementing the EC directive on unfair commercial practices (EC/29/2005) are enforced by national competition authorities and are being applied, in some cases, as an instrument for prohibiting unilateral conduct without the need to ascertain the dominance of the company concerned. In Italy, for instance, price discrimination by non-dominant companies has been prohibited as an unfair commercial practice in the meaning of the directive. Since this directive has been conceived as a total harmonization instrument, which should exclude divergent developments in Member States, ICC invites the Commission to carefully monitor its enforcement.

More generally, ICC respectfully encourages the Commission to review article 3(2) of Regulation 1/2003, in order to promote the convergence of national rules on unilateral business conduct which have as their aim the protection of competition.

Part 3 - Enforcement by the Commission

1. *Please specify, to the extent possible, if you have been involved in Commission enforcement procedures based on Articles 81 and/or 82 EC, including sector inquiries. How do you evaluate the effectiveness and efficiency of the Commission's procedural framework? Please explain your answer*.

Since the entry into force of Regulation 1/2003, the Commission has undertaken a number of different sector inquiries, involving a number of ICC members. The inquiries have resulted in reports with suggestions on policy changes which could enhance competition[2], and they have also resulted in individual companies being investigated by the Commission[3].

ICC believes that the Commission's conduct of sector inquiries could be improved in a number of ways.

[2] A notable example being the third energy package aimed at the further liberalisation of EU electricity and gas markets (Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity, COM(2007)528 and for a Directive of the European Parliament and of the Council amending Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas, COM(2007)529).

[3] See in the energy sector, Cases COMP/39.315 – ENI, COMP/39.316 - GdF foreclosure, COMP/39.386 - Long term electricity contracts in France, COMP/39.387 - Long term electricity contracts in Belgium, COMP/39.388 -Fore German electricity wholesale market, COMP/39.401 E.On - GdF collusion and COMP/39.402 - RWE gas.

First, the Commission could publish best practice guidelines on the conduct of sector inquiries, along the lines of the guidance published by the OFT in the UK regarding market studies[4].

Second, the focus and scope of sector inquiries could be better defined. The Commission's requests for information are broad-ranging and are often issued at an early stage of such inquiries, which potentially generates massive volumes of documents on the part of a single company, particularly in the electronic age. This can be counterproductive to the progress of the Commission's inquiries.

ICC believes that the Commission would be able to issue its requests for documents in a more focused and proportionate manner if it gained a better understanding of the relevant market beforehand by discussing particular topics with industry participants. For example, prior to sending out questionnaires, the Commission could publish an "issues statement" identifying specific questions and areas it believes are relevant in deciding whether any feature of the market(s) subject of an inquiry "*suggest(s) that competition may be restricted or distorted within the common market*" and send the statement to undertakings as a basis for discussion. This would enable the questions to be clarified and better focused towards the target of the Commission's inquiry. In addition, it would enable an up front discussion on whether particular questions were unduly burdensome in light of the utility of the answers given the focus of the Commission's inquiry.

Finally, while the Commission has the right to request that undertakings provide it with all necessary information so as to allow it to properly conduct its inquiry, the Commission should refrain from requesting that undertakings produce "new" documents which may then be discoverable in legal proceedings in other jurisdictions.

Another area of concern is represented by the current use of dawn raids.

Up until 2008, the Commission conducted all its sector inquiries by way of written requests for information to the companies concerned. By contrast, the pharmaceuticals sector inquiry, initiated on 15 January 2008, was the first time that a sector inquiry was started by way of dawn raids, which notably targeted the offices of in-house counsels to the companies concerned. The Commission Press Release[5] stated that the aim of the unannounced inspections was "*to ensure that the Commission has immediate access to relevant information that will guide the next steps in the inquiry" and that "the kind of information the Commission will be examining, such as the use of intellectual property rights, litigation and settlement agreements covering the EU, is by its nature information that companies tend to consider highly confidential. Such information may also be easily withheld, concealed or destroyed.*"

ICC believes that the Commission should only be entitled to have recourse to inspections if the information it seeks cannot reasonably be obtained by requests for information. The reasons

