Enforcement of Competition Law in Times of Crisis: Is Guided Self-Assessment the Answer?

by

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CONTENTS

Abstract

One common criticism of the EU's competition regime is that it hinders adequate mitigation of crises by preventing a collaborative response to the problem. We suggest that this view is incorrect. We suggest that a collaborative response is unlikely to effectively mitigate most problems. Yet some forms of cooperation can facilitate a crisis solution. These may be at the margin of legality, giving uncertainty as to whether the proposed practice is permitted. With the possibility of significant penalties for competition infringements, most undertakings will not engage in such cooperative practices. There are significant legal and institutional impediments to providing this Guidance. Such gaps lead to uncertainty found in the nature of the EU competition rules and in NCA practice. We argue that the means forward is with greater engagement and guidance by the Commission and NCAs.

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Resumé

Une critique courante du régime de concurrence de l'Union européenne est qu'il entrave l'atténuation adéquate des crises en empêchant une réponse collaborative au problème. Nous suggérons que ce point de vue est incorrect. Nous suggérons qu'une réponse collaborative a peu de chances d'atténuer efficacement la plupart des problèmes. Pourtant, certaines formes de coopération peuvent faciliter la résolution d'une crise. Elles peuvent se situer à la limite de la légalité, ce qui crée une incertitude quant à savoir si la pratique proposée sera autorisée. Compte tenu de la possibilité de sanctions importantes en cas d'infraction à la concurrence, la plupart des entreprises ne s'engageront pas dans de telles pratiques de coopération. Il existe d'importants obstacles juridiques et institutionnels à la fourniture de ces orientations. Ces lacunes conduisent à l'incertitude que l'on retrouve dans la nature des règles de concurrence de l'Union européenne et dans la pratique des autorités nationales de la concurrence. Nous soutenons que la voie à suivre est celle d'un engagement et d'une orientation accrus de la part de la Commission et des autorités nationales.

Key words: Enforcement; Competition Law; Regulation 1/2003; Guidance; Crises; Sustainability.

JEL: D42, D43, H12, L21

I. Introduction[1]

One, perhaps cynical, view of life in the Twenty-First Century is that we are lunging from unprecedented crisis to another unprecedented crisis. The year 2000 opened with the 'Dotcom' crash, since then we have had the financial crash of 2008, the economic fallout of the Covid-19 pandemic, and we are now facing sustainability and climate crises. In addition to these economy-wide events, industrial sectors have faced their own crises. These latter sorts of crises are not unique to this Century, and likely endemic in any market-based

[1] This paper is based on some arguments and work contained in my forthcoming monograph *Competition Law in Crisis: The Antitrust Response to Economic Shocks* (Cambridge: Cambridge University Press, 2022) the writing of which was assisted by the British Academy / Leverhulme Trust Small Grants Programme (SRG20\201069). An earlier version of this appeared in the Jean Monnet Network on EU Law Enforcement Working Paper Series No. 02/22 and was presented at a conference, 'EU Competition Law Enforcement: Challenges to Be Overcome' held at the Centre for Antitrust and Regulatory Studies (CARS) of the Faculty of Management of the University of Warsaw on 26–27 May 2022, my thanks to commentators and participants for their helpful comments as well as to the anonymous reviewer of an earlier draft. Of course, any errors are my responsibility.

economy, reflecting the inevitable result of the competitive process: less efficient firms or industries which produce unwanted goods will (and should) exit the market.

In spite of inefficient firms and industries exiting the market, these crises have economic consequences: those employed by the firm, the firms' stakeholders, and others relying on the existence of the firm, all suffer some form of economic damage. Given this damage, there are inevitable calls for something to be done to mitigate these effects. And mixed with these calls is often the claim that if only competition laws were not in the way, the crisis-stricken industry could mitigate these effects. In the UK, we saw this during the early stages of the Covid pandemic. In March 2020, in the context of panic buying (in particular of toilet roll) and resulting shortages at the supermarkets, the *Financial Times* reported:

> Industry figures also said that the relaxation of competition rules confirmed by the government on Thursday should help them co-ordinate supplies better.
> 'It just means [for instance] that people from Tesco and Sainsbury's could sit and talk to Kimberly-Clark about toilet rolls without the fear of being prosecuted for collusion,' said one.[2]

Similar claims are made in the context of the current sustainability crisis. Insofar as it is perceived as hindering a solution, competition law is seen as at least part of the problem.

This paper argues that this is not the case. We will argue that not only is the 'relaxation' or suspension of competition law in the face of a crisis a mistake, as it cannot cure – or even mitigate – the cause of the crisis. The competition regime is generally well-suited to market-based resolutions of crises situations. In general, a collaborative response is unlikely to either solve or mitigate crises of the sort we are concerned about. However, there may be exceptions, where some forms of cooperation can facilitate a solution.

But such cooperation is typically at the margin of legality, and there may be significant uncertainty as to whether the proposed practice is permitted or proscribed. Regulation 1/2003[3] requires undertakings to self-assess the legality of their proposed actions. And in the face of the possibility of significant penalties for competition infringements, risk-neutral to risk-adverse undertakings will not propose or engage in such cooperative practices. Indeed, recent surveys of European undertakings indicate that uncertainty of this sort had prevented them from engaging in collaborative activity that may have

[2] Jonathan Eley and Judith Evans, "Supermarkets Raid Restaurants to Restock Shelves" *Financial Times*, 20 March 2020, accessed 24 August 2022.

[3] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L-1/1.

sustainability benefits. Our solution to this is through greater guidance by the Commission and the NCAs. Hence, guided self-assessment may be a more effective means of addressing crisis situations.

The remainder of this paper is structured as follows. In Section II, we examine competition law's place in the economy. Its purpose is to address the market failure caused by the monopoly problem and thereby increase social (consumer and /or producer) welfare in a particular market. Suspension of a competition regime does not generally address the causes of these crises. Nevertheless, we recognise that there may be some instances where some form of coordination can mitigate a crisis. In Section III, we consider the desire for and practical difficulties which undertakings may face in devising and implementing such coordination. Supposing such strategies do mitigate the crisis without welfare losses, such activities will be at the margin of legality. And in the face of potentially significant fines, a risk-neutral to risk-adverse actor may well rationally opt against this activity – thus the mitigation benefits may be lost. Section IV briefly examines two well-known cases where cooperative strategies were proposed, Irish Beef ('BIDS') and the Dutch 'Chicken of Tomorrow' initiatives. In both cases, market actors proposed cooperative responses to a problem. Their initial solution was at the margin of legality.

