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Time for fresh guidance?

The return of the exemption decision

by **Alec Burnside, Marjolein De Backer** and **Delphine Strohl**

Regulation 1/2003 abolished the notification system which had been a cornerstone of EU competition law since the early days – the venerable Regulation 17 of 1962. Notifications gave the European Commission (EC) information about commercial practices, and allowed it to develop the law. They were vital in those early days when antitrust was an unfamiliar discipline, and everything remained to be explored as to the interplay between the twin objectives of upholding competition and integrating national markets.

Forty years later, the body of accumulated law and practice was such that the EC felt able to relinquish its monopoly over the power to exempt, and we entered instead into the age of self-assessment. The EC retained a power to adopt "decisions of inapplicability" – but has studiously refrained from using it. Nearly 20 years on, and in a much-changed world, is it time to revisit that dormant power?

The demise of the system of notifications also reflected a reality that it had become unmanageable, with a vast backlog of cases. Block exemptions had removed the need to notify swathes of agreements, in areas where the EC had amassed sufficient experience to set limits – distribution, patent licensing, for example. But the burden on the EC's notification system remained: taking some snapshots in time, the backlog of pending notifications was 3,451 cases in 1988, albeit reduced to 1,052 at the end of 1994 – still a significant number.

And of the cases that were addressed, only a small handful were dealt with by formal decision. Instead the EC commonly resorted to issuing comfort letters – a euphemism, since the "comfort" given would often be that a given agreement needed exemption, but would not actually be exempted.

Self-assessment, in the way familiar to US practitioners under section 1 of the Sherman Act, has been a success. New block exemptions and associated guidelines have proliferated, and intermittent rulings from the EU courts mould the law further. Nevertheless new forms of economic activity throw up fresh questions where the value or relevance of existing precedent and guidance is doubtful. Notably the digital economy has changed the dynamic in many areas of business: a good case in point is the tussle over recent years in relation to most-favoured nation (MFN) clauses whose impact online has catapulted their significance far beyond their impact in the bricks-and-mortar economy. A further area demanding new clarity is the application of the Article 101(3) exemption criteria in relation to environmental considerations and sustainability more generally.

As noted, despite the move to self-assessment the EC has relevant powers and procedures:

- Under Article 10 of Regulation 1/2003 the EC may decide that Article 101 or 102 of the Treaty on the Functioning of the European Union (TFEU) do "not apply to an agreement, a decision by an association of undertakings or a concerted practice, either because the conditions of Article [101(1)] of the Treaty or not fulfilled, or because the conditions of Article [101(3)] of the Treaty are satisfied. The Commission may likewise make such a finding with reference to Article [102] of the Treaty".
- The press release accompanying Regulation 1/2003 explicitly stated that the EC would "remain open to discuss specific cases with undertakings where appropriate" and would "in particular [be] prepared to provide guidance to businesses where novel questions of EU competition law make it difficult for them to assess their agreements or conduct under the EC competition rules." To this end, the EC adopted the Notice on informal guidance to businesses.[1] Such guidance letters are reserved to cases where a genuinely novel question arises which falls within the EC's enforcement priorities. Guidance letters have to be reasoned and published.

The Covid-19 pandemic has led the EC to issue more guidance but also to issue its first comfort letter in 20 years. More such comfort letters might be expected in the Covid-19 context.

The present article explores the detail of the Commission's "guidance powers", before then noting indications from the EC that it recognises these challenges.

Regulation 1/2003: Decision of inapplicability

Recital 14 of Regulation 1/2003 explains in more detail the circumstances in which the EC would find it opportune to adopt a decision of inapplicability.

First, the EC will act on its own initiative. Although it will in practice be companies and their advisers who bring potential cases to the EC's attention, there is no right to invoke the use of Article 10.