[4] http://www.oft.gov.uk/shared_oft/business_leaflets/enterprise_act/oft519.pdf

[5] Commission memorandum MEMO 08/20 of 16 January 2008, "sector inquiry into pharmaceuticals – frequently asked questions", accessible at http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/20&format=HTML&aged=0&language=EN&guiLanguage=en

given by the Commission do not seem sufficient to justify the use of dawn raids, which undoubtedly create a reputational harm to companies. In particular, ICC does not believe that it was accurate to suggest that in-house counsel of major pharmaceutical enterprises would have "withheld, concealed or destroyed" such information. Going forward, if the Commission has reason to believe there is evidence of serious anti-competitive activity and there is a risk that it could be destroyed, then it would be better to proceed via a classic competition investigation under Articles 81 and 82 (complete with dawn raids), rather than a sector inquiry.

This said, the rights of the defence of the company subject to dawn raids can only adequately be safeguarded if basic procedural rules are respected. For example, a shortcoming of the current procedural framework is the lack of an obligation on the Commission's officials to take detailed minutes of the actions and interviews carried out during dawn raids.

2. *Please specify to the extent possible if you have encountered practical or legal issues or difficulties in the context of a Commission investigation. Please specify in particular, if you encountered any issues or difficulties in respect of the Commission using the powers introduced by Regulation 1/2003.*

Within the context of cartel cases the provisions set out in the 2006 leniency notice aimed at protecting the leniency applicant's corporate statements may, in certain circumstances, lead to practical difficulties. For instance, in very large files where documents are drafted in five or more languages a company may have difficulties in reviewing the documents and gathering the information that is relevant for the case. Sometimes the company is only in a position to understand whether a given corporate statement might be relevant once it has reviewed a file of more than 100,000 documents and needs to go back to the Commission to review again the corporate statements. These difficulties would be alleviated if undertakings were given more time to reply to the Statement of Objections.

3. *Please specify to the extent possible if you have been involved in Commission procedures aimed at the adoption of a decision in accordance with Chapter III of Regulation 1/2003 where particular issues or difficulties arose.*

Based on the experience of its members, ICC believes that the Commission's enforcement procedures could be improved. These improvements would go some way to resolving a number of serious legal concerns.

The overarching institutional problem that ICC sees in Commission competition cases is the absence of an independent decision maker during the administrative process. This means that the same officials who have investigated the case from the outset and who draft the statement of objections are then responsible for deciding whether their theories are well-founded and for drafting a decision. That puts the officials in an invidious position: no matter how good they are, like everyone else they will find it difficult to do an intellectual U-turn. It also leads to wider concerns that the procedure is not fair and balanced. This is not because the officials concerned act inappropriately – rather that the officials are being put in the difficult position of being expected to judge whether their own work is correct. The famous quote that it "is of

fundamental importance that *justice should not only be done, but should manifestly and undoubtedly be seen to be done*" [6] applies with some force here: the same official should not be put in the position of having to be both prosecutor and judge at the same time. These concerns have been expressed by a wide range of academics, practitioners, and even the OECD[7].

The Commission's practice of using internal peer-review panels in certain cases was a step forward (albeit a modest one). However, ICC believes that the Commission needs to go further.

The best solution would be for there to be an independent judge who would adjudicate EC competition cases; however, so radical a change may be beyond the scope of the present review. So ICC suggests that the Commission first take an interim step, which could be accomplished more easily.

The Commission could as a first step follow the practice of the UK Office of Fair Trading (OFT), which in deciding whether to refer a merger to the Competition Commission, allocates the decision to a separate "decision maker", who is a senior official independent of the case team[8]. The case team would still be responsible for drafting the decision – but it would do so based on the decision and direction of a senior independent official who had not been involved in the investigation phase of the case. That official would decide whether there is sufficient evidence to prove an infringement based on an independent reading of the evidence and of the law.

