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TOWARDS AN OPTIMAL ENFORCEMENT OF COMPETITION RULES IN
EUROPE – TIME FOR A REVIEW OF REGULATION 1/2003 ?

REPORT ON THE DIRECTLY APPLICABLE EXCEPTION SYSTEM AND
THE DIRECT APPLICABILITY OF ARTICLE 81(3) EC: POSITIVE
ENFORCEMENT AND LEGAL CERTAINTY

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THE DIRECTLY APPLICABLE EXCEPTION SYSTEM AND THE DIRECT APPLICABILITY OF ARTICLE 81(3) EC: POSITIVE ENFORCEMENT AND LEGAL CERTAINTY

- I. ISSUES RELATED TO THE DIRECTLY APPLICABLE EXCEPTION SYSTEM
- II. THE RESPECTIVE ROLES OF ARTICLE 81(1) EC AND 81 (3) EC
- III. POSITIVE ENFORCEMENT AND GUIDANCE

THE DIRECTLY APPLICABLE EXCEPTION SYSTEM AND THE DIRECT APPLICABILITY OF ARTICLE 81(3) EC: POSITIVE ENFORCEMENT AND LEGAL CERTAINTY

I. ISSUES RELATED TO THE DIRECTLY APPLICABLE EXCEPTION SYSTEM

PRAGMATIC FINDINGS (FOCUS ON ARTICLE 81 (3)) :

1. IN HOUSE COUNSEL POINT OF VIEW
2. NATIONAL CASE LAW
 - NATIONAL COMPETITION AUTHORITIES
 - NATIONAL COURTS

THE DIRECTLY APPLICABLE EXCEPTION SYSTEM AND THE DIRECT APPLICABILITY OF ARTICLE 81(3) EC: POSITIVE ENFORCEMENT AND LEGAL CERTAINTY

1. IN HOUSE COUNSEL POINT OF VIEW

- Self-assessment now as before
- “No regrets” for notification system but...
- ... ex-ante cooperation system with competition authorities should be possible
- Guidance perceived as not available
- Block Exemptions popular, but need update
- A need for better defined safe harbours (BER or soft law)
- Where is the law on Article 81(3) ?
- Tendency to avoid debate on the Article 81 (3) conditions : analysis of risks rather at Article 81 (1) level.
- Low level of confidence in national courts.

2. NATIONAL CASE LAW : NATIONAL COMPETITION AUTHORITIES

- General remark : Article 81(3) is invoked as a defence : NCA decisions are at most declaratory, but reasoning applying Article 81 (3) will not appear when cases are terminated (allegation of infringement dropped) without decision.
- Analytical framework of convergence rule seems overall correct : NCAs know when to apply community law.

2. NATIONAL CASE LAW : NATIONAL COMPETITION AUTHORITIES

- Numerous decisions applying Block Exemption Regulations.
- A few NCA decisions discuss the Article 81(3) conditions (both BER and individual) rather thoroughly and reject them.
- Rare “positive” decisions, i.e. explicitly finding that the conditions of Article 81 (3) are fulfilled in order to decide that Article 81(1) is not infringed.
- Distinction between non infringement of Article 81(1) and application of Article 81(3) sometimes unclear.
- General features : little to no economic analysis; Article 81(3) Guidelines largely ignored (and certainly not applied).

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2. NATIONAL CASE LAW : NATIONAL COURTS

- Serious information deficit : transmission system does not function properly.
- Body of precedents only partially available : hinders the development of national case law.
- Arbitration cases : a significant number but not easy to access.
- Most case law concerns vertical agreements and therefore the application of the Vertical restraints BER.
- In general, application of Article 81(3) is rather superficial and form based : little to no economics based reasoning or evidence, Article 81(3) Guidelines not applied.
- No judgment positively applying Article 81 (3).

THE DIRECTLY APPLICABLE EXCEPTION SYSTEM AND THE DIRECT APPLICABILITY OF ARTICLE 81(3) EC: POSITIVE ENFORCEMENT AND LEGAL CERTAINTY

II. THE RESPECTIVE ROLES OF ARTICLE 81(1) EC AND 81 (3) EC

GENERAL REMARKS

- Legal exception regime : Article 81(3) directly applicable also by national courts. The previous need to protect the exclusivity of the Commission in enforcing Article 81 (3) can no longer be a justification to reserve all balancing analysis to Article 81(3).
- Principle of legal exception requires that Article 81 is interpreted following a global approach and in a unitary framework in assessing the evidence of an infringement.

