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The Revised Informal Guidance Regime Brings Little to the Table – If Any

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Last week, the European Commission adopted an updated version of its Informal Guidance Notice ("**the IGN**"), the mechanism that allows businesses to seek clarity regarding the compliance of specific activities with EU competition law. The substance of the IGN is animated by "*guidance letters*", informal documents intended to provide legal certainty to undertakings facing novel or unresolved questions that cannot be answered via recourse to existing resources, such as case law of the Union Courts or Commission guidelines. The Notice replaces its former counterpart, which was issued after the entry into force of Regulation 1/2003. This brief piece evaluates whether the updated Notice brings about substantial differences. As the title suggests, it is very difficult to argue that it does.

Background

As known, the modernization of European competition law saw the discontinuation of the notification procedure, according to which, undertakings were expected to notify their intended operations to the Commission. After examination, the Commission would in turn provide the undertaking with a negative clearance decision, transforming the provisional validity of a practice into formal validity. However, Union enlargement and the completion of the single market in the 1990s heavily increased the workload of the Commission, prompting it to rely on quick and informal ways to provide assurances to businesses. Against this background, the comfort letter was born.

Since Regulation 1/2003 abolishes the notification procedure, undertakings essentially relied on existing guidance, in the form of decisional practice, guidelines, and case law, to self-assess the compatibility of their activities with competition law. Back in the day, many commentators lamented the diminished opportunity for the Commission to issue informal guidance. Some, like Cortese, (inaccurately) speculated that non-infringement decisions enshrined under Article 10 of the Regulation could prove fruitful. Instead, the Commission opted for adopting a simple Notice, under the auspices of which only those ventures raising truly novel competition law questions would be received.

The track record of the old Notice has been nothing short of abysmal. As the Commission itself concedes, since 2004, few undertakings approached it to obtain guidance letters, and none

succeeded. The primary reason behind the disappointment is the fact that guidance letters represented an "*all-loss, no-gain*" situation. In particular, the Notice required several criteria to be satisfied for the Commission to *consider* issuing a guidance letter – which provided little value to its recipient due to a lack of binding legal effects.

Different Different but Same?

How does the revised Informal Guidance Notice fare in alleviating the deficiencies of its expired version? In line with the older Notice, the IGN sets out a number of strict criteria that undertakings need to meet in order to be eligible for a guidance letter. In other words, satisfying these conditions only opens the path towards an application for the letter, not its reception. Essentially, there are two such conditions: a genuinely novel competition law question that remain unanswered by existing forms of guidance, and a positive preliminary assessment by the Commission regarding the soundness of the application.

The second criterion determines whether it is valid to provide guidance on the application of Articles 101 and 102 TFEU to the agreement or unilateral practice in question. It relies on the evaluation of a plethora of further sub-criteria, including:

- **The Commission's interest in providing guidance**, which refers to the potential existence of added value to be derived from clarifying the application of the law through a guidance letter. The Commission determines this added value to legal certainty by considering the economic importance of the goods and services concerned by the activity, whether the activity is in line with its enforcement priorities or Union interest, the magnitude of investments accompanying the activity, and whether it expects the activity to occur frequently throughout the EU.
- **Lis pendens**, which means that in cases where the contents of the novel question (or *similar* questions) are the subject to proceedings before the Union Courts, Member State courts, or a national competition authority.

There are other questionable elements of the IGN that did not undergo any transformation whatsoever. For instance, there still is a requirement to provide detailed information for the envisaged agreement/practice, and the Commission gets to keep that information for any future proceedings. Furthermore, in cases where undertakings manage to overcome the above hurdles and obtain a guidance letter, the guidance contained therein is conditional upon the factual circumstances provided.

Moreover, the Commission emphasizes that guidance letters issued through the IGN remain a mere component of the overall "*self-assessment package*"; they confer no rights on undertakings and produce no binding force.

Lastly, the IGN preserves the need for a question to conform to the enforcement priorities of the Commission. [1] The reasoning behind this rule is to prevent the indirect resurrection of comfort letters. This criterion lowers the probability of an application being made. Since undertakings need to provide detailed information on their actual or potential business practices, the wide swath of discretion accorded to the Commission with regard to designating its enforcement priorities endangers the prospects of obtaining a guidance letter. [2]

It is not difficult to envisage that in such a situation, undertakings will feel as if they effectively

incriminate themselves, especially considering that the Commission is at freedom to open infringement proceedings under Regulation 1/2003, based on or relying on the information provided by the undertaking. The Commission's freedom to do so has been long confirmed in cases like *BVGD* and *Diamanthandel*.

