

CONTRIBUTION TO PUBLIC CONSULTATION IN PREPARATION OF THE REPORT ON THE FUNCTIONING OF REGULATION 1/2003*

Introduction

White & Case LLP welcomes the opportunity to contribute to the European Commission's ("Commission") public consultation in preparation for the Report on the Functioning of Regulation 1/2003.

We agree with the Commission that Regulation 1/2003 is "*the cornerstone of the modernisation of the European Union's antitrust enforcement rules and procedures*" and that, as a result, it is timely and useful to debate how it has functioned over the past four years.

We have structured our comments in two sections, one on the decentralised enforcement of EC competition law by national competition authorities ("NCAs") and national courts, and another on the enforcement of the EC competition rules by the Commission. Within the first section, which constitutes the largest part of this submission, we will refer, where appropriate, to specific questions in the Commission's Questionnaire.

Decentralised Enforcement of EC Competition Law

Indicative List of National Cases

Our overall assessment of the system of competition enforcement introduced by Regulation 1/2003 is positive. However, we have been involved in several cases which raise certain specific issues regarding the decentralised enforcement of EC competition law which we believe any review of Regulation 1/2003 should address. We list below some of these cases:

Greece – Coca Cola Hellenic Bottling Corporation – Decision of the Hellenic Competition Commission ("HCC") 309/V/2006 – Article 3(2) of Regulation 1/2003, supremacy and effectiveness of Article 9 commitment decisions

We advised Coca Cola Hellenic Bottling Corporation ("CCHBC") in a HCC case concerning the compliance of CCHBC with a previous (2002) HCC infringement decision, in which CCHBC was found to have abused its dominant position under Greek competition law. In the 2006 case, the HCC decided that CCHBC had not complied with part of the injunctions that were addressed to it under the 2002 Decision. Meanwhile, in June 2005, CCHBC was the addressee of a Commission Decision based on Article 9 of Regulation 1/2003, accepting commitments offered in the course of an Article 82 EC investigation.¹

The HCC's 2006 Decision held that the Commission's 2005 Decision had no effect on its case, *inter alia*, for the following reasons:

* These comments are offered by the Brussels office of White & Case LLP in response to the Commission's public consultation. They are designed to assist the Commission in its ongoing work in this area and should be used for no other purpose, either by the Commission or by third parties. They do not represent the views of the Firm or of its clients.

¹ Commission Decision of 22 June 2005 (COMP/A.39.116/B2 – *Coca-Cola*).

“According to Recital 13 (corresponding to Article 9) of [Regulation 1/2003] ... commitment decisions are without prejudice to the powers of competition authorities and courts of the Member States to make [an infringement] finding and decide upon the case. In addition, according to Article 3(2)(b) of that Regulation Member States shall not ... be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings”.

We represented CCHBC in appeal proceedings before the Athens Administrative Court of Appeal which partially annulled the HCC 2006 Decision (Decision 2961/2007). The Greek court adopted a more deferential approach vis-à-vis Article 9 commitments decisions holding that national authorities and courts “*must not take decisions running counter to the European Commission decision, so as to ensure the uniform application of the competition rules in the European Union,*” but did not touch upon the HCC’s position concerning the scope of Article 3(2) of Regulation 1/2003.

This case raises the question of the true meaning of Article 3(2) of Regulation 1/2003 and whether it is open to a NCA to prohibit under national competition law unilateral conduct allowed under Article 82 EC, when the national provision is similar or indeed identical to the Community provision. In addition, it raises the important question of the *effet utile* (effectiveness) of a commitments decision under Article 9 of Regulation 1/2003 and of the scope of the principle of supremacy of such decisions vis-à-vis national action.

Czech Republic and the Slovak Republic – Gas Insulated Switchgear – Decision R 059-070, 075-078/2007/01 of the Czech Office for the Protection of Economic Competition 08115/2007/310 and Decision 2007/KH/1/1/109 of the Slovak Antimonopoly Office – application of the *ne bis in idem* principle and of Article 11(6) of Regulation 1/2003

We represent Toshiba Corporation, one of the companies alleged to have entered into and operated a worldwide cartel relating to the supply of Gas Insulated Switchgear (“GIS”). On 24 January 2007, the Commission adopted a decision, imposing combined fines of over EUR 750 million on eleven groups of companies for their participation in the alleged cartel between 1989 and 2004.² The Commission’s Decision has been appealed by six companies, including Toshiba.³

Following the adoption of the Commission’s Decision, both the Czech (“UOHS”) and Slovak (“AMO”) NCAs adopted decisions holding the same eleven GIS producers liable for the impact of the alleged cartel in their respective territories between 1989 and mid May 2004, i.e. for the most part prior to the accession of these two Member States to the EU on 1 May 2004.

The Regional Court of Brno annulled the UOHS’s Decision on the grounds that the UOHS had acted in breach of the *ne bis in idem* principle on 25 June 2008.⁴ The matter is now pending before the Czech Supreme Administrative Court. On 17 January 2008, Toshiba appealed the AMO Decision to the Council of the AMO, whose decision is still awaited.