The Irish and Dutch competition authorities engaged with the players to very different degrees. In the Dutch case, after engagement with and guidance from the NCA, a solution consistent with the competition regime was achieved. In the Irish case, where the NCA did not engage, no such outcome resulted. Although in neither case did the NCA's engagement provide a solution, in the sense that the NCA was able to show the relevant undertakings how to 'adjust' their arrangements to bring them within the boundaries of Article 101(3), the greater engagement by the Dutch authorities provided added value to those parties. The Dutch authority's demonstration of how the proposed arrangement failed the 101(3) test served to guide the relevant undertakings towards another, more effective solution to the problem. This represents a partial step in the rights direction, which allows for our suggestions for improvement, namely greater engagement by NCAs in providing guidance. We end with these suggestions as concluding remarks.

II. Crises and the Role of Competition Law in a Market Economy

Market societies can be viewed as possessing two different elements: a system by which wealth is created, and another system by which wealth is redistributed. The former is created through the market, and the latter takes

place through a tax and transfer regime. The principles of orthodox price theory show that in a competitive market, the actions of all involved will led to an optimal, and wealth-maximizing, outcome for all involved.[4] However, the conditions of perfect competition are very rarely – if ever – realised and the resulting market failure will prevent the 'invisible hand' from directing market forces to achieve this outcome. In such a regime, the purpose of competition law is to eliminate (some of) these market failures, metaphorically releasing the invisible hand from its handcuffs. Hence the social goal of competition law is to increase surplus and reduce deadweight losses; in other words, to allow the market to 'grow' wealth via the elimination of market failures associated with monopoly.[5] To this end, antitrust law proscribes practices which reduce consumer welfare without providing a countervailing benefit.

Hence, to suggest that competition law be suspended or 'relaxed', as a solution to or mitigation of a crisis, is to suggest that too much competition is the source of the problem, which implies that the problem can be mitigated through an injection of further monopoly into the relevant market. This is unlikely to be the case.

Most industrial crises are caused by a sudden drop in demand. The Covid crisis experienced marked heterogeneous shifts in consumption patterns: by a significant decline in demand in some sectors of the economy (such as travel, entertainment, hospitality, in-person retail shopping), and an increase in demand in other sectors (for example anti-viral sanitisers at the start of the crisis). The financial crisis of 2008 was also marked by a mismatch of supply and demand, in particular in wholesale financing; its origin can likely be traced to regulatory failure. The environmental crisis is marked by market failure of externalities and inadequate incentives for investment in means which may abate the problem due to their nature as quasi-public goods. In none of these cases would the addition of monopoly into the situation abate the problem.

Two considerations speak against most collaborative solutions to crisis-driven supply problems. First, there is the assumption that collaboration in a crisis will be in the public interest. This is unlikely to be the case. Firms are motivated by profit, and it is the pursuit of profit that drives their activities.[6] The opportunities for activity that is both motivated by altruism and simultaneously

[4] See e.g. Wolfgang Kerber, 'Should Competition Law Promote Efficiency? Some Reflections of an Economist on the Normative Foundations of Competition Law' in Josef Drexl, Laurence Idot and Joël Monéger (eds) *Economic Theory and Competition Law* (Cheltenham: Edward Elgar, 2009) pp 93–120 at 96.

[5] In this regard, there may be an argument that the goal of competition law should be to promote total welfare; see Wardhaugh (n 1) at 11–14.

[6] On this point see Peter Ormosi and Andreas Stephan, 'The Dangers of Allowing Greater Coordination Between Competitors During the COVID-19 Crisis' (2020) 8 *Journal of Antitrust Enforcement* 299, 300.

successfully profit-seeking is, at best limited, as those interested in an adequate return on capital will note. [7]

This point is well-discussed in the literature. Schinkel and d'Ailly correctly remark:

> Altruistic initiatives are fragile. The problem is that in a corporate context, the profit motive is never far away. Even the most benevolent manager will have to report to the owners and shareholders, funders and lenders of his company, who require a rate of return on their investments. Before a company can sacrifice profit, these financially interested parties would need to agree to accept a lower rate of return than they can earn elsewhere in the economy. That is complex enough to achieve for a single firm, let alone for all involved in a cooperation. Rent seeking capital has the tendency to undermine low rate of return corporate social responsible activities, by management interventions and ultimately capital flight.[8]

Ormosi and Stephen apply this reasoning to the UK food industry and the apparent shortages faced during the early stages of the Covid pandemic:

> The relaxation of the present rules may even cause supermarkets to close some stores, to concentrate supply where it is needed most. Coordination will ensure that those closures do not overlap with each other (thereby ensuring that at least one supplier remains in each geographic location). But ensuring that there is at least one supplier in any area does not equate to ensuring that there is a sustained supply of food in these areas. On the contrary, economic theory would suggest that reduced competition is unlikely to lead to a sustained supply of food.[9]

Indeed, they could have added that this sort of coordinated strategy of store closing will result in a set of geographical monopolies – with corresponding prices, lack of choice and resulting consumer harm.

The market is a very effective means of distributing goods and services. Where demand is high, prices will rise or goods will be brought in to satisfy the demand.[10] If prices rise as a result of scarcity, this serves as a signal and

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[7] Maarten Pieter Schinkel and Abel d'Ailly, 'Corona Crisis Cartels: Sense and Sensibility' Amsterdam Law School Legal Studies Research Paper No. 2020-31 / Amsterdam Center for Law & Economics Working Paper No. 2020-03 (11 June 2020) (SSRN=3623154) at 9 accessed 24 August 2022.

[8] Ibid.

[9] Ormosi and Stephen (n 5) at 301.

[10] The UK experience showed some diversion of food supplies from the restaurant industry to grocery supplies. There was also diversion of distilled alcohol towards the production of hand gels. Food diversion was limited by packaging (the quantities purchased by the catering industry were far larger than those needed by households), logistics and labelling issues. These concerns would not be mitigated by reduced competition. Indeed enhanced competition

incentive for others to enter the market and alleviate the scarcity, resulting in a price drop. Cartels and cooperative activity among competitors do not have this effect. Cartel behaviour creates artificial shortages and the resulting scarcity to exploit higher prices. Cartelists will tend to erect market barriers to prevent other parties from entering the market and moving the cartelists' prices down.

