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COMMENTS OF THE GLOBAL COMPETITION LAW CENTRE (“GCLC”) ON THE FUNCTIONING OF REGULATION 1/2003

On 24 July 2008, the Commission launched a public consultation on the functioning of Regulation 1/2003. Interested parties have been invited to submit comments by 30 September 2008.

As stressed by the Commission itself, Regulation 1/2003 was a landmark reform, amounting to the most far-reaching overhaul of the European Community (“EC”) antitrust procedures in more than 40 years. The GCLC appreciates that Regulation 1/2003 introduced a number of significant improvements in the enforcement of the EC competition rules. The GCLC is however keen to actively participate in the public discussion launched by the Commission in order to help assess whether the system can be further improved. The GCLC is indeed convinced that the effectiveness of Community competition policy is highly dependent on a proper enforcement system.

To this end, the GCLC has decided to organise in June next year a conference specifically dedicated to the procedural enforcement system of Article 81 and 82 of the EC Treaty. Working groups will be set up dealing with each topic identified by the Commission in its questionnaire.

At this stage, within the short time frame allowed by the Commission, the GCLC submits some limited and non exhaustive comments on four issues:

- decentralisation of enforcement (1);
- decisional and enforcement structure at Commission level – system of checks and balances (2);
- a more “*holistic*” view involving the coordination of rules that have developed outside the application of the Regulation itself (3);
- abolition of the notification system and legal certainty (4).

1. Decentralisation of enforcement

One of the key reforms of Regulation 1/2003 was to entrust national competition authorities (“NCAs”) and courts with the role of applying the EC antitrust rules in their entirety. In so doing, the Council and the Commission’s purpose was to bring about wide-spread enforcement of the same set of rules in order to prosecute cartel operators and other actors engaged in anti-competitive practices throughout the European Union (“EU”).

Whilst this reform clearly delivers a number of benefits, it also raises problems. In allowing for the parallel application of the same EC competition provisions by 28 different competition authorities which may all become simultaneously active, Regulation 1/2003 entails a risk of inconsistent decisions and a cumulation of sanctions (see (a) hereafter). In addition, since all NCAs apply different procedural systems and sanctions, the protection standards afforded to firms are heterogeneous and potentially discriminatory (see (b) hereafter):

- (a) First the GCLC is aware of various examples where given behaviour was initially condemned by a NCA – and even sanctions imposed – and subsequently exempted by another competition authority¹; or where given behaviour was initially exempted by a NCA and subsequently condemned by another competition authority.² One may wonder how far the possibility for one authority to take a decision concerning a fact, which was previously examined by another authority under the same set of rules and considered by it as not constituting an offence is at all compatible with the principle of the legality of the sanction provided for in Article 7 European Convention on Human Rights (“ECHR”) and with the *ne bis in idem* principle. Thus, the parallel application of competition rules by multiple authorities entails a major risk of inconsistent decisions and double jeopardy which the GCLC respectfully submits ought to be remedied.
- (b) Second, in the absence of clear case-allocation rules, it is unclear how far a system pursuant to which a case may be allocated to a Member State where incarceration is possible while in others only limited fines are provided for is at all compatible with the fundamental rights of legality of the sanction and of equality of treatment.

¹ For instance, in *Visa International*, the non-discrimination rule was first condemned by the Swedish and Dutch authority and then exempted by the Commission.

² In the *Michelin II decision* of 20 June 2001 (case COMP/E-2/36041) for instance, the Commission imposed a €19,76 million fine on Michelin for a rebate system which had been reviewed and approved by the French competition authority. *Vice Versa*, behaviour exempted by the Commission has sometimes been condemned by national authorities (see e.g. the British rules on beer supply agreements which are stricter than the Commission's). Another example can for instance be found in the differing interpretation of the vertical block exemption regulation as regards the prohibition of resale price maintenance. In the petrol station business, several companies provide for a guaranteed margin system for the retailers. In a decision of 8 June 2000, the Italian authority found this system to be blacklisted. In the words of the Italian authority, the modalities of determination of the margins stimulate the resellers not to undertake an independent policy on prices. The Spanish authority came to the opposite conclusion in a decision of 23 February 2000 (File R 348/98), taking the view that this system was in the interest of petrol stations. More recently the Dutch authority found that the system was illegal. According to it, since all oil companies use systems for supporting filling station owners in almost identical ways, filling station owners are not given an incentive to charge prices below their suppliers' national recommended prices. As a result, the Director General of the Dutch authority notified its intention to render the Block Exemption inoperative (press release 01-46, The Hague, 18 December 2001).