In Search of a Drop of Change

Even though the IGN largely reflects the state of play of the old mechanism, it also brings about minor differences. However, these changes are mostly cosmetic and reflect the established case law.

As established, the Commission may not be estopped from relying on the contents of a request for a guidance letter to initiate further proceedings. The new IGN qualifies this statement by adding that, in cases where an undertaking relies on a guidance letter, *in good faith*, to go forward with an agreement or practice, the Commission will not impose monetary penalties.

At first glance, this modification may seem like a welcomed development. However, the reality is more complex and largely illusory. First, consider that pecuniary penalties constitute merely the direct costs an undertaking faces in case of a successful prosecution. There are also indirect costs involved when the Commission strikes down a complex web of agreements or a particularly costly business venture.

As several Advocate-General opinions remarked, the guidance provided by the Commission may lead undertakings to derive reasonable expectations that need to be accounted for, should the authority wish to turn back on an earlier blessing, particularly as the period between the letter and an investigation extends further.

Second, the commitment that *bona fide* undertakings will not incur a fine comes with its own clarification. Accordingly, if the factual elements provided by the undertaking that gave rise to a guidance letter materially change, the undertaking cannot be taken to have acted in good faith. Even though the IGN does not define "*material change*", details can be teased out from case law. For instance, *Langnese – Iglo*, confirms that the entry of new competitors or a (slight) alteration in the market structure (such as an increase/decrease of market shares) qualify as changes significant enough to justify the retraction of a guidance letter. If a green-lighted agreement turns out to be a successful enterprise and generates market shares for the undertaking, it would therefore be rather easy for the Commission to invoke that material change has occurred, and the undertaking had thus not acted in good faith. In my view, such a risk alone transforms the IGN mechanism into an efficiency offence in disguise. [3]

Aside from the above points, a true novelty does present itself in the IGN: the inclusion of "*Union interest*" in the criteria for evaluating whether to issue a guidance letter. Put briefly, along with its enforcement priorities, the Commission will be empowered to also consider the importance of an envisaged agreement (such as a non-fully functional joint venture) vis-à-vis projects of common European interest. The prospect of elevating the pandemic-induced Temporary Framework of comfort letters into a normalized framework has been permeating antitrust discussions lately. In that regard, the provision of a comfort letter to GAIA-X, a consortium of European technology firms working on data interoperability and cybersecurity, seems like a frontrunner of an emerging trend.

Conclusions

The revised informal guidance notice brings little added value. Much of the document remains loyal to its former counterpart, and the revisions that do stick out tend to be either recitations of existing case law or incapable of inducing dramatic change.

Although the explicit inclusion of a Union interest criterion in the conditions for issuing a guidance letter is truly novel, its concrete effects may leave something to be desired. All in all, it would be rather surprising not to see another footnote in a Commission report years from now, lamenting that undertakings are reluctant to use the IGN. The underlying reason would be rather clear: guidance letters still represent an all-loss, no-gain situation.

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[1] Back in the days of Regulation 17 (replaced by Regulation 1/2003), the Commission would sometimes close a request for a comfort letter by assuring the undertaking that its conduct does not constitute an enforcement priority ("discomfort letter").

[2] Although the extent of discretionary freedom the Commission enjoys is not easily discernible from the case law. For instance, in *Beef Industry Development Society*, there is an implicit argument that, *even in times of crisis*, the Commission cannot shy away from investigating practices that are potentially anticompetitive by object. Another example in this regard is *BP v Commission*. Perplexingly, in those cases involving prospective "by object" arrangements, where it may be argued that the Commission is "compelled" to issue a guidance letter, it would have no incentive to do so – since it can initiate proceedings to evaluate a potential infringement instead.

[3] There is also controversy regarding whether the Commission would be able to merely change its legal assessment of an agreement/practice to override an earlier guidance letter. The case law answers that question in the positive, diminishing the little value offered by the IGN even further.

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