Where supply problems are caused by a shortage of goods, suppliers have an incentive to seek new supplies from elsewhere or increase production, and to do so before their competitors do the same. When competitors cooperate, this race to supply is eliminated, and there is no fear that the resulting higher prices will subsequently be 'competed' down to a competitive price.

If cooperative activity could remedy crises without harming the public interest (that is, diminishing consumer welfare), that activity would not be precluded by competition rules. But more significantly, the encouragement of anti-competitive activity may well leave a post-crisis anti-competitive hangover hindering an effective recovery for the economy.

Indeed, given the possibility of 'crisis washing' (that is, dressing up a situation as a 'crisis', and using this to suggest that competition rules be disapplied) it is not evident that we can trust those who request such an exemption to act in the public interest. [11]

Second, anti-competitive collaboration typically results in a reduction in output. This is the main driver of the price increase leading to extra profit. In fact, if anything, collaboration is likely to prioritise production of those goods that experience the highest profit margins. The literature which appears in business and marketing journals seems to suggest this point. On one, we read, 'If competition laws are relaxed, firms should capitalise on the increased freedom to share resources and capabilities with their trustworthy

(e.g. providing retail-sized packaging and more agile logistics) would have been likely to solve the problem. See Jonathan Wentworth, 'Rapid Response: Effects of COVID-19 on the Food Supply System' UK Parliament Post (13 July 2020); <https://post.parliament.uk/effects-of-covid-19-on-the-food-supply-system/> accessed 24 August 2022. The diversion of alcohol towards antivirals was constrained by regulatory (including taxation) requirements in the production and distribution of ethanol and of hand sanitisers. This is not a competition law issue but may be an argument for a general reduction of the regulatory burden. See Health and Safety Executive (UK), 'Manufacture and Supply of Biocidal Hand Sanitiser Products during the Coronavirus Pandemic'; <https://www.hse.gov.uk/coronavirus/hand-sanitiser/hand-sanitiser-manufacture-supply.htm> accessed 24 August 2022.

[11] As an example, the two UK industries which were the main beneficiaries of exemptions during the Covid pandemic (the grocery and dairy industries) have a history of collusive activity (however, prosecution of this activity has not always been successful). See e.g. OFT Case CE/3094-03 (Decision 10 August 2011); *Tesco et al v OFT* [2012] CAT 31.

and complementary industry rivals for mutually-beneficial outcomes.'[12] Given that the publication is directed towards the business community, we presume that 'mutually-beneficial' is a euphemism for 'mutually-profitable'. We note that in March 2020 (during the early stage of the Covid-19 pandemic) one UK manufacturer of own-brand toilet and kitchen paper reduced its range of production 'from 120 to 30 so more can be manufactured quickly. Each supermarket it supplies now gets one type of kitchen roll and two of toilet roll.'[13] One need not be overly cynical to ask whether the least profitable lines were reduced, particularly given other industry statements assured that the Covid outbreak had no effect on the UK's production and supply of toilet paper.[14]

This exempted collusion may be time- and purpose-limited to the crisis at hand, but it may have lingering after-effects. It allows undertakings to glean information about their competitors' businesses that they would not have otherwise known. But further, it marks a cultural change in the industry to one where regular sharing of information is permitted, or even encouraged. As noted in an academic marketing journal:

> Owner-managers are encouraged to acknowledge that once this global pandemic is over (and the regulation of certain forms of competition is potentially enforced), it might be challenging to end their partnerships with rivals. Thus, they should agree on the extent to which they will cooperate, vis-à-vis, compete with their rivals in advance of changing circumstances.[15]

Nevertheless, it is not clear if post-crisis, any information shared could be 'unlearned' or that the industry's culture will return to the 'old ways'.[16]

Furthermore, any belief that competition rules prohibit all cooperation or coordination between competing undertakings is false. There is no binary

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[12] James M Crick and Dave Crick, 'Coopetition [sic] and COVID-19: Collaborative Business-To-Business Marketing Strategies in a Pandemic Crisis' (2020) 88 *Industrial Marketing Management* 206, 211.

[13] Jonathan Eley, 'Supermarkets take measures to control panic buying' *Financial Times*, 18 March 2020, accessed 24 August 2022.

[14] Edward Devlin, 'Don't Panic: Toilet Roll Production and Distribution Normal, Say Suppliers' *The Grocer* (10 March 2020) <https://www.thegrocer.co.uk/supply-chain/dont-panic-toilet-roll-production-and-distribution-normal-say-suppliers/602737.article> accessed 24 August 2022.

[15] Ibid.

[16] Ormosi and Stephen (n 5) at 301 remark:

> It is very hard to monitor coordination and allowing competitors to share key data will bestow a level of familiarity about one another that did not exist before. This means that even after the relaxing of competition rules ceases, there will still be an increased ability to continue colluding tacitly. This sort of behaviour has been observed in the past.

choice between competition and cooperation. Rather, the rules prohibit cooperative action when that activity is likely to lead to consumer harm. Beneficial cooperation is entirely consistent with the EU's (and other jurisdictions') antitrust regime(s); and – to this end – the Commission has promulgated a set of exemptions and guidelines on cooperation. It is noteworthy that the Oxford/AstraZeneca, Moderna and Pfizer-BioNTech vaccines (the first vaccine to be approved) are collaborative efforts, produced within a competitive environment of (consortiums of) undertakings developing competing products.[17] The design and production of ventilators, which were in short supply in the early stages of the pandemic, provide another illustration of this point.[18] The key difficulty with which this paper is concerned is that the line between permissible cooperation and welfare-destroying collusion. This line, particularly in novel situations, is not always easy (or costless) to discern.

III. Cooperation and Its Barriers

Nevertheless, we are open to suggestions that some form of cooperative activities could provide social or crisis-mitigating benefits. This arises in the context of environmental and sustainability concerns. A recent study for Linklaters showed that 'An overwhelming number of businesses want to work closely with peers when pursuing sustainability goals, with 9 in 10 saying that collaboration is key to achieve progress on ESG [environmental, social and governance] issues.'[19]

Yet collaboratively pursuing these ESG goals could be fraught with danger. Under the present regime (governed by Regulation 1/2003), undertakings are to self-assess the compatibility of their proposed agreement or arrangement with competition laws. To aid in this process, the Commission has promulgated a number of Block Exemptions and Guidelines which give very general direction to undertakings and their advisors about the legality of a proposed

[17] As a coda, one might consider the dangers of industry-wide cooperation in developing this vaccine. The success of the project may have been delayed if industry-wide cooperation steered research toward one (or a very limited set of) direction(s), had the preferred direction turned out to be a 'dead end'.