Articles 11 and 13 of the Regulation aim at coordinating the activities of the Commission with those of the different NCAs, as well as the activities of the latter among themselves, in order to ensure, according to recital 18, “*that cases are dealt with by the most appropriate authorities within the network*”. The ultimate purpose of Article 11 and 13 is obviously to avoid, to the maximum extent possible, that a given case be subject to parallel proceedings, possibly leading to conflicting decisions. However, whilst the provisions on vertical coordination (between the Commission and the NCAs) are binding on the latter, those relating to horizontal coordination (amongst the NCAs) are not, nor are the criteria for the allocation of tasks very accurate. It is therefore questionable whether an optimal allocation of cases can actually be achieved in the current legal framework.

In this context, the GCLC refers to the Common Declaration of the Council and the Commission on the functioning of the network, pursuant to which (para. 20): “*After the initial period of allocation, when the same case (...) is treated by more than one NCA able to treat it in the appropriate way, only one such Authority will issue a formal decision, while the others will suspend their proceedings or, should this not be possible, said authorities will cooperate closely in the treatment of this case*”. This provision clearly exhibits the uncertainties arising from the system of parallel competences set out in Regulation 1/2003. It is indeed difficult, if not impossible, to reconcile the rule according to which only *one* authority will *decide formally* on a case of common interest, with the risk that other authorities may freely decide not to suspend their own proceedings. How would then the latter proceedings end up in practice? True, Article 11 (6) of Regulation 1/2003 enables the Commission to relieve NCAs of their competence by initiating proceedings itself. However, according to para. 21 of the Declaration, this should happen only in exceptional circumstances, enumerated in said paragraph.

Since the allocation of cases can seriously affect the legal position of the parties, the GCLC respectfully emphasizes that the choice of the authority best placed to investigate a given case – and eventually to adopt a decision – should be based on objective, uniform and verifiable criteria and should be effected in a transparent way.

Moreover, the wide discrepancies among national rules on sanctions for violations of Articles 81 and 82 render the choice of the authority that should deal with a case extremely sensitive, inasmuch as the legal consequences of a given conduct can differ. In order to protect the fundamental rights of the parties involved in antitrust proceedings, the choice of the competent authority and of the applicable national provisions should be made according to clear criteria; it should not be modified without precise reasons; and any such modification should be communicated in due time to interested parties, so that they may avail themselves of an appropriate defense. Once again, this is an area where competition law can skim over the realm of fundamental rights

In the same vein, whilst substantive competition law is henceforth largely harmonised throughout the EC, procedural requirements remain exclusively regulated at national

level, and are in practice often diverge significantly among the Member States. This raises numerous questions: How far, for instance, can an authority in one Member State rely on information obtained in another Member State which does not respect the same standard of protection? Can a Member State with a higher standard of protection deliberately undermine the effectiveness of the investigation it is requested to carry out on behalf of another NCA? Can a company refuse to be subject to an investigation because the NCA's investigative measures do not satisfy the fundamental rights standard applied in the Member State "on behalf of" which the inspection is made? The same goes with the diverging rules which apply in different Member States on limits to replies for requests for information, on legal professional privilege, on access to file, on leniency programmes, on judicial control, on the suspensory effect of appeals, etc.

The GCLC respectfully submits that this raises the question of a need for a minimal harmonisation of procedural standards throughout the EU, at least in those situations where problems are most likely to arise.

2. Decisional and enforcement structure at Commission level – System of checks and balances.

In recent years, the fines imposed by the Commission for competition law infringements have reached a historic level. The GCLC believes that this increased "criminalisation" of competition law raises fundamental questions as to the appropriateness of the current enforcement system of competition rules. Thus, whilst accumulation of investigative, prosecutorial and adjudicative powers within the Commission in competition matters may have been justifiable as long as fines were still relatively limited, it raises today –as stressed *inter alia* by the OECD– serious "concerns about the absence of checks and balances".³

The GCLC is fully aware of the various improvements which have recently been introduced in the system (review panels, chief economist, progressive changes in the role of the hearing officer, etc.). It, however, believes that more fundamental changes are required to satisfy the requirements of a "Community of law", to improve the effectiveness of Community competition policy, and to comply with the requirements of the ECHR.

Normally, under Article 6 ECHR, any judgment concerning the "determination" of a criminal charge –including fines in competition proceedings–⁴ must be given at first instance by an independent and impartial tribunal established by law.⁵ This right is often regarded as "one of the most important guarantees of the whole Convention".⁶

³ See OECD country studies – European Commission – Peer Review of Competition Law and Policy 2005, p. 62.