² Commission Decision of 24 January 2007 (COMP/F/38.899 - *Gas Insulated Switchgear*).

³ See pending Cases T-112/07, *Hitachi and Others v. Commission*; T-113/07, *Toshiba Corporation v. Commission*; T-117/07, *Areva and Others v. Commission*; T-121/07, *Alstom v. Commission*; T-132/07, *Fuji Electric Holdings and Fuji Electric Systems v. Commission*; T-133/07, *Mitsubishi Electric v. Commission*.

⁴ Judgment 62 Ca 22/2007-489.

The decisions by the UOHS and AMO raise two issues pertaining to the functioning of Regulation 1/2003.

First, there is the question of whether, due to the fact that the infringing parties in the NCAs' decisions were the same as the parties identified in the Commission's Decision and because the NCAs relied on the same facts as the Commission's Decision, the NCAs have acted in breach of the *ne bis in idem* principle.

Second, because the decisions of the NCAs covered alleged anti-competitive conduct which was still continuing at the time of the Czech and Slovak Republic's accession to the EU, the NCAs may also have acted in breach Article 11(6) of Regulation 1/2003, read in conjunction with Article 3 and Recital 18, which provides that once the Commission has initiated proceedings, national competition authorities are relieved of their competence to investigate such conduct under national competition law as they would also be under an obligation to apply Article 81 EC.

United Kingdom (Scotland) – Calor Gas – Article 81(1) EC as a defence and effect on trade

We represented Calor Gas in a case before the Scottish Court of Session⁵ regarding the question of whether two sets of contractual provisions in Calor Gas Limited's dealership agreements were unenforceable on the ground that they were contrary to Article 81(1) EC. The provisions in question concerned (i) an exclusivity obligation, according to which dealers could purchase and sell only Calor cylinder LPG during the term of the contract, and (ii) a post-termination obligation that the dealer would not handle Calor Gas' gas cylinder products after the termination of the dealership agreement.

The Court found that the duty not to handle the gas cylinders of competitors on safety and efficiency grounds, both during and after termination of the agreement, breached Article 81(1) EC because it had the effect of foreclosing the UK market, despite the fact that there was no intra-Community trade in cylinders for reasons of weight and safety.

Replies to the Commission's Questionnaire

Part 1 – Direct Applicability of Article 81(3) EC

We have no particular knowledge of how the application of Article 81(3) EC has worked in practice. Cases where Article 81(3) EC has been positively or negatively applied by a NCA or a national court remain very rare. By contrast, national authorities and courts typically appear to have applied Article 81(1) EC more often.

In this regard, we would like to make the following general comments:

- First, the fact that the advent of the system of legal exception has resulted in a unitary norm applied as a whole by all competition enforcers and courts does not mean that the conceptual difference between paragraphs (1) and (3) of Article 81 EC has lost its significance.

In particular, it is erroneous to believe that it is unimportant if Article 81(1) EC is interpreted broadly or without any conceptual rigour, since the economic analysis of pro-competitive effects and thus the balancing against the anti-competitive effects,

⁵ See <http://www.scotcourts.gov.uk/opinions/2008csoh13.html>.

will immediately follow under the third paragraph of Article 81 EC. A first question of utmost practical importance is the burden of proof, which under Article 81(1) EC is borne by the Commission, or by national competition authorities or third parties when that provision is invoked at national level, whereas under Article 81(3) EC it is borne by the undertakings. If Article 81(1) EC were to be given too narrow a meaning, then the burden of proof would entirely fall upon the parties, who would have to defend their agreement essentially only under Article 81(3) EC. On the other hand, if almost all balancing were to take place under Article 81(1) EC, the Commission and generally the competition authorities would be inappropriately burdened. Therefore, the current division between the two paragraphs reflects a balance and apportionment of the burden of proof that it would be unwise to tilt.

In addition, apart from the burden of proof, the distinction between the two paragraphs still remains significant. The Treaty itself requires a two-stage reasoning under the two paragraphs but, more importantly, if too narrow a meaning is given to Article 81(1) EC and one proceeds to an economic analysis only under Article 81(3) EC, there is a risk that the objective and the function of Article 81 EC as a whole will be compromised. Potentially benign agreements which would otherwise have escaped the application of Article 81(1) EC (if a narrower meaning were adopted), might not satisfy the two positive and two negative cumulative conditions of Article 81(3) EC and the agreement might end up being prohibited.

Moreover, Article 81(3) EC, as applied by the Commission and by the European Courts, while corresponding to a substantial extent to the US “rule of reason”, is not a very flexible norm. It does not allow for a total welfare test, but only for a consumer surplus standard, since at least some part of the cost savings must be passed on to the consumer. Furthermore, the second negative requirement for an agreement not to eliminate competition means that an agreement which creates a monopoly, although socially desirable because of accruing efficiencies, will still be prohibited. It should therefore remain possible for certain pro-competitive agreements to escape Article 81(1) EC altogether under a reasonableness test, thus being spared the more inflexible antitrust analysis of Article 81(3) EC. It is therefore important to respect the conceptual difference between the first and the third paragraph of Article 81 EC, even though modernisation may give the impression of a unitary step of analysis.