[18] On ventilator production and procurement in the time of Covid, see Fiona M Scott Morton, 'Innovation Incentives in a Pandemic' (2020) 8 *Journal of Antitrust Enforcement* 309.

[19] Linklaters, 'Competition Law Needs to Cooperate: Companies Want Clarity to Enable Climate Change Initiatives to be Pursued' (29 April 2020), <https://www.linklaters.com/en/insights/publications/2020/april/competition-law-needs-to-cooperate-companies-want-clarity-to-enable-climate-change> accessed 24 August 2022.

arrangement. While these publications may be useful in the majority of (clear) cases (including those cases which clearly violate competition rules), when the proposed arrangement is at the margin or affects a national market, their utility is minimal.

The consequences for an undertaking 'crossing the line', in spite of *bona fide* self-evaluation, can be dire. Engaging in activity which contravenes Article 101 TFEU (or its national law counterpart) risks a substantial fine. Even if undertakings are not fined (or if a nominal fine is meted out), defence costs in an investigation and/or hearing are non-trivial. In the face of this contingent cost, simple economics tells us that a risk-neutral actor will likely forego the activity, notwithstanding possible social benefits.

Experience confirms this theoretical observation. The Linklaters Report notes, '57% of sustainability leaders say that there are concrete examples of sustainability projects that they have not pursued because the legal risk was too high. As advisors, we see examples of companies walking away from genuinely beneficial projects because of competition law risk.'[20]

The impediments to self-assessment have both legal and institutional origins. The former has its origins in Article 101's object/effect distinction, the latter's origins rest in institutional practice which has evolved from Regulation 1/2003's self-assessment regime.

Article 101's object/effect distinction is a notorious source of difficulty for assessment.[21] Although there is significant CJEU case-law on this point, there is nevertheless uncertainty at the boundary. 'By object' restrictions are those which have been shown by experience (which presumably includes experience gleaned from economic analysis,[22] as opposed to – or supplementing – the casual empiricism of one's experiences in the marketplace) to have sufficiently likely detrimental effects so that further analysis is not needed. These are typically forms of horizontal collusion, which lead to reductions of output, increases in prices and thus harm to consumer welfare.[23]

The Court's guidance regarding by-effect restrictions is less clear. When an authority or court is required to analyse a 'by effects' restriction, this analysis is to take place in the light of the commercial context of the agreement, and evaluated against the counterfactual of what the state of competition would be

[20] Ibid.

[21] On this point see my *Competition, Effects and Predictability: Rule of Law and the Economic Approach to Competition* (Oxford: Hart, 2020) pp 99–106.

[22] See Opinion of AG Bobek in C-228/18, *Gazdasági Versenyhivatal v Budapest Bank Nyrt.*, ECLI:EU:C:2019:678, point 42 citing Opinion of Advocate General Wahl in C-67/13P, *CB v Commission*, EU:C:2014:1958, point 79.

[23] Case C-228/18 *Gazdasági Versenyhivatal v Budapest Bank Nyrt*. ECLI:EU:C:2020:265 paras 36–44.

in the absence of the agreement in question.[24] This applies to both inter- and intra-brand competition.[25] If the agreement is viewed as anti-competitive (or 'restrictive of competition'[26]) with a 'reasonable degree of probability'[27], the agreement would, after this evaluation, be considered as prohibited subject to the justification under 101(3) TFEU.

However, as stated above, the test is circular. There is a need to determine what is precisely meant by the term 'anti-competitive' or 'restrictive of competition'. Ibáñez Colomo identifies this criterion as:

> ...it has long been clear that anticompetitive effects amount to more than a mere competitive disadvantage and/or a limitation of a firm's freedom of action. Something more, namely a reduction of competitive pressure resulting from a negative impact on equally efficient firms' ability and/or incentive to compete, is required.[28]

This test is consistent with the approaches taken by the Commission in Article 102 TFEU and merger cases.

This test is a substantively more difficult and resource-intensive test than that deployed in the case of 'by object' restrictions. Competition authorities have limited resources and will seek to use them as efficiently as possible – obtaining the greatest possible return. The burden of proving an infringement of 101 TFEU rests on the competition authority (or other parties challenging the legality of the agreement). The confluence of these factors has led to under-enforcement of the prohibition against restrictions of competition 'by effect'.[29] A result of the (at best) under-enforcement of this provision is that the Commission has provided no guidance as to how to appropriately evaluate the effects of agreements in order to assist undertakings in their self-assessment. The lack of guidance and the fragmentary nature of discussions in case-law make *ex-ante* planning difficult.

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[24] See Case 56–65, *Société Technique Minière v Maschinenbau Ulm GmbH* ("*STM*") ECLI:EU:C:1966:38, at 249–250 and *Budapest Bank*, ibid, para 55, citing C-382/12P, *MasterCard and Others v Commission*, EU:C:2014:2201, paras 161 and 164.

[25] Alison Jones, Brenda Sufrin, and Niamh Dunne *Jones & Sufrin's EU Competition Law: Text, Cases, and Materials* (Oxford: OUP; seventh edn, 2019) at 240.

[26] Ibid.

[27] Ibid, citing Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C-101/97, para 24.

[28] Pablo Ibáñez Colomo, 'Anticompetitive Effects in EU Competition Law' (2021) 17 *Journal of Competition Law & Economics* 309, 361.

[29] See Anne C. Witt, 'Public Policy Goals under EU Competition Law – Now Is the Time to Set the House in Order' (2012) 8 *European Competition Journal* 443, 435.

The object/effect distinction, and how a proposed arrangement is viewed in this context, is crucial for its analysis, as European competition lawyers know. We only need to recall the BIDS[30] case before the CJ to recognise the significance of the distinction – particularly in the context of cooperative attempts at crisis mitigation. The object/effect boundary is vague, to the detriment of certainty.

Article 101(3) provides a means by which anti-competitive arrangements, particularly those which are restrictions of competition 'by object', can be justified. However, there are significant difficulties in interpreting this paragraph.[31]

Providing guidance would be a straightforward means of resolving some uncertainty, particularly in novel situations. The CJEU is unlikely to be in a position to do so: it will rule only on matters before it, and is reluctant to provide what lawyers trained in the common law tradition term 'orbiter' comments. The second-best source of guidance is the Commission and NCAs. Although their guidance is not binding on Courts (CJEU and national), such guidance is self-binding.[32] However, there are issues of institutional unwillingness, inability and inconsistency which interfere with the authorities' ability to issue effective guidance that provides the needed certainty to undertakings which wish to engage in novel, and perhaps beneficial, practices.