Second, a decision of inapplicability will only be taken in exceptional circumstances where the public interest of the EU so requires. The EU's public interest here should be understood as the EU's commitment to a system of undistorted competition. Other public policy considerations such as industrial interests cannot be invoked to establish that there is an "EU public interest" in the sense of Article 10 of Regulation 1/2003.[2]

Third, the EC will only take the initiative to adopt a decision if there is a need to clarify the law and ensure its consistent application across the EU. Recital 14 of Regulation 1/2003 makes it explicit that the possibility of adopting decisions of inapplicability is particularly important in the case of "new types of agreements or practices that have not been settled in existing EC decisional practice or the EU court's case law".

When the EC considers it appropriate to adopt a decision of inapplicability it will publish its intention to do so. Once proceedings have been opened national competition authorities and courts are prevented from issuing a decision or ruling that would conflict with the EC's forthcoming Article 10 decision. The final decision is published and has EU-wide binding effect.

Notice on guidance letters

Regulation 1/2003 recognises that companies may wish to seek informal guidance from the EC where cases give rise to genuine uncertainty because they present novel or unresolved questions about the application of Article 101 or 102 (recital 38). The Regulation itself does not deal with such informal guidance, which is addressed only in the EC's Notice on informal guidance.

Companies can request the EC to provide informal guidance in relation to agreements or practices which are sufficiently developed. The EC will not consider providing guidance letters for hypothetical collaboration initiatives. The EC could also decide to open formal proceedings on the basis of the facts presented by the companies.

Companies can withdraw a request for informal guidance at any stage but risk that the EC will use the information obtained during the process in later investigations: the Notice allows the EC to use all information supplied by the parties if at any later point in time the EC decides to open an investigation under Regulation 1/2003.

The EC is only allowed to issue a guidance letter if such letter does not interfere with the primary objective of Regulation 1/2003, ie, effective competition law enforcement. The EC may therefore only provide informal guidance to individual companies in so far as this is compatible with its enforcement priorities. In addition, three cumulative conditions must be met:

- There is no precedent available in the case law of the EU courts or the EC's decisional practice. Nor is there any publicly available general guidance or precedent by way of previous guidance letters;
- Based on a prima facie evaluation of the case it appears that a guidance letter would be useful taking into account (1) the economic importance from the point of view of the consumer, (2) how widespread these types of agreements are, and/or (3) the economic importance of the agreement in view of the size of the companies or if it creates structural changes such as the set-up of a joint venture;
- A guidance letter can be issued on the basis of the available information and no further fact-finding is needed.

The EC will not consider a request for a guidance letter if similar questions are pending before the courts in Luxembourg or before national agencies or courts.

Companies wanting to seek informal guidance do not need to complete a specific form but should submit a memorandum which identifies: (1) the parties; (2) the questions on which guidance is sought; (3) all information the EC needs to provide guidance, including relevant documentation; (4) a detailed reasoning why the request presents a novel question; and (5) all other relevant documentation and information including confirmation that the conduct is not subject to proceedings pending before the national courts or competition authorities.

The EC will evaluate the request on the basis of the information it receives and can also seek further information from public sources or former proceedings or any other source. The EC may also discuss the matter with the competition authorities of the member states.

If the EC decides not to issue a guidance letter, it will inform the parties. If the EC decides to adopt a guidance letter it can respond to all questions raised in the request made by the companies, or the EC could also limit its guidance to only some questions. The letter will include: (1) a summary of the facts on which the letter is based; and (2) the principal legal reasoning underlying the understanding of the EC on the novel questions raised. A non-confidential version of the guidance letter is published.

Guidance letters are not binding on the courts in Luxembourg or the national courts and competition authorities. It is in the discretion of the EU courts, national courts and national competition authorities whether or not to take account of the guidance letters issued by the EC in the context of a particular case. The guidance letters do not prevent the EC from opening an investigation into the conduct which was the subject of the guidance letter, in particular if the EC receives a complaint. The EC will in that case take the guidance letter into account but also changes in the underlying facts, any new aspects raised by the complaint, developments in the case law of the EU courts or wider changes in the EC's policy.