It is noteworthy that such practice is also followed by certain NCAs, such as the French Conseil de la Concurrence, where a strict distinction between investigation and decision making has been maintained since 2001. In the procedure before the Conseil, the rapporteur investigates the case and presents a Report to the Conseil, which decides independently on the case.

This would be a step in the right direction to resolving the problems and criticisms of current DG Competition procedure. It would also help reinvigorate the oral hearing process. Currently, the administrative oral hearing only provides an opportunity for the parties being investigated to restate their case to the case team. The hearing often has a strange disembodied feel to it as arguments are being made without there being any independent decision maker in the room.

Indeed, having an independent decision maker in the room, could allow the oral hearing to develop into a more effective hearing process with the case team also being free to present its case in more depth and for their to be a proper forensic examination of contested evidence. Further reforms to the Hearing Officers' mandate and role could also be envisioned. The outcome would be decisions that are tested in more scrutiny.

ICC believes that in order to fully respect the requirements of Article 6 of the European Convention of Human Rights, after the Commission has concluded its investigation, a trial-type hearing should be held, allowing parties to test before an independent judge the Commission's case and the evidence upon which it is based. The idea of having an independent decision maker

[6] R. v. Sussex Justices, Ex parte McCarthy, [1924] 1 KB 256, [1923] All ER 233.
[7] See OECD country studies – European Commission – Peer Review of Competition Law and Policy 2005, p. 62.
[8] See http://www.oft.gov.uk/shared_oft/consultations/oft526con.pdf at 6.52-6.55.

would go some way (though not all the way) to satisfying this goal. Moreover, ICC respectfully submits that the Commission fining policy should duly take into account the efforts made by undertakings to comply with the law. In setting the amount of fines, the Commission should clearly distinguish between infringements resulting from mere negligence and intentional infringements. In this respect, the existence of serious and comprehensive compliance programs should be considered as a mitigating factor.

For cases raising novel issues, effective antitrust enforcement does not require so much high fines as a clarification of the boundaries of the antitrust prohibitions, in order to help undertakings to avoid future infringements. Therefore, uncertainties on the classification of the conduct as an infringement of competition rules should be given autonomous relevance in the quantification of fines.

Part 4 - Enforcement by National Competition Authorities

1. *The institutional structure of the NCAs varies between Member States (e.g. one body with exclusive competence to investigate and decide; the division of the investigation and decision-making between two bodies; the NCA acts as a prosecutor with prohibition and/or fine decisions being imposed by national courts; and/or sectoral regulators have competence to apply Articles 81 and 82 EC to the sector for which they are competent). In your experience, does this raise any issues and if so, please specify*.

The importance for the rights of defence and the right to a fair trial, enshrined as general principles of EU law, of an effective division of investigation and decision-making has already been discussed with reference to the European Commission. The same arguments apply to enforcement by national competition authorities.

From practical experience, the absence of an institutional division between the body competent for investigations and the decision-making body seems to lead to some "prosecutorial path dependence".

In the countries where this institutional setting prevails, an in-depth judicial review of the decisions of the national competition authority, comparable to the judicial control of Community courts, is of particular importance.

2. *Based on your experience, do you consider that the procedural framework applicable to NCAs' proceedings works efficiently and effectively? Please specify your views by authority and by subject matter (e.g. powers of investigation, types of decision, deadlines etc) as appropriate.*

Limits on inspections may vary depending on whether the NCA acts under EU law (Regulation 1/2003) or under national competition rules. In Spain, for instance, it is doubtful whether the undertaking is legally obliged to agree to an inspection in its premises duly decided by the NCA under Spanish competition rules if the NCA does not bring a judicial warrant. Similarly, it is doubtful whether the NCA may read and copy emails and other correspondence without the

express consent of the physical person affected (and not only of the inspected company) unless a waiver is granted in a judicial warrant.

The Italian Competition Authority initially adopted interim measures, using the powers provided for by Regulation 1/2003, without previously hearing the interested party (*inaudita altera parte*). The right to be heard before the adoption of interim measures has subsequently been stressed by the Italian Administrative Court and the NCA has adopted procedural rules correcting the previous lack of safeguards.