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II. THE RESPECTIVE ROLES OF ARTICLE 81(1) EC AND 81 (3) EC

GENERAL REMARKS

- Little attention is given to the role of the “bifurcation” between para (1) and (3) of Article 81 : is there a shift to a different substantive legal test or is it a rule of evidence (shift of burden of proof) ?
- Risk of Article 81(3) becoming obsolete (too complex to apply, too high burden of proof...) : because of scarcity of case law, downwards spiral phenomenon.
- If no balancing test occurs at the level of Article 81(1) (“form based” approach), risk of asymmetry and unbalance between Article 81(1) (finding of infringement) and Article 81 (3) : the defendant loses.

A. THE ROLE OF THE BIFURCATION OF ARTICLE 81

- Burden of proof : Article 2 of Regulation 1/2003 : authority must prove the infringement but the undertakings invoking Article 81 (3) have the burden of proving that the conditions are satisfied.
- However, Commission Guidelines establish conceptual framework which is more economic oriented for both Article 81(1) and (3). Consumer welfare is guiding principle for both paragraphs.
- Is the introduction of a consumer interest test compatible with the Treaty distinction between paras (1) and (2) ? and within (1) with the distinction between “object” and “effect” ?
- Separate issues of law of evidence (burden of proof and standard of proof) and substance (type of efficiencies) not always clear.

A. THE ROLE OF THE BIFURCATION OF ARTICLE 81

- Attention has shifted from Article 81 (3) to Article 81(1) :
 - Uncertainty on the exact content of Article 81 (3)
 - Debate over the role and content of balancing (economic/intuitive) analysis within Article 81(1)
 - Standard of proof under Article 81(3) particularly high in comparison with Article 81(1)
 - Difficulties for NCAs and even more national courts to perform the economic assessment required to implement Article 81(3).
 - May favour active and systematic application of Article 81(1) without an effective and equally systematic possibility for undertakings to argue efficiency considerations under Article 81 (3)
 - Need for more flexibility in the context of Article 81 (1).

B. THE NEED FOR A MORE BALANCED APPROACH IN THE INTERPRETATION OF ARTICLE 81(1).

- Two main issues in case law :
 - The objectives of Article 81(1)
 - The method of analysis employed in Article 81 (1)

- Objectives :
 - “welfare of the final consumer” (cfr CFI in *Glaxo Smith Kline*)
 - “Different aspects of consumer welfare in Article 81(1) and 81(3)” (AG Trstenjak in *Beef Industry*) but existence of a restriction of competition at the level of Article 81(1) can be rejected only in a limited number of circumstances.
 - Protection of “public interest of undistorted competition” or “public at large” (competitive rivalry or competition as such) (AG Kokott and ECJ in *T-Mobile*).

B. THE NEED FOR A MORE BALANCED APPROACH IN THE INTERPRETATION OF ARTICLE 81(1).

- Method of analysis :
 - Distinction between the object of the clause and the object to restrict competition (economic and legal context may mean that agreement as such does not harm the consumer). Then, analysis of effects through counterfactual test (CFI in *Glaxo Smith Kline*)
 - Counterfactual test (effects) (CFI in *O2 Germany*) but is not a full balancing test (no rule of reason under Article 81(1)).
 - “Intuitive balancing test” (*Metro, Coditel, Nungesser, Pronuptia, Gottrup-Klim...* as well as the *Wouters* and *Meca-Medina* line of case law).
 - Anticompetitiveness by object (no clear link with impact on consumer welfare) : ECJ in *Beef Industry* .
 - Idem AG Kokott and ECJ in *T-Mobile* : however “having regard to the specific legal and economic context”.
 - Does this case law exclude any economic analysis under Article 81(1) ? What about the market power threshold ?

C. SUGGESTION FOR A NEW APPROACH

- Analytical framework must minimise the risk of errors and the decision costs
- Bifurcation has little to do with different objectives but rather with two different procedures :
 - Article 81(1) : intuitive analysis
 - Article 81 (3) : quantitative balancing of costs and benefits

C. SUGGESTION FOR A NEW APPROACH

- Allocation between intuitive balancing and cost-benefit analysis (public policy concerns...) must be refined.
- No intuitive analysis available under Article 81 (1) if there is a presumption of restriction by object (not necessarily irrebuttable).
- Issue remains of appropriate level of enforcement allowing an efficient implementation of Article 81(3).