- Second, with particular reference to the burden of proof, we wish to express some reservations on the compatibility of Article 2 of Regulation 1/2003 with human rights principles and in particular with the principle *in dubio pro reo*.

Article 2 provides that the burden of proving an infringement of Article 81(1) EC rests with the authority (or the claimant), while the defendant bears the burden of proving the conditions of Article 81(3) EC.

The concept of the burden of proof is not an easy one and may differ between common law and civil law. It is also sometimes referred to as “legal burden of proof” (*charge de la preuve*) and is distinguished from the “evidential burden of proof” (*charge de l’allégation*), which refers to a party’s duty to substantiate his arguments

and pleas with appropriate evidence, reflecting the principle *ei incumbit probatio qui dicit, non qui negat*, which is recognised as a general principle of law.⁶

It is only very recently that the Community Courts have shed light on these concepts.⁷ Advocate General Kokott has eloquently described the function of the rules on the burden of proof in the following terms:

“The Commission naturally bears the burden of proving all the findings which it makes in its decision. However, before there is any need to allocate the burden of proof at all, each party bears the burden of adducing evidence in support of its respective assertions. A substantiated submission by the Commission can be overturned only by an at least equally substantiated submission by the parties. The rules governing the burden of proof are only applicable at all where both parties provide sound, conclusive arguments and reach different conclusions.

Therefore, if in its decision the Commission draws conclusions as to the conditions prevailing in a particular market on the basis of objectively verifiable evidence from stated sources, the undertakings concerned cannot refute the Commission’s findings simply by unsubstantiatedly disputing them. Rather, it falls to them to show in detail why the information used by the Commission is inaccurate, why it has no probative value, if that is the case, or why the conclusions drawn by the Commission are unsound. This requirement does not represent the reversal of the burden of proof ... but the normal operation of the respective burdens of adducing evidence.”⁸

In other words, the rules on the legal burden of proof cover the extraordinary situation where both parties, i.e. (a) the Commission or the claimant and (b) the defendant, have in reality discharged their evidential burden of proof and yet they both provide sound arguments reaching different conclusions. By way of illustration, in a 50-50 case, where both sides appear to stand on solid ground, the rule on the legal burden of proof will result in a finding against the party that bears that burden of proof.

If that is what the legal burden of proof stands for, the rule of Article 2 of Regulation 1/2003, which apportions the legal burden of proof in Article 81(3) EC to the defendant, is problematic and seems to be contrary to the principle of *in dubio pro reo*, which undoubtedly applies to EC competition law enforcement. In a “50-50 situation” where both sides appear to provide sound arguments as to the applicability of Article 81(3) EC, an individual cannot be condemned through an infringement decision and be possibly fined (for an Article 81 EC violation), merely because it happens to bear the relevant legal burden proof.

It is sometimes said that Article 2 codifies pre-existing case law of the Community Courts, but a closer look at that case law shows that the Community Courts have used terminology that is akin more to the evidential and not so much to the legal burden of

⁶ Case C-526/04, *Laboratoires Boiron SA v. Union de recouvrement des cotisations de sécurité sociale et d’allocations familiales (Urssaf) de Lyon*, [2006] ECR I-7529, AG Tizzano’s Opinion, para. 68.

⁷ See e.g. Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland A/S and Others v. Commission*, [2004] ECR I-123, paras. 78-79.

⁸ Case C-105/04 P, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v. Commission*, [2006] ECR I-8725, AG’s Opinion, paras. 73-74.

proof.⁹ Indeed, in *Consten & Grundig* the ECJ stressed that the Commission is not free of any burden of proof in Article 81(3) EC.¹⁰

It appears therefore to us that in a possible review of Article 2 of Regulation 1/2003, it should be made clear that the burden of proof referred to in that provision is the evidential and not the legal one, which is always borne by the Commission or the prosecuting authority. Such a rule would be consistent with the principle of *in dubio pro reo*.

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

In our experience, since modernisation, NCAs and national courts have not shied away from their obligation to apply Community competition law in addition to national competition law, to the extent the former was applicable because of an inter-State trade effect.

A first issue is of course whether certain conduct affects trade between Member States, thus Community competition law being applicable to the specific case. The Commission Notice on effect on trade¹¹ is certainly of assistance. We have had some positive experience arguing such matters in an arbitration case¹² but we also fear that some national courts may decide to apply or not apply Community competition law too easily, quasi-automatically, without addressing that jurisdictional criterion.

As for the relationship between Community and national competition law, we have identified two specific problems.