Novel questions: New forms of collaboration and a shift to digital

For almost two decades the EC has taken the view that no novel questions needed to be answered by way of a declaration of inapplicability. Nor has it applied its

procedures under the Notice on informal guidance. Most practitioners will be able to cite instances in which they sought informal guidance, but comfort that may have been given will have remained unpublished, so not feeding into general awareness. Frequent conference contributions from the EC of course go some way towards informing professional opinion, but never rooted in specific facts and without offering appropriate legal precedent.

This ground may be shifting. Commissioner Vestager has in the last five to six months referred to the need to use the EC's powers to provide guidance; and in a recent merger decision the press release included commentary on agreements relevant to the sector but unrelated (and therefore not ancillary) to the merger.

More recently still, the Covid-19 pandemic has raised many questions about industry collaboration, in particular in critical sectors such as pharma. These extraordinary times have caused the EC to issue, with breakneck speed, what may be its first comfort letter in 20 years: reportedly a three-page document giving the green light for makers of generic medicines to cooperate to ensure supplies. This, of course, within certain boundaries; but we can expect more cooperation and possibly more urgent comfort letters beyond the pharma industry.

Even before Covid-19, Commissioner Vestager had already been outspoken about the need for clear rules about how businesses can cooperate in a speech given on 2 March this year.[3] She referred to the review of the Horizontal Guidelines and added that:

> "we should also make use of the other powers we have, to make it clear to businesses how they can cooperate, without harming competition. So we'll be ready to give informal guidance when it's needed – in new or unclear situations, for instance. And we should consider making use of our power to decide formally that the antitrust rules don't apply to an agreement, when that agreement doesn't harm competition. So that, by replacing doubt with certainty, we can unlock new possibilities for cooperation."

Based on these statements we can expect the EC to use its power under Article 10 of Regulation 1/2003 but also to issue informal guidance letters. The question then is for which type of agreements the EC is intending to use these powers.

A first category might be industry initiatives to improve sustainability cf the UN's Sustainable Development Goals (to which the EU has subscribed) which range from environmental issues to eradicating poverty and ensuring quality education. Many sustainability initiatives can only be effective when they are joint projects among competitors. From a competition law perspective there is at first sight an inherent tension between companies agreeing on a small increase in labour (input) costs, for example, and the recognised goal of ensuring a living wage for farmers who might otherwise send their children to work in the field rather than to school. The fact that the children and fields in question may more likely be in Africa rather than Europe of course raises the issue of recognising out-of-market efficiencies.

Indeed, the Commissioner's first public comments on the matter came some months previously, at the Sustainability and Competition Policy conference in Brussels. The area of "novel cooperation" Vestager then identified related to the unionisation of gig-economy workers. Platform workers such as Deliveroo riders and Uber drivers should be able to team up and defend their rights, the Commissioner said, taking the position that the platforms may use the label self-employed to disguise the reality that their workers are (at least for antitrust purposes) employees. She added that "we may need to make clear that nothing in the competition rules stops those platform workers from forming a union" *and that* "national competition authorities have been asked to look at the issue and 'give comfort' to platform workers".[4] This is an area where the Court of Justice ruled that competition law does not apply to collective bargaining agreements which fix minimum wages of independents (freelance musicians in that case) provided that the independents are "false independents" and, in fact, perform the same duties as employees.[5] The court's preliminary ruling did not, however, provide guidance on whether the freelance musicians were actually independent (in which case they might each be distinct undertakings) and said that this assessment was difficult.