⁴ It is today well-established in the case-law of the European Court of Human Rights [ECtHR] that competition proceedings, in the course of which a decision imposing fines on undertakings is taken, are to be qualified as "criminal" under Article 6 ECHR (see most recently the judgment of the ECtHR of 23 November 2006, *Jussila v. Finland*, App. N° 73053/01).

⁵ As it is put in the case-law of the ECtHR, this right implies that in criminal law cases, "there must be at first instance a tribunal which fully meets the requirements of Article 6 (...) and where the applicant has an entitlement to have its case "heard", with the opportunity *inter alia* to give evidence in his own defence, hear the evidence against him and examine and cross examine witnesses" (*Jussila v. Finland*, cited above, at para. 40, emphasis added).

Exceptions to the principle of first instance decision by a tribunal are only admitted in a narrow set of circumstances, essentially where the criminal charges under consideration are either minor or disciplinary in nature.⁷ Except in such cases, applicants are "*entitled to a first instance tribunal which fully met the requirements of Article 6, para. 1*".⁸ A mere judicial review in appeal of a decision taken by an administrative authority is insufficient. This has been explained as follows:

*"Where criminal justice, as is often the case, is administered at two levels –at first instance and on appeal– it is not sufficient that the requirement of impartiality is satisfied at the appeal stage. While various minor procedural deficiencies may well be remedied in appeal proceedings, the requirement of an impartial tribunal is of such fundamental character that it should be satisfied already during the trial at first instance, this being in general an essential –and perhaps even the most important– part of the criminal proceedings (...)"*⁹ (emphasis added).

With the dramatic rise in recent years of fines for breaches of competition rules, it is increasingly difficult to classify such offences as "*minor*".

In order (i) to improve the enforcement mechanism; (ii) to be in line with the requirements of a Community of law; and (iii) to comply with the requirements of the ECHR, the GCLC believes that ideally the current system ought to be replaced by a new system where the decisional power in antitrust cases is given to an independent tribunal (the CFI or a newly created competition court).

Although only such a fundamental reform would, in the opinion of the GCLC, fully satisfy the requirements of a Community of law and comply with the ECHR –and arguably this could be done without changing the Treaties–, the GCLC urges the Commission to consider at least whether in a first stage less radical reforms could be introduced in the context of the review of Regulation 1/2003. Such reforms should at least improve the system of "*checks and balances*" and reduce the current "*prosecutorial bias*" which is inherent in a system where the same authority is both prosecutor and first-instance judge in a case.

⁶ See S. TRECHSEL, *Human Rights in Criminal Proceedings*, Oxford University Press 2005, p. 46.

⁷ Thus, in *Öztürk* (Judgment of the ECtHR of 21 February 1984, *Öztürk v. Germany*, A 73, at para. 56, emphasis added), the ECtHR stated that "[h]aving regard to the large number of minor offences, notably in the sphere of road traffic (...), conferring the prosecution and punishment of minor offences on administrative authorities is not inconsistent with the Convention provided that the person concerned is enabled to take any decision thus made against him before a tribunal that does offer the guarantees of Article 6 (...)" (the same reasoning can apply also to tax cases; see judgment of the ECtHR of 24 February 1994, *Bendenoun v. France*, A 284, at para. 46). In *Le Compte* (Judgments of the ECtHR of 23 June 1981, *Le Compte e.a. v. Belgium*, A 54, at para. 51 and of 10 February 1983, *Le Compte v. Belgium*, A 58, at para. 29), the ECtHR came to the same conclusion in cases "*adjudicating on disciplinary offences*".

⁸ See e.g. Judgment of the ECtHR of 25 February 1997, *Findlay v. United Kingdom*, reports 1997-I, at para. 79. OLAF performs its functions under the supervision of a Committee whose members are chosen amongst "*independent outside persons*" with appropriate skills and expertise. The Office is headed by a Director appointed as the Commission upon recommendation of the Supervisory Committee and after consulting the European Parliament and the Council for a term of five years. It has wide autonomy.

⁹ Opinion of Mr. Darelius, Mrs. Thune and Mr. Loncaides in the Report of the HR Commission of 2 March 1995, in case *Thomann v. Switzerland*, App. n° 17602/91.