- One problem is the real scope of Article 3(2) of Regulation 1/2003, which allows Member States to adopt and apply on their territory stricter national laws which prohibit or sanction unilateral conduct, even when such conduct is not prohibited under Community law. Some authorities (and courts) give too broad a reading to that provision with the result that they end up prohibiting conduct under national competition law that is lawful under Community competition law, even though the specific national provision is identical or very similar to Article 82 EC. Pursuant to Recital 8 and to the spirit and letter of Article 3 of Regulation 1/2003, it is open to national competition authorities to prohibit conduct allowed under Article 82 EC Treaty only to the extent the relevant national rule is *a priori* stricter than that provision.¹³ It is not the case that Regulation 1/2003 allows a general exception to the

⁹ See Joined Cases 56/64 and 58/64, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v. Commission*, [1965] ECR, English special edition, page 299, at 347: “*The undertakings are entitled to an appropriate examination by the Commission of their requests for Article 85(3) [now 81(3)] to be applied. For this purpose the Commission may not confine itself to requiring from undertakings proof of the fulfilment of the requirements for the grant of the exemption but must, as a matter of good administration, play its part, using the means available to it, in ascertaining the relevant facts and circumstances.*” (emphasis added); Case T-34/92, *Fiatagri UK Ltd. and New Holland Ford Ltd. v. Commission*, [1994] ECR II-905, para. 99: “*the Court observes that it is primarily for the undertakings notifying an agreement in order to obtain an exemption from the Commission to present to it the evidence to show that the agreement satisfies the conditions laid down in Article 85(3) of the Treaty*” (emphasis added).

¹⁰ See the preceding footnote.

¹¹ *Commission Notice - Guidelines on the Effect on Trade Concept Contained in Articles 81 and 82 of the Treaty*, OJ [2004] C 101/81.

¹² In that case, we presented arguments before the arbitration tribunal on the appreciability of the inter-State trade effect, relying on the two numerical presumptions of the Commission Notice.

¹³ See Paul Nihoul, “Le projet de loi belge sur la protection de la concurrence économique : Les relations avec le règlement CE 1/2003”, (2006) *Revue de la Concurrence Belge* 4, pp. 21-22.

principle of supremacy of Community competition law for all cases of unilateral conduct but rather that it puts in place a narrow exception which is only valid for “*stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings*” (emphasis added).

Regulation 1/2003 refers to stricter laws and not to stricter application of laws. Recital 8 of that Regulation is even clearer:

“Member States should not under this Regulation be precluded from adopting and applying on their territory stricter national competition laws which prohibit or impose sanctions on unilateral conduct engaged in by undertakings. These stricter national laws may include provisions which prohibit or impose sanctions on abusive behaviour toward economically dependent undertakings.” (emphasis added)

From the above, it is obvious that the rationale of Article 3(2) of Regulation 1/2003 is generally to safeguard the supremacy of Community law and to allow for a derogation with regard to unilateral conduct only to the extent that a Member State has in place or wishes to introduce national competition rules on unilateral conduct that differ from and are stricter than Article 82 EC. In particular, this provision is aimed, as Recital 8 of Regulation 1/2003 makes clear, at national provisions on abuse of economic dependence. This is accepted by the majority of commentators,¹⁴ and most believe that this exception covers only Sections 19 to 21 of the German Act against restraints of competition, which deal with abuse of economic dependence and other similar unfair practices in Article L420-2(1)(b) of the French Commercial Code and in some provisions of Austrian competition law which create a rebuttable presumption of dominance where certain thresholds of market share are met and cover low cost selling.¹⁵

In the *CCHBC* case described above, the Hellenic Competition Commission in its pleadings and decisions took a different approach and considered that it was entitled under Regulation 1/2003 to apply its national provision on unilateral conduct (Article 2 of L. 703/1977) in a stricter way than Article 82 EC. Indeed, in another case, it took a Decision declaring that for exactly the same facts and conduct there was no infringement of Article 82 EC, but there was an infringement of the national equivalent.¹⁶ However, Article 2 of L. 703/1977 does not fall within the *ratio* of Article 3(2) of Regulation 1/2003, since the former provision is not stricter than the latter provision, its legislative model being Article 82 EC. There is nothing that

¹⁴ See e.g. Martin Sura, in: Langen & Bunte (Eds.), *Kommentar zum deutschen und europäischen Kartellrecht*, Vol. II, *Europäisches Kartellrecht* (Munich, 2006), pp. 620-621:

“Article 82 EC is not explicitly excluded from the supremacy rule; rather Article 3(2), 2nd sentence, of Regulation 1/2003 speaks generally of unilateral conduct engaged in by undertakings. According to Recital 8, 6th sentence, of Regulation 1/2003 stricter national laws may include provisions which prohibit or impose sanctions on abusive behaviour toward economically dependent undertakings. This provision satisfies the wish of some Member States to apply national laws imposing obligations on companies which are not in a dominant position, also in situations where there is an effect on trade between Member States” (our translation).