At the outset and to be fair, the Commission provides a fair amount of guidance, and the relevant rule-making bodies also produce Block Exemption Regulations, which recognise the 'legality' of those arrangements that are brought within their scope. This aids self-assessment of some proposed arrangements.[33] However, this guidance is necessarily general and incomplete, as no set of guidance can *ex ante* envisage every situation. And while this guidance is updated from time to time,[34] it will remain incomplete. The

[30] Case C-209/07, *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd ('BIDS')* ECLI:EU:C:2008:643.

[31] On this point, the literature is voluminous, among which see e.g. Witt, ibid, Or Brook, *Non-Competition Interests in EU Antitrust Law: An Empirical Study of Article 101 TFEU* (Cambridge: Cambridge University Press, 2022), Bruce Wardhaugh, 'Crisis Cartels: Non-Economic Values, the Public Interest, and Institutional Considerations' (2014) 10 *European Competition Journal* 311 and Christopher Townley, *Article 81 and Public Policy* (Oxford: Hart, 2009).

[32] Joined Cases C-189/02 P, 202/02 P and 213/02 P *Danske Rørindustri A/S and Others v Commission*, ECLI:EU:C:2005:408; Case C-397/03 P *Archer Daniels Midland Co v Commission* ECLI:EU:C:2006:328; Case C-226/11 *Expedia v Authoritié de la Concurrence* ECLI:EU:C:2012:795; Case T-446/05 *Aann und Söhne GmbH and Co KG v Commission* ECLI:EU:T:2010:165.

[33] See e.g. European Commission, *XXXIVth Report on Competition Policy (2004)* (Luxembourg: Office for Official Publications of the European Communities, 2005) point 1.

[34] E.g. see the revisions to the Guidelines on the Applicability of Article 101 of the Treaty of the Functioning of the European Union to horizontal co-operation agreements (Brussels 1.3.2022 C(2022) 1159 final).

authors of the 2011 Guidelines on Horizontal Cooperation[35] could not have the foresight to consider a pandemic which would occur eight years later.

The existing Regulation 1/2003 regime allows for two ways that these gaps can be filled: one, the Commission could introduce supplementary guidance, or two, it can provide specific guidance in individual cases which raise a novel issue. In terms of supplementary guidance, the Commission can act fast when it is required to so do. As an example, we note that during the 2008 financial crisis, there was a need to use significant amounts of state aid to recapitalise financial institutions, and the Commission responded very rapidly. Lehman Brothers filed for bankruptcy on 14 September 2008, by the end of the month the magnitude of the crisis was becoming apparent. The European Council (in the configuration of ECOFIN, that is, the Economics and Finance Ministers) met on 6 and 7 October to coordinate the political response to the crisis.[36] And on October 13, the Commission published its initial guidance on how Member States would be able to provide aid to support troubled financial institutions.[37]

Yet there is no guarantee that the Commission will issue guidance. We note the case of environmental and sustainability agreements. While some guidance was given in the 2001 Guidelines,[38] this was withdrawn from the 2011 Guidelines, only to reappear in the 2022 draft Guidelines. This is in spite of the significance that sustainability and environmental concerns took on during the second decade of the Twenty-First Century.

Further, in novel cases, the Commission undertook to provide guidance letters to undertakings that feared their practices would infringe competition rules. Recital 38 to Regulation 1/2003 reads:

> Legal certainty for undertakings operating under the Community competition rules contributes to the promotion of innovation and investment. Where cases give rise to genuine uncertainty because they present novel or unresolved questions for the application of these rules, individual undertakings may wish to seek informal

[35] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C-11/1.

[36] Council of the European Union, 'Immediate responses to financial turmoil Council Conclusions – Ecofin Council of 7 October 2008' (Luxembourg, 7 October 2008) 13930/08 (Presse 284) <https://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/misc/103202.pdf> accessed 24 August 2022.

[37] Commission, Press Release, 'State Aid: Commission gives guidance to Member States on measures for banks in crisis' (13 October 2008) (IP/08/1495), <https://ec.europa.eu/commission/presscorner/detail/en/IP_08_1495> accessed 24 August 2022. The guidance was published on 25 October 2008: Communication from the Commission, 'The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis' [2008] OJ C-270/8.

[38] Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements [2001] OJ C-23/2.

> guidance from the Commission. This Regulation is without prejudice to the ability of the Commission to issue such informal guidance, …

To this end, the Commission has issued a Notice on the circumstances under which it will offer such guidance and issue comfort letters.[39] However, this 'guidance on guidance' and the use of comfort letters is illusory. The Commission issued its first comfort letter in April 2020 during the Covid pandemic.[40]

NCAs will also issue guidance and/or engage in a discussion with their stakeholders, albeit to varying degrees. European principles surrounding reasonable expectations entail that such guidance is binding on the issuing authority, there need not be absolute consistency among national guidance or with the guidance promulgated by the Commission.[41] In spite of the fragmentated manner of NCA response, it nevertheless shows a way forward, through greater engagement with stakeholders, particularly in novel situations.

In the next section, we consider briefly two such situations, the Irish Beef case (hereinafter: *BIDS*) and the Dutch 'Chicken of Tomorrow' (hereinafter: *CoT*) initiative. Both cases involved novel concerns. The former resulted from a crisis in that country's beef processing industry, the latter raised animal welfare concerns; and its significance cannot be understated. These animal welfare concerns were novel, and as such did not fit well into existing competition analysis; but more significantly, these concerns mirror some of the concerns which underlie cooperative sustainability proposals. There was a stark difference in the engagement of the NCAs with the parties, and – perhaps not coincidentally – a similarly stark difference in their outcome.

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[39] 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) [2004] OJ C-101/78, points 3 and 4.

[40] Commission (DG Comp) to Medicines for Europe, Comfort letter: coordination in the pharmaceutical industry to increase production and to improve supply of urgently needed critical hospital medicines to treat COVID-19 patients (8 April 2020) <https://ec.europa.eu/competition/antitrust/medicines_for_europe_comfort_letter.pdf> accessed 24 August 2002; see also Gianni De Stefano, "Covid-19 and EU Competition Law: Bring the Informal Guidance On" (2020) 11 *Journal of European Competition Law and Practice* 121 and Jacques Buhart and David Henry, 'COVID-20: The Comfort Letter Is Dead. Long Live the Comfort Letter?' (2020) 43 *World Competition* 305.