The following non-exhaustive list of possibilities – which the GCLC will discuss in more detail during the conference it intends to organise in June 2009 – could be examined:

- as in the early days, establish within DG COMP distinct directorates for instruction and for decision-making?;
- in a similar manner to the enforcement systems in force in several Member States, separate the tasks of preparing the case/drafting the decision from the decision-making process itself at the level of the Commission, with a right for the parties to express their views on the draft decision before the Commissioner(s) final decision (and the possibility for the latter to send the case back to DG COMP services for further inquiry or reconsideration of given aspects)?;
- reinforce/improve the role of the hearing officer?;
- oblige the Commission to communicate, after receipt of the observations on the Statement of objections and prior to the decision, the reasoning it proposes to follow and the precise elements it will take into account (including the value of the sales) in view of calculating the fine in each individual case, and give the parties the opportunity to be heard and submit observations on the proposed fine before the decision is adopted?;
- reinforce and formalise "*review panels*"? (e.g. define and publicise the review panels' operational rules, composition of the review panels, persons exterior to the Commission, stage at which the panels intervene, report of the panels made public?);
- improve the hearing process and in particular require that Commissioner(s) attend it? (as indicated by the OECD, "*no other jurisdiction in the OECD assigns decision-making responsibility in competition enforcement to a body like the Commission*" where, when the Commission decides a matter "[n]o Commissioner, including even the Competition Commissioner will have attended the hearing");¹⁰
- allow hearings to be public where there is no issue of confidentiality? (According to the ECtHR, an "*oral, and public, hearing constitutes a fundamental principle enshrined in Article 6(1)*");
- reinforce/improve the role of the advisory committee? Or, at the very least, ensure that its reports are an integral part of the file and are made accessible to the applicant in case of challenge of the final decision before the CFI (not a mere "*rubberstamping*" role)?;
- as in the case of any procedure before an independent judge, should not all contacts between the case team and the parties (formal or informal) –both plaintiffs and incriminated parties– be recorded and the minutes of these conversations be part of the case file?

¹⁰ Report quoted above, at p. 63.

3. A more “holistic” view

The GCLC believes that a review of Regulation 1/2003 should provide the opportunity to better coordinate rules that have developed outside the framework of the Regulation itself.

This applies to two areas in particular:

- the relationship and consistency between the Guidelines on the method of setting fines, the Leniency notice and the rules on direct settlements;
- the relationship and respective objectives of the commitment decisions under Article 9 of the Regulation and the rules on direct settlements.

4. Abolition of the notification system and legal certainty

Finally, and as is also well-known, the core of the reform brought about by Regulation 1/2003 is the replacement of the centralised notification and authorisation system for Article 81(3) EC by a directly applicable exception system. The introduction of a directly applicable exception system undoubtedly brings about a number of benefits. The GCLC submits, however, that there are also a number of instances where the absence of some form of "clearance" system may discourage companies from adopting otherwise efficient policies. As fines increase, the negative effects stemming from the absence of some sort of "clearance" mechanism become increasingly acute.

Whilst notifications entail certain administrative burdens, they may also allow the Commission to be made aware of industry concerns and to establish its jurisprudence. As stressed in the past by the Commission itself:

"The notification system provides the Commission with a steady source of information about transactions (...). A substantial portion of the Commission's decisions are triggered by notifications. This indicates that many contractual provisions deserving careful sourcing have been brought to the Commission's attention through notifications. They also provide the basic material for the Commission to determine the necessity and scope of block exemptions".¹¹

There is also some inconsistency between the Commission incentivising the notification of cartels (through leniency) and making the notification of mergers compulsory, and then refusing any form of notification which might otherwise be useful to give some guidance in complex Articles 81-82 EC cases.

The GCLC believes that some form of "guidance system" should be reintroduced for complex matters in a future review of Regulation 1/2003. The GCLC in this regard notes that the Commission has not adopted any positive decision under Article 10 nor to its knowledge issued a guidance letter. The reasons for this must be analysed. The GCLC believes that the lack of positive decisions and/or guidance makes the application of article 81 outside the area

¹¹ See Commission's Greenbook on vertical restraints at para 188. See similar comment made in the Commission's White Paper at para 76.

of cartel cases less and less transparent. The lack of precedents at Community level makes the task of national courts more difficult and has negative consequences on the ability of undertakings and their advisers to self-assess their commercial conduct, thus lowering legal certainty even more. This is particularly true in respect of the application of Article 81(3) EC. In the experience of the members of the GCLC the Commission's Guidelines of 2004 on the application of Article 81 (3) EC are hardly applied nor referred to and they are generally seen as impractical and unsuitable in national court proceedings.

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