¹⁵ See Marc Van der Woude and Valérie Landes, “The Procedure in the Network”, in: Korah (Ed.), *Competition Law of the European Community* (New York, 2004), p. 11-14; John D. Cooke, “General Report”, in: Cahill (ed.), *The Modernisation of EU Competition Law Enforcement in the European Union, FIDE 2004 National Reports* (Cambridge, 2004), p. 645.

¹⁶ Decision of the Hellenic Competition Commission 318/V/2006.

differentiates the protective scope of Article 2 of L. 703/1977 from the protective scope of Article 82 EC. The objective of both provisions is to protect effective competition in the market. The identity has also been noted by the European Court of Justice (“ECJ”) in *Syfait*, where the Court states that “*Article 2 of Law No 703/1977 on the control of monopolies and oligopolies and the protection of free competition (FEK (Official Gazette) A’ 278), as amended by Law No 2941/2001 (FEK A’ 201, hereafter ‘Law No 703/1977’), essentially corresponds to Article 82 EC*”.¹⁷

Although this all appears clear, errors and misapplication of Article 3(2) are still possible. The Commission is therefore invited to reflect on an appropriate amendment of the text in order to make the above principles more evident.

Of course, an optimal way to deal with this and other similar problems is to exclude the application of national competition law altogether when Community competition law is applicable and thus require national authorities and courts only to apply the latter. This was the solution proposed by the Commission in its proposal of September 2000, but which at that time encountered resistance from the Member States, eventually resulting in the current compromise solution of Article 3. We believe that the Commission’s 2000 proposal would be better for legal certainty and would “*ensure that the same competition rules apply to businesses throughout the Community*”.¹⁸ Moreover, such a rule would by no means marginalise national authorities and courts as four years on from the implementation of Regulation 1/2003, enforcement of EC competition law actually mostly takes place in the Member States and not in Brussels.

- Another problem is action by national competition authorities subsequent to a commitment decision taken by the Commission under Article 9 of Regulation 1/2003. We will not enter into the substance of the Greek *CCHBC* case, but there is certainly some need for Regulation 1/2003 to ensure that the effectiveness (*effet utile*) of such decisions is not compromised by national action.

Ideally, a more pro-active approach needs to be adopted and it should be made clear that the principle of supremacy fully applies to such decisions, which are after all measures adopted by a Community institution. Although at the time of drafting Regulation 1/2003 it was not clear how the new mechanism of Article 9 would work in practice, the experience so far shows that this is a valuable enforcement tool in the arsenal of the Commission. It allows the Commission to adopt competition remedies into effect in a timely, efficient and consensual manner. In reality, such decisions are not just a form of exercise of administrative discretion to close a pending

¹⁷ Case C-53/03, *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v. GlaxoSmithKline plc and GlaxoSmithKline AEVE*, [2005] ECR I-4609, para. 4, emphasis added.

¹⁸ *Commission Proposal for a Council Regulation on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty and Amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 (“Regulation Implementing Articles 81 and 82 of the Treaty”), COM(2000) 582 final, OJ [2000] C 365E/284, Recital 8. The text of the then proposed Article 3 read as follows:*

“Where an agreement, a decision by an association of undertakings or a concerted practice within the meaning of Article 81 of the Treaty or the abuse of a dominant position within the meaning of Article 82 may affect trade between Member States, Community competition law shall apply to the exclusion of national competition laws.”

investigation, but reflect the enforcement policy of the Commission in a positive way.¹⁹

Protecting such commitment decisions from subsequent national action which may frustrate the effectiveness of their operative part and of the specific remedies ordered therein or which may create confusion to undertakings as to the required conduct for the future, would be in conformity with long-standing principles of Community law (supremacy, pre-emption, effectiveness) and would thus not break new ground.

At the very least, it has to be stressed that an Article 9 decision is a formal Commission act, adopted under Article 249 EC by the Commission as a collegiate body and, as with all formal Community acts, must be accorded full respect by national authorities and courts.²⁰ It is true that under a combined reading of Recitals 13 and 22 of Regulation 1/2003 such commitment decisions are currently not binding, strictly speaking, for national competition authorities. However, national competition authorities remain bound by the general principle of supremacy of Community law, as expressed in Article 10 EC and Article 16 of Regulation 1/2003, to pay full respect to the Commission's decision and not to put at risk its effectiveness (*effet utile*). Indeed, according to a public Communication by the Commission about commitment decisions:

*“the same companies may still face enforcement action before Member States’ authorities and courts, provided that the uniform application of the competition rules throughout the EU is not jeopardised”.*²¹ (emphasis added)

An amendment of Regulation 1/2003 should therefore make particular reference to the principle of effectiveness. This could be done by adding some appropriate text at the end of Recital 22.

Part 4 – Enforcement by National Competition Authorities

Enforcement action taken by NCAs has generally been satisfactory. The most important achievement has been the mere fact that so much EC competition law enforcement now takes place at national level. If we compare this with the state of affairs in the 1990s when only a few NCAs were empowered to apply Community law and these actually applied it very rarely, then we can indeed speak of a “brave new world”.