More generally, the "digital economy", which has raised broader questions about the adequacy of the existing antitrust toolkit,[6] may be an area where Article 10 decisions could be necessary and could align the approaches of different national authorities. For example, the diverging national decisions in relation to MFN clauses – in particular in the online hotel booking industry – would have benefited from an EC Article 10 decision for the type of MFN clauses it considers lawful under Article 101 TFEU. Another example would be data sharing and data pooling, which are often pro-competitive but, as explained in the Competition policy for the digital era report, may also have anti-competitive aspects such as denying access or access only on excessive terms, facilitating unlawful information exchange, or discourage innovation.[7]

In a press release accompanying the recent EUMR clearance in *Vodafone Italia/TIM/INWIT*[8] the EC seems to have gone out of its way to provide an analysis of cooperation agreements with which Telecom Italia and Vodafone aim to roll out 5G in Italy. These cooperation agreements were not subject to review in the merger investigation but were nevertheless examined and adapted in light of the EC's concerns. The press release devotes over half a page to discussing the cooperation agreements; it is to be seen whether this is also addressed in the decision once published. This may be a third, more ad hoc way, in

which the EC intends to provide guidance outside of the Article 10 and informal guidance notice procedures.

It may be said of course that the EC has continued to take decisions of applicability – in other words, infringement decisions; and in the margins of these it may be possible to perceive areas of inapplicability. A case in point would be the pending proceedings against various car manufacturers whose R&D collaboration appears to have overstepped the mark in some respects (emission cleaning technology), but not others which were originally in scope of the EC's concerns. A press release hints at a broader initial scope (technological development of passenger cars) and outsiders to the case are left unclear as to where the dividing line has been drawn, and why.[9]

Building confidence

It is a welcome development that the EC appears willing to go beyond the publication of guidelines and guidance notices. Indeed at the Sustainability conference, the commissioner actively invited companies to come forward with their initiatives so that the EC could guide them and thereby develop its own relevant experience. This of course was the quid pro quo of the early years of the notification regime. The EC will have the opportunity, for example, to build on its 1999 decision concerning energy efficient washing machines[10] in which it based the Article 101(3) exemption on the agreement's contribution to recognised environmental goals – a solitary decision much cited in the sustainability debate. Building confidence among industry that joint sustainability initiatives do not risk exposing parties to ex post infringement decisions will surely be a legitimate use of the still dormant powers discussed in this article.

The EC will very certainly be sparing in its use of these powers. Nothing here heralds a return to the notification system, and it must certainly be hoped that the EC does not lapse into a generalised use of unpublished comfort letters (although their urgent use in the context of the pandemic is sensible pragmatism). Guidance in block exemptions and other instruments will remain the main yardsticks for companies to assess their conduct. But these yardsticks need to be revisited for relevance to evolving commercial needs and practices. Given the lack of decisional practice over nearly 20 years, it is equally certain that there is ground to be made up.

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Endnotes

1. Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters).
2. EC Antitrust Manual of Procedures, November 2019, 18 - Decision finding inapplicability (Article 10 Decision), para 4.
3. Keeping the EU competitive in a green and digital world, College of Europe, Bruges, 2 March.
4. Commissioner Vestager's speech, "Competition and Sustainability", at Sustainability and Competition Policy – Bridging Two Worlds to Enable a Fairer Economy Conference, GCLC, Fairtrade, UCL, Brussels, 24 October 2019, recording available here: https://www.youtube.com/watch?v=7mpWAOhkQbY.
5. C-413/13 FNV Kunsten Informatie en Media.
6. For example, Crémer, J, de Montjoye, Y-A and Schweitzer, H, *Competition policy for the digital era report*, 2019.
7. Ibid, at pp 9 and 93.
8. Mergers : Commission clears acquisition of joint control over INWIT by Telecom Italia and Vodafone, subject to conditions, 6 March.
9. EC press release, "*Antitrust: Commission sends Statement of Objections to BMW, Daimler and VZ for restricting competition on emission cleaning technology*", 5 April 2019 and Burnside, A and Okkonen, M, *Minimising the risk of breaching antitrust rules in Research and Development (R&D) collaboration, Practical Law UK*, 1 December 2019.
10. IV.F.1/36.718 CECED, 24 January 1999.

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