JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION'S SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW ON THE EUROPEAN COMMISSION'S CONSULTATION ON THE FUNCTIONING OF REGULATION 1/2003

October 3, 2008

The views stated in this submission are presented jointly on behalf of these Sections only. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.

Introduction

The Section of Antitrust Law and the Section of International Law (together, the Sections) of the American Bar Association (ABA)[1] respectfully submit these comments in response to DG Competition's consultation request on the functioning of Regulation 1/2003.[2]

The Sections appreciate this opportunity to comment on their experience with the application of the Regulation and the practical effects of the Commission's modernization efforts. In doing so, the Sections refer to and expand upon their 2003 joint comments, submitted on the draft European Commission Notices and Draft Regulation Implementing Regulation 1/2003 and appended hereto (the Sections' 2003 Comments).[3] These current comments further address particular concerns raised in the Sections' 2003 Comments, focusing on a growing need to promote cooperation and consistency in European competition enforcement, both as a matter of internal governance and

[1] The members of the Working Group that drafted these comments are: Rachel Brandenburger, Terry Calvani, Michael Fanelli, David Hull, Tad Lipsky, Stephen Kinsella, Elizabeth Kraus, Evelina Kurgonaite, and Cristoforo Osti.

[2]The Commission recently published a consultation document at http://ec.europa.eu/comm/competition/antitrust/consultations/consultation_1_2003.pdf in which it requested public comment on experience with Regulation 1/2003.

[3] The Sections' Comments on the Draft European Commission Notices and Draft Regulation Implementing Regulation 1/2003 (the Sections' 2003 comments) are available at http://www.abanet.org/antitrust/at-comments/2003/12-03/ecmodernization.html.

coherence and to limit negative external effects for trade and international cooperation resulting from inconsistency. At the outset, the Sections wish to make clear that we recognize and welcome the substantial cooperation and consistency within the European Union resulting from the modernization process. These comments address selected areas in which, based on our experience, we believe potential opportunities for improved consistency and cooperation within the modernization program exist. These fall into two broad categories: (i) additional opportunities for the Commission to promote consistency and coordination and (ii) opportunities for substantive rule changes to rationalize and promote the consistent application of Articles 81 and 82 EC, which are discussed below.

The Sections' comments reflect their considerable expertise with U.S. antitrust law, and substantial familiarity with competition laws internationally, particularly with respect to the European Union and its Member States. We would be pleased to provide any additional comments, or to participate in consultations, as appropriate.

I. Cooperation and Consistency in European Competition Enforcement

As an initial matter, the Sections wish to congratulate the Commission and the Member State competition authorities (NCAs) on their efforts to develop a coherent enforcement mechanism amidst the decentralized network of enforcers with parallel competences, which exists in the EU. The enforcement mechanisms developed as a result of these efforts have helped to avoid a number of the concerns raised in the Sections' 2003 Comments. In particular, our experience with decentralized European competition law enforcement indicates that the concerns initially raised regarding the allocation of cases among NCAs and the protection of information exchanged between

these authorities[4] have not, in fact, come to fruition. Further, we commend the Regulation's establishment of a policy that ensures that twenty-eight jurisdictions apply EC law.[5] In addition, it is clear that substantial formal and informal cooperation within the European Competition Network now exists, and that some Member States have gone beyond the scope of the Regulation to reform certain of their procedural rules to further reduce inconsistency.[6]

The current regime, however, could do more to promote the consistent application of EC precedent across jurisdictional lines and cooperation and consistency as among NCAs, the Commission, and national courts. As the European Union grows and its external influence expands, the need to ensure consistent European competition law enforcement within the European Union takes on ever-greater importance. Intra-jurisdictional rationality and coherence is not merely an issue internal to the European competition law enforcement system, but has increasingly important external ramifications. Even within the brief period of time since the inception of Regulation 1/2003, rationality and coherence in enforcement relationships have become more critical as additional competition law regimes, such as those of China, Egypt, and Singapore, have come into being, and as globalization of firms and markets continues apace.

Accordingly, every jurisdiction, be it national or supranational, has a heightened

[4] *See* Sections' 2003 Comments at 4–6.

[5] Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27/04/2004, p.43, Article 1.

[6] *See, e.g.*, Eric Gippini-Fournier, "The Modernisation of European Competition Law: First Experiences with Regulation 1/2003, Community Report to the FIDE Congress 2008, *available at* SSRN: http://ssrn.com/abstract=1139776 (Modernisation Report). [The author notes that "the few years of application of Regulation 1/2003 have witnessed an interesting phenomenon of voluntary convergence […] leading Member States to go beyond the specific duties deriving from Regulation 1/2003 and adjust their national laws and practices to achieve further convergence."] at p. 96.

responsibility to avoid competition law approaches that impose unnecessary obstacles to competitive behavior that transcends its own legal boundaries. In furtherance of this goal, the Sections respectfully suggest additional opportunities to promote greater consistency and cooperation within the Regulation 1/2003 framework. In particular, we address three areas touched upon in the Sections' 2003 Comments: (i) coordination with NCAs, (ii) coordination with national courts, and (iii) the provision of informal guidance. In addition, we suggest three substantive rule changes aimed at further rationalizing and promoting the consistent application of Articles 81 and 82 EC: (i) rationalization of the leniency process, (ii) greater procedural harmonization, and (iii) convergence of national unilateral conduct standards.