[41] For instance, the Netherlands' requirement that long-term considerations be taken into account in assessing sustainability initiatives may be an example of one such practice that is not consistent with other Member States' practices. See Decision of the Minister of Economic Affairs of 6 May 2014, no. WJZ / 14052830- (Government Gazette 2014, 13375).

IV. Guidance: Failure and Success

1. The 'Irish Beef' Case

The facts of this case are presented in some detail in McKechnie J's judgment, who – as a High Court Judge – heard the proceedings instigated by the Competition Authority against the Beef Producers.[42] Post-EEC entry, Irish farmers could obtain the numerous benefits of the Common Agricultural Policy (hereinafter: CAP).[43] Among these benefits, the CAP provided for price supports and grants to the beef industry. Traditionally cattle were slaughtered in autumn months, reflecting the cycle of breading and outdoor grazing, requiring plants to have sufficient peak capacity for production during these months.[44] There were early incentives to build slaughterhouses for these peaks. But as part of the 1992 reforms to the CAP, farmers received financial incentives to reduce delivery of cattle during peak periods, smoothing out demand (and need for capacity) in production, entailing that capacity designed for peak periods would be superfluous.[45]

This led to a situation where the incentives for beef production were divorced from market realities.[46] By the late 1990s, the severity of the situation was apparent.[47] Representatives of the industry and the Irish Government engaged the consulting firm McKinsey to produce a report on the state of the industry.[48] The Report noted severe overcapacity and resulting unprofitability. McKechnie J summarises these points:

> In 1997, with 32 plants operating, the industry had an estimated capacity to kill 66,000 head of cattle per week. This compares with an actual maximum throughput

[42] *Competition Authority v Beef Industry Development Society Ltd & Anor* [2006] IEHC 294, paras 8–31; see also Okeoghene Odudu, 'Restrictions of Competition by Object – What's The Beef?' (2009) 8 *Competition Law Journal* 11; and Conor Talbot, 'Finding a Baseline for Competition Law Enforcement during Crises: Case Study of the Irish Beef Proceedings' (2015) 18 *Irish Journal of European Law* 55.

[43] *BIDS* (High Court), ibid, para 9.

[44] Ibid, para 17.

[45] Ibid.

[46] Ibid, para 11.

[47] But the poor state of the beef industry resulting from public interventions had been noticed earlier. See Seamus J. Sheehy, 'The Impact of EEC Membership on Irish Agriculture' (1980) 31 *Journal of Agricultural Economics* 297, 310.

[48] *BIDS* (High Court) (n 40) para 13–26 (this contains a good summary of the Report's details), see also Conor Talbot, Finding a Baseline for Competition Law Enforcement during Crises: Case Study of the Irish Beef Proceedings" (2015) 18 *Irish Journal of European Law* 55, 56–57.

> of 45,000 and an average throughput of 32,000 per week. In addition, there were a number of dormant plants which if activated would add to this overcapacity.[49]

The Report further recommended coordinated action to reduce total capacity by 32% per annum, with those remaining in the industry ('stayers') compensating those leaving ('goers'). In turn, the Government recognised the need for rationalisation and provided indications of its support.[50] In May 2002, the Beef Industry Development Society Limited (hereinafter: BIDS) was established to implement the rationalisation strategy suggested by the McKinsey Report, and was, at least implicitly, supported by the Irish Government.

After the BIDS programme was agreed upon, its members informed the Competition Authority of the programme and provided submissions as to the programme's compatibility with Irish and EC competition law. BIDS and its members attempted to engage with the Competition Authority (and cooperated with it throughout its investigation).

The plan was proposed prior to the self-assessment regime of Regulation 1/2003, and BIDS sought clearance (under the domestic equivalent of Regulation 17) of the programme. Yet, the Authority did not vet these proposals and 'declined to engage in this way'.[51] The Competition Authority took the view that these arrangements were contrary to domestic provisions mirroring Article 81(1) TEC (now 101(1) TFEU) and could not benefit from the equivalent of 81(3) TEC (now 101(3) TFEU).[52] In the end, the Authority commenced proceedings.

In the High Court, McKechnie J held that these restrictions were not restrictive of competition by their object and found that the programme met 81(3)'s criteria. McKechnie J's judgment was appealed to the Supreme Court, which made a reference to the ECJ for a preliminary ruling. At issue was whether agreements possessing features of the BIDS arrangements are anti-competitive 'by object' alone, or whether it is also necessary to demonstrate the anti-competitive effects of the agreements.[53]

The ECJ held that the BIDS arrangements had as their object the restriction of competition.[54] Hence the compatibility of this crisis cartel with EU competition law relied on a 101(3) TFEU justification. The Irish Supreme

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[49] *BIDS* (High Court), ibid, para 18.

[50] *BIDS* (High Court), ibid, para 28.

[51] Ibid, para 87.

[52] These provisions are Ireland, *Competition Act 2002* (No 14 of 2002), ss 4(1) and 4(5), respectively.

[53] *BIDS* (ECJ) (n 29) para 14.

[54] Ibid, para 34.

Court referred the case to the High Court to consider the 101(3) issue *de novo* and in light of the ECJ's judgment.[55] The High Court heard these arguments in 2010. It ultimately did not issue a ruling, as in January 2011 BIDS withdrew its action against the Competition Authority.

In concluding our brief discussion of the *BIDS* case, we make two points. First, the cause of the overcapacity was a result of the distortive effects of subsidies. Subsidies created an artificial floor for beef prices, underwrote the cost of expansion of processing plants, and smoothed out the demand for capacity during the year. It is hardly a surprise that the industry acquired too much capacity. Second, and more significantly, we note the lack of engagement by the Irish NCA. This lack of engagement is significant.

Although the lack of engagement was not the sole reason why the BIDS arrangement failed, we suggest that greater engagement may have provided the parties with an opportunity to revise the arrangements in a manner which could pass Article 101(3) scrutiny. We note that even an explanation given to parties by an NCA, on how and why (at least in the NCA's view[56]) the proposed arrangement fails the test, can be useful to parties for a future redesign of their proposal. Indeed, as we will next see, the Dutch Autoriteit Consument en Markt's (hereinafter: ACM) 'negative guidance' (or explanation of why a particular proposal failed 101(3) scrutiny) can assist the parties in developing an acceptable alternative.