This does not mean to say, however, that problems do not exist. The most serious – though also inevitable – problem remains the differing structure, quality and independence of NCAs. Moreover, the decisions of NCAs are subject to different degrees of judicial review in the Member States. Such differences are regrettable from the point of view of uniformity and of

¹⁹ Compare Case 14/68, *Walt Wilhelm v. Bundeskartellamt*, [1969] ECR 1, para. 5, where the Court refers to “certain positive, though indirect” Community measures, which aim at promoting a harmonious development of economic activities in the Community.

²⁰ See Rainer Bechtold, Ingo Brinker, Wolfgang Bosch and Simon Hirsbrunner, *EG Kartellrecht, Kommentar* (Munich, 2005), p. 231; Georg De Bronett, *Kommentar zum europäischen Kartellverfahrensrecht – VO 1/2003* (Munich, 2005), Artikel 9, Rn. 9-11; Jürgen Schwarze and Andreas Weitbrecht, *Grundzüge des europäischen Kartellverfahrensrecht – Die Verordnung (EG) Nr.1/2003* (Baden-Baden, 2004), p. 114.

²¹ Public Communication of the Commission: *Commitment Decisions (Article 9 of Council Regulation 1/2003 Providing for a Modernised Framework for Antitrust Scrutiny of Company Behaviour)*, *Frequently Asked Questions and Answers*, MEMO/04/217, 17 September 2004.

equality of treatment, but they are a consequence of the Member States' institutional and procedural autonomy, which is also recognised by Article 35 of Regulation 1/2003.

While it is politically difficult for the Community to impose a certain model of organisation of competition authorities on the Member States, it is not impossible for the Commission to publish soft law texts such as recommendations with best practices or even commission a study on optimal agency structures.

Of course, these differences among the NCAs will continue to exist, but some degree of harmonisation is appropriate, particularly if in the future there is Community legislation introducing an EU-wide "binding effect" of NCA infringement decisions for follow-on civil actions for damages.²²

Part 5 – Co-operation in the European Competition Network ("ECN")

We were involved in a case concerning the rejection of a complaint by the European Commission on the basis of Article 13(1) of Regulation 1/2003.²³ The European Association of Euro-Pharmaceutical Companies ("EAEPCC"), the trade body that represents parallel trade manufacturers in Europe, had lodged three complaints with the Commission alleging that a refusal by GlaxoSmithKline ("GSK") to supply three pharmaceutical products to Greek pharmaceutical wholesalers constituted an abuse of a dominant position contrary to Article 82 EC.

In April 2006, the Commission pursuant to Article 13(1) of Regulation 1/2003 declined to take up the three complaints of EAEPCC, since the HCC was already dealing with the case. EAEPCC sought the annulment of that Commission Decision, but it finally chose to withdraw its application for annulment shortly before the Oral Hearing. The case would have been the first time the Court of First Instance ("CFI") would have dealt with a provision of Regulation 1/2003 that is so central to modernisation and to the functioning of the ECN.

Part 6 – Co-operation between Competition Authorities and Judicial Authorities

We have not been involved in proceedings before national courts where the issue of Article 15 of Regulation 1/2003 arose; however we proceed below to provide some comments concerning co-operation between competition authorities, notably the Commission, and national courts.

- Our first point is that it is unfortunate that the Commission Notice on co-operation²⁴ adopts a definition of "court" that follows the "court or tribunal" criterion of Article 234 EC, as interpreted by the Court of Justice.²⁵ Thus, paragraph 1 states that "*for the purpose of this notice, the 'courts of the EU Member States' (hereinafter 'national courts') are those courts and tribunals within an EU Member State that can apply Articles 81 and 82 EC and that are authorised to ask for a preliminary question to the Court of Justice of the European Communities pursuant to Article 234 EC*".

²² See *Commission White Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM(2008) 165 final.

²³ Case T-153/06, *European Association of Euro-Pharmaceutical Companies v. Commission*, removed from the register (OJ [2008] C 92/46).

²⁴ *Commission Notice on Co-operation between the Commission and the Courts of the EU Member States in the Application of Articles 81 and 82 EC*, OJ [2004] C 101/54.

²⁵ Para. 1 of the co-operation Notice.

This was an unwise text for two main reasons. First, because by *renvoi* it results in excluding arbitration, since arbitration tribunals are not considered by the ECJ as “courts or tribunals” in the sense of Article 234 EC.²⁶ It is not clear whether this language intended to specifically exclude arbitration, though there is some evidence that this may well have been the intention.²⁷ There is, however, no valid reason to exclude arbitration from such a soft law instrument.²⁸

Second, the above text is unfortunate because it is Article 10 and not 234 EC that should guide the Commission in its co-operation with national courts. Indeed, Article 15(1) of Regulation 1/2003 and, in a certain sense, also the Co-operation Notice, are *leges speciales* of the *lex generalis* of Article 10 EC. This means that an entity considered as a “court” in the national legal order should be able to co-operate with the Commission on the basis of Article 10 EC and of the *Delimitis*²⁹ and *Automec II*³⁰ principles of co-operation. In other words, the term “court or tribunal” in Article 234 EC may be narrower than what may nationally be considered a “court”. In our view, it is inappropriate for the Commission to refuse to cooperate with such a court, since the latter, being an organ of the Member State in question, must always be able to seize the Commission on the basis of Article 10 EC, notwithstanding paragraph 1 of the Co-operation Notice.