For commitment decisions, Italian law provides that a business against which a proceeding has been started has only three months from the beginning of the investigation to present commitments. This deadline for submitting commitments is unreasonably short: in some of the recent proceedings opened by the Italian Competition Authority, three months were not even sufficient for the Authority officials to clearly outline their concerns with respect to the conduct being investigated so as to allow the parties to properly address such concerns and submit adequate commitments. The European Commission follows a more flexible procedure. The Italian Administrative Court recently pronounced on this matter stating that the three month deadline provided for by the law must not be considered authoritative.

In France the procedure is more flexible, allowing for the presentation of commitments at any time during the investigative proceedings, prior to the issuing of a statement of objections. In practical terms, due to the 18 month average duration of proceedings, this implies that commitments can be presented within approximately six months from the opening of the investigation.

In Finland, the use of interim measures in the application of Articles 81 and 82 and of national competition rules is discouraged by a legislative provision requiring the NCA to adopt its final decision within sixty days from the date in which the interim measure was issued.

In Spain, controversy has arisen over the restrictive access given by the Spanish NCA to the objective content of complaints when the addressee of a complaint receives a request for information from the NCA before the formal initiation of an infringement procedure. The Spanish regulation has been amended in order to ensure that these companies have access to any and all objective elements of such complaints. However the Spanish NCA interprets this provision very narrowly (sometimes, it does not explain the alleged infringement at all, in other cases the explanation is reduced to one sentence). The rights of defence and not to self-incriminate enshrined in the Spanish Constitution and the ECHR are clearly inconsistent with the practice of the Spanish NCA.

More generally, ICC submits that the procedural rules concerning investigations should be harmonized across Member States, in order to streamline the legal framework and ensure a uniform level of protection of the fundamental rights of the parties concerned.

3. *Have you encountered legal or practical difficulties due to specificities in the investigation powers, types of decisions and/or any other aspect of the procedures of individual authorities and/or due to differences of such matters between different authorities? If so, please explain in detail.*

In the use of commitment decisions by national competition authorities, there are relevant differences both in procedures and in the content of commitments. As anticipated, where the national legislation sets a strict time limit for the proposal of commitments, there is an unjustified loss of flexibility which may be at the disadvantage of both the competition authority and the undertaking concerned.

Most importantly, the proportionality principle in the use of commitments stressed by the CFI in *Alrosa*, according to which commitments should not go beyond what is necessary to remove the alleged infringement, does not seem well established in some Member States. Commitments are sometimes used to obtain pro-competitive results beyond the scope of the alleged infringement (in the Italian experience, see the Merck case of 2007, where the commitments concerned a market different from the one under investigation in the proceedings).

ICC firmly believes that this approach, which may lead to a regulatory evolution of the enforcement of competition rules, should be carefully avoided both by NCAs and by the Commission.

A proper use of commitment decisions in the application of Articles 81 and 82 of the Treaty requires that all competition authorities adopt this type of decision only with the aim to remove, in a rapid and efficient way, concerns which might otherwise be addressed by a decision finding an infringement and requiring the undertaking or association concerned to bring such infringement to an end.

ICC encourages the Commission to fully employ the instrument afforded by Article 11(4) of Regulation 1/2003, inviting if necessary Member States to standardize the use of commitment decisions with Community guidance.

Moreover, ICC suggests that harmonization initiatives be promoted within the ECN or the ECA to ensure that all competition authorities use commitment decisions according to the principle of proportionality.

4. *Please specify if you have been involved in proceedings before a NCA where particular issues or difficulties arose in relation to the imposition of sanctions (administrative, criminal or other) on undertakings for substantive violations of Articles 81 and 82 EC (e.g. the basis for calculation, criteria applied in setting a fine, modalities of judicial review). If so, please provide details to the extent possible.*

The practical criteria for the calculation of fines vary significantly between cases decided by the same authority and between cases decided by different authorities. The recent effort by the ECA to publish best practices for the calculation of fines should hopefully contribute to address this

problem. In some countries, a clearer reasoning in the competition authorities' decisions imposing fines has been requested by review courts.