2. The Dutch 'Chicken of Tomorrow' Initiative

The Dutch Chicken of Tomorrow (CoT) initiative arose from a February 2013 agreement among Dutch poultry farmers, processors and supermarkets to enhance sustainability and welfare in broiler chicken production.[57] This was not a 'crisis cartel' in the standard sense. It was a buying arraignment among Dutch supermarkets, motivated by non-economic concerns of enhancing welfare and environmental sustainability in chicken production. This initiative

[55] *The Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd* [2009] IESC 72.

[56] Note that although an NCA may have a particular view on what is or is not acceptable under 101(3), this view is not binding on the European Courts and therefore may or may not reflect the law. Nevertheless, a prudent undertaking may wish to accept and follow NCA guidance (if and when available) as a litigation-avoidance strategy.

[57] Autoriteit Consument en Markt (hereinafter: ACM), Memo: Welfare of today's chicken and that of the 'Chicken of Tomorrow' (13 August 2020), p 3 <https://www.acm.nl/sites/default/files/documents/2020-08/welfare-of-todays-chicken-and-that-of-the-chicken-of-tomorrow.pdf> accessed 24 August 2022.

is regarded as a test case for competition law's ability to take into account non-economic values.

The goal of the CoT agreement was to phase out entirely the sale of regularly produced broiler chicken by 2020, in an effort to replace it with meat produced according to the CoT standard. The immediate consequences of this would be that supermarkets would pay more for such chicken, and these costs were later passed on to consumers.[58]

This initiative was popular with the Dutch public.[59] The ACM was asked to provide an informal opinion (similar to a comfort letter[60]) regarding this initiative. The Authority opined that the arrangement would deny customers the freedom of choice regarding their chicken purchases and would 'have a considerable effect (real or potential) on the consumer market for chicken meat.'[61] Further, given that supermarkets would sell only chicken raised according to the CoT standard, this would preclude the sale of chicken imported from neighbouring Member States.[62]

The measures violated both Article 101(1) TFEU and its Dutch counterpart.[63] As such, the compatibility of the initiative with Dutch and European competition law rested with whether or not they could be exempted under Article 101(3) TFEU (and its domestic equivalent). The ACM's analysis found that the proposed CoT standard would not satisfy any of the 101(3) criteria.

The starting point of the ACM's analysis of Article 101(3)'s first criterion (improvement in productive or distributive efficiencies) is that any such efficiencies are efficiencies only to the extent that customers are actually willing to pay for them. Accordingly, the Authority collected data to determine consumers' willingness to pay for the animal welfare, environmental and public health benefits which would accrue from the arrangement.[64] As the costs of the

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[58] Jacqueline M Bos, Henk van den Belt, and Peter H Feindt, 'Animal Welfare, Consumer Welfare, and Competition Law: The Dutch Debate on the Chicken of Tomorrow' (2018) 8 *Animal Frontiers* 20, 20.

[59] See e.g. Anna Gerbrandy, 'Solving a Sustainability-Deficit in European Competition Law' (2017) 40 *World Competition* 539, 540.

[60] Ibid at 541 fn 6; see also ACM, 'ACM procedure regarding informal opinions' (Dutch Government Gazette No. 11177 – 26 February 2019), <https://www.acm.nl/sites/default/files/documents/2019-07/acm-procedure-regarding-informal-opinions.pdf> accessed 24 August 2022.

[61] ACM's analysis of the sustainability arrangements concerning the 'Chicken of Tomorrow', ACM/DM/2014/206028 (January 2015) p. 4.

[62] Ibid.

[63] Mededingingswet (22 May 1997) Art 6(1), English Translation available at <http://www.dutchcivillaw.com/legislation/competitionact.htm> accessed 24 August 2022, and ACM, Sustainability Arrangements (n 58) p. 4.

[64] Machiel Mulder, Sigourney Zomer, Tim Benning en Jorna Leenheer, 'Economische effecten van "Kip van Morgen" Kosten en baten voor consumenten van een collectieve afspraak

initiative to the consumer exceed its benefits, it could not be said to improve production or distribution of a good. In light of this cost-benefit balance, the initiative also failed the second criterion (consumers obtaining a fair share).

As the ACM noted, its findings were subject to criticism and discussions from all corners, domestically and internationally.[65] But the immediate consequence of this intervention was that it forced supermarkets and producers to work, without colluding or otherwise restricting competition, to improve chicken-welfare standards of their product. In May 2014, the largest Dutch supermarket chain, Albert Heijn, became the first chain to introduce higher-welfare chicken. Jumbo, (the second largest) followed suit in October 2014.[66] In August 2020, the ACM published a stock-taking exercise to assess the extent to which sustainability and welfare goals had been achieved in the absence of the Chicken of Tomorrow initiative.

The results of the study showed that 'the welfare conditions of the current selection of chicken meat sold in Dutch supermarkets more than exceeds the minimum requirements of the Chicken of Tomorrow.'[67] This was achieved thanks to competition among the main supermarkets (representing over 97% of the market) over chicken-welfare standards. Though these vary, all are in excess of those that the Chicken of Tomorrow programme would have established.[68] In addition to these own-brand standards, supermarkets also sell chicken certified under market-wide labels (the Better Life Label – with three levels, initiated by the Dutch Society for the Protection of Animals – and the organic label), these also exceed the CoT standard. The participation of organisations such as that society added trust and made consumers more willing to pay for the more sustainable, higher-welfare product.[69]

In this regard, the approaches of the Dutch and Irish competition authorities are worth contrasting. In CoT, the Dutch authorities were in a position to provide an informal opinion to the industry about the legality of the proposed arrangements, and – when they determined that the proposal likely contravened competition rules – to engage with them and provide suggestions as to how to move forward. While the ACM's guidance was primarily negative,

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in de pluimveehouderij' (Office of the Chief Economist ACM, October 2014), <https://www.acm.nl/sites/default/files/old_publication/publicaties/13759_onderzoek-acm-naar-de-economische-effecten-van-de-kip-van-morgen.pdf> accessed 24 August 2022.

[65] ACM, Welfare of today's chicken and that of the 'Chicken of Tomorrow (13 August 2020) p. 3.

[66] Berrie Klein Swormink, 'Chicken of Tomorrow is here today' *Poultry World* (13 March 2017), <https://www.poultryworld.net/Meat/Articles/2017/3/Chicken-of-Tomorrow-is-here-today-103092E/> accessed 24 August 2022.