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III. POSITIVE ENFORCEMENT AND GUIDANCE

- A. PRESERVING LEGAL CERTAINTY AND PROVIDING GUIDANCE :
THE INSTRUMENTS
- B. LACK OF POSITIVE ENFORCEMENT AND NEED FOR GUIDANCE
- C. THE SPECIFIC ISSUE OF THE GUIDELINES ON THE
APPLICATION OF ARTICLE 81(3)
- D. STRIKING A BETTER BALANCE

THE DIRECTLY APPLICABLE EXCEPTION SYSTEM AND THE DIRECT APPLICABILITY OF ARTICLE 81(3) EC: POSITIVE ENFORCEMENT AND LEGAL CERTAINTY

A. PRESERVING LEGAL CERTAINTY AND PROVIDING GUIDANCE : THE INSTRUMENTS

- White Paper confirmed the importance of preserving legal certainty
- The framework of Regulation 1/2003 contains the instruments allowing to ensure that objective:
 - Block Exemptions (and Guidelines) retained and new BERs' adopted.
 - Specific Guidelines on the application of Article 81(3)
 - Article 10 : non-applicability decisions
 - Principle on informal guidance confirmed and Notice of informal guidance letters.

B. LACK OF POSITIVE ENFORCEMENT AND NEED FOR GUIDANCE

In practice, the situation is characterized by :

- Absence of significant enforcement in areas outside hard core infringements
- No single Article 10 decision : no “positive enforcement” (in particular no positive application of Article 81(3)).
- No single Guidance letter.
- Commitment decisions (Article 9) : imperfect surrogates.

Commission’s 2009 Report not encouraging :

- Article 10 allegedly “not necessary” because of convergence within ECN.
- Commitment to informal guidance but no actions to encourage such guidance.

B. LACK OF POSITIVE ENFORCEMENT AND NEED FOR GUIDANCE

Why is lack of positive enforcement a problem and why is more guidance needed ?

- Self assessment is costly and remains risky and little confidence in national courts : positive guidance would limit the error risk.
- Chilling effect on development of Community law/balanced enforcement.
- Lack of precedents means deficit in regulators' experience with the real economy (downwards spiral).

B. LACK OF POSITIVE ENFORCEMENT AND NEED FOR GUIDANCE

Enforcement should include positive decisions :

- Positive decisions contribute to shape competition policy and encourage pro-competitive forms of co-operation.
- Respective roles of Article 81(1) and 81(3) would be better delineated: lack of precedents discourages use of Article 81(3).
- Block exemptions and Guidelines do not make up for lack of positive enforcement and guidance in individual cases.

B. LACK OF POSITIVE ENFORCEMENT AND NEED FOR GUIDANCE

Why not take inspiration from the US Business Review Procedure ?

- Business review procedure largely supported
- DOJ sees enforcement interest in ex ante guidance and willing to provide guidance.
- Why diverging situation with EU ?
 - EU “trauma” of previous notification system
 - Negative decisions favoured over positive ones because more rewarding politically.
 - DG COMP understaffed : enormous flow of cartel work.

C. THE SPECIFIC ISSUE OF THE GUIDELINES ON THE APPLICATION OF ARTICLE 81(3)

- Guidelines overly complex economic assessment
 - No safe harbours or bright line rules
 - Quantified balancing test and “sliding scale” approach : overly demanding and often lack of data.
 - Quantified pro-competitive effects will seldom prevail over alleged anti-competitive effects (“judgment call” in any event).
 - No promotion of Article 81(3), but rather makes its use exceptional.

C. THE SPECIFIC ISSUE OF THE GUIDELINES ON THE APPLICATION OF ARTICLE 81(3)

- Guidelines not fully consistent with case law of the Community institutions :
 - Type of efficiencies under the first condition of Article 81(3) ; what about non-competition concerns ? (Guidelines narrower than case-law).
 - Market to market standard : approach is commendable but perhaps unduly restrictive (and in part inconsistent with case law).
 - A priori exclusion of hardcore restrictions.

C. THE SPECIFIC ISSUE OF THE GUIDELINES ON THE APPLICATION OF ARTICLE 81(3)

- Problematic interpretation of the fourth condition :
 - “elimination of competition” must be distinguished from “restriction of competition”
 - More concrete definition is needed (clearer benchmarks).

D. STRIKING A BETTER BALANCE

- Public commitment to positive enforcement : more non-applicability decisions under Article 10.
- Commitment to informal Guidance to be translated into reality and guidance no longer discouraged.
 - More formal and systematic guidance process
 - At the very least :
 - o Amending the Notice to broaden its application.

D. STRIKING A BETTER BALANCE

- Reflection needed on the role and application of Article 81(3).
 - Revisiting the Guidelines of Article 81(3) : making it more user-friendly and improve consistency with case-law.
 - In-depth reflection and clarification of respective roles of Article 81(1) and 81(3).