5. *Have you had experience with proceedings before national courts reviewing decisions of NCAs? Have you encountered any issues that you wish to report? Please specify as appropriate*.

Due to the lack of organizational support and resources comparable to the ones available in Community courts, national review courts do not always provide an in-depth analysis of NCAs decisions comparable to the one carried out by the Court of First Instance (CFI) and the Court of Justice (COJ).

In Spain, some peculiar situations have also taken place. For instance, in the *ONO-Sogecable and US Majors* output deals case, the NCA decided ex-officio to continue with an appeal procedure lodged by ONO against a previous decision of that same NCA whereby it had decided to close an infringement procedure against Sogecable and the US Majors. The rarity of the case relies on the fact that the appellant withdrew its appeal and the NCA decided to continue with the appeal against its own previous decision, thus causing enormous legal uncertainty for the parties. This decision was appealed before the Spanish court but it did not quash the NCA's decision.

Part 5 - Cooperation in the European Competition Network

1. *Have you been involved in proceedings for the application of Articles 81 and 82 EC before the Commission or a NCA where you considered that the authority dealing with the case was not well placed to do so? If so, please specify, giving reasons.*

So far, it is not clear whether the ECN has worked as a forum for an in-depth discussion of the substance of the more controversial cases among the members of the network.

Experience shows that in some cases entailing important new issues for the application of EC antitrust rules, which would have benefited from an assessment at Community level, the decision was taken by the national authority, without much involvement of the Commission or other members of the network (see, for instance, the *Eni/TTPC* case in Italy, concerning the assessment of investment decisions under Article 82). If Community institutions continue not to be involved in highly innovative cases, there is a serious risk of inconsistencies developing, which would not contribute to legal certainty.

The Commission seems to have followed a very cautious approach in the relations with the other members of the ECN; so far, only oral or written informal comments by DG Comp officials have been sent to the national competition authorities on the substantive assessment of cases. This hands-off approach may not be sufficient to ensure the functioning of the new system. In cases raising potentially important issues at Community level, a more active role of the Commission seems necessary to promote legal certainty and the uniform application of Community rules, including a more frequent use of art. 11 (6) of Reg. 1/2003.

The need for the active involvement of Community institutions in such cases is increased by the very sparing use of Article 234 of the Treaty by national courts in competition cases. Since requesting a preliminary ruling by the Court of Justice may significantly slow down the procedure, national judges usually prefer to keep cases at national level (on this point, see also House of Lords - European Union Committee, *An EU Competition Court. Report with Evidence*, London, 2007). The obligation on courts of last instance to bring the matter before the Court of Justice, when the conditions contained in Article 234 are met, is sometimes neglected, but no effective remedy is available to the undertakings concerned. The use of Article 234 as a fundamental instrument to ensure a coherent application of Articles 81 and 82 should be encouraged by Community institutions.

Paragraphs 34 and 35 of the current Notice on cooperation within the network firmly exclude any participation of undertakings in the allocation of cases[9]. A more flexible attitude might be adopted. In particular, the parties concerned in a case dealt with at national level might be expressly allowed to submit their arguments to the Commission explaining why they deem that the case is of Community interest and what new competition issues are at stake. The evidence received might be used by the Commission to play a more active role as a *primus inter pares* within the network. An external request for careful assessment of a case in the Community interest might help the Commission to justify, before the other members of the network, its involvement in some national cases and, when necessary, the use of Article 11(6).

A more specific issue concerns requests of information by members of the ECN. In Spain, sometimes the NCA initiates investigations (before starting formal infringement procedures) and makes requests for information regarding practices which are simultaneously being investigated by the Commission and other NCAs (for instance, in a recent request regarding Internet markets, the name of the company is not disclosed for confidentiality reasons). These requests for information do not only refer to the company's policy in Spain but in the whole EEA. The company has to bear the burden of duplicating replies and is also subject to the risk of inconsistent approach to the case by the different NCAs and the Commission. Closer cooperation between NCAs and the Commission even at these preliminary stages of investigation is desirable.