[67] ACM, Memo: Welfare of today's chicken (n 62), p. 2.

[68] Ibid, pp. 5–8.

[69] Ibid, p. 15.

demonstrating that the initial proposal was anti-competitive, this negative guidance had utility. By closing off a collaborative path, it forced the parties to seek an alternative solution.

However, in the *BIDS* case, there was no such engagement, despite the fact that the old (notification) regime had not yet expired. This was a cause for comment for McKechnie J. One can only speculate what the eventual outcome may have been, had the Irish Authority engaged in a dialogue with market participants. Indeed, to go forward, this difference between the two cases shows the need for competition authorities to engage with stakeholders in times like this.

V. Conclusion

We seem to be in a continuous process of facing crises; and in particular our present climate crisis calls out for action. Although we are sceptical about coordinated efforts, we nevertheless recognise that there may be some instances where our general scepticism is unwarranted. To this end coordination among stakeholders may aid in meeting some of the challenges. Article 101 TFEU does not prohibit coordinated efforts – it prohibits such efforts which are harmful to competition. There is room within the Article for coordinated activity which may promote the resolution of an economic or some other form of crisis.

The Dutch 'Chicken of Tomorrow' initiative suggests the general suitability of standards as a means of achieving such goals. In addition to animal welfare labelling, as in the Dutch case, coordinated approaches could permit the development of, for instance, recyclability and carbon footprint standards. Yet standardisation requires consistency – presupposing agreement – among the metrics used in expressing these standards.[70]

Although standardisation may be one means forward (as was seen in the CoT case), standardisation is not the exclusive method by which undertakings may collaborate to achieve socially desirable outcomes in a manner consistent with he competition rules.

In its 2020 submission to the OECD, which focused on sustainability goals, the Dutch Competition Authority noted:

[70] See also Simon Holmes, 'Climate Change, Sustainability, and Competition Law' (2020) 8 *Journal of Antitrust Enforcement* 354, 382–383.

With respect to competitors starting collaborations related to sustainability initiatives, there are at least four avenues to explore by competition authorities, without the need to adapt competition laws.

For example, authorities can indicate what types of agreements are, in general, not anti-competitive, such as agreements that incentivize undertakings to make a positive contribution to a sustainability objective without being binding on the individual undertakings. Another category concerns covenants by which companies bind themselves and their suppliers to comply with laws abroad in areas such as labour rights or the protection of the environment, and for which the companies, for example, jointly organize oversight by an independent body. Also, agreed codes of conduct, joint trademarks or logos promoting environmentally-conscious or climate-conscious practices are, in general, not anti-competitive if the participation criteria are transparent, and access will be determined on the basis of reasonable and non-discriminatory criteria.[71]

The need for guidance is important and the more specific guidance, the better. It is by providing such guided self-assessment that Authorities can alleviate significant enforcement problems. Not only that, but guidance also adds certainty, reducing risk and encouraging investment in strategies which have socially beneficial outcomes, that is, aid in crisis mitigation.

Indeed, for novel or unusual arrangements, specific guidance might be appropriate. The ACM recognises this.[72] It is unfortunate that other NCAs have yet to share this recognition. Although it is true that the post-Regulation 1/2003 regime imposes a duty on undertakings to self-assess proposed arrangements, in novel cases, such self-assessment is difficult. Given the costs of running afoul of the competition regime, it would be prudent and risk-neutral to risk-adverse, if there were doubts, to forgo entering into such measures. This approach may therefore hinder, if not thwart, the development and implementation of measures to advance otherwise beneficial aims.

Providing guidance for novel situations or arrangements is not inconsistent with a general duty for undertakings to self-assess. The Commission recognises this and suggests that in novel or uncertain cases, undertakings approach the Commission in order to seek informal guidance,[73] and as the Commission notes, this adds certainty and promotes investment.

[71] Organisation for Economic Co-operation and Development, 'Sustainability and Competition–Note by the Netherlands' contribution for 134th OECD Competition Committee meeting on 1–3 December 2020 DAF/COMP/WD(2020)66 (Paris: OECD, 2020) paras 8–9, see also para 2.

[72] Ibid, paras 11–13.

[73] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L-1/1.

Although certainty interests would suggest more than infrequent use of guidance, the Commission's practice has not even approached that threshold. Until the 2020 Covid crisis, the Commission had not provided any informal guidance. There is no point in suggesting that undertakings may be able to obtain guidance, if its availability is chimaera. Additionally, the same concerns can also be raised with the practice of National Competition Authorities, given their analogous role. Our discussion of Irish Beef suggested that the Irish Competition Authority could have acted to guide the parties towards an appropriate resolution of the problem. At a minimum, this would have imposed less cost on all parties – including the NCA itself.

Our suggestion does not entail that we return to the 'old' regime represented by Regulation 17 and require every agreement which may restrict competition to be vetted by Competition Authorities. The experience since the implementation of Regulation 1/2003 shows that the self-assessment regime works well, save in cases which are near the margin. The importance of these marginal cases is that they are often (but not exclusively) driven by social concerns, such as sustainability, economy or industry-wide concerns. Given the general success of the present regime, Competition Authorities may wish to focus their guidance on those cases which reflect these broad concerns. Further, we emphasise that there will likely be very few cases near or at the margin which will (or could) pass scrutiny: collaborative efforts to 'solve' crisis situations almost always result in consumer welfare-destroying restrictions of output.

The Dutch ACM's willingness to engage in the Chicken of Tomorrow matter is commended and may be taken as an example of best practice. Although this engagement did not result in an NCA written solution to the undertakings' problem (and expecting such extensive involvement by NCAs would be unrealistic), the ACM's engagement showed the parties why their proposal ran contrary to Article 101(3) TFEU. As a result, the parties could pursue other strategies.

While the parties' first choice of solutions proved to be anti-competitive, this did not entail that no solution could be found. Indeed, through dialogue involving multiple stakeholders, including the ACM and the Government, the parties found a solution, which – it must be added – went further than the original one to achieving the stated goal, with fewer anti-competitive effects, than was the case with the parties' first choice. This is clearly the way forward and shows that crisis response (and mitigation) also requires an adjustment of NCAs' behaviour, to develop a greater willingness to provide guidance to undertakings thereby demonstrating – at least in part – that the competition regime and authorities are also part of the solution.

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