II. Additional Opportunities for the Commission to Promote Consistency and Coordination

The introduction to the Sections' 2003 Comments provided that "[i]n view of the decentralization of EC competition law enforcement, appropriate guidance from and involvement by the Commission will be important to provide legal certainty and avoid potentially chilling pro-competitive and competitively benign restraints."[7] This remains the case, even though much work has been done to promote consistency and coordination, particularly with respect to the Commission's interaction with NCAs, national courts, and parties.

With regard to NCAs, Regulation 1/2003 provides the Commission with little opportunity to intervene to remedy the inconsistent application of EC precedent and

[7] *See* Sections' 2003 Comments at p. 2.

practice by NCAs.[8] For example, the Commission does not have formal powers to comment on NCA decisions, and has no power to require NCAs to revise draft decisions to reflect EC law and practice. Thus, since the inception of the modernization program, there have been some NCA decisions that differ from Commission precedents (for example in relation to market definition) and an apparent reticence on the part of certain NCAs to engage in the complex assessment of Article 81(3) issues in a manner similar to that of the Commission.

Moreover, while we are aware of instances in which the Commission has provided comments on NCA draft decisions, the extent to which the Commission employs supervisory oversight or moral suasion to promote NCA interpretations consistent with those of European competition law is unclear. Whereas the Commission appears to have influenced certain NCA decisions, this does not appear to have occurred in all instances in which guidance might have been constructive. Given the lack of transparency surrounding the extent to which the Commission employs this type of oversight and the resources allocated to such efforts, the Sections are limited in their ability to provide suggestions for improvement. We note, however, that this lack of transparency, in and of itself, is less than optimal as it tends to minimize the appreciation that those outside of the ECN network have for the cooperation that is taking place between the Commission and the Member State agencies and within the network.

Similarly, the Commission and the national courts do not appear to have made the most of the Regulation's tools to aid in ensuring the consistency of national court interpretations with EC policy and precedent. In particular, certain national courts have

[8] Understandably, the Commission has not chosen to take the drastic step of invoking its powers to relieve Member State agencies of their competence in individual cases to remedy such cases.

been reluctant to make Article 234 requests to the European Court of Justice for preliminary references in cases involving interpretations of Articles 81 and 82 and the Commission acted as amicus curiae in only two cases, although it has provided opinions in response to approximately 19 requests from national courts.[9] Moreover, it appears that the Commission has neither provided opinions in all cases in which they were requested by courts, nor provided opinions on its own initiative.

As with some NCAs, the judiciary in certain jurisdictions has limited experience with the complex factual assessment required by an Article 81(3) review. Thus, it can be the case that the judiciary in one or more of these jurisdictions may not be in a position to adjudicate a faulty NCA analysis consistent with the Commission's policies and practices. Moreover, instances in which the national courts affirmatively forgo an assessment of Articles 81 and 82 are not reported to the Commission, and, thus can go unnoticed. This effectively can leave parties without recourse under European competition law. With the anticipated increase in private actions in the European Union, these issues are likely to become more frequent and disruptive in future years, unless rectified.

Additionally, to date, the guidance letter mechanism, provided for in Regulation 1/2003 and the relevant Notice,[10] has yet to be used. The Sections' 2003 Comments highlighted the limited scope available for public guidance based on the criteria outlined

[9] *See* discussions of the ECN and the overview of cooperation in the *Commission's Annual Reports on Competition Policy*, 2004-2007, http://ec.europa.eu/comm/competition/annual_reports/ and Wright, Kathryn, *Consistent Application and the Judicial –Administrative Relationship*, CCP Working Paper 08-24, http://www.ccp.uea.ac.uk/publicfiles/workingpapers/CCP08-24.pdf, at pp. 17-19.

[10] Regulation at Recital 38, 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), OJ C 101, 27/04/2004, p.78.

in the Notice, and raised questions regarding the legal relevance of such guidance.[11] These factors, in combination with a perceived resistance by parties to the publication of such guidance, appear to discourage parties from seeking such guidance.

In assessing the application of the Regulation as part of its Report, the Commission may wish to explore how to address these concerns in an effort to promote greater consistency in the application of Articles 81 and 82. It is important that companies doing business in the European Union do not find themselves faced with a patchwork of inconsistent case law that will make it difficult for them to pursue coherent pan-European strategies that allow them to deliver the benefits of a single European market.

