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

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WORKING GROUP II ***RELATIONSHIP BETWEEN EC COMPETITION LAW AND NATIONAL COMPETITION LAW***

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Some proposals for reform

- 1. Extension of convergence rule (Art. 3(2) Reg. 1/2003) to unilateral conduct**
- 2. Explicit safeguard of *ne bis in idem***
- 3. One stop shop for leniency applicants**
- 4. Clarifying Art. 11(6) Reg. 1/2003**
- 5. Clarifying NCA power to adopt positive decisions**

1. Extension of Convergence Rule

o Description of the current situation

- Currently, Art. 3(2) Reg. 1/2003 convergence rule specifically covers only Art. 81 practices
- Thus, Member States (“MS”) can adopt and apply “stricter national laws” against “unilateral” and possibly against “multilateral” conducts not falling within the categories of Art. 81 (see, e.g. Spanish law on “conscious parallel practices”)
- Rationale for discrimination is clear when national law mainly pursues objectives such as protection of consumers or fair trade => Art. 3(3) Reg. 1/2003
- But why national competition laws should be stricter than Art. 82?

- **Absence of convergence rule for unilateral conducts: consequences**
 - Several MS maintained, or even introduced, stricter rules concerning:
 - threshold for dominance
 - notion of abuse
 - Lack of harmonization may create barriers to trade:
 - companies may need to adopt different business models depending on MS
 - companies may prefer not to sell into certain MS
 - Similar concerns raised in Commission Report on Reg. 1/2003 (par. 22)

o **Proposals for reform**

- Extend convergence rule (Art. 3(2)) to cover all (multilateral or unilateral) practices potentially affecting interstate trade
- Require prior notification to the Commission if a MS authority (other than NCA) intends to withdraw a block exemption
- Clarify scope of convergence rule in Art. 3(3), *i.e.* such rule does not preclude application of national laws relating to unfair trading practices, consumer protection and abuse of economic dependence

2. The *ne bis in idem* principle

o The legal context

- Scope: no double jeopardy for conduct for which penalty or acquittal is *res judicata*
- Legal basis: Protocol 7 to ECHR, general principle of EC law, Art. 50 CFR
- Conditions for application: (i) identity of facts, (ii) unity of offender, (iii) same legal interest (see, e.g., Case T-38/02 *Danone*, par. 185)

o Risks of *bis in idem*

- Reg. 1 does not exclude, but even admits, *bis in idem* (see ECN Notice, par. 5, second indent)
- If two NCAs adopt Art. 81/82 decision against the same companies for the same conducts, threefold conditions are met for a finding of violation of *ne bis in idem*
- Under Reg. 1/2003, high risk of *bis in idem* because:
 - If interstate trade is affected, NCAs are obliged to apply 81 or 82 if applying national competition law
 - No case allocation rules within ECN
- One case of *bis in idem* (amongst NCAs) has already occurred (see Staff Working Paper, par. 223)

o **A proposal for reform (1)**

- The following new provision could be introduced in Reg. 1/2003:

“Where the Commission or the competition authority of a Member State adopts a decision based on Article 81 or 82 of the Treaty, no other authority of a Member State nor the Commission can apply again those provisions to the same undertaking(s) for the same conduct.”

- Other minor amendments could be made to certain provisions of Reg. 1/2003 and the ECN notice to make these consistent with the above provision

o **A proposal for reform (2)**

- The new safeguard provision would apply:
 - When the Commission or an NCA adopts a prohibition decision
 - When the Commission adopts an Art. 10 Reg. 1/2003 decision
 - When an NCA adopts a positive decision (but see Staff Working Paper, par. 34 and 37)
 - When the Commission (or an NCA) adopts a commitment decision

3. One stop shop for leniency applicants

- o **Reg. 1/2003 and the purpose of leniency programs**
 - Effective public enforcement of Art. 81 in cartel cases
- o **Description of the current situation (1)**
 - Current barriers to the effective functioning of Europe's leniency programs
 - Infringing parties must clearly determine the full range of relevant conducts and all the jurisdictions they intend to apply to before submitting their first immunity application

3. One stop shop for leniency applicants

o **Description of the current situation (2)**

- Current barriers to the effective functioning of Europe's leniency programs
 - An application at the European Commission level will not qualify parties for immunity at the MS level
 - Discrepancies in the various leniency regimes or the inconsistent application of these regimes can often expose undertakings to sanctions

o **A proposal for reform**

- Adoption of a uniform European leniency application and marker system

4. Clarifying Art. 11(6) Reg. 1/2003

o Scope of the provision

- Art. 11(6) is an important tool of the “vertical coordination”, between the Commission and NCAs
- Art. 11(6) deals with two different situations:
 - in the first situation (first sentence), the Commission is the first competition authority to initiate the proceedings in a case for the adoption of a decision under the Council Regulation; the NCAs are no longer entitled to deal with the case
 - in the second situation (second sentence), the Commission is not the first authority to initiate the proceedings since one or more NCAs have already informed the network that they are handling the case

o **Is Art. 11(6) a useful tool and does it work properly?**

- Art. 11(6) is totally silent on the situation where a NCA already acting on a case, after having been consulted by the Commission, raises an objection with regard to the Commission's intention to initiate proceedings
- Two interpretations:
 - under the first interpretation, the NCAs are granted a right of veto. The Commission will normally assert its right of precedence if the NCAs does not object to it
 - under the second interpretation, the Commission is entitled to take over a case currently handled by a NCA in any event, (i) after the initial allocation period, and even tough (ii) the NCA objects to being relieved of its competence

► **Clarification needed!**

o A proposal for reform

- Art. 11(6) could be clarified along the following (alternative) lines:
 - should Art. 11(6) second part expressly grant the NCAs a right of veto once the allocation period has lapsed and that no agreement has been reached?

OR

- would it be preferable to grant the Commission a right of precedence, but tied into strict boundaries?
 - take over permitted only if certain conditions are met which reveal a risk of disharmony
 - foresee « procedure/timeframe » allowing the parties to harmonize their views
 - requirement to publish any decision taken by the Commission following a disagreement with NCAs

5. Clarifying if NCAs can adopt positive decisions

o **The current situation**

- In some MS, a notification system has been maintained since 2003 with a right to apply for unconditional exemption irrespective of whether the agreement in question affects the trade between MS
- The possibility for NCAs to issue a “positive” decision, although not prohibited by Reg.1/2003, is no longer consistent with the legal exception principle introduced by Reg. 1/2003

o **A proposal for reform**

- It will be focused on improving the coherence in Reg. 1/2003 with regard to this residual phenomenon
- It will mean amending Art. 11(4) by including an express reference to exemption or negative clearance decisions adopted pursuant to Art. 5(2) among those subject to the duty to inform the Commission prior to their adoption
- If, however, the Commission confirms its interpretation of Art. 5(2) - *i.e.* that NCAs cannot adopt this kind of decisions (see Staff Working Paper, paragraphs 34 and 37) -, this should be made clear at least in the recitals of an amended Reg. 1/2003