- Our second point is that Member States have not fully respected their duty to transmit copies of national judgments applying EC competition law to the Commission. Indeed, we are aware of the existence of national judgments in some Member States, yet it seems that nothing has been reported or transmitted to the Commission. A better mechanism might therefore need to be established at Community level. For example, Community law might provide itself for a specific duty of NCAs to assemble such judgments in their respective territories and transmit them to the Commission. This could be combined with a procedural duty imposed (by Community legislation) on the litigants to serve their initiating pleadings (actions, appeals, etc.) to the NCA,³¹ so that the latter can be alerted to the litigation, and/or an obligation for the national courts to notify their judgments to the NCA.
- Finally, we wish to note that although the Commission has promised to publish non-confidential versions of its *amicus curiae* submissions made before national courts

²⁶ Case 102/81, *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG*, [1982] ECR 1095; Case C-125/04, *Guy Denuit and Betty Cordenier v. Transorient – Mosaïque Voyages and Culture SA*, [2005] ECR I-923.

²⁷ See Emil Paulis, “Panel Discussion: Administrative Antitrust Authorities: Adjudicative and Investigatory Functions”, in: Hawk (Ed.), *International Antitrust Law and Policy 2002, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 2003), p. 459, who explains that, indeed, the Commission was probably “frightened” to grant full access to arbitrators for the same reasons as maybe the ECJ was.

²⁸ We have experience of one case where the question of the arbitration tribunal’s inability to use the co-operation Notice was mentioned in the course of the arbitration proceedings.

²⁹ Case C-234/89, *Stergios Delimitis v. Henninger Bräu AG*, [1991] ECR I-935.

³⁰ Case T-24/90, *Automec Srl v. Commission (II)*, [1992] ECR II-2223.

³¹ This is now the formalised practice in the UK where any party whose statement of case raises or deals with an issue relating to the application of Articles 81 and 82 EC or the equivalent national provisions must serve a copy of the statement of case on the OFT at the same time as it is served on the other parties to the claim. See *Practice Direction – Competition Law – Claims Relating to the Application of Articles 81 and 82 of the EC Treaty and Chapters I and II of Part I of the Competition Act 1998*, para. 3. The same duty of notification is imposed on appellants. See *Practice Direction 52 – Appeals*, para. 21.10A.

under Article 15(3) of Regulation 1/2003, no publication has ever taken place, despite the fact that such submissions have clearly been made.

Public Enforcement of EC Competition Law by the European Commission

Regulation 1/2003 not only deals with the decentralised application of Community competition law, but also sets out the procedural framework for the exercise of the Commission's powers in the competition field. Each review of that framework is a unique opportunity to improve the quality of centralised competition law enforcement.

In that regard, we believe that inherent weaknesses in the way the Commission undertakes its administrative investigations may ultimately impact upon the perception of the quality of the Commission's decision-making. In this section we therefore provide some thoughts as to how the current system could be improved. We are perfectly aware that it may not be possible to accommodate some of these ideas without having recourse to more radical reforms, or perhaps even a Treaty amendment. However, they are nonetheless offered in good faith in the context of the current consultation with a view to stimulating further debate, bearing in mind the common aim of all interlocutors to achieve or come as close as possible to an optimal system of enforcement both in terms of efficiency and in terms of justice.

Ex ante Review of the Legality of Inspections under Article 20 of Regulation 1/2003

A recent judgment of the European Court of Human Rights ("ECtHR") appears to cast doubts on the compatibility of the Commission's current system with the European Convention on Human Rights (the "Convention").³² In *Ravon*, the ECtHR held that French taxpayers were entitled to effective judicial review, in fact and law, of the legality of a decision by the tax administration to conduct an unannounced inspection. An *ex post* appeal limited to points of law to the French *Cour de cassation* was deemed insufficient to meet the requirements of Article 6(1) of the Convention. Applying by analogy the rationale of the *Ravon* judgment to the Community legal order, it would appear that EC competition law suffers from the same shortcomings as French tax law. Currently, under Article 20 of Regulation 1/2003 the Commission may order inspections by decision without having to produce a warrant, which only becomes necessary where the Commission requires the assistance of national authorities, who alone are entitled to use public force, to overcome a company's opposition to the inspection.³³

Moreover, even in those circumstances, the judicial review of national courts is limited to verifying the authenticity of the decision ordering the inspection and the proportionality of the use of public force to conduct the inspection:³⁴ only the Community Courts have *ex post* jurisdiction to assess the legality of the decision authorising the inspection.