2. *Have you been involved in proceedings for the application of Articles 81 and 82 EC before the Commission or NCAs in which the issue of the exchange of information pursuant to Article 12 was raised? If so, please specify to the extent possible, highlighting any particular issues or difficulties.*

The current regime of information exchange within the ECN does not provide all the proper safeguards against the risk that commercially sensitive information, such as investment plans or strategic goals, is leaked. A stronger protection of confidentiality could be attained, in particular, by ensuring that the undertaking concerned is informed in advance about a contemplated sharing of information ("advance warning") and is given the possibility to provide a non-

[9] "Allocation of cases …does not create individual rights for companies to have a case dealt with by a particular authority. The same applies to the opening of proceedings by the Commission (Article 11(6))"; moreover, "all competition authorities apply the same substantive law, i.e. EC competition law and the Council Regulation set out mechanisms to ensure that the rules are applied in a consistent way. Furthermore, there is a sufficient level of protection of the rights of defence before all competition authorities in the network".

confidential version of the document, purged of all business secrets, to be circulated and freely exchanged within the ECN. This should apply in all cases except where prior notice would hamper an ongoing investigation into a hard core cartel.

Another perceived shortcoming is that, in the current system, information exchange allows a competition authority to collect information which could not have otherwise been obtained because it is subject to privileged protection in the jurisdiction of that authority. The case occurs, in particular, when the national legal system of the recipient authority recognizes legal professional privilege for in-house lawyers while the legal system of the disclosing authority does not provide this safeguard.

Part 6 - Cooperation between Competition authorities and judicial authorities

1. *Have you been involved in proceedings before national courts where the issue of Article 15 arose? If so, please specify to the extent possible, highlighting any particular issues or difficulties. Please also provide any comments you may have regarding the use and/or scope of Article 15.*

The mechanisms for notifying the Commission cases of enforcement of Article 81 or 82 by national courts are still not working properly in some Member States. For instance, in Italy and Spain there are cases of private enforcement of Community rules which have not yet been reported to the Commission. The legal or administrative reasons which impede a proper working of this fundamental mechanism should be removed, to allow the construction of a true Community data base on private enforcement.

So far, there is no evidence of a significant cooperation between competition authorities and national courts. There may be some reluctance by judges to request the help of competition authorities.

2. *Do you have experience with civil litigation where the relevant procedural framework obliged/empowered or limited/prevented (e.g., rules protecting leniency applicants) the Commission or a NCA to/from transmitting information obtained in a competition proceeding for the application of Articles 81 and 82 EC to national courts? If so, please provide details to the extent possible*.

The Spanish Competition Act prevents the Spanish NCA from disclosing information or documents to the Spanish courts submitted by leniency applicants to the NCA. Given the recent entry into force of the Spanish leniency program (February 2008) this provision has not yet given rise to specific concerns.

Conclusions

ICC wishes to highlight the following possible improvements:

- the review of the rule on the burden of proof contained in Article 2 of Regulation 1/2003;

- extending the subjective scope of application of legal professional privilege, in order to also include, under clear conditions, in-house lawyers;

- the harmonization of procedural rules concerning investigations;

- the review of Article 3(2) of Regulation 1/2003 to promote convergence of national rules on unilateral conduct which have as their aim the protection of competition;

- a more active role of the Commission in the interplay with NCAs, including a more frequent use of its powers to "claw back" a case even after a NCA's opening of proceedings;

- the review of the Notice on cooperation within the ECN to allow undertakings to submit their arguments to the Commission explaining why they deem that a case should be dealt with at Community level;

- the review of the Notice on informal guidance, aimed at relaxing the requirements under which the Commission is available to issue guidance letters.

- the appointment of a senior independent official who has not been involved in the investigation, to review the evidence, to hear the case team and the undertakings concerned, and to determine whether there is sufficient evidence to support a possible finding of infringement.

- in setting the amount of fines, the Commission should clearly distinguish between intentional infringements and infringements resulting from mere negligence, while the existence of serious and comprehensive compliance programs should be considered as a mitigating factor.

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