III. Substantive Rule Changes to Rationalize and Promote Consistent Application of Articles 81 and 82 EC

While important reforms have been implemented as a result of Regulation 1/2003, the Sections believe there to be additional opportunities for improvement. In addition to the suggested areas for review as regards the Commission's powers and relations with the NCAs and national courts, we respectfully suggest three substantive areas that can benefit from rule changes: (i) a rationalization of the leniency process, (ii) greater procedural harmonization, and (iii) convergence of Article 82 analysis throughout the Member States.

The Sections' 2003 Comments proposed a rationalization and simplification of the leniency application process.[12] Since that time, the number and breadth of Member

[11] *See* Sections' 2003 Comments at 13-14.

[12] *See* Sections' 2003 Comments at 6.

State leniency programs has expanded significantly.[13] Now, virtually every Member State has a leniency program in place.[14] In an effort to limit the burden and discrepancies arising from the application of parallel European leniency programs, the ECN developed a Model Leniency Programme.[15] While this is an impressive initial effort to alleviate the notification burden and the potential for divergent requirements placed on parties attempting to avail themselves of European leniency programs, it has not eliminated concerns as to disparate outcomes on similar facts within various EU Member States. Accordingly, the Sections welcome a review of the program and respectfully suggest that, as part of this review, the Commission and the NCAs examine proposals aimed at adopting a genuine "one-stop shop" for leniency notifications. This will both reduce the burdens imposed by the current regime and enhance the effectiveness of the EC's anti-cartel program.

Moreover, the Sections recognize that certain Member States have reformed their procedures, even though not required to do so by Regulation 1/2003, to promote increased competition law enforcement consistency throughout the Europe.[16] Nevertheless, further improvements can be made. At present, each NCA continues to apply its own national procedural rules when conducting investigations pursuant to both

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[13] *Compare, e.g.*, Getting the Deal Through: Cartel Regulation, *Global Competition Review* (2004) with Getting the Deal Through: Cartel Regulation, *Global Competition Review* (2008).

[14] The two EC jurisdictions without leniency programs are Malta and Slovenia.

[15] A description of the ECN's program is available at: http://ec.europa.eu/comm/competition/ecn/documents.html. The Modernisation Report, cited at n. 6, notes that "A most remarkable example of procedural convergence is the widespread adoption of leniency programmes in the Member States, and their approximation under the aegis of the ECN." Modernisation Report at 96.

[16] *See* n. 6, supra, and articles cited at n. 284 of the Modernisation Report.

national and EC competition rules, and significant differences exist. The Sections highlight dawn raids as one area particularly deserving of review in this light. NCAs conduct dawn raids not only for their own investigations, but they also enter premises of firms or individuals located within their territories on behalf of other NCAs and the Commission. Yet, the rules describing the conditions under which inspectors are entitled to enter company premises and private homes differ throughout the European Union, as do procedural safeguards related to legal privilege and document inspection. Efforts to harmonize the rules regulating the scope of the inspectors' powers and guarantees related to privilege and document inspection would be welcome and would help to bring legal certainty and transparency to this regime, which, in turn, would improve the ability of firms to respond to enforcement efforts. For example, minimum standards regarding document inspection might be based on the principles established in the recent *Akzo* decision,[17] or the European Commission could draw from existing models and guidance employed by NCAs on certain dawn-raid procedures (e.g., the Dutch NCA's guidelines on the examination and copying of digital data and documents).[18]

Finally, we note that Article 3(2) of Regulation 1/2003 provides, in part, that "Member States are not precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by

[17] Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd. v. Commission of the European Communities, Joined Cases T-125/03 and T-253/03, Judgment of the Court of First Instance (First Chamber, Extended Composition) *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003A0125:EN:HTML. (This would ensure, for example, that national competition authorities follow the so-called "envelope procedure" instead of making any final judgment regarding a document on the spot.)

[18] Staatscourant 11 June 2003, nr. 109, p. 30.

undertakings."[19] This permits NCAs and national courts to apply their national laws to the detriment of a consistent application and outcome throughout the European Union, including in cases that affect trade between the Member States.[20] Given the importance of a consistent application of unilateral conduct rules globally, the Sections respectfully submit that the Commission and Member States consider amending this provision to promote consistent interpretations and enforcement of unilateral conduct provisions throughout Europe.

Conclusion

The Sections commend DG Competition for undertaking a review of the working of Regulation 1/2003. We are grateful for the opportunity to provide these views on what we believe are additional opportunities for the Commission to promote consistency and coordination; and for further substantive rule changes to promote the consistent application of Articles 81 and 82 EC, and hope that our comments are useful.

[19] *See* Recommendation 1/2003 at Article 3(2).

[20] For example, the definition of and thresholds for dominance differ among the Member States, such that firms that would not be considered dominant under EC rules are inhibited from developing practices, such as pan-European discounting policies, based on concerns of the application of more stringent national provisions.