We do recognise that entrusting national courts with the power to review Commission decisions would not be consistent with the supremacy of Community law and would undermine its uniform application throughout the Community. *De lege ferenda*, however, a

³² ECtHR, Judgment of 21 February 2008, *Ravon v. France*, Application number 18497/03.

³³ Article 20(6) of Regulation 1/2003.

³⁴ Article 20(7) of Regulation 1/2003.

solution for the future, compatible with the ECtHR's case law, could be to involve the CFI or its President in the authorisation of investigations.

Less Commission Control over Access to File

Access to file is currently much broader than before and better protects the right of defence of undertakings while safeguarding business secrets and other confidential information. However, the system still has shortcomings. In particular, the Commission continues in our view to have too much control over the access to file process, with the result that parties may labour under the possible misapprehension that they may not obtain access to the whole of the Commission file. We would therefore recommend that the role of the Hearing Officer in relation to access to file be further strengthened, so as to ensure that companies under investigation are confident that they have full access to the whole file.

Greater Separation of Investigators and Decision-makers

Another problem is that the Commission acts simultaneously as “*investigator, decision-maker, public prosecutor, judge and jury*”,³⁵ a view which may explain the judgment of the US Supreme Court in *Intel*, where the Commission was considered as a foreign court for the purposes of application of 28 U.S.C. § 1782.³⁶ This has led to claims that the Commission's procedures are unfair and unbalanced, not because the officials concerned act inappropriately but rather because officials are put in the almost impossible position of being expected to judge whether their own work is correct.

We therefore believe that the same officials should not act as both investigator and decision-maker. In that regard, while the Commission's practice of having a separate unit dedicated to case support is a first step, more transparency would be welcome. For example, the companies under investigation could be granted the right to express their views directly to DG-COMP officials charged with the so-called “peer review”.

Reinforcing the Administrative Oral Hearing Process

Separating case team investigators and decision drafters would also help reinforce the administrative oral hearing process. Currently, the administrative oral hearing procedure only provides parties under investigation an opportunity to restate their position to the case team, albeit under the supervision of the Hearing Officer. This can be contrasted to the position in the US where competition agencies will assemble documents, data, and testimony, and likely integrate that evidence through the testimony of experts, who will be subject to cross-examination by the parties and scrutiny by the judge. Thus, the perception of many lawyers, especially those from a common law tradition, is that the Commission procedures are wanting.

In order to address this situation, we believe that when the Commission's case team has concluded its investigation, it should test and support its conclusions before an independent decision-maker during a public hearing. Moreover, during that hearing, parties should be able to question the evidence the Commission puts forward and also cross-examine (under

³⁵ Compare AG Vesterdorf's Jointed Opinions in Jointed Cases T-1/89 to T-4/89 and T-6/89 to T-15/89, *Rhône-Poulenc SA and Others v. Commission*, [1991] ECR II-867, at II-887, stating that “*generally problems may arise if the same administrative authority has such wide-ranging powers that, in addition to investigating and prosecuting, it may also impose fines of such considerable amounts...*”.

³⁶ *Intel Corp. v. Advanced Micro Devices, Inc.*, 124 S.Ct. 2466.

the control of the decision-maker) witnesses upon whose testimony the case team seeks to rely.

Enhancing the Independence of the Hearing Officers

We also believe that the independent status of Hearing Officers should be enhanced in light of the importance of their tasks. Hearing Officers already play a fundamental role in being entrusted with the safeguarding of due process throughout the procedure. In particular, they organise and chair the oral hearing, are called upon to solve disputes between the parties and the Commission on procedural issues, and draft reports on the respect of due process by the Commission. Those are important tasks as ensuring procedural fairness during the administrative phase before the Commission is crucial, especially in light of the relative deference showed by the Community Courts towards the Commission's findings of facts.

However, Hearing Officers, though enjoying functional independence from DG COMP, remain attached to the Commissioner responsible for competition. In our view, Hearing Officers should be statutorily independent from the Commission. This would moreover reinforce their role as guardians of due process throughout the whole procedure. Currently, Hearing Officers lack a judge's decision-making powers to adjudicate on procedural issues such as confidentiality or legal privilege. Nor *a fortiori* do Hearing Officers take decisions regarding the substance of the case. As a consequence, the role of Hearing Officers at oral hearings remains rather passive.

In that regard, it should be possible to enhance the role of Hearing Officers even without restructuring the Commission's internal organisation. For instance, Hearing Officers could make more frequent use of their power to comment at any time on a case. They could also deal with the substantive questions raised by a case and offer their opinions instead of limiting their reports to procedural issues. The Commission could also be required to justify any departure from the Hearing Officer's report in its final decision.

Conclusion

We trust that the foregoing remarks, prepared in a relatively short period, offer food for thought to the Commission's services as they embark on this very important exercise. We recognise that a lot has been attained, but a lot can still be improved.